Outline of A Theory of General Rational Practical Discourse

This section of the book will draw together the results of the discussion so far, into a general theory of rational practical discourse. It will only be possible to recapitulate in brief the most important findings to be retained of the investigation so far, along with the main outlines of the arguments which justify them. What follows will therefore only be fully comprehensible in the light of the previous discussions.

1. THE PROBLEM OF THE JUSTIFICATION OF NORMATIVE STATEMENTS

It was shown that normative expressions such as 'good' and 'ought' which occur in normative statements (judgments of value and obligation)[1] do not refer to any kind of non-empirical object, characteristic, or relation as is assumed by intuitionism,[2] nor are they reducible to empirical expressions as is claimed by naturalism.[3] Normative statements accordingly cannot be tested either by reference to any non-empirical entities or by the methods of the empirical sciences.

This does not, however, amount to a reason for conceptualizing normative terms in the emotivist or subjectivist way (or any variant thereon)[4] as giving expression to or descriptions of feelings or attitudes explicable in psychological or sociological terms yet which cannot be shown to be correct or true.[5]

[1] On these concepts cf. above, p. 60.
[2] On intuitionism cf. above, pp. 37 ff.
[3] On naturalism cf. above, pp. 34 ff.
[4] On emotivism and subjectivism cf. above, pp. 39 ff.
[5] The discussion so far has shown that there are a number of arguments in favour of the truth value of normative statements (cf. above, pp. 46, 56 ff., 83, 104 ff., and 129). However, it remains to be shown whether these arguments justify designating normative statements as 'true' in exactly the same way as

Emotivist or subjectivist theories do not allow properly for the fact that a claim to correctness is always implicated in any judgment of value or obligation.[6] If someone casts doubt on such a judgment, its justification is then open to discussion. In such discussion reasons (G) can be adduced for and against the disputed normative statements (N). To be sure, mere reference to the fact that normative statements are amenable to discussion is as yet no conclusive reason for speaking of their amenability to justification or their correctness. Such discussions might be no more than contrivances for persuading, for exerting psychological influence. The crucial question is whether there are criteria or rules for distinguishing good from bad reasons, valid from invalid arguments.

The discussion of Hare and Toulmin showed that whenever anyone puts forward a reason or ground G (for example, 'A lied') in support of a normative statement N (for example, 'A behaved badly') this presupposes a rule R (for example, 'Lying is bad') from which, together with G, N follows logically.[7] In this case N can be said to be 'justifiable through G and R'. Whoever wishes to question the justifying of N by resort to G and R can attack either G or R. If R is the subject of attack, there is a need to provide justifying arguments for the rule expressed by 'Lying is bad'. In this process of second-order justification a statement like 'Lying causes avoidable suffering' (G′) can be put forward as such an argument. This in its turn presupposes some rule (R′) such as: 'Whatever brings about avoidable suffering is bad'.[8] If one now wishes to provide justifying arguments for R′ on this model, there is a need for a further rule R″, and so on.

The only way of avoiding an infinite regress would seem to be by breaking off the process of justification at some point and substituting for it a decision not itself amenable to justification. The upshot of this, however, would be that one could ascribe 'correctness' only in a very limited sense to the purportedly

empirical ones. This must remain the subject-matter of a separate investigation. The following pages will therefore only speak of the correctness of normative statements.

[6] Cf. above, pp. 107–8, 127 ff.

[7] Cf. Hare, *Freedom and Reason*, p. 21; Toulmin, *The Uses of Arguments*, p. 97, as well as above, pp. 66, 84 ff.

[8] Cf. above, p. 87.

justified statement N. The arbitrary nature of this decision would be carried over into the whole justificatory process which is dependent on it. The attempt to set about justifying normative statements in this continuous manner thus leads either to an infinite regress or to a decision which can at best be explained psychologically and sociologically but which is not amenable to justification. The only way out of these two alternatives would be by recourse to a logical circle—hardly acceptable.

This 'Münchhausen-Trilemma'[9] (as H. Albert calls it) is, however, not without remedy. It can be avoided by dropping the demand for ever further justification of every statement by another statement, in favour of a set of requirements governing the procedure of justification. These requirements can be formulated as rules of rational discussion. The rules of rational discussion do not relate only to statements as do the rules of logic, but reach out beyond them to govern the conduct of the speaker. To this extent they can be called 'pragmatic rules'. Observance of these rules does certainly not guarantee the conclusive certainty of all[10] results, but it does nevertheless mark the results out as rational ones. Rationality is accordingly not to be equated with conclusive certainty. This characterizes the basic idea of the theory of rational practical discourse.

Discourses are sets of interconnected actions devoted to testing the truth or correctness of the things we say.[11] Discourses concerned with the correctness of normative statements are practical discourses. It remains to be shown that legal discourse

[9] Cf. Albert, *Traktat über kritische Vernunft*, p. 13; Popper, *The Logic of Scientific Discovery*, p. 94.

[10] Of course, as the theory of discursive necessities shows, several results are necessarily required; cf. above, pp. 17, 132.

[11] Discourses are thus primarily events in which several individuals participate. Nevertheless, this does not exclude the possibility of speaking of 'inner discourses'. Inner discourses are the reflections of one person in which the possible counter-arguments of imaginary opponents are evaluated. It is possible to speak of successful inner discourses in a weaker sense, to the extent that all known counter-arguments have been appraised in a non-partisan way. An inner discourse can be said to succeed in a stronger sense to the extent that this has occurred with respect to all conceivable counter-arguments of all conceivable opponents. It must remain an open question how far and in what way these conditions can be met. It will only be noted that although the theory drawn up here does indeed offer the basis for a theory of inner discourse too, such a theory would have to solve a number of additional problems as well.

can be understood as a special case of general practical discourse under limiting conditions such as statute, legal dogmatics, and precedent.

2. POSSIBLE THEORIES OF DISCOURSE

A theory of discourse can be empirical, analytical, and/or normative. It is *empirical* when, to give just a few examples, it describes and explains the correlation between certain groups of speakers and the use of certain arguments, the effects of arguments, or the prevailing views of certain groups concerning the validity of arguments. It is *analytical* when it deals with the logical structure of actually occurring and possible arguments. Finally, it is *normative* when it proposes and justifies criteria for the rationality of discourses.

There are a number of connections between these three characteristics. Both empirical and normative theories presuppose informed positions on the logical structure of arguments. The relationship between empirical and normative theories is more problematic. Among the tasks of empirical theory is that of giving a descriptive account of the rules which individuals or given social groups acknowledge as binding. But giving such an account is not tantamount to justifying these rules. They would only be justified within the framework of a normative theory, and then only by the addition of some such further premiss as that the rules observed by particular academics at certain times are reasonable ones.

3. THE JUSTIFICATION OF RULES OF DISCOURSE

The theory of rational discourse is a normative theory of discourse. It therefore addresses the problem of how the rules of rational discourse can be justified. At first glance, this problem would seem not to admit of any solution. The rules of rational practical discourse can be understood as norms for the justification of norms. Does their justification not require third-order norms and so on, so that the infinite regress described in relation to norms of the same level also applies in relation to

norms of different levels? Before giving up, the possible ways of arriving at rules of discourse should first be investigated. There are four possible routes.

3.1 The first way consists in conceptualizing rules of discourse as technical rules. Technical rules are rules which prescribe means as appropriate to particular ends.[12] Lorenzen and Schwemmer take this path when they attempt to establish the good sense of their rules by postulating non-coercive conflict resolution as their end.[13] This mode of justification can be termed '*technical*'.

There are two objections to the technical mode of justification. The one is that the end it postulates needs to be justified in its turn. But what rules are to be applied in this process, if the aim is supposed to be that which justifies all rules? The other is that an aim which might justify the observance of *all* rules of discourse is either so general that it becomes possible to postulate incompatible norms as a means to its attainment—this is the case with such aims as happiness or the dignity of human beings—or the state of affairs designated as the aim is itself defined by the observance of these norms.

This is the case when, for example, the purpose of non-coercive conflict resolution is understood not as a state of social pacification, also rejected by Schwemmer,[14] but as a state in which conflicts are rationally resolved. Setting as an end, a state of affairs already defined by the rules which it is intended to justify, holds true particularly of 'ends' such as justice and truth. There are not two separate kinds of things:[15] on the one hand justice and truth, as ends, and on the other hand rules-as-means

[12] On this cf. Wright, *Norm and Action* (London, 1963), 9 ff.

[13] Cf. above, p. 141; and also Grice, who claims to have formulated his rules in such a way that they serve the aim of a 'maximally effective exchange of information' (*Logic and Conversation*, p. 35).

[14] Lorenzen and Schwemmer, *Konstruktive Logik, Ethik und Wissenschaftstheorie*, p. 109.

[15] Instructive on this point is J. Ladd, 'The Place of Practical Reason in Judicial Decision', in *Rational Decision*, *Nomos*, vol. vii, ed. C. J. Friedrich (New York, 1964), 140. According to Ladd, the aim of the judge should be the 'impartial administration of justice or of the law'. This aim is to be pursued by acting in accordance with a number of rules and principles. 'These rules and principles play the logical function of defining the end itself.'

according to which they can be established or discovered; on the contrary, what is just or true is that which is established or discovered by applying these rules.[16]

This does not mean that the technical mode of justification is of no value at all. It will not serve as a procedure for justifying all rules. But it is indispensable to the justification of more concrete rules in terms of limited aims.[17] Of course, these aims would themselves need to be justified.

3.2. A second possibility consists in showing that certain rules have *de facto* validity—that is, that they are actually observed to a considerable extent, or that the particular results realizable through the observance of certain rules correspond to the normative convictions we actually have. This mode of justification can be called '*empirical*'.[18]

[16] This observation does not run counter to the distinction between definitional and criteriological theories of truth. (On this cf. N. Rescher, *The Coherence Theory of Truth* (Oxford, 1973), 1 ff.; H. J. Wolff, 'Begriff und Kriterium der Wahrheit', in *Gegenwartsprobleme des Internationalen Rechts und der Rechtsphilosophie*, Festschrift for R. Laun, ed. D. S. Constantopoulos and H. Wehberg (Hamburg, 1953), 587 ff.) Should this distinction prove feasible and meaningful, and there are indications in favour of this, then, to the extent that the observation concerns the concept 'truth' it would fall to be understood in the sense of a criteriological theory of truth. Should the distinction between definitional and criteriological theories of justice also prove possible, the same would hold true of the concept of 'just'. Of course the acceptance of the distinction between definitional and criteriological theories does not exclude the assumption that there exist close relations between such theories.

[17] The six main norms put forward by Arne Naess for an unbiased exchange of views can be seen as examples of such more concrete rules. These norms include those (1) against tendentious 'beating about the bush', (2) against tendentious rendition, (3) against tendentious ambiguity, (4) against the setting up of bogeymen, (5) against tendentious opening statements, and (6) against the tendentious preparation of contributions to the discussion (*Kommunikation und Argumentation* (Kronberg, 1975), 160 ff.). Naess justifies his norms via the aim of 'effective exchange of ideas' (ibid., 161).

[18] The term 'empirical' is not intended to imply that within the framework of this mode of justification it is possible to cite quite general facts as reasons. Only those arguments are to be included which make reference to a certain class of facts, namely the factual validity of rules and the actual confirmation of normative convictions. Calling such arguments 'empirical' in the present context can be justified by pointing out that the sentences describing these facts are not themselves normative but rather norm-describing and to this extent empirical sentences.

As already indicated above in the discussion of the relationship between an empirical and a normative theory of discourse, the main problem for the empirical mode of justification lies in the transition from the observation that a norm is actually operational or corresponds to actually existing convictions, to the conclusion that it is rational. This is a special case of deriving an 'ought' from an 'is'. Such a move would only be admissible if one were to accept the premiss that the prevailing practice is rational.

This premiss is certainly not entirely misguided. The existence of a prevailing practice is after all proof of its possibility. This is by no means certain in the case of proposed but untried methods. A further advantage of the empirical mode of justification lies in the fact that it provides a framework in which it is possible to point out contradictions within an existing practice and inconsistencies between actually held normative convictions. In this way a partner in the justificatory process may be moved to give up certain rules or convictions in order to maintain others which contradict them but seem of greater importance to him or her. It therefore makes sense to analyse prevailing practice and to take it as a prima facie starting-point.[19]

On the other hand the history of science or procedural law, for example, shows that the practice of a specific historical period is not only not the only possible one but need not necessarily be the best. A statement such as Hegel's: 'What is rational is actual and what is actual is rational'[20] cannot be taken literally, to say the least. An empirical justification of the kind indicated is therefore always only provisional in view of possible corrections by reference to other modes of justification.

[19] This is the aim of Kriele's demand that theory must 'achieve its standards for the judgment of practice from the observation of practice, that is it must learn from the experience of practice itself what constitutes good and bad practice' (*Theorie der Rechtsgewinnung*, p. 22). Of course this does not mean that the theory can confine itself to pure description and analysis of practice. In order to discover whether a certain practice is a good practice, theory must ask whether there are good reasons in favour of this practice (ibid., 288). The nature of these good reasons, on the other hand, will hardly be derivable from practice.

[20] G. W. F. Hegel, *Philosophy of Right*, trans. T. M. Knox (Oxford, 1965), 10.

3·3 Another path which often cuts across other modes of justification is taken by those who analyse the system of rules defining a language game and propose the adoption of the system of rules worked out in this way. The language games can be actually existing ones or hypothetical ones. The crucial factor for this mode of justification is that the presentation of the system of rules as defining a practice is considered the real motive for adopting the practice. This of course does not exclude the option of using other modes of justification as well, such as pointing out that the rules are already ('ever-presently') actually observed and are only to be intentionally strengthened once more, or that the observance of the rules has particular consequences. The only matter of importance is that the presentation of a system of rules is seen to constitute a reason or motive for its acceptance, regardless of whether or not any further reasons are given. This mode of justification is to be called '*definitional*'.[21]

The definitional mode of justification suffers from one weakness which makes it a matter of some doubt whether it is to count as a mode of justification at all. No further reasons are adduced in favour of the system of rules to be justified; it is simply elucidated and presented. This is meant to suffice as a motive or a reason. The definitional mode of justification thereby rests to some degree upon mere fiat or arbitrary will. Nevertheless, it should not be abandoned as pointless. It does make a difference whether one decides in favour of an explicitly formulated and comprehensively presented system of rules or whether one chooses something wholly lacking in conceptual

[21] Popper's argument moves in this direction in attempting to define 'empirical science . . . by means of its methodological rules'. These methodological rules he calls 'conventions', which must conform to the supreme rule that there be no protection 'against falsification' (*The Logic of Scientific Discovery*, p. 54). The supreme rule gives expression to the 'rationalist attitude' whose adoption is a matter of simple choice. 'That is to say, a rationalist attitude must be first adopted if any argument or experience is to be effective, and it cannot therefore be based upon argument or experience' (*The Open Society and its Enemies*, ii. 230). One can indeed draw attention to the consequences of opting for or against such an attitude, but to do so would not determine the case for this attitude (ibid., ii. 232). Albert takes the point with particular sharpness, speaking of the 'rationalism of criticalism' as the 'sketch of a way of life' whose adoption involves a moral decision (Traktat über kritische Vernunft, pp. 40–1).

and analytic endeavour. The definitional mode of justification can be advantageous in another way too. It allows the construction of completely new systems of rules.

3·4 A fourth and last way consists in showing that the validity of certain rules is a condition of the possibility of linguistic communication. Apel calls such a mode of justification 'transcendental-pragmatic'.[22] Habermas, however, is hesitant about the use of the word 'transcendental' as given currency by Kant. He gives two reasons for this: (1) rules of discourse, unlike Kant's philosophy, are not concerned with the constituents of experience but rather with the generation of arguments,[23] and (2) in working out these rules it is not possible to make a clear distinction between logical and empirical analysis.[24] He therefore suggests the expression 'universal-pragmatic' for the 'reconstruction of general and unavoidable presuppositions of possible processes of understanding'.[25] This expression is preferable since it is better suited to avoiding misunderstanding. The fourth mode of justification will therefore be called '*universal-pragmatic*'.

A weaker version of this mode of justification consists in showing that: (1) the validity of certain rules is constitutive[26] of the possibility of certain speech acts, and that (2) we cannot do without these speech acts save by giving up those forms of behaviour which we regard as peculiarly human.[27] The speech act of asserting would seem to belong to this category.

The mode of justification just described gives rise to many problems. Not only are these concerned with the questions of which rules can be rightfully characterized as 'general and unavoidable presuppositions of possible processes of understanding', which are constitutive of which speech acts, and

[22] Apel, *Towards a Transformation of Philosophy*, pp. 256 ff. and his 'Sprechakttheorie und transzendentale Sprachpragmatik zur Frage ethischer Normen', in id. (ed.), *Sprachpragmatik und Philosophie* (Frankfurt-on-Main, 1976), 116 ff.

[23] Habermas, 'What is Universal Pragmatics?' pp. 23–4.

[24] Ibid., 24–5.

[25] Ibid., 21. On the procedure for such a rational reconstruction cf. pp. 8 ff.

[26] On this concept cf. Searle, *Speech Acts*, pp. 33 ff.

[27] On this cf. ibid., 186 n. 1.

which speech acts are necessary for peculiarly human forms of behaviour; over and above that it is a question of importance from the standpoint of theory of science namely whether or not such justification is in the end possible at all. This dispute can be seen as a new variant of the old controversy between logical-empirical and transcendental-philosophical attitudes. It will not be entered into here.[28] It will only be observed that the boundaries in this dispute are no longer in the least clear cut. It can nevertheless be stated that where certain rules can be shown to be generally and necessarily presupposed in linguistic communication, or are constitutive of peculiarly human ways of behaviour, it is quite possible to speak of a justification of these rules. Of course, such justification will only be possible for relatively few fundamental rules.

3·5 The exposition of these four modes of justification lays no claim to completeness. It is quite conceivable that there are yet other methods; certainly other classifications are possible, and in any event further differentiation is possible within the individual modes of justification. However, the above observations show clearly that no mode of justification is without its weaknesses. Technical justification involves presupposing ends which are themselves not justified. In addition to this there is always the danger of excessively abstract aims or of aims which already contain the rules to be justified. The empirical method makes existing practice the standard of rationality. The definitional method is, in the last analysis, arbitrary, and the universal-pragmatic mode at best serves as a justification procedure for a few fundamental rules.

Nevertheless, each of these methods seems to contain an important element. Rules which can be justified in the universal-pragmatic mode are to be retained as valuable primary material. *De facto* binding rules are significant in two respects. Those engaged in theory of discourse must themselves be guided by them at least in the first instance, in the process of giving any justifications. How else can they begin? Furthermore, it can be said in favour of these rules, that they have

[28] On this cf. the essays by Apel, Habermas, Kanngießer, Schnelle, and Wunderlich, in *Sprachpragmatik und Philosophie.*

succeeded. This is indeed no proof of their rationality. But it does at least show that to date no criticism has been brought to bear against them which has proved sufficiently trenchant to lead to their abandonment. Take into account that the possibility of criticizing them did not always exist, but nevertheless often arose, and it is not possible to deny them limited reasonableness. In addition, empirically discovered rules can be scrutinized as to their appropriateness and set against other systems of rules constructed according to different criteria of appropriateness. Finally, the definitional method enhances the possibility of criticizing systems of rules by explicitly formulating them and by constructing new rules, opens up the way to new modes of procedure.

This review makes it clear that a discourse about rules of discourse is itself meaningful. Such a discourse can be called '*discourse-theoretical discourse*'. The four possible modes of justification applicable in discourse-theoretical discourse have just been outlined. How they are to be applied in detail must be left to the participants in discourse. Rules are already observed in the course of discussion within the framework of these four modes of justification. These rules consist partly of those actually valid for the group of speakers and partly of rules already provisionally justified. It is not unreasonable not to proceed exclusively by means of justified rules. Since this is not possible, and since it is reasonable to get discussion started, it is also reasonable to begin in the first instance on the basis of rules which are not themselves justified.

4. THE RULES AND FORMS OF GENERAL PRACTICAL DISCOURSE

The rules defining rational practical discourse are of quite diverse kinds. There are rules which are only valid for practical discourses and rules which are also valid in other language games. There are commands, prohibitions, and permissions. Some rules demand strict observance; others contain demands which can only be approximately met. In addition, there are rules governing behaviour within practical discourse and rules

which deal with moving over into other forms of discourse. Finally, argument forms must be distinguished from the rules of discourse.[29]

In the following, the rules and forms worked out in the preceding investigation will be explicitly formulated. It is not least the aim of such an explicit formulation to highlight shortcomings more clearly. Such shortcomings may relate to the content of the rules, to the incomplete nature of their enumeration, to the superfluity of some rules and forms, and to the inadequacy of their formal expression. Should it prove possible to eliminate these shortcomings, it ought to be possible one day to construct something like a code of practical reason. Such a code would be a synopsis and an explicit formulation of all the rules and forms of rational practical argumentation partly mentioned and partly only sporadically subjected to analysis in so many different writings.

4.1. The Basic Rules

The validity of the first group of rules is a precondition for the possibility of every linguistic communication which gives rise to any question of truth or correctness:

(1.1) No speaker may contradict him or herself.

(1.2) Every speaker may only assert what he or she actually believes.

(1.3) Every speaker who applies a predicate F to an object *a* must be prepared to apply F to every other object which is like *a* in all relevant respects.

(1.4) Different speakers may not use the same expression with different meanings.

(1.1) makes reference to the rules of logic. These rules are presupposed here. There are two further remarks to be made. First, it should be pointed out that the rules of logic are also applicable to normative statements. This is not without its

[29] The difference between rules and forms will become clearer when they are set out below. Here it will only be noted that the forms can be reformulated into rules—that is, into rules which require that in certain argument situations one must employ certain forms and only certain forms of argument. It is for this reason that one often only speaks of rules.

problems. If logic is regarded as 'the science of the most general laws of truth'[30] and if, furthermore, one is of the opinion that normative statements do not have truth-value, one might arrive at the belief that the rules of logic do not hold for normative statements. This problem is discussed under the heading 'Jørgensen's Dilemma'.[31] However, this 'dilemma' can easily be avoided. One way out consists in choosing values like 'valid' and 'invalid',[32] or 'lawful' and 'not lawful'[33] instead of the values 'true' and 'false'; a second way out lies in showing that the very occurrence of expressions such as 'and', 'if . . . then . . .', 'all', and 'some' in normative sentences is itself a ground for supposing that logical relations obtain between such sentences.[34] The third and probably the best way is to construct semantics (model theories) which allow of the ascription of truth and falsity to normative sentences.[35]

The second point is closely related to the first. The reference to the rules of logic expressed in (1.1) does not relate only to classical logic but above all also to deontic logic,[36] which has been developing for some years amid stormy and unresolved controversy. The prohibition against self-contradiction therefore relates also to deontic inconsistencies.

(1.2) secures the sincerity of the discussion. (1.2) is constitu-

[30] Frege, 'Logik' in *Schriften zur Logik und Sprachphilosophie. Aus dem Nachlaß*, ed. G. Gabriel (Hamburg, 1971), 39 and his 'The Thought: A Logical Inquiry' in P. F. Strawson (ed.), *Philosophical Logic* (Oxford, 1967), p. 18.

[31] J. Jørgensen, 'Imperatives and Logic', *Erkenntnis*, 7 (1937/8), 288 ff.; Ross, 'Imperatives and Logic', *Theoria*, 7 (1941), 55–6; and id., *Directives and Norms* (London, 1968), 139.

[32] Ross, *Directives and Norms*, pp. 177 ff.

[33] R. Schreiber, *Logik des Rechts* (Berlin, Göttingen, and Heidelberg, 1962), 65–6.

[34] Hare, *The Language of Morals*, pp. 20 ff.

[35] On such semantics cf. S. Kanger, 'New Foundations for Ethical Theory', *Deontic Logic: Introductory and Systematic Readings*, ed. R. Hilpinen (Dordrecht, 1971), pp. 44 ff.; J. Hintikka, 'Some Main Problems of Deontic Logic', *Deontic Logic*, pp. 67 ff. On model theory in general cf. S. A. Kripke, 'Semantical Considerations on Modal Logic', *Reference and Modality*, ed. L. Linsky (Oxford, 1971), 63 ff.

[36] On deontic logic cf. the writings of Wright, in particular, 'Deontic Logic', *Logical Studies* (London, 1957), 58–74; *Norm and Action* (London, 1963); *An Essay in Deontic Logic and the General Theory of Action* (Amsterdam, 1968); 'Deontic Logic Revisited', *Rechtstheorie*, 4 (1973), 37–46.

tive of every linguistic communication.[37] Without (1.2) it would not even be possible to lie, for in the absence of the presupposition of a rule requiring sincerity, deception is inconceivable. (1.2) does not thereby exclude the utterance of conjectures; it only demands that they be marked out as such.

(1.3) relates to the use of expressions by one speaker, (1.4) to the use of expressions by different speakers. (1.3) is formulated in stronger terms inasmuch as it demands a readiness for self-consistency in the application of terms. This would, however, not amount to an essential difference if (1.4) were to be strengthened so as to say that only those who are prepared to apply an expression in every case to which it is applicable use that expression at all. Under this condition (1.3) and (1.4) could be united into a single rule requiring all speakers to use all expressions with the same meaning. The reason for not doing this here lies above all in the fact that (1.3) and (1.4) contain quite different aspects of this general rule, aspects which it is worth distinguishing.

(1.3) relates to the self-consistency of the speaker. Applied to evaluative expressions (1.3) assumes the following form:

(1.3′) Every speaker may assert only those value judgments or judgments of obligation in a given case which he or she is willing to assert in the same terms for every case which resembles the given case in all relevant respects.

(1.3′) is a formulation of Hare's principle of universalizability.[38]

(1.4) requires communality in the use of language.[39] It is a matter of controversy how this communality is to be established and secured. Representatives of the Erlangen School stipulate that every expression should be subjected to the rules of an 'ortho-language' to achieve communality. For this, ordinary language can only be used in a subordinate role. The

[37] On the requirement of sincerity cf. Austin, 'Other Minds', pp. 82, 115; *How to Do Things with Words*, p. 15; Searle, *Speech Acts*, p. 65; Grice, *Logic and Conversation*, p. 34; O. Weinberger, 'Wahrheit, Recht und Moral', *Rechtstheorie*, 1 (1970), 131 ff. Cf. also above, pp. 145, 169.

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

[39] On this cf. above pp. 142 ff. On the communality of the use of language as an indispensable presupposition of every argumentation cf. also Perelman and Olbrechts-Tyteca, *La Nouvelle Rhétorique*, pp. 19 ff. (pp. 15 ff.).

practicability of this programme was questioned above.[40] There is quite a lot to be said in favour of starting out from ordinary language and only making stipulations concerning word usage where obscurities and misunderstandings arise. Analysis of the expressions used is a presupposition of any such stipulation. Artificial languages such as that of deontic logic may be employed as an instrument for this analysis.

Discussions carried out to elucidate communication problems can be understood as discourse *sui generis*. This type of discourse was called 'linguistic-analytical discourse' above.[41] Apart from the establishment of a common use of language, linguistic-analytic discourse is concerned with securing clear and meaningful speech. To this extent (1.4) might be further refined.

(1.1)–(1.4) are to be called '*basic rules*' because of their elementary character.

4.2 The Rationality Rules

Practical discourse is concerned with the justification of assertions of normative sentences.[42] In discussing such assertions, further assertions are drawn up, and so on. Assertions are also needed to refute something, to answer questions, and to justify suggestions. It is not possible to have practical discourse without assertions.

Whoever makes an assertion not only wishes to express a belief that something is the case but also implicitly claims that what is being said can be justified—that is, is true or correct. This applies equally to normative and non-normative statements.[43]

The claim to justifiability does not include a claim to the effect that the speaker him or herself is capable of giving a justification. It is quite sufficient for the speaker to refer to some other determinate or determinable person as capable of justifying

[40] Cf. above, pp. 143–4.

[41] Cf. above, p. 144.

[42] On the possibility of speaking of the speech act of asserting in regard to normative statements too cf. above, pp. 64 ff.

[43] Cf. Habermas, 'Wahrheitstheorien' p. 200; Patzig, 'Relativismus und Objektivität moralischer Normen', p. 75; Frankena, *Ethics*, pp. 79 ff. as well as above, pp. 127 ff.

what has been said. Reference to the competence of others to justify is, like every other argument, itself open to discussion. Thus it can be asked whether the authority invoked by the speaker really guarantees the correctness of the statements made. It is possible and, as a rule, necessary in this process to go into the question of whether or not what is said is in substance correct. In this way even the reference to the competence of determinate or determinable other people can be regarded as a justification argument. Nevertheless, it is not enough for the speaker simply to be of the opinion that someone at some time will be in a position to justify his or her statement, unless reasons can be given for this opinion.

Furthermore, the claim to justifiability does not mean that a speaker has to justify every assertion at any time to anyone at all. However, when a speaker refuses to provide a justifying argument, he or she has to be able to give reasons which justify this refusal.[44]

The following rule thus holds good for the speech act of asserting:

(2) Every speaker must give reasons for what he or she asserts when asked to do so, unless he or she can cite reasons which justify a refusal to provide a justification.[45]

This rule may be called the '*general justification rule*'.

Whoever gives justifying reasons for something at least pretends to accept the other party as a partner of equal standing, at least with regard to what concerns the justificatory process, and neither to practise coercion him or herself nor rely on coercion exercised by others. Furthermore, he or she claims to be able to defend the assertion not only to the speech-partner in question but to anyone at all. Language games which do not at least purport to fulfil these conditions cannot be regarded as justifications. The requirements of equal standing, universality,

[44] On these limitations with respect to the claim of justifiability cf. above, p. 128.

[45] On such a rule cf. Wunderlich, 'Zur Konventionalität von Sprechhandlungen', p. 20; Grice, *Logic and Conversation*, pp. 32 ff.; Schnelle, *Sprachphilosophie und Linguistik*, pp. 42 ff. On the question of whether such a rule is to be regarded as a rule constitutive of the speech act of asserting or simply as a general postulate of conversation cf. above, p. 129.

and freedom from coercion can be formulated as three rules. These rules correspond to the conditions laid down by Habermas for the ideal speech situation[46] in the weakened version accepted above.[47] The first rule concerns entry into discourse. It goes as follows:

(2.1) Everyone who can speak may take part in discourse.

The second rule governs the freedom of discussion. It can be subdivided into three provisions:

(2.2) (a) Everyone may problematize any assertion.
(b) Everyone may introduce any assertion into the discourse.
(c) Everyone may express his or her attitudes, wishes, and needs.

(c) is of significance particularly in practical discourse. Finally, the third rule has the task of shielding discourse from coercion. It stipulates that:

(2.3) No speaker may be prevented from exercising the rights laid down in (2.1) and (2.2) by any kind of coercion internal or external to the discourse.

It may be doubted whether (2.3) is a rule of discourse at all. It could also be regarded as a condition of realizing (2.1) and (2.2). However, it will suffice here to point out its special status.

It might be thought that little has been gained by setting out these rules. In reality, it is quite out of the question that all speakers should avail themselves of the rights provided for in rules (2.1) and (2.2). Furthermore, it may be doubted whether the freedom from coercion required by (2.3) could ever be achieved.[48]

Nevertheless, these rules are not meaningless. Justificatory arguments which would not be accepted when (2.1)–(2.3) (including the additional rules of discourse) were satisfied, are to be regarded as invalid. So together with the remaining rules of discourse they form a *negative hypothetical criterion* for the

[46] Cf. Habermas, 'Wahrheitstheorien', pp. 255–6.

[47] Cf. above, pp. 120–1, 127 ff.

[48] On this cf. above, pp. 121 ff.

correctness of normative statements. Their role as a *positive criterion* is more problematic. A distinction must be made between their function as a criterion for discussions which have actually occurred or are occurring, and their function as a criterion for hypothetical discussions. With regard to actual discussions, rules (2.1)–(2.3) can only be approximately satisfied. In addition, there always exists some possibility of error about the degree to which they have been satisfied. However, it can be said that where (2.1)–(2.3) are satisfied to the highest degree possible in the situation to be assessed, they do yield something akin to a provisional criterion. With regard to their role as a positive hypothetical criterion, the difficulty arises that there is a need for prognoses concerning the behaviour of *all* those affected in relation to the discussion. This calls for extensive empirical inquiry. The criterion will be as uncertain in application as these prognoses are. This uncertainty, however, does not make the criterion meaningless. But it does furnish grounds for treating as reversible, conclusions reached by reference to it.

Linked to the role of (2.1)–(2.3) as criteria for the correctness of normative statements is their role as an *instrument of criticism* of unjustifiable limitations of the rights and opportunities of discourse-partners. For they show that some limitations can be justified, namely those which in comparison with other limitations or with no limitations at all offer a better chance of arriving at a result which would also be generated under ideal conditions. Furthermore, they define an *ideal* which can be approached through practice[49] and organizational arrangements. Empirical knowledge must be brought into play both in testing limitations and in answering the question of the degree to which an approximation to this ideal is possible under certain circumstances. Finally, these rules yield an '*explication*' of the claim to truthfulness or correctness. The claim to justice is a special case of the claim to correctness. An explication of this concept is therefore made possible by reference to these rules.

(2) along with (2.1)–(2.3) defines the most important

[49] On the question of how such practice is possible cf. O. Ludwig and W. Menzel, 'Diskutieren als Gegenstand und Methode des Deutschunterrichts', *Praxis Deutsch*, 14 (1976), 13–22, as well as the eight didactic models put forward in this issue.

conditions for the rationality of discourses. They are therefore to be called '*rationality rules*'.

4.3 Rules for Allocating the Burden of Argument

(2.2.a) allows everyone to problematize any assertion. If this were unqualified it would let any speaker be driven into a corner by childish and mechanical repetition of the question 'why?'. It would also be possible to present everything said by the other parties to the deliberation as completely dubious. Each of these moves is quite simple for a speaker who can ask questions or express doubts without ever having to give reasons for so doing. The rules worked out so far do indeed regulate the burden of putting forward justifications in the case of assertions, but not with respect to posing questions or registering doubts.

This gives rise to a question of great importance for discourses, namely that of the extent and distribution of burdens of argument or of burdens of justification.[50] This problem has cropped up in various connections in the discussion so far. According to Singer, the generalization principle demands that anyone wishing to treat one person differently from another must provide a reason for so doing.[51] In Lorenzen's dialogical logic, for example, whoever asserts that all x's have the characteristic F ($(x)Fx$) is obliged to show with regard to any a that it is an F (Fa).[52] Finally, Perelman's principle of inertia stipulates that a view or practice which has once been accepted should not be abandoned without some reason.[53]

The distribution of the burden of argument stipulated by Singer results from the principle of universalizability (1.3′) together with the justification rule (2). Whoever proposes to treat A differently from B asserts, inasmuch as he or she presupposes (1.3′), that there exists a relevant difference

[50] These expressions are used synonymously in this investigation. A. Podlech differentiates between them in a way not needed here in his *Gehalt und Funktionen des allgemeinen verfassungsrechtlichen Gleichheitssatzes* (Berlin, 1971), 87–8.

[51] Singer, *Generalization in Ethics*, p. 31. Cf. above, pp. 65 ff.

[52] Lorenzen and Schwemmer, *Konstruktive Logik, Ethik und Wissenschaftstheorie*, p. 46. Cf. above, p. 138.

[53] Perelman and Olbrechts-Tyteca, *La Nouvelle Rhétorique*, p. 142 (p. 106). Cf. above, pp. 171 ff.

between them. This assertion has to be justified. The following rule therefore applies:

(3.1) Whoever proposes to treat a person A differently from a person B is obliged to provide justification for so doing.[54]

A further justification of (3.1) is to be found in the rationality rules according to which all are equal and reasons must therefore be put forward in order to justify any deviation from this condition. The rationality rules provide justifying grounds for a presumption of equality.[55]

It is not possible to discuss the justification of a dialogical construction of logic in this investigation. For this reason it will only be pointed out here that it is to be taken for granted that the rules of logic impose the strictest commitments in argument. Whoever asserts '$p \rightarrow q$' must, if his or her speech partner advances '$\neg q$', either accept '$\neg p$' or refute '$\neg q$' or give up '$p \rightarrow q$'.

In addition, Perelman's principle of inertia is of considerable significance. According to (2), when a speaker asserts something, his or her discussion-partner or collocutor has the right to call for a justifying reason. By contrast, a statement or norm which is presupposed as true or valid within the speaker's community, yet is not expressly asserted or discussed, may, according to this principle, only be doubted or questioned by giving some reason for so doing:

(3.2) Whoever attacks a statement or norm which is not the subject of the discussion must state a reason for so doing.

Finally, it is not admissible for a speaker to persist in demanding ever more reasons from his or her partner.[56] The partner or collocutor would soon run out of reasons. Once the

[54] For a very similar interpretation of the 'pragmatic content' of the constitutional principle of equality cf. Podlech, *Gehalt und Funktionen*, p. 89.

[55] On this cf. Rawls, 'Justice as Fairness', *The Philosophical Review*, 67 (1958), 166: 'There is a presumption against the distinctions and classifications made by legal systems and other practices to the extent that they infringe on the original and equal liberty of the persons participating in them.'

[56] Cf. Austin, 'Other Minds', p. 84: 'If you say, "that's not enough", then you must have in mind some more or less definite lack. . . . If there is no definite lack, which you are at least prepared to specify on being pressed, then it's silly (outrageous) just to go on saying "That's not enough".'

collocutor has cited a reason as is required by the justification rule, he or she is only obliged to make any further response in the event of counter-arguments:

(3.3) Whoever has put forward an argument is only obliged to produce further arguments in the event of counter-arguments.

(2.2.b) and (2.2.c) allow any speaker to introduce, whenever he or she pleases, any number whatever of assertions and utterances about his or her attitudes, wishes, and needs. In this way anyone can at any time advance assertions about the weather, for example, as well as utterances about his or her perceptions of it, without the existence of any connection at all with the problem under discussion. It is not necessary to exclude such utterances completely. If they only crop up once in a while, they do not necessarily harm the discussion. It must be left to the participants in a discourse to decide when they should be excluded. Moreover, it is not appropriate to exclude them by setting up a requirement that only relevant points be made,[57] as if it were a matter for discourse theory to determine issues of relevancy. That is entirely a matter for the parties to an argument. This suggests the following rule:

(3.4) Whoever introduces an assertion or an utterance about his or her attitudes, wishes, or needs into a discourse, which does not stand as an argument in relation to a prior utterance, must justify this interjection when required to do so.

4.4 The Argument Forms

Before embarking upon further rules of discourse, it will make sense to take a look first at the argument forms characteristic[58] of practical discourse.

Singular normative statements (N) are the immediate subject-matter of practical discourse. There are two basic ways

[57] On such a requirement cf. Grice, *Logic and Conversation*, p. 34.

[58] It should be stressed that only those argument forms specific to general practical discourses are dealt with here. Besides these there exist many argument forms which occur both in general practical as well as in other discourses. On this cf. the discussion of Perelman's analyses above, pp. 164 ff.

of justifying them. In the first, reference is made to a *rule* (R) presupposed as valid; in the second the *consequences* (F) of observing the imperatives implied[59] in N, are pointed out.[60]

There is an important structural relationship between these two ways. Whoever appeals to a rule in the course of providing a justificatory argument is at least presupposing that the conditions for applying this rule have been met. These conditions of application might be the characteristics of some person, action, or object, or the existence of a certain state of affairs, or the occurrence of a specific event. This means that whoever cites a rule as a reason presupposes that a statement (T) describing such characteristics, states of affairs, or events is true.

On the other hand whoever asserts something about consequences as a reason for N presupposes a rule to the effect that the achievement of these consequences is obligatory or good. This is so by reason of the generalization: 'the notion of a reason, as always, brings with it the notion of a rule which lays down that something is a reason for something else'.[61]

One can therefore distinguish argument forms as shown:

(4.1) T, R / N (4.2) F, R / N

(4.1) and (4.2) are sub-forms of the more general form:

(4) G, R' / N'[62]

There can be theoretical discourse both about the truth of T and about whether or not F really is a consequence of the action

[59] On the possibility of imperatives being implied by normative propositions (value-judgments and judgments of obligation) cf. above, p. 59.

[60] On these two kinds of justification cf. Toulmin, *The Place of Reason in Ethics*, p. 132, and also above, pp. 81 ff.

[61] Hare, *Freedom and Reason*, p. 21. Cf. also above, p. 66.

[62] 'R'' in contrast to 'R', and as well as to 'R'', denotes a rule of any level whatever, 'N'' in contrast to 'N' any normative proposition (not just a singular one). The introduction of 'R'' and 'N'' is necessary in order to be able to express the generality of (4).

in question.[63] The requirement that one must always be able to open up such a discourse at any time is supported by a rule of its own to be introduced below.

The main focus of interest here is disputes about R. There are different ways of defending R. R may be justified by giving an account of the state of affairs which prevails when R holds (S_R) or by pointing out some future state which will come to pass if R holds (S_F). S_R and S_F are to be distinguished in that in order to describe S_R it is necessary to include some reference to R in addition to indicating consequences which can be described independently of R. Provided one bears in mind these differences, it is nevertheless justifiable, for reasons of simplicity, to speak of the *consequences of the rule R* (F_R) both in the case of S_R and in that of S_F.

The thesis that giving a reason for an assertion presupposes a rule to the effect that the reason given counts as a reason for such an assertion, also holds good when R is justified through F_R. A second order rule (R') is therefore necessary.[64]

Besides drawing attention to F_R, it is also possible to adduce a further rule R' which requires R under some condition T' which is not classifiable as a consequence of R. T' could, for example, involve pointing out what is by no means morally irrelevant, namely that a certain rule was decided upon in a certain way.

This yields two second-level argument forms:[65]

(4.3) F_R, R' / R (4.4) T', R' / R

(4.3) and (4.4) are also sub-forms of the basic form (4).[66]

[63] It should be stressed that it is the answer to this question which is the decisive problem in many discourses. Many disputes about practical questions could be settled immediately were there sufficient certain empirical knowledge on which to draw. It would nevertheless be wrong to conclude from this that all practical problems are soluble merely by procuring empirical information.

[64] On such rules of the second level cf. above, p. 87.

[65] On the different levels of justification cf. above, p. 82.

[66] In (4.1)–(4.4) the conclusion in each case follows from the general normative statement together with an empirical statement. Starting out from the position of a true empirical statement and a false conclusion the general normative premiss must be false. The four forms therefore not only represent

In each case of (4.1)–(4.4) the application of a specific rule leads to a specific result. However, different rules can yield different and mutually inconsistent results both when the justifying arguments involved are of the same form and when they are of different forms. In such cases it must be decided which justifying argument is to take precedence. The rules invoked to justify such decisions are called '*priority rules*'.[67]

There are priority rules which prescribe that certain rules are

the *justification* of normative statements—corresponding to them over and above this are four forms of *testing* general normative statements. In the process of such testing it may be asked whether logical consequences which cannot be accepted as correct may be yielded by a general normative statement, perhaps the premiss R of a justification of form (4.2) (the hypothesis) together with an empirical statement to be accepted as true. Should this be the case the general normative statement must be rejected or modified. In the case of (4.2) the following pattern of inference would underlie such testing:
$([(F \wedge R) \rightarrow N] \wedge \neg N \wedge F) \rightarrow \neg R$
In practical discourses arguments corresponding to (4.1)–(4.4) can thus be used both in justifications and for testing. Since the various forms of testing can be arrived at through the forms of justification according to the rules of logic (1.1) there is no need to go into them here. The relationship of justification and testing is yielded by the rules of discourse. Whoever makes an assertion must give a reason for so doing (2). He or she does not, however, have to continue justifying any assertion ever further. Further arguments need only be adduced in response to counter-arguments (3.3). These counter-arguments may contain a test of the aforementioned kind, and themselves become the object of such testing. There thus occurs an interplay between justification and testing.

In this, justification takes priority. Testing occurs in practical discourses only where something is being asserted. When something is asserted, however, then according to (2) at least one reason for it must always be cited. Moreover, the object of such testing always consists of general statements. In practical discourse, general normative statements only become relevant in the course of justification of singular normative statements. Even more importantly, the testing of normative statements always requires further normative statements. Whoever asserts such a statement in the course of such testing must by reason of the general justification rule (2) always give at least one reason in favour of it—that is, must cite a justification of the form (4.1)–(4.4). A mere reference to evidence or intuition is not admissible. This results from the untenability of intuitionism (cf. above, pp. 38 f.). It is for these reasons, as well as for reasons of simplicity of exposition, that reference is made throughout to justifications in particular. It would always be possible to extend the arguments to testing.

[67] On the concept of a priority rule cf. Baier, *The Moral Point of View*, pp. 99 ff. and also above, p. 94.

to take precedence over others under all circumstances; but there are also priority rules which lay down that certain rules are to take precedence over others only under specified conditions (C). Let P be a relation of precedence between two rules. The priority rules can then be of two forms:

(4.5) $R_i P R_k$ and $R'_i P R'_k$
(4.6) $(R_i P R_k)C$ and $(R'_i P R'_k)C$

The priority rules in their turn can be justified by arguments of the forms (4.3) and (4.4).[68] Where conflict arises between priority rules, recourse must be had to second-order priority rules.

A great deal of further differentiation is possible within the various forms. Drawing attention to negative consequences, for example, presents a particularly important variant of (4.2) and (4.3). There may perhaps be further forms. However, the analysis presented here is sufficient for the theory of rational discourse which is the concern of the present investigation.

It highlights one factor in particular: the different argument forms can (except in so far as the two-stage character of justification imposes a limitation) be combined and iterated entirely *ad lib*. The various combinations of argument forms constitute an argument structure.[69] A distinction must be made here between a regressive and an additive argument structure.[70] Justificatory arguments can be combined with testing procedures and testing procedures lead on into justification. Argument structures which occur in this way are always finite.

[68] (4.5) and (4.6) themselves are not argument forms, but rather forms of rules. The insertion of (4.5) or (4.6) for R in (4.3) or (4.4), however, yields four further argument forms as follows: two sub-forms each of (4.3) and (4.4). Since (4.3) and (4.4) are sub-forms of (4), it is possible to speak of the existence of two groups of sub-forms of (4), characterized by (4.5) and (4.6) as conclusions. This is what was meant when in the Introduction there was a remark to the effect that six forms are distinguished here. What must be stressed is that all six are sub-forms of (4).

[69] On the concept of argument structure cf. above, pp. 92–3.

[70] An additive argument structure exists when an assertion or rule is justified by means of various arguments which are independent of one another. It would also be possible to speak of several justifications in such a case. In a regressive structure, the one argument would act as the support of the other. On this cf. above, p. 169.

It is never possible to justify all rules, for there are always some which simply have to be accepted if the process of justification is to be possible at all.[71] The demand for rationality does not mean that all rules are to be simultaneously justified, but only that any rule can be subjected to the process of justification.

4.5 The Justification Rules

The formulas (4.1)–(4.6) only specified *forms* of argument employable in practical discourses. It is already a gain for rationality if arguments are conducted in these forms and not countered by means such as flattery, accusations, and threats. On the other hand, any normative statements and rules whatever may be justified in these forms. A search should therefore be carried out for rules which govern the justificatory arguments to be conducted in these forms.

4.5.1 The various versions of the principle of generalizability form a first important group of rules.[72] According to the preceding discussion, three versions of the requirement of generalizability should be distinguished here: those of Hare, Habermas, and Baier.[73]

[71] Toulmin, *The Uses of Argument*, pp. 100, 106, as well as above, p. 87.

[72] These rules can in the main be justified by means of the rules already cited. This might be put forward as a reason for not receiving them into the list of rules. However, there are at least considerations of expediency in favour of such a move.

[73] Singer's generalization argument, which has already been mentioned several times (above, pp. 97–8), will not be taken up here. The following justification will be given for this: It is fairly certain that this argument will lead back to other principles. Singer derives it from the principle of universalizability (1.3′), together with a principle of consequences which might be viewed as a negative variant of (4.2) (*Generalization in Ethics*, pp. 63 ff.). Hoerster justifies it through a 'principle of fairness' (*Utilitaristische Ethik und Verallgemeinerung*, pp. 108 ff.). Should Singer's derivation be tenable, it could be traced back to rules and forms which have already been taken up here, which would involve further definition of (4.2). Hoerster's principle of fairness declares it to be 'immoral, to enjoy the fruits of an enterprise undertaken by many and yet to leave the burdens or sacrifices necessarily involved in the enterprise only to the others' (ibid., p. 112). Everything is in favour of the view that such a way of behaving would not be accepted in a practical discourse. Singer's argument can thus, insofar as regards the justification put forward by him and by Hoerster, be viewed as implied by the rules and forms as well as the conditions of general practical discourse. This makes it appear unnecessary to receive Singer's argument into the list of rules summarized here. To be sure, it would certainly be quite useful to include this argument in a more elaborate theory of discourse.

Hare's principle of universalizability has already been formulated as rule (1.3′). From this principle, together with that of prescriptivity,[74] Hare arrives at a requirement of the following kind:[75]

(5.1.1) Everyone who makes a normative statement that presupposes a rule with certain consequences for the satisfaction of the interests of other persons must be able to accept these consequences,[76] even in the hypothetical situation where he or she is in the position of those persons.[77]

In short, everyone must be able to agree to the consequences for everyone else of the rules he or she presupposes or asserts.

Habermas's version of the generalizability principle is the direct result of the structure of discourse as determined by the rationality rules ((2.1)–(2.3)). If everyone deliberates about practical questions on an equal footing, then only those normative statements and rules which everyone can accept will be generally agreed upon.

(5.1.1) takes the normative views of individual speakers as its starting-point. Habermas's principle of generalizability relates to the common views to be worked on in discourse. It can be formulated as follows:

(5.1.2) The consequences of every rule for the satisfaction of the interests of each and every individual must be acceptable to everyone.[78]

[74] On this cf. above, pp. 69 ff.

[75] On the question of whether this requirement follows solely from the principle of universalizability, together with the principle of prescriptivity, cf. above, pp. 70–1.

[76] 'Consequences' are here to be understood as both the factual consequences of the observance of a rule, and the constraints which directly result from observance of the imperatives implied by the rules.

[77] On the problems related to (5.1.1), particularly its limited efficiency, cf. above, pp. 72 ff.

[78] On this and on the question of the compatibility of (5.1.1) and (5.1.2) cf. above, p. 116.

In short, everyone must be able to agree to every rule.[79] (5.1.2) shares the ideal character of the rationality rules.

Baier's principle can be justified by two requirements governing discourse: openness and sincerity. It can be understood as a concretization of (1.2). It immediately excludes a whole number of rules as unjustifiable:[80]

(5.1.3) Every rule must be openly and universally teachable.

4.5.2 Even (5.1.1)–(5.1.3) do not yet offer anything like a guarantee of rational *agreement*. (5.1.1) makes it possible to proceed from the various, actually extant normative convictions of any speaker whoever; (5.1.2) shares the ideal character of the rationality rules, and (5.1.3) excludes only relatively few moral rules.

It is not possible to present a procedure which secures a rational agreement in each case. However, much would already have been gained if a procedure could be found which at least increased the probability of adjusting mutually inconsistent but actually held views in the direction of rational agreement. Such a procedure has been proposed by Habermas and also—in an elaborated and detailed form—by Lorenzen and Schwemmer in the programme of critical genesis.[81] In such a genesis, the development of the system of moral rules is retrospectively reconstructed by the participants in the discourse. It can then be established for the various developmental stages, to what extent the conditions of rational discourse were realized. Corresponding to this, the rules evolved in this developmental process and which now govern our practical reasoning can be criticized. This gives rise to the formulation of the following additional rule of discourse:

(5.2.1) The moral rules underlying the moral views of a speaker must be able to withstand critical testing in terms of their historical genesis. A moral rule cannot stand up to such testing if:

(a) even though originally amenable to rational justification, it has in the meantime lost its justification, or

[79] For Perelman's very similar requirements cf. above, p. 163.
[80] Cf. above, pp. 95–6.
[81] Cf. above, pp. 133–4, 149 ff.

(b) it was not originally amenable to rational justification and no adequate new grounds have been discovered for it in the meantime.[82]

The testing of the socio-historical origin of norms proposed by Lorenzen and Schwemmer must be supplemented by testing normative views in their individual development:[83]

(5.2.2) The moral rules underlying the moral views of a speaker must be able to withstand critical testing in terms of their individual genesis. A moral rule does not stand up to such testing if it has only been adopted on grounds of some unjustifiable conditions of socialization.

It must remain an open question during this investigation what are to count as 'unjustifiable conditions of socialization'. Here it can only be remarked that conditions of socialization can certainly not be justified if they result in the individual concerned being unable or unwilling to participate in discourses.

4.5.3 A final rule of this group results from the fact that practical discourses are conducted for the purposes of resolving practical questions as they actually occur. It is of course possible to conduct practical discourse just for the fun of it, but this possibility is parasitic on the aforementioned one. This gives rise to the conclusion that practical discourses must yield results which are practically realizable:

(5.3) The actually given limits of realizability are to be taken into account.[84]

The application of (5.3) presupposes considerable empirical knowledge.

(5.1)–(5.3) have direct and decisive impact on the content of statements and rules to be justified. They are therefore to be called '*justification rules*'.

[82] Cf. above, pp. 151–2.
[83] Cf. above, pp. 152–3.
[84] (5.3) requires both that the realizability of a norm be logically possible at all and that it lies in the realm of the actually possible. On the first requirement cf. Kutschera, *Einführung in die Logik der Normen, Werte und Entscheidungen*, pp. 69–70.

4.6 The Transition Rules

It has already been observed that many problems arise in practical discourses which cannot be resolved through practical argumentation. These problems include questions of fact, particularly the prediction of consequences; linguistic problems, especially problems of understanding; and questions relating to practical discussion itself. In such cases it must be possible to make a transition into other forms of discourse. This possibility is guaranteed through the following rules:

(6.1) It is possible for any speaker at any time to make a transition into a theoretical (empirical) discourse.

(6.2) It is possible for any speaker at any time to make a transition into a linguistic-analytical discourse.[85]

(6.3) It is possible for any speaker at any time to make a transition into a discourse-theoretical discourse.[86]

(6.1)–(6.3) are to be called '*transition rules*'. (6.1) is of particular significance. Speakers often agree about normative premisses but are in dispute about the facts. It is frequently the case that the necessary empirical knowledge cannot be attained with desirable certainty. In this situation there is a need for rules of reasonable presumption.

5. THE LIMITS OF GENERAL PRACTICAL DISCOURSE

Observance of the stated rules and utilization of the described forms of argument do indeed increase the probability of reaching agreement on practical issues, but they do not guarantee that agreement can be reached on every subject nor that any agreement obtained will be final and irreversible. The reason for this lies in the facts that the rationality rules (2.1)–(2.3), in particular, can only be partially fulfilled; that not all steps in argumentation are fixed ones; and that every discourse must latch on to historically given, and hence changeable, normative preconceptions.

[85] Cf. above, pp. 144–5.
[86] Cf. above, p. 187.

To the extent that the outcomes of discourse cannot lay claim to any final certainty, it is necessary that they should always be open to revision. This requirement is borne out by the rules set out above, in particular the rationality rules which lay down that anyone can at any time dispute any rule and any normative statement, including even the rules and statements which have hitherto been regarded as indisputably sound.

To be sure, several judgments of value and of obligation as well as several rules are stringently required and flatly excluded by the rules of discourse. This holds true, for example, of rules which completely exclude some human beings from participation in discourses by imposing the legal status of a slave on them. In this sense it is possible to speak respectively of '*discursive impossibility*' and '*discursive necessity*'.[87] Rules of discourse can be used as premisses in the justification of such discursively necessary or discursively impossible rules.

In those instances in which two incompatible normative statements or rules can be justified without violating any of the rules of discourse,[88] one can speak of '*discursive possibility*'. This situation in its turn can be the subject of practical discourse. In such discourses, rules are justified which make it possible to decide between two incompatible and discursively possible solutions. Examples of such rules are the rules of parliamentary legislation based on the principle of representation and the majority principle. Rules such as these, as well as those legal rules established by procedures governed by them, are necessary and to this extent reasonable, because there are limits to the possibility of arriving at compelling solutions in practical

[87] Cf. above, pp. 17, 132.
[88] The concept of a violation of a rule of discourse must be defined differently according to the distinct character of the different rules. In the case of non-ideal rules, as for example (1.1) (freedom from contradiction), (1.3′) (universalizability), and (5.3) (realizability), it is in principle always ascertainable whether or not there has been a violation. The ideal rules like (2.1) (universality of participation) and (5.1.2) (universality of agreement) on the other hand are only approximately realizable. Accordingly, one would speak of their being fulfilled in any given situation if there were conformity to them to an optimal degree in the given context.

discourse.[89] The limits of general practical discourse provide justifying grounds for the necessity of legal rules.[90] This brings about the transition into legal discourse.

[89] A similar idea is to be found in Kant, whose principle of the 'freedom of every member of society as a human being' (*Kant's Political Writings*, ed. H. Reiss, trans. H. B. Nisbet (Cambridge, 1970), 74—a translation of 'On the Common Saying: "This May be True in Theory, but it does not Apply in Practice" ') requires that 'only the united and consenting Will of all—that is, a general united Will of the people by which each decides the same for all and all decide the same for each—can legislate' (*The Metaphysical Elements of Justice*, p. 78). Kant establishes that such a consent of an entire people is problematic. 'An entire people cannot, however, be expected to reach unanimity, but only to show a majority of votes (and not even of direct votes, but simply of the votes of those delegated in a large nation to represent the people). Thus the actual principle of being content with majority decisions must be accepted unanimously and embodied in a contract; and this itself must be the ultimate basis on which a civil constitution is established' ('On the Common Saying', p. 79).

[90] Such legal rules usually have not only the function of facilitating solutions where no discursive agreement can be reached, but also that of securing the presuppositions under which it is in fact possible for discourses to be conducted. On this requirement cf. Wieland, 'Praxis und Urteilskraft', pp. 40 ff. However, the fact that legal rules can make it possible for discourses to be conducted does not mean that they are not themselves amenable to discursive justification.

C. A THEORY OF LEGAL ARGUMENTATION

I. Legal Discourse as a Special Case of General Practical Discourse

1. TYPES OF LEGAL DISCUSSION

There are quite different types of legal discussions. A distinction can be made between discussions in legal science (legal dogmatics),[1] judicial deliberation, debates in courts of law, legislative treatment of legal questions (whether in legislatures themselves or before commissions or committees), discussions of legal questions among students or among jurists or lawyers or among legally qualified personnel in administration or industry, as well as debates on legal problems in the media, at any rate where these take the form of juristic arguments.

The differences between these forms of discussion, which can in turn be divided into further sub-groups, are manifold. Several of them, such as court-room negotiation and judicial deliberation, are institutionalized. This is not the case with others, like the discussion of legal questions among lawyers. With some of the forms it is a question of arriving at a conclusion within a limited time period; with others such as discussions in legal science (dogmatic discussions), there is no time limit. Some result in binding decisions, whilst others only suggest, or lay the groundwork for, or criticize decisions. Some forms, such as the public discussion of judgments, allow of a transition at any time from legal to general practical arguments, whilst in others, such

[1] Under the concept of legal scientific (dogmatic) discussion in the present context, are to be understood discussions of an institutionally organized profession of academic lawyers where these discussions are either concerned directly with the resolution of actual or imaginary legal cases, or with justifying or criticizing dogmatic propositions, constructions, and theories with at least some reference to the resolution of legal cases. The concept of legal dogmatics will be discussed in more detail below, pp. 250 ff. For a different use of terminology cf. O. Ballweg, *Rechtswissenschaft und Jurisprudenz* (Basle, 1970), 7 ff., 90 ff., 123. He calls what is here termed 'dogmatic legal science', 'jurisprudence', and limits the expression 'legal science' to the analysis and theory of 'jurisprudence'.

as legal scientific (dogmatic) discussions, this is certainly not possible without constraints.

Just as diverse as the differences are the similarities and connections. The most important common feature consists in the fact that within all the forms argumentation is (at least in part) *legal*.

The question of what distinguishes legal reasoning from general practical reasoning is one of the central questions of the theory of legal discourse. One point can be established even at this stage: legal reasoning is characterized by its relationship with valid law, however this is to be determined.

This highlights one of the most important differences between legal reasoning and general practical reasoning. In the context of legal discussion not all questions are open to debate. Such discussion takes place under certain constraints.

The extent and kinds of constraint are very different within the different forms. The freest or least constrained is discussion of a legal scientific kind. Constraints are greatest in the context of a trial. Here roles are unequally distributed, the participation of the defendant is not voluntary,[2] and the obligation to tell the truth is limited. The reasoning process in limited in time[3] and regulated by the rules of procedural law. The parties are entitled to be guided by their own interests. Frequently, perhaps even commonly, they are not concerned with arriving at a correct or just outcome but rather at one that is advantageous to themselves. The other forms can be ranged between these extremes with respect to the extent of the various constraints.

2. THE SPECIAL CASE THESIS

The thesis has been stated above that legal discourse is a special case of general practical discourse.[4] This was supported on the ground that: (1) legal discussions are concerned with practical

[2] On this cf. H. Rottleuthner, 'Zur Soziologie richterlichen Handelns II', *Kritische Justiz*, 4 (1971), 81 ff.

[3] On this cf. Wieacker, 'Zur praktischen Leistung der Rechtsdogmatik', 329, and K. Makkonen, *Zur Problematik der juridischen Entscheidung*, trans. B. Assmuth (Turku, 1965), 26.

[4] Above, pp. 15, 19.

questions—that is, what should or may be done or not done—and (2) these questions are discussed under the claim to correctness. It is a matter of a 'special case' because legal discussions (3) do take place under constraints of the kind described.

The special case thesis is accordingly open to attack on all three points. It is possible to assert that legal discussions: (1) are not concerned with practical questions, (2) do not carry with them any claims to correctness, or (3) do indeed make such claims but the constraints governing legal discussions make it unjustifiable to designate them 'discourses'.

2.1 The first objection is the easiest to counter. It is certainly the case that there are many discussions relating to legal questions which are concerned not with substantiating normative statements but rather with the establishment of facts. This does not only include investigations in legal history, sociology of law, and legal theory but also descriptions of valid law and predictions of future judicial behaviour.[5] This is not the place to discuss whether and to what extent these activities are possible without entering into practical questions. The only important point is that quite apart from these activities, there exists legal reasoning orientated to solving practical questions. It plays a central role both in legal practice and in the realm of legal science.[6] This is what we are concerned with here.

[5] On this cf. the investigation into the concept of legal dogmatics below, pp. 250 ff.

[6] It should be noted that the broad concept of legal science used here, which includes argumentation related to the resolution of practical questions, does indeed conform to what is regarded as self-evident by probably most jurists working in the field of dogmatics, but it is by no means self-evident. According to Kelsen, for example, legal science should limit itself to the knowledge and description of positive legal norms (*Pure Theory of Law*, pp. 70 ff.). The task of legal science is the 'value-free description' of valid law (ibid., 79). Kelsen does indeed see that a legal norm cannot give rise to a definite, clear-cut decision in every case if only because of the vagueness of the expressions used to formulate it. Nevertheless, the task of legal science should be limited to elaborating the various possible meanings with respect to any doubtful cases which occur (ibid., 355 ff.). The option in favour of one of several possible decisions should be reserved for the 'authentic interpretation' of the courts (ibid., pp. 236 ff., 353 ff.), for this involves a value-judgment and not a question of scientific truth (ibid., 356). Underlying Kelsen's view in the conviction that value-judgments

2.2 The claim to correctness involved in legal discourses is clearly distinguishable from that involved in general practical discourses. There is no claim that the normative statement asserted, proposed, or pronounced in judgments is absolutely rational, but only a claim that it can be rationally justified within the framework of the prevailing legal order. Precisely what this means has to be elucidated in the framework of the theory of legal discourse.

A whole series of quite distinct arguments can be adduced for the 'claim-to-correctness thesis'. First it may be observed that justifying arguments are put forward in all forms of legal discourse. Anyone who justifies something is thereby implicitly claiming that the justification is sound and the assertion therefore correct.[7] It is not permissible in legal discourses any more than in general practical discourses to assert something and then to refuse to justify it without giving reasons. It is therefore true of legal statements, just as of general normative statements, that they make a claim to correctness[8]—a claim to be upheld in quite different ways, of course. This claim to correctness is not rendered invalid by the fact that the person justifying some position is only following his or her subjective interests. What holds true here is similar to the case of promising. The fact that in making a promise I may secretly intend not to keep it, in no way affects the obligation which has objectively come into existence as a result of the promise.

The demand for justification and the claim to correctness bound up with it, can, at least as far as concerns judicial decisions, be justified beyond this through positive law.

and judgments of obligation have no truth-value and are not rationally justifiable, and therefore cannot be the subject of scientific inquiry. It is the thesis of this work that the latter is not the case. If and presumably only if this thesis is tenable, then the above use of the broad concept of legal science has been justified.

[7] Cf. above, pp. 130 ff., 191–2.

[8] On this cf. above, pp. 127 ff. and also Larenz, *Methodenlehre der Rechtswissenschaft*, p. 276, where in reference to Hare and Frankena he observes: 'If moral value-judgments already raise a claim, through their meaning, of being capable of being approved by every reasonable person and in this sense of being "valid", then this must be true to an even greater degree of legal value-judgments'.

According to the law as it is currently in force in the Federal Republic of Germany and doubtless most other states, judges are under a duty to justify their decisions.[9] This places judicial decisions within the scope of the claim to correctness by virtue of positive law. A further grounding for this is in the legal system of the Federal Republic of Germany derivable from Article 20, paragraph 3 of the Constitution (*Grundesetz*) which subjects every exercise of jurisdiction to 'legislation and the rule of law' ('Gesetzund Recht').

It is a quite different question whether it is necessarily the case that this claim is implicit in the issuance of judicial decisions as such. This would be the case if the concept of a judicial decision included the concept of the claim to correctness. The answer to this question depends on how one defines the concept of a judicial decision. There are good reasons for defining this concept within the framework of an analytic legal theory, in such a way that it does not embrace this claim.[10] On the other hand it will be said that a judgment such as: 'Mr N. is hereby sentenced to ten years' imprisonment in the name of the people, although there are no good reasons in favour of this' is not defective solely on moral grounds. Its defectiveness rather resembles that of an utterance such as: 'The cat is on the mat but I do not believe it.'[11] It is, of course, quite possible for such a

[9] Cf. para. 30, sect. 1, *BVerfGG*; para. 313, sect. 1, No. 6, *ZPO* (Code of Civil Procedure); paras. 267, 275, sect. 1, *StPO* (Code of Criminal Procedure); para. 117, sect. 2, No. 5, *VwGO* (Code of Procedure of the Administrative Court); paras. 60, sect. 2; 75, sect. 2; 96, sect. 2, *ArbGG* (Code of Procedure of the Labour Court); also J. Brüggemann, *Die richterliche Begründungspflicht* (Berlin, 1971), 91 ff. On the limitation of the judicial duty of justification cf. para. 313a, *ZPO*, valid since 1 July 1977. Its narrow presuppositions, in particular the requirement of a renunciation by the parties to a justification, show, however, that para. 313a, *ZPO*, also takes a fundamental duty of justification as its starting-point. For a criticism of para. 313a, *ZPO* cf. H. Putzo, 'Die Vereinfachungsnovelle', *NJW*, 30 (1977), 5–6.

[10] Reasons can be cited in favour of this which quite generally support using the expression 'legal norm' in such a way that it includes no reference to moral norms. Cf. Hart, 'Positivism and the Separation of Law and Morals', pp. 615 ff. On the thesis that there exists no necessary connection between legality and justifiability cf. also Kriele, *Theorie der Rechtsgewinnung*, p. 168.

[11] On the mistaken nature of this utterance cf. Austin, *How to Do Things with Words*, pp. 48 ff., and his 'The Meaning of a Word', *Philosophical Papers*, pp. 63 ff.

judgment to be executed in fact and to be accepted by the members of a legal community, particularly if it remains an isolated case. However, this in no way alters its defects. It is for this reason that there is something to be said for the view that although the lack of a claim to correctness with respect to a given decision does not necessarily deprive the decision of its character as a valid judicial one, yet such a decision always remains defective in more than a morally relevant sense.

It is a quite separate question to what extent the claim to correctness implicit in the issuance of legal judgments and legal justifications is in fact taken seriously and satisfied, and whether and to what extent it matters at all in the light of the acceptance of judicial decisions. Extensive social scientific investigations would be needed to answer this question.[12] Such research would, among other things, lead to an empirical testing of Luhmann's views to the effect that legal decision-making and justification, as well as the acceptance of such decisions and justifications, can only be adequately understood by abandoning the traditional concepts of rationality, truth, correctness, and justice in favour of a structuralist-functional theory of systems.[13]

Here it is not possible to do more than give a few reasons for the supposition that empirical investigation would show that the claim to correctness is constitutive of the practice of legal justification and decision-making, and hence that Luhmann's thesis does not apply.

It is possible to point first to the fact that there are legal deliberations which involve long and intensive discussion on the correctness of a decision and which are, moreover, understood by the participants as a search for a correct decision.[14] There is also much to be said for the view that discussions of a judgment

[12] Esser, *Vorverständnis und Methodenwahl*, p. 121: 'Moreover, there is need for a well-aimed research programme into the question which I regard as central, namely that of the necessity to secure consensus on a decision's legitimacy and legality.'

[13] Cf. Luhmann, *Legitimation durch Verfahren*, pp. 57 ff.; id., *Rechtssystem und Rechtsdogmatik* (Stuttgart, Berlin, Cologne, and Mainz, 1974), 15 ff.; id., *Rechtssoziologie*, vol. ii (Reinbek, 1972), 259 ff.

[14] On this cf. Wieacker, 'Zur praktischen Leistung der Rechtsdogmatik', p. 330: 'In the substantive deliberations of a bench of judges or in the scientific discussions of professional jurists, exchange of arguments wholly becomes the means of a common advance to a practical truth.'

in learned journals or the press, for example, can be seen as disputes about the correctness of the judgment. Furthermore, it may be acceptable for judicial proceedings *also* to have the function of 'isolating [the defendant] as a source of trouble and establishing social order independently of his agreement or objection'.[15] Judicial justification *can*, however, also fulfil other functions: 'It is, rather, to treat a rational being rationally, that is, as a rational being, by *explaining* to him through reasons why a decision that adversely affects his interests has been reached.'[16] Luhmann himself considers it necessary 'for non-participants to come to a conviction that there is nothing strange going on, that truth and right are established with serious, sincere, and arduous endeavour and that they too, if need be, would have secured their rights by recourse to this institution.'[17] This can be interpreted as a paraphrasing of the claim to correctness.

None of this amounts to proofs. However, it does serve to strengthen the suggestion that one reference to rationality expressed by the claim to correctness has as yet not been 'overtaken by evolution', and that 'a mode of socialisation' cut off from norms in need of justification has as yet not been established.[18]

2.3 What has been said up till now is still not sufficient to justify the special case thesis. It would be possible to concede that the legal discussions examined here are indeed concerned with practical questions and that they do make claims to correctness which are in fact significant, yet, in light of the constraints which govern legal discussions, to deny that these

[15] Luhmann, *Legitimation durch Verfahren*, p. 121.

[16] J. Ladd, 'The Place of Practical Reason in Judicial Decision', 144. Cf. Müller, *Juristische Methodik*, p. 106, where he writes that the justification should 'convince those affected', and Larenz, *Methodenlehre der Rechtswissenschaft*, p. 347 n. 83.

[17] Ibid., 123. Cf. Zippelius, who puts forward the empirical claim that a judicature which cannot rely on reasons which are accepted must 'soon also lose the general agreement, the overall consensus on which Luhmann wishes to found the legitimacy of the system.' ('Legitimation durch Verfahren?', in Festschrift for K. Larenz, ed. G. Paulus *et al.* (Munich, 1973), p. 302).

[18] On this problem cf. Habermas, *Legitimation Crisis*, pp. 94, 120. Cf. also above, p. 126.

can count at all as forms of discourse. It must be asked whether this objection is significant.

It is easiest to answer this question with respect to the freest form of legal discussion, namely debates in legal science. No claim is made here to the effect that the normative statement to be justified would receive universal assent in a free-ranging discussion, but it is claimed that everyone governed by the validly prevailing legal order must agree to the statement in question.[19] It is to this kind of argumentation, occurring under certain constraints, yet nevertheless rational, that reference will be made. Such reference to rational argumentation not only justifies talking of legal discourses, but makes such talk seem necessary at least as long as the constraints are not disguised.[20]

Sound reasons can thus be adduced for the special case thesis with respect to legal scientific discussion. It is much more problematic to decide whether this holds true for the reasoning occurring in the context of various legal proceedings. Several features of such proceedings indicate the contrary: the limitations imposed by the procedural rules, time constraints, and the actual motivations of the participants who often if not usually are concerned to achieve a judgment which is to their advantage rather than a correct or just outcome. In addition, in regard to criminal proceedings there is the asymmetrical distribution of roles already mentioned above. It is for these reasons that Habermas conceptualizes a trial as a strategic undertaking rather than as discourse.[21]

At a first glance these reasons would seem incontrovertible. Nevertheless, it should be observed that, although the parties in

[19] This, incidentally, is entirely consistent with holding that a legal statement can only be said to be possible rather than conclusive. In the present instance it is being claimed that agreement is to the effect that it is possible.

[20] Add to this, that it is precisely in legal scientific discussions that one enters into counter-arguments to a high degree. The extent of the consideration and weighing of counter-arguments is regarded as a criterion of the quality of legal scientific inquiries and opinions. To this extent legal scientific treatises—like many other scientific inquiries—are a written form of inner discourse. On this concept cf. above, p. 179.

[21] Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?', pp. 200–1.

civil proceedings, for example, may be concerned with their own advantage, unless they are striving for a settlement this is not the subject of their negotiation. The argumentation before a court is fundamentally differentiated from that which goes on in negotiations aimed at a settlement. In the arguments they put forward both the parties and their lawyers raise claims to correctness even if they are subjectively only following their own interests. The reasons they put forward in favour of a certain decision could, at least in principle, be included in legal scientific treatises. It is not unusual, particularly in proceedings in the higher courts, to take justifying arguments from learned discussions. Beyond this, the arguments brought forward in court often find their way into judicial justifications and it can hardly be disputed that these are made under a claim to correctness.

It would therefore appear that the various kinds of judicial proceeding cannot be easily categorized as either discourse or strategic undertaking. This gives credence to the suggestion that the distinction is too simplistic. It does not do justice to many phenomena which cannot be unambiguously classified as one or the other.

This difficulty in achieving a clear categorization of proceedings before judges does indeed exclude the possibility of designating them simply as discourses, but on the other hand it does mean that they cannot be theoretically understood without reference to the concept of discourse. This last point connects particularly to the fact that the participants claim to be arguing rationally. Thus, in civil proceedings, the parties do not as a rule wish to convince each other—this has previously already been shown to be impossible—nevertheless, they claim to speak in such a way that every rational person would have to agree with their viewpoint. They at least purport to be making arguments such that they would gain assent under ideal conditions. Discourse theory is thus not only suited to the theoretical understanding of the reasoning involved, it is necessary to understanding it.

This makes it clear that the theory of rational discourse as theory of legal reasoning does not presuppose that all legal disputes are to be viewed as discourse in the sense of non-coercive unfettered communication, but only that, in legal

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,