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Legal Argumentation as Rational Discourse

In a decision from 1990, the German Federal Constitutional Court expressed the opinion that '[t]he interpretation of the constitutional law in particular has the character of a discourse, in which … reasons and counter-reasons are offered, and, ultimately, the better reasons shall yield a decision'.[1] This hints at the thesis that legal argumentation ought to be regarded as a rational discourse. The question is how to understand this thesis and how to substantiate it. In answering it here, I shall take three steps. First of all, I will present four models that oppose the theory of legal discourse. Then I shall sketch a discourse theory of the law that forms a framework for the theory of legal discourse. Finally, I intend to offer the main elements of a theory of legal argumentation that is orientated to the idea of discourse.

I. Models

The discourse model of legal argumentation represents a reaction to the weaknesses or deficiencies of alternative models and conceptions. The most important alternative models are the model of deduction, the model of decision, the hermeneutic model, and the model of coherence.

A. The Model of Deduction

The true model of deduction says that the decision in every legal case follows logically from valid norms, together with definitions of legal concepts that are presupposed as certain, along with empirical sentences. Many statements from the heyday of conceptual jurisprudence are not far from this model.[2] One has doubts, however, about whether this was at any time more than a programme or an ideal. It is too easily proven wrong. With an eye to a shorthand demonstration of the point, the following will suffice: reference to the vagueness of the language of the law, to the possibility of conflicts between or collisions of norms, to the fact that there might well be no norm at all for the decision at hand, and to the possibility of a development of the law against the wording of a norm, which cannot be totally excluded in most legal systems. For this reason, the model of deduction is no longer being proposed as a comprehensive model of the application of the law by anyone. The creative role of those who apply the law is emphasized or at least recognized everywhere. All that remains to argue about is whether at least simple cases ought to be resolved by a deduction and whether one should postulate that the solution of a difficult case found by non-deductive means might be presented as a deduction.[3] Those questions, however, are concerned with the structure of legal argumentation and no longer with the model of deduction in the sense defined here.

B. The Model of Decision

The model of decision is a reaction to the collapse of the model of deduction. It exists in vastly differing forms. They range from a '*freirechtlichen*' (free law) approach to realist and analytical conceptions, and they all share the thesis that the judge, if authoritative reasons like statutes and precedents leave some issues open, must then decide on the basis of extra-legal standards.[4] This is very clearly formulated by Kelsen, who says that in a difficult case the judge, like a legislator, has to resolve a problem of 'legal politics'.[5] In doing so, the judge is deciding in accordance with 'free' discretion. His decision is based on an 'act of will'.[6]

All this is contradicted by the self-understanding and the internal point of view of judicial decision-making. Even in difficult cases judges try to decide on the basis of legal reasons and to give rational legal explanations, or at least they ought to do so. They raise the claim that their decision, if not the only correct one, is at least correct overall.[7] All of the further models to be taken up here strive to prove that this is no illusion.

C. The Hermeneutic Model

At the centre of the hermeneutic model, developed in the twentieth century mainly by Gadamer and Betti and taken up in German jurisprudence by, for instance, Larenz, Kaufmann, and Esser, there is the structure of interpretation and understanding. The key concept is that of the hermeneutic circle. For jurisprudence, three types of hermeneutic circle are important.[8]

The first concerns the relation of the so-called *preconception* and the *text*.[9] A 'preconception' is a hypothesis held by the interpreter who is approaching the text. This hypothesis gives expression to the interpreter's supposition or expectation concerning the correct resolution of the legal problem to be decided. Its content is determined by the interpreter's general conception of society and his professional experiences. The image of the circle is intended to point out the interaction between the text of the norm and the hypothesis of interpretation. On the one hand, without a hypothesis of interpretation, the text of the norm cannot even be seen to be problematic or unproblematic. On the other hand, the hypothesis of interpretation has to be examined on the basis of text of the norm along with the help of the rules of legal methodology. The decisive point here is that the theory of the hermeneutic circle as such does not say anything about the criteria for affirming or rejecting the hypothesis of interpretation. This question can only be decided on the basis of argument, and this by itself is enough to show that the theory of the hermeneutic circle cannot replace the theory of legal argumentation. It is, however, not worthless. It directs one's attention to the problem of the productive contribution made by the interpreter to the interpretation, thereby making possible and indeed promoting a critical attitude. One can therefore say that the circle of preconception corresponds to the '*postulate of reflexivity*', which is of great importance for the theory of legal argumentation.

The same is true for the two other types of hermeneutic circle. The second of these is concerned with the relation between the *part* and the *whole*. On the one hand, to understand a norm one has to understand the system of norms it belongs to, and on the other, it is not

possible to understand a system of norms without understanding the individual norms it consists of. Again, we simply find a problem formulated but without criteria for its solution. The problem here is the creation of unity or coherence. This is the task of systemic argumentation. One can call the postulate that stands behind the second circle the '*postulate of coherence*'. Thus, the hermeneutic model includes the basic idea of the model of coherence, which to be considered below.

The third type of hermeneutic circle is concerned with the relation between the *norm* and the *facts*. Norms are abstract and universal. The facts they are meant to be applied to are concrete and individual. Norms contain few features, whereas facts contain a potentially unlimited number. On the one hand, facts are described by the features in the statement of facts provided by the norm, and on the other, aspects of the actual facts can give reasons not to apply the norm originally intended, but another norm or to give the norm a new interpretation, for instance, by deleting, adding, or changing features in the statement of facts provided by the norm. Here the language of the *Hin- und Herwandern des Blickes*[10] ('to-and-fro movement of one's view') coined by Karl Engisch is instructive. Like the others, this circle, too, illustrates a problem but without offering criteria for its resolution. At any rate, it is at least clear that the problem can only be resolved if all aspects of the facts as well as all the norms that lend themselves to possible application are considered. The postulate behind the third circle can therefore be called the '*postulate of completeness*'. It requires that all relevant aspects be considered, thereby stating a fundamental criterion of rationality.

In the light of what has been said here, one has to conclude that the hermeneutic model, although offering important insights into the structure of legal interpretation and yielding the three fundamental postulates of rationality mentioned above, does not suffice as a solution to the problem of the correct interpretation.[11] The correctness of an interpretation can only be demonstrated by naming reasons that count in its favour and rejecting those opposed to it. The claim that interpretation is argumentation is true.

D. The Model of Coherence

The fourth model is centred around an idea that has already been turned up as a focus of interest in the hermeneutic conception: the idea of systemic unity or coherence. Coherence is indeed an essential element of rationality and cannot be ignored in a theory of rational legal discourse, as will be shown.[12] The idea of coherence becomes an independent model only if it arises as the dominant idea. In the history of jurisprudence, this has happened again and again. The historically most important example is Friedrich Carl von Savigny's theory of the 'organic whole' and the 'internal interdependence or relation by means of which individual legal concepts and rules are brought together in a larger unit'.[13] Of all recent views one should mention, in particular, Ronald Dworkin's theory of integrity, which, in its methodological dimension, is identical with the theory of coherence: 'Law as integrity, then, requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole.'[14]

A model in which coherence is the only criterion—or the most important and therefore

decisive criterion—for the correctness of an interpretation would represent in its consequence the idea of legal holism, according to which all premises are already included or hidden in the legal system and need only to be discovered.[15] In reply, however, one can say, that what has been institutionalized as the legal system is always necessarily incomplete. Just as rules cannot apply themselves so likewise a system cannot create completeness and coherence all by itself. To do this, persons and procedures are necessary. The necessary procedure is that of legal argumentation.

II. A Discourse Theory of the Law

A look at the four alternative models shows that a theory of legal argumentation that resolves the problem of the correct interpretation or at the very least leads in the direction of a resolution is desirable. Its being desirable does not necessarily mean, however, that it is also possible. There is no difficulty in pointing to two different types of theories of legal argumentation: empirical and analytical theories. Empirical theories describe legal argumentation that has actually taken place. Analytical theories attempt to arrive at a classification of the arguments used in legal argumentation and an analysis of their structure. Doubtlessly, these measures are of immense importance. They do not suffice, however, to answer the question of the correctness of an interpretation or of the rationality of its justification. These questions require a normative theory that provides for at least some determination of the power or weight of the different arguments and the rationality of a legal argumentation. The theory of legal discourse purports to be such a theory. The theory of rational legal discourse is created by incorporating the theory of general practical discourse into a theory of the legal system. This incorporation is no mere application of general discourse theory to the law but an unfolding of discourse theory that is necessary for systematic reasons.

A. General Practical Discourse

The basic idea of discourse theory is that one can—with a claim to correctness—rationally argue about practical questions. Thus, discourse theory attempts to steer a middle course between objectivist and cognitivist theories on the one hand and subjectivist and non-cognitivist theories on the other. General practical discourses are not institutionalized argumentation about what is obligatory, prohibited, or permitted, or about what is good or bad.[16] A practical discourse is rational only if it fulfils the conditions of rational practical argumentation. If these conditions are fulfilled, the result of the discourse is correct. Discourse theory is therefore a procedural theory of practical correctness.[17]

The conditions of the rationality of the discourse procedure can be summarized in a system of rules and forms of discourse.[18] Practical rationality can be defined as the capacity of reaching practical decisions by means of this system of rules and forms.

The rules and forms of discourse can be classified in many different ways. The introduction of two groups seems to make sense here: rules and forms that refer directly to

the structure of arguments, and rules whose direct concern is the procedure of the discourse. To the first group belongs, for example, the demand for freedom from contradiction (1.1),[19] for universalizability in the sense of a consistent use of applied predicates (1.3), (1.3'), for linguistic and conceptual clarity (6.2), for the truth of the applied empirical premises (6.1), for the deductive completeness of the arguments (4), for the consideration of consequences (4.2), (4.3), for weighing and prioritization (4.5), (4.6), for the assumption of an exchange of roles or role reversal (5.1.1), and for an analysis of the genesis of moral convictions (5.2.1), (5.2.2). All of these rules can also be applied monologically, and a good bit can be said on behalf of the opinion that no theory of rational practical argumentation or justification can do without them. Thus, one can make quite clear that discourse theory in no way, as some would have us believe,[20] replace justification by the mere creation of consensus. Rather, it includes the rules of rational argumentation that refer directly to arguments. Its distinctive feature lies solely in the fact that it adds a second level to the first one, that is to say, the level of rules referring to the procedure of the discourse.

The second group of rules is non-monological. Its main purpose is to secure the impartiality of the practical argumentation. Rules serving this purpose can be called 'specific rules of discourse'. The most important of these are:

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

(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.

(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.[21]

These rules grant every individual the right to participate in discourses along with freedom and equality in discourse. They express the universal character of discourse theory. It is not possible to substantiate those rules here.[22] One can say, however, that they correspond to the basic principles of democratic constitutionalism, that is, to freedom and equality.

One of the main problems of discourse theory is that its system of rules does not offer a procedure of finite operations by means of which one can always arrive at precisely one result. For this state of affairs, there are three reasons. First, the discourse rules do not contain definitions as to the starting points of the procedure. Starting points comprise the participant's normative convictions and interpretations of interests. Second, the discourse rules do not define all the steps that are to be taken in the argumentation. Third, a number of discourse rules have an ideal character and can therefore only be fulfilled approximatively. To this extent, discourse theory is a theory that does not offer determinate decisions.

B. Institutionalization

The ideal character of discourse theory leads to the necessity of its being incorporated into a theory of the state and the law. This connection amounts to far more than mere compensation

for its weaknesses. A legal system that elects to meet the demands of practical rationality can come into existence only by means of a connection of institutional or real elements with those of an ideal and non-institutional nature.

The connection in question is found at three levels: philosophical, political, and legal levels. On the *philosophical* level, the necessity of the existence of a legal system and the necessary basic demands with respect to its contents and structure are substantiated by means of general practical arguments. The existence of a legal system is necessary owing to the weaknesses of the general practical discourse. General practical argumentation does not lead in all cases to results that all can agree upon,[23] and even if it leads to a result that all do agree upon, general agreement in the discourse does not secure general observance. Social conflicts, however, cannot be solved by means of conflicting rules, and the observance of rules that everyone can be violate without fear of sanctions, cannot be asked of anyone. This Hobbesian argument must be supplemented by a Kantian one. It says that in a rational discourse not all legal systems can be justified but only those that fulfil the elementary demands of practical rationality. Among these are the guarantee of fundamental human rights, the institutionalization of democratic procedures, and the rule of law. Thus, discourse theory turns out to be the basic theory of the democratic constitutional state.

The importance of discourse theory on the *political* level stems from the fact that in a democratic constitutional state the creation of law is based not only on compromises and institutional acts but on informal argument that is conducted both within and outside the formal procedures of law creation. Legality can be connected with legitimacy in the sense of rational acceptance only in this way.

On the *legal* level, the connection of the institutional with the discursive is necessary for two reasons. On the one hand, as mentioned vis-à-vis the model of deduction, no legal system can be so perfect and complete that its norms necessarily define the solution to every possible case. On the other hand, the claim to correctness and rationality is raised with every decision, and one has to try to fulfil this claim if, in the long run, the legal system is to retain its legitimacy and consequently its acceptance. This has far-reaching consequences for the character of legal argumentation.

III. Legal Argumentation

A. The Different Kinds of Legal Arguments

The arguments which that may be employed in legal justification can be classified in many different ways. The choice of a classification turns primarily on the purpose in question. With this in mind, four categories suggest themselves, namely linguistic, genetic, systematic, and general practical arguments.

Linguistic arguments are based on the ascertainment of usage that actually exists. Often, especially in the so-called simple cases, it leads to a definite result. The decision is than fixed, and another decision is possible only if the law is developed against the wording. Often, however, one can only state that the norm is vague or in some other way indefinite. Then a decision can only be substantiated with the help of other arguments.

Genetic arguments aim at the factual will of the historical legislator. Often, they are not applicable because the factual will cannot be ascertained or because it is too indefinite or contradictory. Also, the application of genetic arguments is disputed owing to the unresolved controversy between the subjective and the objective theories of interpretation.

Systematic arguments are based on the idea of the unity or coherence of the legal system. They represent the correct, central point of the idea expressed in a somewhat exaggerated form in the model of coherence. They can be divided into eight sub-groups that can only be named but not explicated here. They comprise (1) arguments securing consistence, (2) contextual and (3) conceptual-systematic arguments, (4) arguments of principle as well as (5) special legal forms of argument like analogy, (6) arguments of precedent as well as (7) historical and (8) comparative arguments. Most important in our context are the arguments of principle. In democratic constitutional states, arguments of principle are essentially based on constitutional principles.[24] In hard cases, their application regularly requires balancing. This indicates that principles have the character of optimization requirements.[25] Within the scope of balancing, however, general practical arguments play an important part. For this reason, the most important part of systematic argumentation is necessarily connected with general practical argumentation.

General practical arguments form the fourth category. They can be divided into teleological and deontological arguments. Teleological arguments look at the consequences of an interpretation and are based ultimately on an idea of what is good. Deontological arguments express what is legally right or wrong without looking at the consequences.

B. The Strength of the Arguments

The classification does not yet tell us anything about the strength of the arguments. Their strength can only be based on the reasons that justify their employment. Those reasons stem from the discourse theory of the law sketched above.

The linguistic, genetic, and systematic arguments are directly or indirectly supported by the authority of the positive law. They are, therefore, *institutional* arguments. The general practical arguments, on the other hand, derive their strength solely from their correct content. They are, therefore, *substantive* arguments. I shall confine myself to the relation between these two groups of arguments. To turn to rankings within the groups would go beyond of the scope of the present chapter.

The discourse theory of the law leads, as explained earlier, to the necessary institutionalization of a legal system. This implies the authority of the positive law. A successful institutionalization—according to the criteria of discourse theory—includes the principles of the democratic constitutional state, among others, those of democracy, of the separation of powers, and of the rule of law. The principle of the authority of the positive law, supported by these principles, requires that the institutional reasons be seen as enjoying priority over the substantive reasons. This, however, is merely a *prima facie* priority. Substantive reasons can be of such great weight in individual cases that they prevail over the institutional reasons. This not only corresponds to the general practice and to widespread opinion but is also justifiable systematically. If the legal system as a whole represents the

attempt to realize practical reason, then the tension between authority and substantive correctness is preserved with all of its ramifications.

The fact that institutional arguments have merely a *prima facie* priority means that legal argumentation remains dependent on substantive or general practical argumentation even where institutional arguments alone lead to a certain result. This becomes obvious not only in the dramatic case of a judge who decides against the wording of a statute but also in the evaluation of a case of plain subsumption as unproblematic. Such an evaluation includes the judgment that there are no important substantive reasons that count against the decision. The dependence becomes altogether obvious if institutional arguments lead to no result, or to differing results, or if they—as happens regularly when weighing opposing principles—must be supplemented by general practical arguments.

All of this shows that the idea of discourse can and must remain alive notwithstanding institutionalization. Thus, calling legal argumentation a *special case* of general practical discourse is justified.[26] This is not to say that discourse theory can determine the strength of the substantive arguments employed in legal argumentation either generally or definitively. The special case thesis says, however, that discourse theory can define the conditions according to which the power of the better argument can, also in legal argumentation, be unfolded. These are the conditions of an open and impartial rational discourse. The theoretical gain is rationality, the political gain is, on an optimistic reading, lasting legitimacy.

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[1] Decisions of the German Federal Constitutional Court (BVerfGE) 82, 30 (38–9).

[2] See, for instance, Bernhard Windscheid, *Lehrbuch des Pandektenrechts*, 9th edn, ed. Theodor Kipp, vol. 1 (Frankfurt: Rütten & Loening, 1906), 111: '[D]ie Endentscheidung ist das Resultat einer Rechnung, bei welcher die Rechtsbegriffe die Faktoren sind.' ('The final decision is the result of a calculation in which the legal concepts are the factors.')

[3] See, on the one hand, Hans-Joachim Koch and Helmut Rüßmann, *Juristische Begründungslehre* (München: C. H. Beck, 1982), 48–58, 112–3, as well as, on the other, Ulfrid Neumann, *Juristische Argumentationslehre* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1986), 16–37.

[4] John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, 5th edn. (London: John Murry, 1885), vol. 2, 664: 'So far as the judge's *arbitrium* extends, there is no law at all.'

[5] Hans Kelsen, *Pure Theory of Law*, 2nd edn (1960), trans. Max Knight (Berkeley, Calif.: University of California Press, 1967), 353.

[6] Ibid., (n. 5 above), 354. Less radically formulated but similar in content is Hart's attitude; see H. L. A. Hart, *The Concept of Law*, 2nd edn (Oxford: Clarendon Press, 1994), 127–8, 135, 204.

[7] Robert Alexy, *The Argument from Injustice. A Reply to Legal Positivism* (1992), trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 2002), 35–9.

[8] For further types see Wolfgang Stegmüller, 'Walther von der Vogelweides Lied von der Traumliebe und Quasar 3 C 273', in Stegmüller, *Rationale Rekonstruktion von Wissenschaft und ihrem Wandel* (Stuttgart: Philipp Reclam, 1979), 27–86, at 35–46.

[9] See Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung*, 2nd edn (Frankfurt: Athenäum Fischer, 1972), 136–41, as well as Martin Heidegger, *Sein und Zeit*, 11th edn (Tübingen: Max Niemeyer, 1967), 148–53, and Hans-Georg Gadamer, *Wahrheit und Methode*, 4th edn (Tübingen: Mohr Siebeck, 1975), 250–61.

[10] Karl Engisch, *Logische Studien zur Gesetzesanwendung* (Heidelberg: Carl Winter, 1943), 15.

[11] If one regards hermeneutics as a theory of the structure of understanding, this is not its aim; see Arthur Kaufmann, 'Problemgeschichte der Rechtsphilosophie', in *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart*, 5th edn,

eds Kaufmann and Winfried Hassemer (Heidelberg: C.F. Müller, 1989), 25–142, at 130.

[12] Robert Alexy and Aleksander Peczenik, 'The Concept of Coherence and Its Significance for Discoursive Rationality', *Ratio Juris* 3 (1990), 130–47, at 143–6

[13] Friedrich Carl von Savigny, *System des heutigen Römischen Rechts*, vol. 1 (Berlin: Veit and Company, 1840) XXXVI–XXXVII (trans. R. A.); Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg: Mohr and Zimmer, 1814), 22.

[14] Ronald Dworkin, *Law's Empire* (Cambridge Mass.: Harvard University Press, 1986), 245. See also Klaus Günther, 'Ein normativer Begriff der Kohärenz für eine Theorie der juristischen Argumentation', *Rechtstheorie* 20 (1989), 163–90, at 175, 181.

[15] This idea has especially been stressed in the romantic movement. A poetic expression is found in Joseph von Eichendorff's 'Wünschelrute': 'Schläft ein Lied in allen Dingen, / Die da träumen fort und fort, / Und die Welt hebt an zu singen, / Triffst du nur das Zauberwort.'

[16] Habermas distinguishes between moral, ethical, and pragmatic discourses; see Jürgen Habermas, 'Vom pragmatischen, ethischen und moralischen Gebrauch der praktischen Vernunft', in Habermas, *Erläuterungen zur Diskursethik* (Frankfurt: Suhrkamp, 1991), 100–18, at 101–8. This distinction presupposes a theory of the relationship between the deontological and the teleological, which cannot be taken up here. The concept of general practical discourse used here comprises what Habermas calls 'moral', 'ethical', and 'pragmatic' questions and reasons. Such an overarching concept of practical discourse is necessary, for in practice there exists between these three kinds of practical reason not only a relation of supplementation but also of permeation; see Robert Alexy, 'Jürgen Habermas's Theory of Legal Discourse', *Cardozo Law Review* 17 (1996), 1027–34, at 1033–4.

[17] Robert Alexy, 'Die Idee einer prozeduralen Theorie der juristischen Argumentation', *Rechtstheorie*, supplement 2 (1981), 177–88.

[18] For such a system of twenty-eight rules and forms of discourse, see Robert Alexy, *A Theory of Legal Argumentation* (1978), trans. Ruth Adler and Neil MacCormick (Oxford: Clarendon Press, 1989), 187–206.

[19] The numbers refer to the formulation of the rules and forms in Alexy, *A Theory of Legal Argumentation* (n. 18 above), 188–206.

[20] Ota Weinberger, 'Logische Analyse als Basis der juristischen Argumentation', in *Metatheorie juristischer Argumentation*, eds Werner Krawietz and Robert Alexy (Berlin: Duncker & Humblot, 1983), 159–232, at 192, 203.

[21] Alexy, *A Theory of Legal Argumentation* (n. 18 above), 193.

[22] See Robert Alexy, 'A Discourse-Theoretical Conception of Practical Reason', *Ratio Juris* 5 (1992), 231–51, at 238–44 (in this volume: Chapter 17, 255–74, at 263–9).

[23] This corresponds to Rawls's assumptions about the 'burdens of judgements'; see John Rawls, *Political Liberalism* (New York, N.Y.: Columbia University Press, 1993), 54–8.

[24] Robert Alexy, *A Theory of Constitutional Rights* (1985), trans. Julian Rivers (Oxford: Oxford University Press, 2002), 351–4.

[25] Ibid., 47.

[26] Alexy, *A Theory of Legal Argumentation* (n. 18 above), 212–20. The special case thesis is highly controversial. Opposing it are, among others, Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie? Eine Auseinandersetzung mit Niklas Luhmann', in *Theorie der Gesellschaft oder Sozialtechnologie—Was leistet die Systemforschung?* eds Habermas and Niklas Luhmann (Frankfurt: Suhrkamp, 1971), 142–290, at 200–1; Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (1992), trans. William Rehg (Cambridge: Polity Press, 1996), 230–3; Gerd-Walter Küsters, 'Rechtskritik ohne Recht', *Rechtstheorie* 14 (1983), 95–114, at 98–9; Werner Krawietz, 'Juridisch-institutionelle Rationalität des Rechts versus Rationalität der Wissenschaften?' *Rechtstheorie* 15 (1984), 423–52, at 438; Arthur Kaufmann, 'Über die Wissenschaftlichkeit der Rechtswissenschaft', *Archives for Philosophy of Law and Social Philosophy* 72 (1986), 425–42, at 435–7; Neumann, *Juristische Argumentationslehre* (n. 3 above), 86–91; Carl Braun, 'Diskurstheoretische Normenbegründung in der Rechtswissenschaft', *Rechtstheorie* 19 (1988), 238–61, at 258–60; Günther, 'Ein normativer Begriff der Kohärenz für eine Theorie der juristischen Argumentation' (n. 14 above), 184–8. Among those who have argued in its favour: Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), 272; MacCormick, 'Legal Reasoning and Practical Reason', *Midwest Studies in Philosophy* 7 (1982), 271–86, at 282; Martin Kriele, *Recht und praktische Vernunft* (Göttingen: Vandenhoeck and Ruprecht, 1979), 33–4; Jürgen Habermas, *Theorie des kommunikativen Handelns*, vol. 1 (Frankfurt: Suhrkamp, 1981), 62–3; Maarten Henket, 'Towards a Code of Practical Reason?' *Archives for Philosophy of Law and Social Philosophy*, supplement 25 (1985), 36–42, at 41; Ingrid Dwars, 'Application Discourse and the Special Case-Thesis', *Ratio*

Juris 5 (1992), 67–78, at 77.