disputes, discussion proceeds under a claim to correctness and accordingly by reference to ideal conditions.[22]

3. TRANSITION TO A THEORY OF LEGAL ARGUMENTATION

This, then, is the core of the special case thesis: the claim to correctness is indeed also raised in legal discourse, but this claim, unlike that in general practical discourse, is not concerned with the absolute rationality of the normative statement in question, but only with showing that it can be rationally justified within the framework of the validly prevailing legal order. But what is to count as a rational justification within the validly prevailing legal order?

In order to answer this question, the following pages will outline the basic features of a theory of legal reasoning. In the course of this it will be possible to fall back to a considerable extent on the conclusions worked out so far.

[22] A quite separate question is whether today's structure of the different forms of process is to be regarded as rational. This must not be answered in the negative simply by alluding to the fact that the freedom of the participants in the discussion is limited. Rather more decisive is whether, in view of the need for a decision, the limitations set down by the rules of legal process offer a sufficient chance of arriving at outcomes which would also have resulted under ideal conditions (cf. above, p. 194). In favour of the current structure it can be argued that given that the participants argue against one another, the judge is subjected in a particularly forceful way to the reasons for and against any specific decision. (On this cf. Kriele, *Theorie der Rechtsgewinnung*, p. 147.) Reasons against the rationality of current criminal process have been put forward by H. Rottleuthner, 'Zur Soziologie richterlichen Handelns II', pp. 83 ff., where he points out the prevailing distortion of communication. It would only be possible to discover which structure of the various forms of process could best satisfy the criterion cited above through extensive empirical investigation.

II. The Outline of a Theory of Legal Argumentation

Legal discourses are concerned with the justification[23] of a special case of normative statements, namely those which express legal judgments. Two aspects of justification can be distinguished: *internal justification* and *external justification*.[24] Internal justification is concerned with the question of whether an opinion follows logically from the premisses adduced as justifying it.[25] The correctness of these premisses is the subject-matter of external justification.[26]

1. INTERNAL JUSTIFICATION

Problems associated with internal justification have been widely discussed under the heading 'legal syllogism'. Meanwhile, there is a considerable range of publications in which this problem area is dealt with by applying methods of modern logic.[27]

The simplest form of internal justification has the following structure:

[23] [*Translator's note*: This footnote refers to the distinction between 'Rechtfertigung' and 'Begründung' discussed in n. 3 on p. 34. It once again points out that the two terms are more or less interchangeable.]

[24] On these concepts cf. J. Wróblewski, 'Legal Syllogism and Rationality of Judicial Decision', *Rechtstheorie*, 5 (1974), 39 ff., and his 'Legal Decision and its Justification', in *Le Raisonnement juridique, Akten des Weltkongresses für Rechts-und Sozialphilosophie*, ed. H. Hubien (Brussels, 1971), 412 ff.

[25] id., *Le Raisonnement juridique*, p. 412: 'Internal justification deals with the validity of inferences from given premisses to legal decision taken as their conclusion.'

[26] Ibid.: 'External justification of legal decision tests not only the validity of inference, but also the soundness of premisses.'

[27] Cf. Klug, *Juristische Logic*, 3rd. edn. (Berlin, Heidelberg, and New York, 1966), 47 ff.; G. Rödig, *Die Theorie des gerichtlichen Erkenntnisverfahrens* (Berlin, Heidelberg, and New York, 1973), 163 ff.; Wróblewski, 'Legal Syllogism and Rationality of Judicial Decision', pp. 33 ff.; Schreiber, *Logik des Rechts* (Berlin,

(J.1.1) .(1) (x) (Tx→ORx)
.(2) Ta
(3) ORa (1), (2)[28]

'x' is an individual variable ranging over the domain of natural and juristic persons; 'a' is an individual constant, a proper name for example; 'T' a predicate at any chosen level of complexity appropriate to comprehending the operative facts of the norm (1) as a characteristic of persons; and 'R' is a similarly appropriately complex predicate which expresses that which the norm-subject has to do.

There are legal questions in respect of which a justification of the form (J.1.1) is sufficient. The following is an example:

.(1) Soldiers on official business must tell the truth (paragraph 13, section 1, German Military Regulations).
.(2) Mr M. is a soldier.
(3) Mr M. must tell the truth when on official business. (1), (2)

(J.1.1) satisfies the requirement of justification through universal rules laid down by the principle of universalizability (1.3').[29] The principle of universalizability underlies the principle of formal justice. The principle of formal justice demands the observance of 'a rule which lays down the obligation to treat in a certain way all persons who belong to a given category.'[30] It is a requirement of the observance of a rule in a legal justification that, as in the case (J.1.1), the legal judgment follows logically from this rule. Otherwise, it would be possible to adduce a rule in the course of the justification and yet to assert any conclusion whatever. The following rules for internal justification can thus be formulated as a concretization of the principle of universalizability:

Göttingen, and Heidelberg, 1962), 24 ff. For an analysis of the legal syllogism by means of traditional logic cf. in particular K. Engisch, *Logische Studien zur Gesetzesanwendung*, 2nd edn. (Heidelberg, 1960).

[28] On problems relating to this scheme of inference and an explanation of the symbols cf. above, pp. 67 ff. For a scheme of inference of this kind as 'basic form for legal inference' cf. Klug, *Juristische Logik*, pp. 52 ff.

[29] On this cf. above, pp. 65 ff.

[30] Perelman, *The Idea of Justice and the Problem of Argument*, p. 40.

(J.2.1) At least one universal norm must be adduced in the justification of a legal judgment.

(J.2.2) A legal judgment must follow logically from at least one universal norm together with further statements.

(J.2.1) and (J.2.2), just like the principle of universalizability, should not be overestimated. They do not lay down anything about the content of the universal norm, nor do they exclude the possibility of changing the universal norm by, for example, introducing exceptions. But such exceptions must in their turn be of universal application.

Of great significance is that (J.2.1) and (J.2.2) apply both in those cases in which a positive legal norm can be used in justification, and in those where no such positive legal norm is available. If no rule can be derived from statute law then a rule must be formulated.[31]

The justification formula (J.1.1) is insufficient for some more complex cases. Such more complex cases arise when, for example, (1) a norm such as paragraph 823, section 1 of the German Civil Code contains several alternative statements of operative facts, or (2) application of the norm involves supplementing it with other clarificatory, limiting, or referential legal norms,[32] or (3) there are several possible legal

[31] (J.2.1) and (J.2.2) thereby serve to secure what Luhmann has called a 'universalistic decision-making practice' (Luhmann, *Rechtssystem und Rechtsdogmatik*, p. 29). Wieacker views universalizability as a necessary feature of legal decision-making. Cf. his 'Über strengere und unstrenge Verfahren der Rechtsfindung', pp. 440 ff., and 'Zur Topikdiskussion', pp. 411 ff. Wieacker not only provides conceptual (analytic) arguments in favour of this view, but also a legal-positivist justification: since the justifications required by rules of procedure, for example by para. 313, sect. 1, no. 6, *ZPO*, 'can be tested by courts of next higher instance, they must be intellectually objectified (in this sense: rational); and since they are tested by appellate courts for "infraction of the *law*" (para. 549, *ZPO*) and "non-application or incorrect application of the *law*" (para. 550, *ZPO*) they must acknowledge a *general* rule (statute or legal principle: art. 2, *EGBGB* (Introductory Law to the Civil Code); art. 20, GG) as a ground for determination' ('Über strengere und unstrenge Verfahren der Rechtsfindung' p. 442). Cf. also Kelsen, *Pure Theory of Law*, p. 244: 'The court-created individual norm is justifiable only as application of such a not positive, general norm.'

[32] On these concepts cf. Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 239 ff. Such clarificatory, limiting, or referential rules can in their turn either be taken from statutes or formulated by those applying the law.

consequences,[33] or (4) the expressions used in formulating the norm allow of several interpretations.

A simple example will serve to clarify this. Suppose it has been established that *a* killed his wife in her sleep, and that there were neither special circumstances nor reasons to justify this deed or to exclude or mitigate guilt. The judge in such a case—no less than the legal scientist discussing it—must test whether the norm stated[34] in paragraph 211, section 1 of the German Criminal Code ('Whoever commits murder is punished by life imprisonment') is applicable. This norm can be stated in the following logical form:[35]

(1) $(x)\ (Tx \rightarrow OR x)$.

'T' is defined in terms of nine characteristics (M_1^1–M_9^1)[36] in paragraph 211, section 2. Paragraph 211, section 2 can be reduced to the following formula:

(2) $(x)\ (M_1^1 x \vee M_2^1 x \vee \ldots M_9^1 x \leftrightarrow Tx)$.

From (1) and (2) follows:

(3) $(x)\ (M_1^1 x \vee M_2^1 x \vee \ldots M_9^1 x \rightarrow OR x)$.

(3) states that in those instances, when at least one of the characteristics is present, the legal consequence OR*x* obtains. 'M_5^1' has the meaning '. . . treacherously killed a human being'. From (3) thus follows:

(4) $(x)\ (M_5^1 x \rightarrow OR x)$.

According to the definition used by the courts, treacherous killing consists of 'knowingly taking advantage of the victim's unsuspecting and defenceless condition, to kill him or her' (M_5^2).[37]

Hence, likewise valid is:

(5) $(x)\ (M_5^2 x \leftrightarrow M_5^1 x)$.

'M_5^2', in its turn, is to be deemed satisfied when the wrongdoer kills someone who is not expecting an attack and who only has a limited opportunity of warding off the attack (M_5^3).[38]

Hence, likewise valid is:

(6) $(x)\ (M_5^3 x \leftrightarrow M_5^2 x)$.

It now becomes apparent that someone who kills a sleeping person in the absence of any special defensive precautions taken by the victim (S) is to be designated as an individual to whom 'M_5^3' applies, so that the following has to be accepted:[39]

(7) $(x)\ (Sx \rightarrow M_5^3 x)$.

But *ex hypothesi*

(8) Sa

holds good. Accordingly it follows from (1)–(8) that

(9) OR*a*.

The concern here is not with the soundness of the premisses used in justifying (9). This is the subject-matter of external justification. In the present context the only matters of importance are the insight which this example affords into the structure of internal justification.

The most important insight is that with the help of each of the premisses (2), (5), (6), and (7) in the development of the applicable norm (1), an ever more concrete norm is obtained. The chain of ever more concrete norms can be specified in the following way:

(3)	$(x)\ (M_1^1 x \vee M_2^1 x \vee \ldots M_9^1 x \rightarrow OR x)$	(from [1] and [2])
(4)	$(x)\ (M_5^1 x \rightarrow OR x)$	(from [3])
(5′)	$(x)\ (M_5^2 x \rightarrow OR x)$	(from [4] and [5])
(6′)	$(x)\ (M_5^3 x \rightarrow OR x)$	(from [5′] and [6])
(7′)	$(x)\ (Sx \rightarrow OR x)$	(from [6′] and [7])

[33] On this cf. Wróblewski, 'Legal Syllogism and Rationality of Judicial Decision', pp. 43 ff.

[34] On the possibility of expressing norms by means of indicative sentences, as occurs in the criminal code, cf. Wright, *Norm and Action*, pp. 101–2.

[35] It should be stressed that there could be a number of further formalizations of para. 211, sect. 1, *StGB*. One might perhaps understand it as a reaction-guiding norm addressed to the courts and stipulate that it is the court as addressee of the norm which comes within the range of the deontic operator. (On this cf. Makkonen, *Zur Problematik der juridischen Entscheidung*, pp. 27 ff.; H. H. Keuth, *Zur Logik der Normen* (Berlin, 1972), 25 ff.) There is no need to decide here which formalization is the best. The one adopted in the text is not impossible—'. . . is punished by life imprisonment' can be understood as a predicate—and is sufficient for the purposes of this investigation.

[36] The index '1' in 'M_9^1' means that one is dealing here with a characteristic of the first decompositional step, the index '9' that 'M' is the ninth of several characteristics.

[37] *BGHSt* 23, 119 (120); similarly *BGHSt* 9, 385 (390); 11, 139 (143).

[38] *BGHSt* 23, 119 (120). Cf also A. Schönke and H. Schröder, *Strafgesetzbuch. Kommentar*, 18th edn., rev. T. Lenckner, P. Cramer, A. Eser, and W. Stree (Munich, 1976), para. 211, subsect. 13a.

[39] *BGHSt* 23, 119 (120).

Each of these norms, together with the conditions set out in the antecedent proposition, is sufficient to justify the legal judgment under scrutiny. This is indicative of the normative relevance of the premisses (2), (5), (6), and (7). These premisses can be understood as rules for the usage of the expressions used in the preceding stages of the justification. Without embarking on any further differentiation, they will here be called 'word usage rules'. Such rules, as the example illustrates, exhibit the stronger form $(x)\ (Fx \leftrightarrow Gx)$ and the weaker form $(x)\ (Fx \rightarrow Gx)$. In any justification, premisses of the stronger form can be replaced by those of the weaker. The weaker form should therefore be viewed as the standard form.

If it is not certain whether *a* is an instance of T—that is, if the simplest form of internal justification set out above (J.1.1) is therefore not immediately applicable—then there have to be added rules at least of the standard form concerning the usage of T. In the absence of such rules it would be possible to treat two individuals *a* and *b*, who are alike in all the relevant aspects, as T in the one case and not in the other. This would contradict the principle of universalizability. The demand for additional word usage rules can thus be justified by appeal to the principle of universalizability. This demand not only applies to the cases in which it is doubtful whether '*a*' is a T, but also to the cases in which doubts develop at further stages of the justification. The following third rule of internal justification therefore holds good:

(J.2.3) Whenever it is open to doubt whether *a* is a T or an M^i, a rule must be put forward which settles this question.[40]

(J.2.3) together with (J2.2) yields the following both rudimentary and general form of internal justification:

[40] On a requirement corresponding to (J.2.3) cf. Larenz, *Methodenlehre der Rechtswissenschaft*, p. 300: 'Even if the judge has to interpret a particular expression or a particular legal provision on account of the particular case to be decided, he or she may nevertheless not interpret just for this case but only in such a way that the interpretation also stands for any and all other like cases. It would be a contradiction of the requirement of justice to treat like cases alike, as of the legal security sought by the law, if the courts were to interpret the same determination in like cases now one way, now another.'

(J.1.2) .(1) $(x)\ (Tx \rightarrow ORx)$
.(2) $(x)\ (M^1x \rightarrow Tx)$
.(3) $(x)\ (M^2x \rightarrow M^1x)$
.
.
.
.(4) $(x)\ (Sx \rightarrow M^nx)$
.(5) Sa
(6) ORa (1)–(5)[41]

(J.1.2) is rudimentary in that it does not allow for the possibility of a more complex structure of operative facts and legal consequences. (J.1.2) is general in that it reveals the logical structure of any case in which the specific description (S*a*) of the facts of the case is subsumed within a general concept by means of decompositional steps.[42]

The question arises of how many decompositional steps are needed. Two rules can be formulated for this:

(J.2.4) The number of decompositional steps required, is that number which makes possible the use of expressions whose application to a given case admits of no further dispute. In such a case, whatever is M^n becomes S.[43]

[41] The schema (J.1.2) makes it clear that the problem of whether interpretation depends on establishing the major or the minor premiss can be treated as one of terminology. From (2)–(5) in (J.1.2), follows 'Ta' (5′). From (1) and (5′) follows (6). One might thus view (1) as the major premiss (5′) as the minor premiss, and (2)–(5) as justification of the minor premiss. An alternative to this would be to regard the norm '$(x)\ (Sx \rightarrow ORx)$' (4′) which follows from (1)–(4) as the major premiss (5) as the minor premiss, and (1)–(4) as justification of the major premiss. (4′) would be something like Ehrlich's 'norm of decision' (*Fundamental Principles of the Sociology of Law*, trans. W. Möll (Cambridge, Mass., 1936), chap. 6). Between these possibilities, an increasing number of decompositional steps gives rise to an increasing number of further solutions.

[42] (J.1.2) concerns the justification of a command. (J.1.2) might easily be more generally understood by replacing the deontic operator 'O' with a variable for deontic operators. In this way (J.1.2) would also represent the logical form of justification of prohibitions and permissions. It is only for reasons of simplicity that such a variable is not used here.

[43] On this cf. Rödig, *Die Theorie des gerichtlichen Erkenntnisverfahrens*, p. 183.

When there are very few and very broad decompositional steps, their normative content fails to emerge with great clarity. On the one hand they are easily open to attack, on the other hand such attacks often become non-specific. A multiplicity of steps may be laborious but it does lead to clarity. It therefore makes sense to stipulate as follows:

(J.2.5) As many decompositional steps as possible should be articulated.

The rules and forms discovered so far concern the formal structure of legal justification. Their main emphasis lies in securing universalizability. They can therefore be called '*rules and forms of formal justice*'.

The foregoing observations might give rise to several misunderstandings. The most serious misunderstanding would be to interpret the requirement of logical deducibility expressed by (J.2.2) as claiming that legal justification consists solely in deduction from given norms. The example cited shows that no such assertion is here being made. It makes it clear that in more complex cases a whole range of premisses such as (5), (6), and (7) is needed in the justification of legal judgments, premisses which cannot be inferred from any statute. In many cases even the norm from which one starts is not a norm of positive law. The requirement of deducibility leads to precisely the opposite of a concealment of the creative element in the determination of law: those premisses which do not derive from positive law are brought right out into the open. This is perhaps the most important aspect of the demand for internal justification. It is the task of external justification to justify those premisses which cannot be derived directly from positive law.

It would be a further misunderstanding to think that the model given above fails to take sufficient account of the interplay between fact and norm—to say that it starts out too one-sidedly from the norm to be decomposed and therefore does not do justice to the requirement of 'casting one's glance back and forth'.[44] This is also not the case. In order to justify the rules

[44] This concept was introduced into the discussion of legal method by Engisch with an almost casual remark (*Logische Studien zur Gesetzesanwendung*, p. 15, and also the clarification in his *Einführung in das juristische Denken*, p. 203 n. 36, p. 206 n. 54). It won particular acceptance in legal hermeneutics

necessary for the individual steps in the process of decomposition it is necessary to consider most closely both the peculiarities of the fact and the characteristics of the norm. This occurs in the context of external justification, within which all the arguments admissible in legal discourse are allowed. The rules to be put forward in internal justification, which bridge the gap between a norm and a description of the facts, can, if one so wishes, be viewed as the result of the process characterized by the metaphor of wandering back and forth.

This makes it clear at the same time that the forms of internal justification do not claim to reproduce the course of deliberations as these actually occur in the mind of the decision-maker. A clear distinction must be made between the process of discovery and the process of justification.[45] The model of finding and confirmation of 'norm hypotheses' worked out by Kriele can count as a description of the process of discovery.[46] The only matter of interest here is that the reflections of the decision-maker must lead to a justification which corresponds to the forms described. Of course, this is not to say that the requirements of the justification process do not exercise a reciprocal influence on the discovery process.

Furthermore, it is very easy either to over or underestimate the significance of the forms and rules of internal justification.

Engisch correctly observes that 'reaching a conclusion as such gives rise to a minimum of effort; the main difficulty lies in finding premisses for it'.[47] Nevertheless, the demand for internal justification is not pointless. In the course of internal justification

(Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 183 ff., 263 ff.). It also plays a significant part in Kriele's model of legal decision-making (*Theorie der Rechtsgewinnung*, pp. 197 ff.). Esser critically observed that little has yet been achieved with this formula. If casting 'back and forth' is not to become 'wandering without end', there is a need for criteria 'which permit cutting off discussion in favour of a particular subsumption' (*Vorverständnis und Methodenwahl*, p. 79). It is the task of the theory of external justification to specify such criteria.

[45] On this cf. R. A. Wasserstrom, *The Judicial Decision* (Stanford and London, 1961), 27.

[46] Cf. Kriele, *Theorie der Rechtsgewinnung*, pp. 197 ff.

[47] Engisch, *Logische Studien zur Gesetzesanwendung*, p. 13; similarly Kriele, *Theorie der Rechtsgewinnung*, p. 51; Wróblewski, 'Legal Syllogism', p. 43.

it becomes clear which premisses need to be externally justified. Presuppositions which might otherwise have remained hidden must be explicitly formulated.[48] This increases the possibility of recognizing mistakes and criticizing them.[49] Finally, articulating universal rules facilitates consistency in decision-making and thereby contributes towards justice and legal certainty.

(J.1.1) and (J.1.2) as well as (J.2.1)–(J.2.5) thus undoubtedly secure a certain measure of rationality. The rationality guaranteed by them is, of course, relative to the rationality of the premisses. A decision as to the rationality of a judgment thus falls in the realm of external justification. To this the argument now turns.

2. EXTERNAL JUSTIFICATION

The justification of premisses used in the process of internal justification is the subject-matter of external justification. These premisses can be of quite different kinds. The following can be distinguished: (1) rules of positive law, (2) empirical statements, and (3) premisses which are neither empirical statements nor rules of positive law.

Corresponding to these different kinds of premisses are different methods of justification. Justification of a rule as a rule of positive law takes place by showing that it meets the criteria of validity of the legal order. A whole range of procedures can be brought into play in the justification of empirical premisses. These range from the methods of the empirical sciences to the maxims of rational presumption to the rules on the burden of proof in a trial. Finally, what can be called 'legal argumentation' or 'legal reasoning' serves to justify those premisses which are neither empirical statements nor rules of positive law.

[48] On this cf. Rödig, 'Über die Notwendigkeit einer besonderen Logik der Normen', p. 178, and his *Die Theorie des gerichtlichen Erkenntnisverfahrens*, p. 151. Cf. also U. Diederichsen, 'Die "reductio ad absurdum" in der Jurisprudenz', in Festschrift for K. Larenz, ed. G. Paulus, U. Diederichsen, and C.-W. Canaris (Munich, 1973), p. 156: 'Since the jurist is also tied to the basic principles of thinking . . . the evaluative part of a decision on a legal problem, for which he or she must take responsibility on the process of justification, only becomes quite clear if one has previously pictured the generally valid . . . structures of the justification of judgments.'

[49] Wasserstrom, *The Judicial Decision*, p. 173.

There are in fact many diverse relations between these three procedures of justification. Thus rules of positive law and empirical statements play a considerable role in the justification of premisses which are neither a matter of positive law nor empirical. In justifying a norm according to the criteria of validity of a legal order it may be necessary to interpret the rules defining the criteria of validity. This is of particular significance where there are constitutional limitations among the criteria of validity, for example a list of fundamental rights.[50] Legal reasoning may therefore be of decisive significance not only in the interpretation of a valid norm but also in establishing its validity. Indeed this also holds true for establishing empirical facts. Thus what is admitted into the justification as a fact may depend on the interpretation of a rule on the burden of proof. It is just because of these multiple 'cross-overs' that, unless one wishes to throw everything in together, there is a need to distinguish carefully between the three aforementioned methods of justification. It is only in this way that it becomes possible to analyse the interplay between them.

The justification of those premisses which are neither rules of positive law nor empirical statements will be at the forefront of the following discussion. In speaking of 'external justification' in what follows it is the justification of such premisses that is at issue.

2.1 The Six Groups of Rules and Forms of External Justification

In a rough classification it is possible to classify the argument forms[51] and rules of external justification into six groups: rules and forms of (1) interpretation, (2) dogmatic argumentation, (3) use of precedents, (4) general practical reasoning, (5) empirical reasoning,[52] and (6) the so-called special legal

[50] On this cf. Hart, *The Concept of Law*, pp. 102–3.

[51] On the concept of an argument form cf. above, p. 92.

[52] Empirical argumentation serves directly both the justification of empirical statements used in internal justification and also justification of empirical statements used in the external justification of non-empirical statements. It is the last-named mode of application that is under discussion here.

argument forms.[53] Should one wish to characterize these groups by means of only one word one would choose the following: (1) statute, (2) dogmatics, (3) precedent, (4) reason, (5) facts, and (6) special legal argument forms.

The first task of a theory of external justification is logical analysis of the argument forms brought together in these groups. The most important result of this analysis is an understanding of the necessity for and possibilities of linking them together. The examination of the interplay of different kinds of argument forms will make clear above all the role of empirical and of general practical reasoning in legal discourse.

2.2 Empirical Reasoning

Empirical reasoning itself cannot be examined in detail here. Only its relevance can be indicated. Its relevance consists in the fact that almost all legal—just as almost all general practical—argument forms include empirical statements. Statements of quite different kinds are under consideration here. Argument forms variously presuppose statements about particular facts, about individual actions, motives of agents, events, or states of affairs. Yet others require statements concerning laws of the natural or social sciences. Furthermore, a distinction can be made between statements about past, present, and future actions, events, or states of affairs. These statements in their turn can be ordered into different fields of knowledge such as economics, sociology, psychology, medicine, linguistics, etc.[54]

[53] On the classification of the rules and forms of external justification cf. Müller, who distinguishes the following six groups of 'elements of concretization': (1) methodological elements, (2) elements of normativity, (3) dogmatic elements, (4) theory-elements, (5) elements based on techniques of problem-solving, and (6) legal and constitutional-political elements respectively (*Juristische Methodik*, pp. 266, 146 ff).

[54] For an analysis of the empirical statements used in the Federal Constitutional Court cf. K. J. Philippi, *Tatsachenfeststellungen des Bundesverfassungsgerichts* (Cologne, Berlin, Bonn, and Munich, 1971). On the different kinds of knowledge necessary for legal argumentation cf. also C. Starck, 'Empirie in der Rechtsdogmatik', *JZ* (1972), 614. On the import of social-scientific knowledge only the following will be cited from the extensive literature: K.-D. Opp, *Soziologie im Recht* (Reinbek, 1973), 79 ff., and W. Naucke, *Über die juristische Relevanz der Sozialwissenschaften* (Frankfurt-on-Main, 1972), 34 ff.

This makes it clear that a thoroughgoing theory of empirical reasoning relevant to legal justification would have to deal with almost all the problems of empirical knowledge.[55] Added to this are the problems of the incorporation of empirical knowledge into legal reasoning. This problem is only to be resolved by way of interdisciplinary co-operation.[56]

In the theory of general practical discourse the significance of empirical knowledge was taken into account by means of the transition rule (6.1): It is possible for any speaker at any time to make a transition into a theoretical (empirical) discourse.

This rule also applies to legal discourse. Just as in the field of general practical discourse, here too, how to proceed in empirical discourse must remain an open question. Both in general practical and in legal discourse the problem arises that the necessary empirical knowledge is often not available with the desirable degree of certainty. Such a situation requires rules of rational presumption. At the same time the relevance of empirical knowledge for legal reasoning can hardly be overestimated.[57] In numerous legal disputes it is the appreciation of facts which plays the decisive role. There is no disagreement about the normative statements to be accepted; the decision turns only on the facts on which it is to be based.

It would of course be quite wrong to think that legal discourse is reducible to empirical discourse. This is no more possible with respect to legal discourse than with respect to general practical discourse. The reasons for this rehearsed in the theory of general practical discourse are also valid for legal discourse.

Although in the following discussion there is always some emphasis on the relevance of empirical arguments, yet the main focus is the relationship of general practical to legal argument forms. An attempt will be made to analyse the interplay of the different argument forms from this perspective.

[55] At this point one should refer to the entire literature in the field of epistemology as well as psychological and sociological literature on the cognitive process.

[56] Of course one's capability for interdisciplinary co-operation presupposes an appropriate training. On this cf. in particular Opp, *Soziologie im Recht*, pp. 219 ff.

[57] Cf. perhaps Rottleuthner, *Rechtswissenschaft als Sozialwissenschaft*, pp. 205 ff.

2.3 The Canons of Interpretation

The canons of interpretation have been the subject of wide-ranging discussion ever since the time of Savigny.[58] Even today there is as yet no agreement as to their number, their precise formulation, their rank order, and their value. There is little point in taking up a position in the debate without knowing what kind of thing these canons are. The discussion will start with an inquiry into their logical structure.

It will be helpful to discuss the logical structure of the canons in terms of a very simple model of internal justification. In what follows, the shortened version of (J.1.2) will be used:

(J.1.2′) .(1) (x) $(Tx \rightarrow ORx)$ (R)
.(2) (x) $(Mx \rightarrow Tx)$ (W)
.(3) Ma
(4) ORa (1)–(3)

From (1), the norm R, and (2), the word usage rule W, follows the concrete norm R′:

(2′) .(x) $(Mx \rightarrow ORx)$.

Let R′ be designated as 'an interpretation of R in terms of W' (I_W^R).

One of the most important tasks for the canons is the justification of such interpretations. However, this does not exhaust their function. They can also be brought to bear directly in the justification of non-positive norms as well as of many other legal statements.

The following discussion of the canons will serve to give neither a complete nor a very detailed analysis of the argument forms traditionally brought together as arguments on interpretation. Its purpose is solely to elucidate the role of these argument forms in legal discourse. To this end it will be sufficient to emphasize several typical characteristics of some of the forms. Accordingly the canons will be classified into six groups; those of semantic, genetic, historical, comparative,

[58] F. C. von Savigny, *System des heutigen Römischen Rechts*, vol. i (Berlin, 1840), 212 ff.

systematic, and teleological interpretation.[59] It will become clear that these groups represent classes of quite different argument forms.

2.3.1 *The Individual Argument Forms*

(1) *Semantic argument* takes place when an interpretation R′ of R is justified, criticized, or said to be possible by reference to linguistic usage. In this case the rule N is to be understood as a *finding* about natural language or some technical language, in particular that of jurisprudence. Where N amounts to a *determination*[60] by the decision-maker in favour of one of these languages, there exists no semantic argument, since such a determination is not capable of being justified by reference to some existing usage. Such justification calls for further argument.

Semantic arguments can be used to justify or to criticize an interpretation or to show that it is at least semantically admissible. Accordingly, it is possible to distinguish three argument forms:

(J.3.1) By reason of W_i, R′ *must* be accepted as an interpretation of R.

(J.3.2) By reason of W_k, R′ *cannot* be accepted as an interpretation of R.

(J.3.3) It is *possible* both to accept and not to accept R′ as an interpretation of R, since neither W_i nor W_k holds.

Using arguments of this form implies an assertion of the validity or invalidity of W_i and/or W_k. The question of how to justify an assertion to the effect that a semantic rule does or does not hold will not be discussed here. It is possible to conceive of such widely divergent ways as an appeal on the part of the speaker to his or her own linguistic competence, empirical inquiry, and recourse to the authority of a dictionary.

Arguments of the form (J.3.1) and (J.3.2) are definitive whenever it is established by reference to a semantic rule that *a* comes under the norm R or that this is not the case. The

[59] For other classifications cf. above, p. 3.

[60] On the concepts of 'finding about' and 'determination for' a language cf. E. von Savigny, *Grundkurs im wissenschaftlichen Definieren* (Munich, 1970), pp. 22–3.

semantic argument is then sufficient to justify a decision through R.[61] The situation is quite different where (J.3.3) is applicable. In such a case semantic interpretation leads to the conclusion that a decision cannot be attained by semantic means alone.[62] It can only be observed that T is vague and that *a* comes within the range of vagueness of T.[63] The question of whether *a* falls under T cannot be answered by means of a finding about language but only by a determination. The argument forms to be discussed next serve, among other things, to justify such determinations.

(2) *Genetic argument* is at issue when an interpretation R′ of R is justified by saying that this interpretation corresponds to the intention of the legislator. Two basic forms of the genetic argument can be distinguished. The first basic form occurs when it is said that $I^R_W = R'$ was what the legislator directly intended; the second arises when it is claimed that the legislator adopted R as a means for advancing the goals $Z_1, Z_2 \ldots Z_n$ in the combination K ($[Z_1, Z_2 \ldots Z_n]$ K), and that the validity of R in the interpretation I^R_W is necessary in order to bring about ($Z_1, Z_2 \ldots Z_n$) K. This second basic form is a form of teleological argument. If ($Z_1, Z_2 \ldots Z_n$) K is abbreviated to Z, the two forms have the following structure:

(J.4.1) .(1) R′ ($=I^R_W$) is intended by the legislator.
(2) R′

[61] Of course arguments of the form (J.3.1) and (J.3.2) carry the justification of a decision only relative to a norm R (here: R_1). Should one not wish to accept the outcome justified by semantic arguments of the form cited, it is possible to modify R_1. In case of any undesired applicability this may occur by limiting R_1 ((x) $[T_1x \rightarrow ORx]$) with the help of a characteristic F, appropriate to *a*, to R_2 ((x) $[T_1x \wedge \neg Fx \rightarrow ORx]$) (teleological reduction). In case of any undesired inapplicability of R_1 it is possible to justify a norm R_3 ((x) $[T_2x \rightarrow ORx]$) possibly through the argument form of analogy, under which T_2 *a* falls differently than under T_1. It can therefore be generally observed that anyone who wishes to argue against a decision justified through (J.3.1) or (J.3.2) must be in a position to justify a non-positive legal norm such as R_2 or R_3.

[62] Cf. here Savigny's pertinent observation on the cognition of vaguenesses: 'But it is just because of this that it concludes with clear insight into the nature of the existing doubt and does not at the same time involve its dissolution' (*System des heutigen Römischen Rechts*, p. 228).

[63] On the concept of vagueness cf. W. P. Alston, 'Vagueness', in *Encyclopedia of Philosophy*, viii. 218 ff. together with further bibliographies.

(J.4.2) .(1) R is, for the legislator, a means to end Z.
.(2) $\neg R' (=I^R_W) \rightarrow \neg Z$
(3) R′

R′ does not follow logically from the premiss(es) cited in either (J.4.1) or (J.4.2). (J.4.1) requires a further premiss or rule of inference[64] with something like the following content:

(a) The fact that the legislator enacted R with the intention that it should be interpreted according to W ($I^R_W = R'$) is a ground for the validity of R′.

Of greater interest are the presupposed premisses or rules of inference of (J.4.2):

(b) The fact that the legislator enacted R as a means to the end Z is a ground for holding that it is mandatory to apply R in such a way as to realize Z.

(c) If it is mandatory to realize Z then whatever means are necessary for the realization of Z are also mandatory.

(a) and (b) have been given a relatively weak formulation. The intention of the legislator is only *one* reason for an interpretation. This opens up the possibility of counter-reasons. The rule of inference (c) is of greater interest. Underlying it is the following schema:

(S) .(1) OZ
.(2) $\neg M \rightarrow \neg Z$
(3) OM[65]

[64] On the question of whether rules such as (a)–(c) are to be classified as premisses or rules of inference cf. above, pp. 88–9.

[65] An argument of the form (S) can be reduced without difficulty to a form such as (4.2) or (4.3). In a case of (4.2) say, the consequence F of an action *a* which is said to be mandatory through N were cited as a reason for N. Z in (S) corresponds to the description of the consequence F in (4.2). R in (4.2) signifies that an action is required then when it has F as a consequence. This is expressed in (S) not by citing a rule, but through OZ. The premiss $\neg M \rightarrow \neg Z$ is presupposed in (4.2) in the assertion that F is a consequence of *a*. N in (4.2) signifies that *a* is obligatory. In (S) the corresponding *a* is obligatory as the means M for Z (OM). It should be stressed again at this point that both (4.2) and (S) are the simplest basic forms. Not only can many more forms be distinguished, these forms themselves can be analysed in considerably more detail. All that is significant here is that arguments of the argument forms (S) cited above, as well as (J.4.2), can be reformulated into the forms corresponding to (4.2) or (4.3) in the manner put forward. This holds also for the further legal argument forms based on (S) which remain to be elaborated.

In everyday language, (S) can be formulated in some such way as follows:

(1) It is mandatory that the state of affairs Z obtains.
(2) Unless M obtains, Z does not obtain (that is, M is a condition of Z).
(3) It is mandatory that M obtains.

(S) can be viewed as a variant of a practical syllogism.[66] To demonstrate the validity of (S) would require fundamental reflections on both deontic logic and the theory of the means-end relationship. Such reflections cannot be pursued here. Nevertheless, the intuitive plausibility of (S) makes it reasonable to assume that although such inquiries would lead to many refinements, modifications, and limitations, the validity of (S) would remain fundamentally unaffected.[67] Subject to this reservation, (S) and thereby (c) and (J.4.2) can be accepted.

The forms of semantic interpretation include statements about the validity of semantic rules, while those of genetic interpretation include statements about the intention of the legislator. These statements are frequently not made explicit. It is simply stated that a certain interpretation corresponds to the wording of the norm, the will of the legislator or the purpose of the norm. In such cases the argument is incomplete. In order to complete it, statements of the kind indicated above are required. This will be called '*the requirement of saturation*'. The soundness of the arguments in the various forms depends on the soundness of the statements which have to be inserted to fulfil this requirement. Arguments of further forms are needed to justify the soundness of such statements.

To justify the statements needed to bring to saturation genetic argument forms is frequently very difficult and often impossible. This is bound up with the fact that on the one hand it remains unclear who is to be regarded as the subject of 'the intention of the legislator' and on the other hand it is often not possible to establish unequivocally in what the content of this intention consists. Is the totality of elected representatives the subject of

[66] On the various meanings of this concept cf. above, p. 88.
[67] For a scheme like (S) cf. O. Weinberger, *Rechtslogik* (Vienna and New York, 1970), 219–20, where he considers such a scheme as 'fairly convincing even if not immune to every doubt'.

the intention in question? If so, what happens when a majority of the representatives has no view at all about some particular prescription contained in one of the many bills to be enacted? Do they adopt the views of those in a ministry perhaps who drew up the statute and debated it in various committees and commissions? What if different opinions were expressed in this process, or if these expressions of opinion in their turn require interpretation?[68]

These questions highlight the difficulties of genetic argumentation.[69] It will only be pointed out here that both establishing the intent of participants in the legislative process and establishing a particular use of language consist in establishing facts.[70] Semantic and genetic reasoning are thus shown to be special cases of empirical reasoning.

(3) *Historical argument* is a term used for cases where facts concerning the history of the legal problems under discussion are advanced as reasons for or against some interpretive decision. A particularly interesting form of historical argument will be outlined. It consists in explaining that (1) a particular solution of the problem under discussion has already been implemented in the past, (2) this led to the consequence F, (3) F is undesirable, (4) the situations are not sufficiently dissimilar to exclude the occurrence possibility of F in the current situation, and (5) the solution in question is therefore not to be recommended in the present either. This is a case of learning from history. What is important is that an argument of this form not only presupposes historical, sociological, and economic knowledge, but by way of (3) also includes a normative premiss. This requires justification.

(4) In *comparative arguments* reference is made not to some legal state of affairs of the past but rather to that of another society. The above argument form can be changed into a

[68] On these problems cf. Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 315 ff. as well as A. Mennicken, *Das Ziel der Gesetzesauslegung. Eine Untersuchung zur subjektiven und objektiven Auslegungstheorie* (Bad Homburg, Berlin, and Zurich, 1970), 30 ff., with numerous references.
[69] For a model of critical genetic argumentation cf. Esser, 'Bemerkungen zur Unentbehrlichkeit des juristischen Handwerkzeugs', *JZ* (1975), 555 ff.
[70] Cf. perhaps Wieacker, 'Über strengere und unstrenge Verfahren der Rechtsfindung', p. 432, where he speaks of the 'empirical intention of the historical legislator'.

comparative one through minor modification. Just as in the case of the historical argument, such a comparative argument form includes at least one normative premiss as well as many empirical ones.

(5) *Systematic argument* is an expression used as a reference both to the position of a norm in a legal text,[71] and to the logical or teleological relation of a norm to other norms, goals, and principles. Only the latter will be discussed here. When teleological relations come into play it is a case of a systematic-teleological argument.[72] Such arguments are better dealt with in the framework of teleological reasoning. Only those arguments solely concerned with logical relations between norms shall be viewed as strictly speaking 'systematic'.

The most important form of systematic argument, in this strict sense, is a reference to a contradiction between norms.[73] If the interpretation of R_1 through W, R'_1, contradicts the norm R_2, which is to be recognized as valid, then R'_1 must be abandoned. Of course a reference to contradictions only leads to a result when all interpretations of R_1 except one are excluded by other norms. This is often not the case.

(6) A comprehensive elucidation of the concept of *teleological argument* presupposes a detailed analysis of the concepts of ends and means as well as of the related concepts of willing, intention, practical necessity, and goal.[74]

Such a detailed analysis cannot be undertaken here. Nevertheless, it is possible even without a detailed investigation to gain some insights into the structure of teleological reasoning which are of significance for this work.

[71] On this argumentation from the 'outer system' cf. Larenz, *Methodenlehre der Rechtswissenschaft*, p. 313.

[72] On the connection between systematic and teleological arguments cf. Larenz, *Methodenlehre der Rechtswissenschaft*, p. 315; Engisch, *Einführung in das juristische Denken*, p. 79.

[73] Those arguments relating to the avoidance of contradictions between norms are instances of the application of the general rule of discourse (1.1); cf. above, pp. 188–9.

[74] For such an analysis cf. Stegmüller, 'Probleme und Resultate der Wissenschaftstheorie und Analytischen Philosophie', vol. i, Wissenschaftliche Erklärung und Begründung (Berlin, Heidelberg, and New York, 1974), pp. 518 ff.; Wright, 'On So-called Practical Inference', pp. 39 ff. In the legal literature, a critical position is taken up by Dreier, *Zum Begriff der 'Natur der Sache'* (Berlin, 1965), 103 ff.

It was shown whilst discussing genetic interpretation, that there are teleological arguments in which the person arguing can rely directly on the aims of the historical legislator. The focus here is on teleological arguments in which this is not the case. Following Larenz, they will be called 'objective-teleological'.[75]

Objective-teleological arguments are characterized by the fact that the individual arguing does not rely on the aims of any past or present actually existing person but rather on 'rational' aims, or on those 'objectively prescribed in the framework of the valid legal order'. This raises the question of what is to be regarded as a rational aim or as one objectively prescribed in the framework of the valid legal order. The answer of discourse theory goes as follows: those aims which decision-makers deciding within the framework of the valid legal order would posit on the basis of rational argumentation, are rational aims or aims objectively prescribed in the framework of the valid legal order. The community of those deciding in the framework of the valid legal order on the basis of rational argumentation is the hypothetical subject of the aims presupposed in objective-teleological arguments. The aims stated by the interpreter are hypotheses about the aims set by this hypothetical subject. Their correctness has to be justified by rational argumentation.

The aims involved in teleological interpretation are thus a matter not of empirical findings but rather of normative distinctions. Such a normatively determined aim is to be understood here as a prescribed state of affairs or event.[76]

The fact that a state of affairs or event is prescribed can be symbolized by 'OZ'. The fact that the interpretation $I^R_W = R'$ is necessary to bring about Z—that is, is a means to Z[77]—can be expressed by a sentence of the form: $\neg R'\ (= I^R_W) \rightarrow \neg Z$. The simplest form of objective-teleological argument thus has the

[75] Larenz, *Methodenlehre der Rechtswissenschaft*, p. 322.

[76] On the concepts of 'state of affairs' and 'event' cf. Wright, *Norm and Action*, pp. 25 ff.

[77] To say that $I^R_W = R'$ is a means to Z, can mean several things: (1) The application of R′ in a concrete case, is a means to Z (2) general compliance with R′ is a means to Z, (3) the validity of R′ is a means to Z. The starting-point here will be that the validity of R′ is a means to Z.

following form:

(J.5) .(1) OZ
.(2) $\neg R' (=I^R_W) \rightarrow \neg Z$
(3) R'

(J.5) corresponds to the genetic argument form (J.4.2), apart from the fact that Z is not asserted as something intended by the legislature but as something which ought objectively to be realized.[78] The general schema underlying it, as in the case of (J.4.2) is:

(S) .(1) OZ
.(2) $\neg M \rightarrow \neg Z$
(3) OM

(J.5) presupposes the soundness of two quite diverse premisses. 'OZ' (1) is a normative statement, while '$\neg M \rightarrow \neg Z$' (2) is an empirical one. To give grounds upholding the truth of (2) calls for knowledge based on empirical generalizations. Teleological arguments thus rely in part on empirical argumentation. When, as is not uncommon, there is no dispute about (1), the decision depends only on empirical arguments. This illustrates the considerable importance of empirical reasoning in legal discourse.

Here only the justification of (1) is of interest. For the most part, (1) is justified with reference to the applicable norm. It is claimed that it is necessary to bring about condition Z because of the binding character of R. Z is frequently justified by reference to a group of norms rather than to a single norm. Nevertheless in none of these cases does Z follow logically from the norms to which reference is made in the justification. Further arguments are therefore needed. Only where a norm immediately prescribes the pursuit of Z is this not the case.

In most cases not only one aim but several aims can be put

[78] (J.5) corresponds to the combination of the argument forms analysed by Dreier under the description 'technical practical' and 'objective practical argumentation from the nature of the thing'. (J.5) is objective practical to the extent that Z is described as something which objectively ought to be realized. (J.5) is technical practical because it includes the statement that R, when it is to serve the aim Z, must have the characteristic 'interpreted through W' confirmed in it (*Zum Begriff der 'Natur der Sache'*, pp. 106 ff., 108 ff., 120 ff., 124).

forward in favour of a norm or a group of norms. These aims usually either exclude one another or can only be realized by limiting each in the light of the other.[79] What is necessary in these cases is to justify the mandatory quality of a combination of aims ($[Z_1, Z_2 \ldots Z_n]K$). This presupposes the application of priority rules.

The most difficult problems of teleological reasoning arise when Z or ($Z_1, Z_2 \ldots Z_n$) K—the following will once again only talk of Z—cannot be described solely by means of empirical expressions. This is the case when Z is defined as being a state of affairs in which certain norms hold good.[80]

A borderline case of such a state of affairs exists when Z can be determined as being the very state of affairs in which R', the norm to be justified, holds. In such a case, reference to Z has no point other than to clarify what it means for R' to be valid.

As a rule the description of such a state of affairs requires norms general in scope or principles.[81] Z is then the state of affairs in which the principles $P_1, P_2 \ldots P_n$ hold. Teleological argument accordingly turns into a kind of argument from principles.[82] The problem of reasoning from principles consists not so much in the justification of the principles but much more

[79] On the realization that a norm need not always have only one aim assigned to it cf. Esser, *Vorverständnis und Methodenwahl*, p. 102; Engisch, *Einführung in das juristische Denken*, p. 80.

[80] Cf. above, p. 199.

[81] By 'principles' in this context are meant normative statements of a high level of generality like: 'The dignity of man should be respected', 'Like cases should be treated alike' and 'Everyone should take responsibility for shortcomings in their sphere of business'. Because of their high level of generality, such statements cannot be used directly in the justification of a decision. Further normative premisses are needed. On the concept of principles cf. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (Tübingen, 1956; repr. 1964), pp. 87 ff. and his *Vorverständnis und Methodenwahl*, p. 42; Canaris, *Systemdenken und Systembegriff*, pp. 48 ff.; Larenz, *Methodenlehre der Rechtswissenschaft*, p. 458. On the concept of generality cf. Hare, 'Principles', pp. 2–3 and above, pp. 66–7.

[82] Cf. Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 323 ff., who—without distinguishing between states of affairs and principles—included principles such as the principle of equal treatment and ethico-legal principles among the 'objective-teleological criteria of interpretation'. Cf. also Engisch, *Einführung in das juristische Denken*, p. 81, who for reasons like those cited above, holds the view that the term 'interpretation on the basis of reasons' would be more fitting than that of 'interpretation on the basis of purpose'.

in the fact that the norm to be justified does not usually follow logically from the principles. There is a need for a concretization of the principles with the help of further normative statements.

2.3.2 *The Role of the Canons in Legal Discourse*

Six points will be raised with a view to clarifying the role of the canons of interpretation in legal discourse: (1) the range of their applicability, (2) their logical status, (3) the saturation requirement, (4) the different functions of the various forms, (5) the problem of their rank order, and (6) the resolution of the problem of their rank order within the theory of legal discourse.

(1) The different forms of argument have until now been represented as forms of argument for or against a particular interpretation I of a presupposed norm R, through a 'word usage rule' W ($I^R_W = R'$). Beyond that, apart from the argument forms of semantic interpretation, all the forms can be deployed in a large number of further contexts. In particular we should note the contexts of a conflict of norms, of a limitation of norms, and of the justification of norms which cannot be inferred from any statute. Thus in a situation of a conflict of norms, for example, reference may be made to the fact that the legislature accorded particular significance to one of the norms. When justifying a restrictive reading of a norm it is possible to refer to comparable and well-tried regulations in other states, and in justifying a norm which cannot be inferred from positive law one can advance as an argument an aim which ought to be pursued. To this extent, the traditional characterization of the argument forms discussed above under the heading of canons of interpretation, is too narrow.

(2) The logical status of the canons is subject to dispute. Rottleuthner denies that they have the character of rules. They are said to serve only 'to indicate viewpoints for questions of relevancy and to propose lines of inquiry'.[83] Hart calls them 'general rules for the use of language.'[84] Müller speaks of 'elements in the process of concretization' and 'moments in a

[83] Rottleuthner, *Richterliches Handeln*, p. 30, and his *Rechtswissenschaft als Sozialwissenschaft*, p. 197.
[84] Hart, *The Concept of Law*, p. 123.

unitary interpretative procedure',[85] Larenz of 'guiding perspectives to which variable weight is assigned'.[86]

The foregoing reflections have shown that the various argument forms do not in actual fact amount to rules. They do not lay down what must conditionally or unconditionally be done or striven after. On the other hand they are more than mere points of view or guidelines for raising questions. They can, to use a concept of Perelman's, best be described as 'schemata for arguments' ('*schèmes d'arguments*').[87] They amount to schemata for statements of a particular form such that a further statement of a particular form follows logically or may be justified by reference to a presupposed rule. It is for this reason that they are to be called 'argument forms'.[88]

As argument forms the canons give a special character to the structure of legal reasoning. A comprehensive analysis of all argument forms possible in legal discourse would yield something like a grammar of legal argumentation. To take the analogy further, however, this would tell us nothing about the issue of what one ought to say if speaking the language which follows this grammar. Still, it would have shown how one can proceed in order to arrive at a rational outcome.

(3) An argument of a particular form is only complete if it contains all the premisses belonging to this form. This may be called the requirement of saturation.[89] The premisses needed for completeness are of different kinds. Corresponding to these are quite different methods of justification.

Empirical justifications play a significant part. Observations about linguistic usage, claims about the will of the legislator or of individuals participating in the legislative process or about the state of the law at times past or those in other jurisdictions, as well as hypotheses which underlie assertions about consequences, are all subjects for empirical justification.

In addition to the empirical statements of the kind mentioned here, the argument forms contain normative premisses which

[85] Müller, *Juristische Methodik*, p. 145.
[86] Larenz, *Methodenlehre der Rechtswissenschaft*, p. 332.
[87] Perelman and Olbrechts-Tyteca, *La Nouvelle Rhétorique*, p. 252 (p. 187).
[88] On the concept of argument form cf. above, p. 92.
[89] Cf. above, p. 238.

cannot be inferred from the enacted law. Examples occur in cases of historical, comparative, and teleological interpretation, all of which presuppose the evaluation of states of affairs. The justification of these normative presuppositions certainly does not always depend directly on the methods of general practical discourse. The justification of some interpretation may perhaps initially deploy a comparative argument. In order to justify the evaluation presupposed in this argument, it might be possible to refer to the commitments to certain aims involved in other norms. It is only at this point that it may be necessary to resort to general practical arguments.

The requirement of saturation secures the rationality of the application of the canons. It excludes the possiblity of argument by recourse to bald assertion to the effect that a particular interpretation results from the wording or the historical origin or the purpose of the norm. It is always necessary to put forward either empirical or normative premisses whose truth or correctness can at any time be made the subject-matter of further discussion. The following rule accordingly precludes resort to empty assertions:

(J.6) Saturation—that is a full statement of reasons—is required in every argument which belongs among the canons of interpretation.

(4) The different forms fulfil different functions. The forms of semantic and genetic reasoning are concerned with the commitment of the decision-maker to the very words of the statute and to the intention of the legislator respectively. The historical and comparative forms allow for learning from the experiences of the past and of other societies. Systematic interpretation contributes among other things to freeing the legal order from contradiction. Finally, the teleological forms open up the field to general practical reasoning. All this only characterizes one particularly important function of the various forms in each case.

(5) It is already obvious from the different functions of the different forms that in the context of a discussion about a particular problem arguments using one form may lead to a quite different solution from arguments using another. This gives rise to a double uncertainty in the application of the

canons. A single form may achieve saturation in diverse ways and different forms may be used to justify different conclusions.

The question of the mutual relationships of the arguments of different forms is generally treated as the problem of constructing a catalogue of priorities or stages, or a rank ordering of the canons. To date no proposal for such a catalogue has met with general acceptance.[90] Different reactions have been voiced both as to the possibility of and the necessity for such a rank ordering. According to Esser, the 'hope that one might be able to draw up a catalogue of stages "among the sequence of steps in interpretation", is doomed to failure.'[91] Kriele has presented a number of significant arguments on this point.[92] Larenz tries to establish a certain determination of the relationship between the canons, but he too arrives at the conclusion that there is 'no definite rank order' of the different forms. 'They stand in a relation of reciprocity and their respective weight is not in the last analysis determined by the results they yield in individual cases.'[93] Müller advances a view of the rule of law as supporting priority for the semantic and systematic arguments.[94] Engisch is of the opinion that if it should turn out to be 'quite impossible to resolve' the issue of the relationship of interpretational methods then there is 'absolutely no prospect of overcoming the problems of legal decision-making in any way which gives rise to even vague confidence'.[95] He sets up a catalogue of stages for discussion, in which, in accordance with the subjective theory, the will of the legislator is initially to be the decisive factor and objective-teleological arguments are only to be brought in if the legislative will cannot be determined with certainty.[96] However, he reduces the value of this catalogue by observing that the dispute between objective and subjective theories of interpretation 'has not been conclusively resolved and like all true foundational problems will never admit of final resolution.'[97]

[90] Müller, *Juristische Methodik*, p. 198.
[91] Esser, *Vorverständnis und Methodenwahl*, p. 124–5.
[92] Kriele, *Theorie der Rechtsgewinnung*, pp. 85 ff.
[93] Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 334–5.
[94] Müller, *Juristische Methodik*, pp. 202 ff.
[95] Engisch, *Einführung in das juristische Denken*, p. 225 n. 82d.
[96] Ibid., 230 ff.
[97] Ibid., 96. On the dispute between the subjective and the objective theory of interpretation cf. Mennicken, *Das Ziel der Gesetzesauslegung*, pp. 30 ff., 75 ff.

(6) Discourse theory in its turn can offer a solution neither by constructing a catalogue of stages, nor by deciding in favour of an objective or subjective theory of interpretation, nor by constructing a formula which puts them both in relation to one another. However, it can make a contribution to resolving the problem in that it indicates how the different argument forms can usefully be employed.

Here two characteristics of discourse theory show themselves in a favourable light. The first of these is the fact that discourse theory includes an account of the pragmatic dimensions of justification; the second is the fact that it does not attempt to provide criteria which are so strong as to enable one to determine a result with certainty simply on the basis of familiarity with discourse theory.[98] Rules and forms are set out whose observation and implementation increases the probability of achieving a correct, that is a rational or reasonable result in any discussion. It cannot be said on the basis of these rules and forms alone—except in the case of discursive necessity—what these results shall be. This requires an actually occurring or imaginary discussion.

In order to link this discussion to valid law it must be stipulated that those arguments which give expression to a link prima facie have the greater weight. If a proponent (P) appeals to the very words or the will of the historical legislator in support of a proposed solution, while by contrast his or her opponent (O) cites a rational aim in support of a divergent proposal, then P's arguments should take precedence unless O is not only able to give good reasons for his or her assertions but can also give good reasons for saying that his or her arguments are stronger than P's. In cases of doubt, P's reasons take precedence. The following rule on the burden of proof in argumentation thus holds as a pragmatic rule:

(J.7) Arguments which give expression to a link with the actual words of the law, or the will of the historical legislator, take precedence over other arguments, unless rational grounds can be cited for granting precedence to the other arguments.

This rule leaves open the question of when there exist rational

[98] Cf. above, p. 17 ff., 206.

grounds for assigning a lesser weight to arguments which express a link. This is left to the participants in legal discourse to decide. This, however, does not mean that this decision is arbitrary. Those grounds alone are rational which can be justified in a rational juristic discussion. All possible arguments of legal discourse are admissible in a discussion of this sort on the use of legal arguments. Of course general practical arguments will, in this situation, play the decisive part, since these very legal arguments which are under discussion cannot themselves be used to determine its outcome. The problem of rank ordering is thus shown as a problem to be resolved primarily through the methods of general practical reasoning.

Assigning the decision to the rationality of the participants in the argument does not mean that the determination of the relationship between the canons is always open and has to be actually investigated anew in each case. The participants in the discourse have to determine weights to be attached to various forms of argument in various contexts of interpretation. The weights they assign, since these have to be well-founded, are valid not only for the case under discussion but also for any other case which is similar in the relevant respects.[99] As a fundamental principle of discourse theory, the principle of universalizability in this way requires that the use of argument forms takes place according to rationally justifiable rules governing their interrelationships. This yields the following rule as a variant of the principle of universalizability:

(J.8) Determinations of the relative weight of arguments different in form must conform to weighting rules.

Such rules can only be developed with reference to particular contexts of interpretation and particular branches of law. Moreover, since the contexts of interpretation and the branches of law are subject to change, they never achieve final and conclusive certainty.

(J.8) is a rule of general practical discourse governing the use of the canons. Yet another general rule of discourse can be specified in an analogous way.

(2.2.a) and (2.2.b), which express the requirement of freedom of discussion, secure the admissibility of all arguments. In

[99] Cf. above, pp. 65 ff.

relation to legal argumentation this means that all arguments which might possibly be produced must be given due consideration. The following rule therefore holds:

(J.9) Every possibly proposable argument of such a form that it can be counted as one of the canons of interpretation must be given due consideration.[100]

To sum up, it can be said that although the canons do not offer a guarantee of 'finding one right answer ... with a relatively high degree of certainty',[101] they are nevertheless more than mere instruments for secondary legitimation of a decision which can be reached and justified in alternative ways. They are forms in which legal reasoning has to be cast if it is to fulfil its claim to correctness, which, unlike that of general practical discourse, contains acknowledgement of the mandatory quality of legislation.

2.4 Dogmatic Reasoning

2.4.1 *Towards a Concept of Legal Dogmatics*

In order to discover the nature of dogmatic arguments and the role they play in legal discourse it is necessary to know what is meant by 'juristic dogmatics' or 'legal dogmatics'. This is far from clear. To be sure there is a growing number of publications on this subject, but a generally accepted theory of legal dogmatics is not yet in sight.

If one follows the terminology probably most prevalent among jurists, then 'juristic dogmatics' or 'legal dogmatics' is taken to mean legal science in the narrower and proper sense,[102] as it is actually pursued by them.[103] This legal science, in the

[100] For a parallel requirement cf. Larenz, *Methodenlehre der Rechtswissenschaft*, p. 335.

[101] Kriele, *Theorie der Rechtsgewinnung*, p. 85.

[102] On this cf. G. Radbruch, *Rechtsphilosophie*, 7th edn. (Stuttgart, 1970), 209.

[103] Instead of starting from prevailing terminology and those matters designated by the expressions 'juristic dogmatics' or 'legal dogmatics', one might begin with an analysis of the term 'dogmatics', an inquiry into its history and its application in other disciplines, particularly theology. This path is taken by a number of writers (e.g. U. Meyer-Cording, *Kann der Jurist heute noch*

narrower and proper sense, is a mixture of at least three activities: (1) that of describing the law in force, (2) that of subjecting it to conceptual and systematic analysis, and (3) that of working out proposals about the proper solutions to legal problems. As is clear from this, legal dogmatics is a 'multi-dimensional discipline'.[104]

Corresponding to the three activities above it is possible to distinguish three dimensions: descriptive-empirical, logical-analytical, and normative-practical.[105] There are different ways of proceeding within each of these dimensions. In the context of the descriptive-empirical dimension it is possible to distinguish, in particular, the description and prognosis of the practice of the courts and the determination of the actual will of the

Dogmatiker sein? Zum Selbstverständnis der Rechtswissenschaft (Tübingen, 1973), 7 ff.; Albert, 'Erkenntnis und Recht: Die Jurisprudenz im Lichte des Kritizismus', *Jahrbuch für Rechtssoziologie und Rechtstheorie*, 2 (1972), 82 ff.; E. J. Thul, 'Die Denkform der Rechtsdogmatik', *ARSP* 46 (1960), 241 ff. Cf. also D. de Lazzer, 'Rechtsdogmatik als Kompromißformular' in *Dogmatik und Methode*, Festschrift for J. Esser, ed R. Dubischar *et al.* (Kronberg, 1975), 87). This kind of shift towards conceptual-analytical, conceptual-historical, and comparative inquiries can certainly yield significant insights, so long as we postpone a decision on what juristic dogmatics is until the thing itself has come into view. Such inquiries only have meaning when they are pursued in sufficient depth. This cannot be done here. Apart from one observation to be made below, they will therefore be dispensed with here.

[104] Dreier, *Was ist und wozu Allgemeine Rechtstheorie?*, p. 15. Cf. also Meyer-Cording, *Kann der Jurist heute noch Dogmatiker sein?*, p. 41, who speaks of a 'mixture of very different activities', and K. Adomeit, 'Zivilrechtstheorie und Zivilrechtsdogmatik, mit einem Beitrag zur Theorie der subjektiven Rechte', *Jahrbuch für Rechtssoziologie und Rechtstheorie*, 2 (1972), 504, especially n. 8, where he tries to grasp the 'mixed character' of juristic dogmatics in an '8-operation model'.

[105] Several authors present a bipartite division rather than a tripartite one, that is into a descriptive-theoretical and a normative-practical dimension (cf. Dreier, *Was ist und wozu Allgemeine Rechtstheorie?*, p. 15), or into 'reporting' and 'proposing' statements (Adomeit, 'Zivilrechtstheorie und Zivilrechtsdogmatik', pp. 503 ff.). This could be justified by reference to the logical-analytical work already required in the description and elaboration respectively of proposals for regulation. On the other hand it must be admitted that it is precisely in the framework of juristic dogmatics that the logical-analytical dimension plays a role which, though linked with the other dimensions, remains clearly distinctive.