ARGUING ON THE TOULMIN MODEL

New Essays in Argument Analysis and Evaluation

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CHAPTER 14

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THE FLUIDITY OF WARRANTS: USING THE TOULMIN MODEL TO ANALYSE PRACTICAL DISCOURSE

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ABSTRACT: This contribution seeks to understand the dynamic nature of practical arguments on the basis of an alternative reading of Toulmin's theory. The essence of this alternative reading is that warrants are conceived of as unstable elements of practical logic: they evolve as arguments are unfolded in, for example, legal decisions. Using this insight, a judgement by the US Supreme Court is analysed and shown to go through various phases of warrant-construction. Finally, the Toulmin scheme is adapted in order to capture this dynamic aspect of practical reasoning.

KEYWORDS: Stephen E. Toulmin; practical discourse; legal reasoning; warrant; construction; dialectic

1. INTRODUCTION[1]

The complexity of arguments used in practical discourse keeps scholars searching for new theories and models. The main difficulty lies in the fact that in practical discourse we try to order our social environment on the basis of normative standards such as rules, principles and values, but these standards are not easy to apply to concrete cases. On the one hand, these standards always have to be interpreted in the light of the ever-changing world they are supposed to keep in order. On the other hand, even when it is crystal clear what a certain standard means in the light of a certain case, it always remains to be seen whether other standards or considerations stand in the way of its application. As MacCormick puts it: "There are background principles always available to qualify, defeat, or even override a discourse couched in terms of rules" (MacCormick, 1978, xii).

This contribution argues that the Toulmin model can help to understand and analyse this complexity of practical discourse. This may come as a surprise, because the Toulmin model is often criticised for not being suited to deal with complex

[1] The author would like to thank Henrike Jansen, Marc Loth and Bob Brouwer for their useful comments.

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argumentative structures. Allegedly, this model is too simple and static to capture the nuances of practical reasoning: it over-simplifies arguments, forcing them into a so-called 'single-claim, single-ground, single-diagram mode', whereas in practice arguments have a more complex structure (Gasper and George, 1998, p. 376). It will be argued, however, that the Toulmin model has more to offer than this line of criticism wants us to believe. Although it may indeed appear to be quite static, the Toulmin model is in fact very useful where it comes to analysing the arguments that appear, for instance, in the practice of legal decision-making. This potential can be revealed if we let go of the standard diagram and return to the theory from which it sprang, as set out in *The Uses of Argument.*

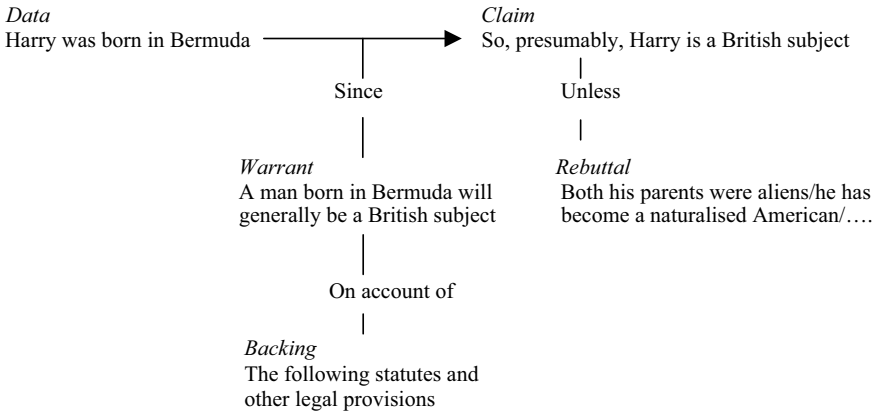
More concretely, this contribution takes the following route. First, it discusses the limitations of the standard Toulmin scheme when it comes to understanding the complexity of practical discourse. Secondly, a more dynamic reading of *The Uses of Argument* will be presented, making this theory more sensitive to the complexity of practical reasoning. Thirdly, a decision of the U.S. Supreme Court will be analysed so as to reveal a certain evolution in its argumentative structure. The essence of this analysis is that, whereas the standard Toulmin scheme forces one to conceive of warrants (rules) as solid, stable authorisers of argumentative steps, they can also be seen as flexible and evolving. Complex practical arguments can be explained as the products of discursive processes in which warrants (rules) are repetitively altered in order to become a satisfying justification.

2. THE LIMITATION OF THE STANDARD TOULMIN SCHEME

Before discussing the limitation of the standard Toulmin-scheme, it may be wise to explain what is meant by the term 'practical discourse', and how legal decision-making relates to it. To keep it simple, in this article practical discourse is understood as argumentation about normative statements, such as statements about what values should be pursued, what rules should guide behaviour, and which norms are binding (Raz, 1990, p. 10). Legal decision-making is considered to be a 'special case' in that it observes a number of specific procedures and constraints in arguing about normative statements, but it is not fundamentally different from general practical discourse (Alexy, 1989, p. 179). On the contrary, this article joins those theorists who believe that, because of its special nature, legal decision-making provides fruitful cases for the study of practical discourse.[2]

[2] Feteris points out, for example, that legal decisions are taken in a social and institutional environment that demands justification (1997, p. 355). Others have stressed that the public character of legal decisions, combined with the fact that they tend to draw attention, stimulates the explicitness and completeness of arguments. Toulmin himself, finally, illustrates the relevance of legal decision-making to the study of practical discourse with his famous jurisprudential analogy.

Toulmin is one of those theorists. In *The Uses of Argument* he argues that, to understand the structure of arguments in general, it is useful to make a comparison with the legal process (Toulmin, 1958, pp. 7, 96). When we argue we try to convince an imaginary 'Court of Reason' that poses questions similar to the ones posed when legal cases have to be solved: what is the claim; what is the ground; how is the step from the ground to the claim warranted; why would we accept this warrant; are there no exceptions? If, for example, we want to argue that a person by the name Harry is a British subject, our argument will have the following well-known structure (Toulmin, 1958, p. 105):



Although this is one of the most cited theories about argumentation, it is at the same time widely regarded as having a limited ability to explain the complicated discursive patterns that occur in, for example, legal practice. The easiest way to describe this limitation is to say that, in this form, it can only explain so called 'easy' cases. In legal theory, the easy case is considered to be a legal decision focusing only on the internal justification of the conclusion on the basis of certain premises (Alexy, 1989). This means that there is no controversy (at least not one acknowledged by the decision maker) about the interpretation of rules or classification of facts, or about the truth, and that the decision is based on a fairly simple deductive argument (MacCormick, 1987, p. 199). As in Harry's case, the decision maker appears to be confident that certain statutes and provisions indicate the existence of a certain rule and that this rule is applicable to a certain case, provided that the exceptional circumstance does not occur.

It may come as no surprise, however, that the main focus of attention by those who try to explain the structure of legal reasoning, and more generally by those who try to explain the nature and the development of the law, are so-called 'hard cases'. In hard cases, the decision also focuses on the external justification, which means that apart from the deductive operation from certain premises to a certain conclusion, the premises themselves are put to the test. In Harry's case, for instance, we might wonder why the text of a certain statute should be taken to express the rule that a man born in Bermuda will generally be a British subject, or why that statute is

more important than an international treaty regulating nationality, or how we can be sure that Harry was in fact born in Bermuda.

Hard case situations occur for social rather than logical reasons. More specifically, they occur when the decision maker perceives a gap in the law: "…the realization that there is ambiguity, vagueness, penumbra, or obscurity in some legal provision seen as applicable to the disputed case or upon which the interpreting court has been requested to make an interpretative decision" (Bengoetxea, 1993, p. 219). One could also say that hard cases lead us to go beyond the formal account of a legal system, and force us to deal with those aspects of the law that cannot be explained as simple rule-application. In yet other words: it is mainly in hard cases that the law reveals what Toulmin calls its 'working logic' (Toulmin, 1958, p. 146). As it stands, however, the Toulmin scheme seems too simple to offer a satisfying explanation.

3. TOWARDS A MORE DYNAMIC USE OF TOULMIN'S THEORY

There have been many attempts to adapt the Toulmin scheme to the complexities of practical argumentation. Hambrick, for example, proposes a more 'field-specific' approach, which means that he seeks to analyse the nature of grounds, warrants and backings specific to policy arguments (Hambrick, 1974). Gasper and George, furthermore, try to transcend the standard Toulmin model by using multiple diagrams to avoid oversimplification (Gasper and George, 1998, p. 382). Patterson, finally, tries to capture the nuances of constitutional decision-making by adding extra warrants and backings to the standard Toulmin scheme (Patterson, 1996, pp. 169-179).

Applying such theories, the writer of this article has been trying to reconstruct the logic of a number of decisions by constitutional courts. It turned out that by using multiple diagrams and field-specific accounts of data, claims etc., it was indeed possible to capture the complexity of these legal decisions. Nevertheless, this type of reconstruction proved to be unsatisfying in two ways. First, it results in diagrams containing so many elements and logical relations that it does not yield a coherent insight in the logical structure of arguments. More precisely, this type of reconstruction does not add to what the original legal decisions already make clear, namely that we are dealing with highly complicated forms of practical reasoning. Secondly, the reconstruction remains artificial, in the sense that a dynamic phenomenon - a legal argument that is gradually unfolded in a written text - is reduced to a static diagram of functional elements and their logical relations.

As will be argued in the remainder of this article, Toulmin's theory can be used in such a way that a more meaningful understanding of the dynamic of practical discourse is gained. Before this alternative reading is presented it may be wise to state that it is not claimed to be in accordance with the author's intentions. Although it is difficult to see a reason why the following would imply a parting with

Toulmin's theory, one cannot rule out the possibility that someone else does. In that (latter) case, the following is to be regarded as an attempt to overcome some of the limitations of the Toulmin scheme.

With that reservation, this article proposes the following reading of the theory set out in *The Uses of Argument*, consisting basically of three components.[3] The first component is that argumentation is characterised by the fact that one (group of) statement(s) can function as a basis for another statement, that we take steps from a foundation to a conclusion. In this respect, Toulmin focuses on the step from *data* to *claim*, but one argument can contain more types of steps. It may, for instance, be necessary to infer the data from given evidence, or to induce a preference for one warrant in case two contradicting warrants are applicable.

The second component is that we try to justify these steps by giving support. According to Toulmin this involves the use of a warrant on the one hand and the use of backing on the other, but here it is argued that it is all about the warrant. More precisely, this contribution adheres to the thought that backing, qualifier and rebuttal are all discursive procedures to somehow test the authority of a given warrant. As van Eemeren, Grootendorst and Kruiger remark (1987), one could say that these are sub-arguments of a compound argumentation (pp. 203-204). A backing, for example, is in fact a new argument to defend the authority of the warrant.[4]

Thirdly and most importantly, this implies that although warrants tend to be presented as static authorisers of argumentative steps, they are in fact changing as practical arguments are unfolded. As shall be illustrated, this means that practical arguments are not logically stable: they are not characterised by a steady, regressive support-structure (backings supporting warrants, warrants supporting these backings, etc.), but rather by an *evolving* support-structure, a logic that develops as the argument progresses. In this way, even the most complicated practical arguments can be based on one single warrant. The crux, however, is that this single warrant can be subject to a complicated procedure of testing, refinement and adjustment, in order to make it 'fit' the case at hand.

In the next sections, a decision by the US Supreme Court will be analysed to illustrate how this works out in practice. Although a similar pattern was found in a number of other legal decisions, it must be stressed that the following analysis is not intended to be statistically relevant. Rather, it is a theoretical experiment. In order to improve the plausibility of the analysis, however, I can refer to a number of studies that describe a more or less similar phenomenon, though not in terms of Toulmin's theory. According to Sunstein, for example, the meaning of principles is established in a confrontation with the circumstances and the facts of cases to which they are applied (Sunstein, 1993). Brewer explains that this confrontation involves an adjustment of general normative principles in the light of specific examples (Brewer, 1996). As we shall see, a Toulmin analysis can help to understand this discursive process.

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[3] This reading of Toulmin's theory is inspired by: Heidt (1968, p. 101), and Trent (1968, pp. 252-259).
[4] An extensive analysis of the concept of 'warrant' can be found in Hitchcock (2003a).

4. THE INITIAL CONSTRUCTION OF A WARRANT

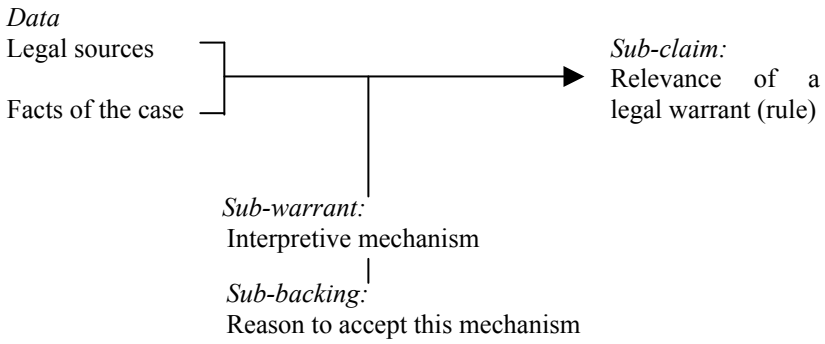
In 1916 the governments of the United States and Canada signed a treaty prohibiting the killing, catching, or selling of migratory birds. In order to effectuate this agreement, the American Congress adopted the Migratory Bird Treaty Act (MBA) of 1918, according to which it was no longer allowed to engage in 'wild games' involving migratory birds. The state of Missouri, where these games were very popular, considered the MBA to be in conflict with the tenth amendment to the Constitution, which reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' Missouri claimed that only the states had the power to legislate in matters of wild life protection, as the Constitution did not explicitly attribute that power to the federal government. It sued Mister Holland, a federal functionary in charge of enforcing the MBA, and the case went all the way to the US Supreme Court.[5]

As in most legal arguments, the decision first focuses on selecting written rules that can provide a warrant to decide the case at hand. Apart from the tenth amendment, there are also Constitutional provisions that help the case of Mr. Holland, that is, the federal government's case. Article 2.2 states that the President has the power to make treaties, and article 6 prescribes that treaties are 'the supreme law of the land'. Hence, the Supreme Court was dealing with written rules pointing in different directions: legislative autonomy of the states versus governmental supremacy where it comes to subjecting the states to rules laid down in treaties. In other words, the Court had to construct a warrant on the basis of ambivalent legal material.

How does one deal with this aspect of the argument in terms of Toulmin's theory? Judging from the example of Harry who was born in Bermuda, we would have to localise the process of legal warrant-construction in its relation to a backing of statutes and other legal provisions. At first sight, this seems adequate, for statutes and provisions are indeed often presented as the reason for the relevance of a certain rule. There are, however, two objections to this analysis. First, the argumentative process is over-simplified by stating that legal warrants are simply backed by written rules. As mentioned, the 'jump' from written rules to legal warrants can involve complicated interpretive processes constituting the major part of legal decisions. Secondly, it can be argued that instead of playing the role of the backing of legal warrants, written rules function as data. Actors in legal practice generally operate on the theory that there would be 'sources' of law; that legal warrants are drawn from objectively existing documents with a legal status. Imagine the Supreme Court posing the question Toulmin uses to discover the data of an argument: 'What have you got to go on?' It seems inevitable that the answer of the state of Missouri contains some reference to the tenth amendment, and that this provision thus functions as data.

[5] *Missouri v. Holland*, 252 U.S. 416; 40 S. Ct. 382; 64 L. Ed. 641 (1920).

We can improve our understanding of the argument by taking account of the fact that it comes about in various steps, the first of which concerns the initial construction of a legal warrant on the basis of the following sub-argument:[6]



In *Missouri v. Holland* the Supreme Court decides that, although there seem to be conflicting legal sources, the relevant legal warrant is that treaties are the supreme law of the land, even when the tenth amendment applies. This is a sub-claim used as the starting point for the rest of the argument. The Court justifies its sub-claim by referring to the 'language' of the Constitution, which means that it relies on a so-called textual or grammatical interpretive mechanism. The reason for using this mechanism is not specified; we can only guess why the Supreme Court chooses this particular method of interpretation.

5. REFINING THE INITIAL WARRANT

By nature, rules force a decision maker to draw a conclusion when certain facts are the case (if p then q), but that does not guarantee actual rule-application. Hage, for instance, argues that reasoning with (legal) rules involves two steps. In accordance with the foregoing, the first step consists of identifying relevant rules (warrants) on the basis of legal sources. The second step consists of weighing the reasons for and against application of those relevant rules (Hage, 1997, pp. 123-124). In the same way, Schauer remarks that rules have a degree of force. In principle, they determine an outcome in a given situation, but they can be challenged by so called 'competing considerations' (Schauer, 1991, pp. 112-118).

Although it is very likely that judges weigh reasons for and against the application of given rules, or test their force in the light of competing considerations, they rarely make it explicit in their rulings, probably because they are expected to strengthen our belief in the legal system rather than to cast doubts on the problem-solving capacity of its rules. Therefore, they tend to keep up the appearance that they

[6] This scheme is partly based on: Hage (1997, p. 97).

are simply applying the rules and use more subtle ways to adapt this application to the circumstances of specific cases. In this respect, Toulmin's theory may be more realistic: after establishing a warrant, the step from data to claim can be qualified by adding potential rebuttals to the structure of the argument (Toulmin, 1958, p. 101).

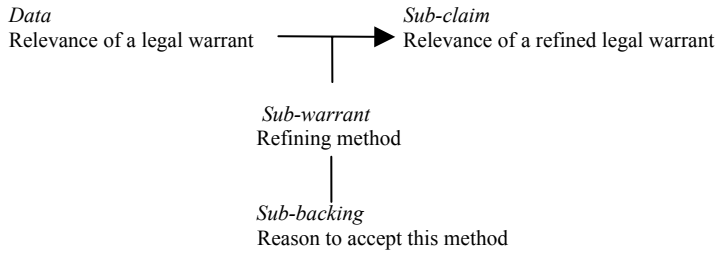
The point, however, is that all these theorists seem to disregard a crucial fact, namely that this testing, or weighing, or qualification, does not leave the original warrant untouched. In theory, it may be possible to say that warrants are first established and then embedded in a more complicated logical structure, but in actual discourse this occurs more gradually and recursively. Take *Missouri v. Holland*. After the Supreme Court has identified the relevant rule, it opens the door to potential competing considerations by stating:

> The language of the Constitution as to the supremacy of treaties being general, the question before us narrowed to an inquiry into the ground upon which the present supposed exception is placed.

At first sight, this manoeuvre fits well in Toulmin's theory of argumentation: the Supreme Court qualifies the step from data to claim by adding a potential rebuttal to the structure of the argument. As we shall see, however, this manoeuvre is the beginning of a development of the argument altogether. In *Missouri v. Holland*, the Supreme Court moves on to qualifying the warrant that treaties are the supreme law of the land as follows:

> With regard to that, we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they had created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the 10th Amendment.

These few lines are indicative of the evolution of arguments in practical discourse. In the process of discussing potential qualifications or rebuttals to the original warrant, the Supreme Court has at the same time altered the warrant itself. This is clearly expressed in the last sentence, which implies that the effect of the tenth amendment has to be reconsidered, thus indicating that the initial warrant is susceptible to refinement. In other words, the argument goes through a second phase of warrant-construction, in which the original warrant is reformulated and adapted in the light of competing considerations:



Although this development is now portrayed as a fairly straightforward argumentative step, it can involve a manifold and reciprocal heuristic process. In this respect, Verheij (2001) speaks of legal decision-making as a kind of 'dialectical theory construction' (p. 1). In the same vein, Ashley speaks of a 'dialectical relationship between legal cases and normative principles'. Interestingly, this author also gives some empirical evidence of the fact that refinement of warrants takes place on a wider scale. After a systematic study of a set of ethics cases written by a professional association's board of ethical review, he concludes: "The abstract principles inform the analysis and decision of the specific cases, but the decisions of the specific cases can specify the meanings of the abstract principles and change the ways in which they are applied in future cases" (Ashley, 2004, p. 1).

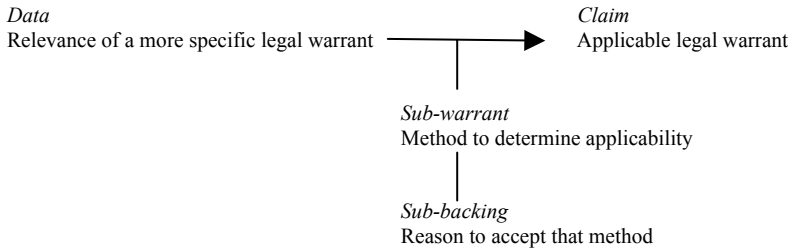
With regard to *Missouri v. Holland*, this specification of meaning can be reconstructed as follows. The original warrant was that treaties are supreme law of the land, even when the tenth amendment applies. In the course of the argument, this has changed into: treaties can be forbidden by an invisible radiation of the tenth amendment. The relevancy of this warrant is a sub-claim that will be the starting point of the last step in the argument. The specification is authorised by a sub-warrant according to which there can be exceptions to the general applicability of legal rules. The reasons to accept this sub-warrant are clearly explained in the quotation: a constitution is like an organism, it grows, and its rules can therefore acquire new meaning.

6. THE APPLICATION OF THE WARRANT

The essence of practical reasoning is that it gives answers: concrete solutions to concrete problems of social order. This means that the process of refining and adjusting warrants cannot go on forever. At some point, the decision maker will have to apply them to bring clarity to a certain case. According to the standard Toulmin scheme, a backing supports this final move from data to claim. As the foregoing analysis illustrates, however, this functional element can play a role in all the phases of practical reasoning, just like all the other functional elements.

In contrast to a standard Toulmin analysis, therefore, this article argues that the conclusion of a practical argument is not characterised by giving a final backing. Rather, this conclusion is characterised by the fact that the decision maker puts an

end to the discursive process of refining the warrant by deciding that it now 'fits' the facts and considerations of the case. In other words: the warrant is ready to be applied. This step is the result of yet another sub-argument, in which the warrant can still undergo change:



In *Missouri v. Holland*, the following statement marks the entrance of the conclusion of the argument:

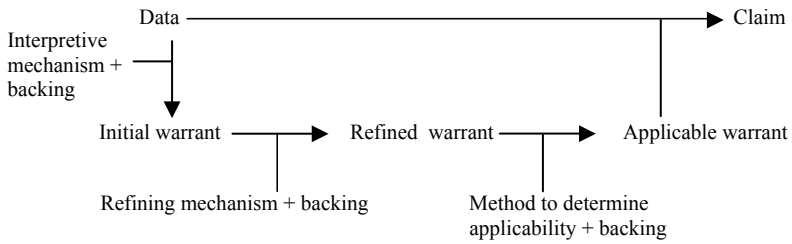
> We must consider what this country has become in deciding what that amendment has reserved.

Again, we can say that the warrant has evolved, in that the 'invisible radiation' from the tenth amendment that was introduced earlier, is now to be deduced from 'what this country has become'. This new criterion modifies the warrant drastically and paves the way for a series of more general legal and sociological observations, leading to the conclusion that the tenth amendment cannot be taken to 'radiate' a rule that the government cannot sign treaties with regard to the protection of migratory birds.

Finalising the argument, the Supreme Court decides that the MBA is valid. Apparently, it was of the opinion that the warrant had been sufficiently developed and was ready to be applied to the case of *Missouri v. Holland*.

7. A MODIFICATION OF THE TOULMIN SCHEME

Combining the three phases that have been analysed in the preceding paragraphs, the following scheme captures the layout of the argument in *Missouri v. Holland* all together:



This analysis exhibits a number of differences from the standard Toulmin scheme. First, the initial warrant is considered to be drawn from data: legal rules are 'found' in sources of law. Secondly, this warrant is taken to undergo change as the argument unfolds: it is gradually moulded into a shape fitting the case at hand. Thirdly, the other functional elements (qualifier, rebuttal, backing) are considered to be discursive procedures that play a role in this ongoing warrant-construction, rather than playing a role in supporting the eventual step from data to claim. According to Toulmin, for example, a qualifier indicates "…a degree of force which our data confer on our claim in virtue of our warrant" (Toulmin, 1958, p. 101). In the model presented above, this boils down to a refinement of the warrant itself. Fourthly, the element of backing is considered to play a role in supporting all these steps that are taken to arrive at an applicable warrant.

Despite these differences, this modification is to be seen as an elaboration rather than a refutation of Toulmin's theory. It is striking, for example, that although *Missouri v. Holland* shows a complicated line of practical reasoning, we can still say its final claim is the result of a fairly simple step based on certain data: given the facts of the case and the valid rules, the Federal government was entitled to issue the MBA. This was also the case in the other legal decisions that were analysed. Furthermore, Toulmin's theory is reinforced by the fact that it appeared to be possible to understand the logical structure of a number of complicated legal decisions by analysing their six functional elements. This article only theorises that, in practical arguments laid down in the text of legal decisions, these elements work together more dynamically than the standard Toulmin scheme suggests.

Moreover, it must be stressed that Toulmin himself seems to indicate the possibility of such an elaboration. After setting out his famous scheme in *The Uses of Argument*, the author moves on to discuss some specific themes, among them the contrast between 'warrant-using' and 'warrant-establishing' arguments (Toulmin, 1958, p. 120). A warrant-using argument involves deduction, which means that established warrants are applied to fresh data to derive new conclusions. One can think of the example of Harry being a British subject, in which the acceptability of the warrant is taken for granted. A warrant-establishing argument involves induction, which means that we use our observations as the backing for creating a new warrant. According to Toulmin (1958): "In this type of argument the warrant, not the conclusion, is novel, and so on trial" (p. 120).

In this light, the foregoing analysis explains how both types of argument cooperate in legal decisions. On the one hand, the Court reaches its conclusion by means of a deductive, warrant-using argument. To put it more generally, what lawyers are doing "…is simply maintaining the legal system by the means of an apparent normative argument" (Calhoun, 1988/1989, p. 409). On the other hand, before the Court reaches the point of deduction it first engages in a more or less inductive, warrant-establishing line of reasoning, or rather, a line of reasoning in which an already established warrant is put to the test and transformed in order to fit the case at hand.

8. CONCLUSION

Using Toulmin's theory of argumentation, this contribution has tried to get a grip on the dynamic structure of arguments produced in the practice of legal decision-making. The upshot is that these arguments can be explained as products of a discursive process in which warrants are tested, refined and adjusted in the light of additional considerations, in order to construct acceptable deductions. This process is reconstructed as going through three phases. First, warrants are drawn from legal sources and identified as being relevant to the facts of a case. Secondly, they are further developed and modified under the influence of the specific circumstances and considerations regarding the case. Thirdly and finally, they are regarded as fitting the case and applied to reach a conclusion. Legal arguments, one may say, are based on warrants that are gradually moulded into a satisfying shape.

To conclude, a brief remark about where this analysis may lead. Primarily, it aims to lead to a better understanding of the structure of single arguments that are produced in concrete situations. This is the 'micro-perspective' that seems to dominate the study of practical discourse, and that has also dominated this contribution. It is conceivable, however, that the foregoing analysis could also lead to insights regarding the totality of legal or practical arguments and how they constitute what Toulmin calls a 'field' of argument. In this macro-perspective, we may attempt to analyse the development of, for example, the legal field of argument by analysing how warrants are first constructed in one case and then re-used and further refined in the other, etc. We might, in other words, start to get a grip on the law as a warrant-recycling system. This, however, is an entirely new theme, to be discussed in another contribution.