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A Treatise on Legal Argumentation

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Chapter 12
Intermission

12.1 The Ten Frames of Legal Analysis, as Contrasted with Jerzy Wróblewski's Three Ideologies of Judicial Decision-Making and Kaarle Makkonen's Three Situations of Legal Decision-Making

The nine plus one *frames of legal analysis* on how to construct and read the law discerned above give a concise outline on the issues of legal argumentation.[1] Each frame locks up a criterion, or a set of more-or-less converging criteria, for judging the semantic qualities of a legal sentence, defined as its *truth-value* (reference) and *meaning-content* (sense) in Frege's conception of semantics. Following Carnap's model of semantics, we may speak of the *extension* and *intension* of the sentence, respectively. The frames of legal analysis and the corresponding criteria of legal semantics are as follows:

(a) *An Isomorphic Theory of Law*: a picture relation of structural similarity is thought to prevail between the two states of affairs compared, the one as given in the fact-description of a legal rule and the other as existing in the world.
(b) *Coherence Theory of Law*: mutual convergence of arguments derived from the institutional and non-institutional (i.e. societal) premises of law, as defined in terms of *mutual match*, *reciprocal support*, *common alignment*, *absence of dissonance*, and/or *shared congruence vis-à-vis* one another when inserted into, and read as part of, the same narrative pattern.
(c) *The New Rhetoric/Societal Approval*: approval or disapproval of the outcome and methods of legal argumentation in the intended universal audience, defined as a *subjective thought construct of the speaker*.
(d) *Philosophical Pragmatism/Social Consequentialism*: economic or other external effects of law in society, as suggested by e.g. the economic analysis of law.

[1] Nine plus one, and not ten, frames of legal analysis, because radical, ad hoc based decisionism denies the impact of any legally qualified criteria in the construction and interpretation of law.

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(e) *Subjective Interpretation/Legal Exegesis*: retracing the *original intentions* of the legislator or a court of justice, as reconstructed from the law text and the *travaux préparatoires* at the back of it or the justificatory reasons given in support of a precedent.
(f) *Objective Interpretation/Analytical Legal Realism*: law as the (in past) effected and the (in future) enforceable judicial decisions, with reference to the totality of legal rights and duties that enjoy effective legal protection by courts and other legal officials.
(g) *Legal Conventionalism*: law as expressive of collective intentionality in the well-established legal practices and usages in the community, defined with reference to the common *acceptance* or *recognition* of certain social phenomena as having legal significance or as a set of *mutual expectations* and *cooperative dispositions* to the said effect among the members of the legal community.
(h) *Legal Formalism*: law as a closed, hierarchical, and internally consistent system of the basic legal concepts and their hierarchical relations, along with the accompanying mode of logico-deductive reasoning, as outlined in Germany by Georg Friedrich Puchta's *genealogy* or *pyramid of legal concepts* (*Genealogie der Begriffe*, *Begriffspyramide*) and in America by Christopher Columbus Langdell's case method, later known as the "Langdellian orthodoxy".
(i) *Natural Law Philosophy*: the law as a subordinate part of absolute social, religious, or political morality, defined as the internal morality of law (Lon L. Fuller); the seven basic values at the back of law (John Finnis); the minimum content of natural law (H. L. A. Hart); or the human and constitutional rights acknowledged in the legal system.[2]
(j) *Radical Decisionism*: justice on a purely ad hoc basis, as detached from all feasible meta-theories, or meta-narratives, of the law, society, or politics.

It is only with reference to *some* frame of legal analysis that a consistent and adequately justifiable account of the process and the outcome legal argumentation can be given.

Above, Jerzy Wróblewski introduced the distinction between the three ideologies of *bound*, *free*, and *legal and rational* judicial decision-making.[3] The bound and the free ideologies are at the two opposite ends of the line, while the ideology of legal and rational judicial decision-making is situated in the middle. Kaarle Makkonen presented a similar typology of the judge's legal decision-making situations in terms of, firstly, the *isomorphic* situation where a picture relation prevails between the two fact-constellations compared and where no act of legal interpretation in the strict

[2]Ronald Dworkin's seminal idea of the role of legal principles with possibly oblique but still legally adequate institutional support and a sense of approval in the community is a "third theory of law" (as coined by J. L. Mackie), since there are elements drawn from legal positivism and natural law philosophy in it.

[3]Wróblewski, *The Judicial Application of Law*, pp. 265–314.

sense of the term is required from the judge[4]; secondly, the *semantically ambiguous* situation where recourse to the methods of legal interpretation is required from the judge; and thirdly, the legally *unregulated* situation where there is no legal norm whatever in the legal system that would have bearing on the fact-constellation to be ruled upon.[5]

Wróblewski's three ideologies of judicial decision-making and Makkonen's three situations of a judge's legal decision-making would seem to correspond to one another so that Wróblewski's *bound* judicial ideology more or less matches with Makkonen's *isomorphic* situation of legal decision-making, since the outcome of legal construction is determined by purely logico-conceptual and systemic criteria in both. Similarly, Wróblewski's *free* judicial ideology would seem to match with Makkonen's *unregulated* situation of legal decision-making, since the judge is not bound by the institutional or societal sources of law in either alternative. Finally, Wróblewski's *legal and rational* judicial ideology would seem to match with Makkonen's *semantically vague*, ambiguous situation of legal decision-making where recourse to the methodology of legal interpretation is required.

Though both Wróblewski and Makkonen were committed to the constitutive premises of *analytical jurisprudence*, there are some key differences in the two approaches. Wróblewski's three ideologies of judicial decision-making are each defined as a self-standing position vis-à-vis the two other alternatives. In Makkonen's typology of the three situations of legal decision-making, on the other hand, the *isomorphic* situation is defined as logically primary vis-à-vis the two other models, since the semantically ambiguous and the unregulated situation of legal decision-making are defined by the *absence* of an isomorphic relation between the two fact-constellations compared. Moreover, Wróblewski's classification is aligned with the various *sources of law*, while Makkonen's typology has more to do with the *semantics* of a judge's legal decision-making.

Makkonen's *unregulated* situation of legal decision-making refers to a situation where there is no valid legal rule that would stand in an isomorphic picture relation to the facts of the case. Makkonen's semantically *vague* situation, in turn, refers to a situation where a particular legal norm, as duly identified by the judge as having relevance for the present fact-situation, needs to be semantically elucidated before it can be applied to the facts of the case. Wróblewski's ideology of *free* judicial decision-making refers to a case where the judge or other legal official may reach a particular decision in disregard of the pertinent sources of law, envisioned by

[4]Makkonen, *Zur Problematik der juridischen Entscheidung*, pp. 78–79: "... kann es sich um einen so klaren und allseitig deutlich gestalteten Fall handeln, dass die anzuwendende Rechtsnorm der entscheidenden Instanz ohne weiteres sofort bekannt ist. Zwischen den gegebenen Tatsachen und den im Rechtsnormsatz dargestellten Tatsachen herrscht dann das Verhältnis des Abzubildenden zum Bilde. Wir gebrauchen für eine derartige Lage die Benennung *Isomorphiesituation*." (Italics in original.)

[5]Makkonen, *Zur Problematik der juridischen Entscheidung*, p. 78 et seq. In German: *Isomorphiesituation*, *Auslegungssituation*, *ungeregelte Situation*.

the German free law movement as a *sense of justice* (*Rechtsgefühl*) or *collectively sustained values* (*Wertfühlen*) in the legal community. Finally, Wróblewski's ideology of *legal and rational* judicial decision-making underscores the impact of the institutional and societal sources of law.

The *isomorphic theory of law* seeks to analyse the judge's legal discretion as the presence or absence of an isomorphic relation between the two states of affairs compared, the one as given in the fact-description of a legal rule and the other as existing in the world. *Legal formalism*, in turn, puts emphasis on the logico-conceptual and systemic tenets of legal construction and interpretation. They both give effect to the ideas entailed in Wróblewski's ideology of bound judicial decision-making and Makkonen's isomorphic situation of legal decision-making. The ontological commitments entailed in them comprise a set of states of affairs with a legal tint under the isomorphic theory and a set of basic legal concepts under legal formalism.

The *coherence theory of law* attaches the criteria of how to construct and read the law to the relations that prevail among the *institutional* and *societal* sources of law. The new rhetoric by Chaïm Perelman and its correlative phenomena in the field of legal argumentation take the approval of the methodology and outcome of interpretation in the ideal, universal audience as decisive in legal construction and interpretation. *Legal exegesis* and *legal positivism* in so far as the latter, too, comprises a theory of legal interpretation seek to retrace the original intentions at the back of legislation or a precedent. Alf Ross' *analytical legal realism* is aligned with the effected law in action of the actual court practice, with coverage of the effectively protected legal rights and duties of individuals, judged in light of the collective normative ideology commonly adopted by the judiciary. Finally, *legal conventionalism* defines the law as commonly accepted or at least commonly recognized societal practices that might as well be defined as *mutual expectations* and *cooperative dispositions* of the members of a legal community.

The five approaches mentioned last – legal coherence, the new rhetoric, legal exegesis with either legislative or judicial bent, the effected law in action under analytical legal realism, and legal conventionalism – comprise the *institutional* or *societal* sources of law (or both) as the criteria of legal argumentation. Thus, they satisfy the criteria of Wróblewski's *legal and rational* judicial decision-making and Makkonen's semantically unclear situation of legal decision-making.

In fact, even the isomorphic theory of law could be situated under the legal and rational ideology of law, as well, though it is a borderline case. From the point of view of the *legal source doctrine*, the isomorphic theory of law is aligned with the institutional sources of law since it is from such material that the valid legal rules are to be inferred. From the point of view of legal *methodology*, on the other hand, the isomorphic theory has no use for the canons of legal interpretation proper, except in the sense of identifying and enforcing the existence of the required relation of structural similarity between the two fact-constellations compared. Therefore, the isomorphic model has more affinity with Wróblewski's ideology of bound judicial decision-making and under Makkonen's isomorphic situation of legal decision-making.

Social consequentialism under the premises of philosophical pragmatism stresses the economic and other external effects of law in society, to be judged in terms of economic efficiency, effected transaction costs, and the allocation of various risks in society. *Natural law philosophy* stresses the inherent relation that the law has to the vital criteria of (absolute) religious or communal justice. The *teleological* element in social consequentialism and the *axiological* dimension in natural law philosophy have the effect of cutting legal interpretation off from the *institutional* premises of law, by subjecting legal interpretation to a set of criteria that are external to such institutional premises of legal decision-making. Thus, both approaches would seem to satisfy the criteria of Wróblewski's ideology of free judicial decision-making and Makkonen's unregulated situation of legal decision-making, when viewed from the *internal* point of view of the institutional facets of law.

Finally, *radical decisionism* is difficult to classify vis-à-vis Wróblewski's and Makkonen's theories of law, because of its total rejection of all legal, social, political, religious, and ethical meta-context of law. Yet, as such it is closest to Wróblewski's ideology of free judicial decision-making and Makkonen's unregulated situation of legal decision-making.

Summarizingly, the ten frames of legal analysis may be presented in the form of Diagram 12.1 vis-à-vis Jerzy Wróblewski's three ideologies of bound, free, and legal and rational judicial decision-making and Kaarle Makkonen's three situations of a judge's legal discretion in terms of legal isomorphism, semantic ambiguity, and total absence of a legal rule.

Taken together, the ten frames of legal interpretation present a fairly comprehensive catalogue of the philosophically defensible approaches to legal interpretation. The *meta-context* of legal argumentation and the related criteria of *how to construct and read the law* to a great extent vary from one frame of legal analysis to another. It is only in radical, ad hoc based decisionism that the pertinence of any meta-context of law and legal analysis is categorically denied.

12.2 Jerzy Wróblewski's Ideology of Legal and Rational Judicial Decision-Making Law as a Compound of the Legislative Ideology, Judicial Ideology, and a Societal Conception of Law and Justice

Wróblewski speaks of the ideology of *bound* judicial decision-making with reference to the idea of legal formalism and the "mechanistic" judge denied of any genuine powers of legal interpretation. The role of the judge is reduced to that of "a mouth that reads the letter of the law", as Baron de Montesquieu put it.[6] That,

[6] "Mais, si les tribunaux ne doivent pas être fixes, les jugements doivent l'être à une telle point, qu'ils ne soient jamais qu'un texte précis de la loi. (...) Mais les juges de la nation ne sont, comme nous avont dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur." Montesquieu, *L'esprit des lois*, pp. 399–404.

Ideologies of Judicial Decision-Making (Jerzy Wróblewski) & **Situations of Legal Decision-Making** (Kaarle Makkonen)	**Frame of Analysis: Criteria on How to Construct and Read the Law in a Well-Reasoned Manner**
– Ideology of ***Bound*** Judicial Decision-Making (Wróblewski) – ***Isomorphic*** Situation of Legal Decision-Making (Makkonen)	(1) ***Isomorphic Theory of Law***: a picture relation between the two states of affairs (2) ***Legal Formalism***: logico-conceptual & systemic elements of law
– Ideology of ***Legal & Rational*** Judicial Decision-Making (Wróblewski) – ***Semantically Ambiguous*** Situation of Legal Decision-Making (Makkonen)	(3) ***Coherence Theory of Law***: mutual congruence and reciprocal support among the institutional & societal sources of law (4) ***The New Rhetoric***: approval of the method & outcome(s) of legal reasoning at the intended ideal, universal audience (5) ***Legal Exegesis***: retracing the original intentions of the legislator/court of justice (6) ***Analytical Legal Realism***: the effected law in action at the courts and officials (7) ***Legal Conventionalism***: acceptance or recognition of social phenomena as legal or mutual expectations to the said effect in the community
– Ideology of ***Free*** Judicial Decision-Making (Wróblewski) – ***Unregulated*** Situation of Legal Decision-Making (Makkonen)	(8) ***Social Consequentialism***: economic or other external effects of law in society (9) ***Natural Law Philosophy***: attainment of social or religious justice through law (10) ***Radical Decisionism***: *ad hoc* justice in disregard of any meta-theories of law

Diagram 12.1 The frames of legal analysis vis-à-vis Jerzy Wróblewski's three ideologies of judicial decision-making and Kaarle Makkonen's three situations of legal decision-making

of course, is an extreme situation for the judge of being bound by the law. Yet, even Wróblewski's ideology of legal and rational decision-making is a "bound" ideology, since the judge is bound by arguments that can be derived from the institutional and non-institutional sources of law acknowledged in the legal community. As Aleksander Peczenik pointed out, the criteria of legality are intertwined with the use of such sources of law in legal argumentation[7]:

> The sources of law are, moreover, related to the *concept* of "legal argumentation". One cannot reject all, or almost all, of them, and still be engaged in *legal* argumentation.

[7] "Rättskällorna är dessutom relaterade till *begreppet* 'juridisk argumentation'. Det går inte att på en och samma gång förkasta alla eller nästan alla av dem och ändå argumentera *juridiskt*." Peczenik, *Vad är rätt?*, p. 226. (Italics in original; translation by the present author.)

Therefore, Wróblewski's ideology of *legal and rational* judicial decision-making looms large in any analysis that seeks to outline the constitutive premises of *legal* decision-making, strictly defined. Finally, under the ideology of free judicial decision-making, the judge, though not bound by any legal sources or logico-conceptual and systemic premises, may still be constrained by the constitutive elements of the *political morality* in society.

Wróblewski's ideology of legal and rational judicial decision-making can be further divided into the following subcategories:

(a) *Legislative ideology*, as given effect in the constitution, parliamentary enactments, the *travaux préparatoires* (if any), administrative decrees, and the regulations, directives, and decisions with general applicability by the European Union vis-à-vis the EU Member States, and duly signed and ratified international legal conventions.
(b) *Judicial ideology* as collectively and (presumably) more or less uniformly internalized by the judges and other legal officials, as given effect in precedents and other judicial decisions, inclusive of the decisions given by the Court of the European Union and the European Court of Human Rights with respect to the EU Member States and the states that have signed and ratified the European Convention on Human Rights and Fundamental Freedoms, respectively.
(c) *A societal conception of law and justice*, as given effect in the established usages of customary law, settled practices on the allocation of contractual liability among the parties to a private law contract, decisions and resolution recommendations given by private and semi-official arbitration boards, and standards of professional ethics and well-esteemed professional practices acknowledged by the legal profession.

The *legislative ideology* comprises the idea of seeing the law as a result of the official will-formation of the state in abstract laws. The *judicial ideology* comprises the judges' and other legal officials' conception of law, as manifested in the effected law in action of individual court decisions and the premises they are based on. Finally, a *societal conception of law and justice* comprises the legal community's point of view to the law, as the view of the majority or in some other sense of the democratic rule.

The relative weight accorded to the different kind of legal source material to a great extent varies in different legal systems, depending on the cultural, linguistic, and historical characteristics entailed. In the Continental and Nordic legal systems, parliamentary legislation and other elements of the legislative ideology usually gain priority over precedents and the like elements of the collective judicial ideology, and over customary law and the like elements of a societal conception of law and justice. In Sweden, in specific, the *travaux préparatoires* have occupied a weighty position as a source of law. In the English and American common law, on the other hand, the part of judicial ideology that is embodied in the construction of the *ratio decidendi* of a precedent generally gains priority over any legislative intentions and over any

purely societal accounts of law and justice as well.[8] The role of a societal conception of law and society, and of the accompanying community-based sources of law, has been in constant decline in the Western world since the emergence of the great law codifications at the late eighteenth and the early nineteenth century. Today, such community-oriented arguments usually have the status of supplementary sources of law only in most, if not all, Western legal systems.

Recent global changes in law and society have to some extent altered the picture, resulting in the emergence of *international*, *multinational*, and *transnational* law on side with the more traditional national law in legal analysis[9]; the impact of the old and new kind of *lex mercatoria*; the creation of a novel *ius commune* in Europe, with reference to the border-crossing EU law and the protection of human rights on a European or global scale; the law of the *cyberspace* of the internet; and so on. Such changes have to some extent levelled down the differences between the two, or three, legal traditions in the Western world, i.e. the common law tradition, the civil law tradition of the Continental Europe, and the law of the Nordic countries.

The relation between the various *sources of law* and *frames of legal analysis* under Jerzy Wróblewski's *legal and rational* ideology of law can be summarizingly depicted with Diagram 12.2.

Legislative ideology gives effect to the will-formation of the state, as expressed in the constitution, parliamentary legislation, and the official *travaux préparatoires*, if any, and administrative regulations. The impact of such an ideological stance vis-à-vis law can best be seen articulated in legal positivism and legal exegesis, with emphasis on the original intentions of the parliament; the coherence theory of law, on the condition that legislation and possibly even the *travaux préparatoires* are acknowledged as sources of law; analytical legal realism, if the impact of legislation and the legislative intentions entailed in the *travaux préparatoires* are acknowledged as having a normative impact on the judge's legal discretion; and the new rhetoric and legal argumentation theory, if such legislative documents are to be duly taken into account by the judges and other officials as is commonplace in all Western legal systems.

Judicial ideology, as collectively and, presumably, more-or-less uniformly internalized by the judiciary and other law-applying officials, looks upon the law from the point of view of the judge and other officials, as the effected "law in action" in the court practice. In specific, the judicial ideology comprises the judges' *precedent-ideology*, i.e. the methods adopted by the judiciary in constructing the *ratio decidendi* of an individual court case and distinguishing it from the *obiter dicta* elements of that decision. Analogically, the notion of such precedent-ideology may be extended to cover other judicial decisions, as well. Judicial ideology will find

[8] The part of judicial ideology that deals with the definition and separation of the *ratio decidendi* of a case from the *obiter dicta* elements in that case may be called a *precedent-ideology*. Cf. Siltala, *A Theory of Precedent.*

[9] A concise account of the concept of *transnational* law is given in Glenn, "A Transnational Concept of Law", passim.

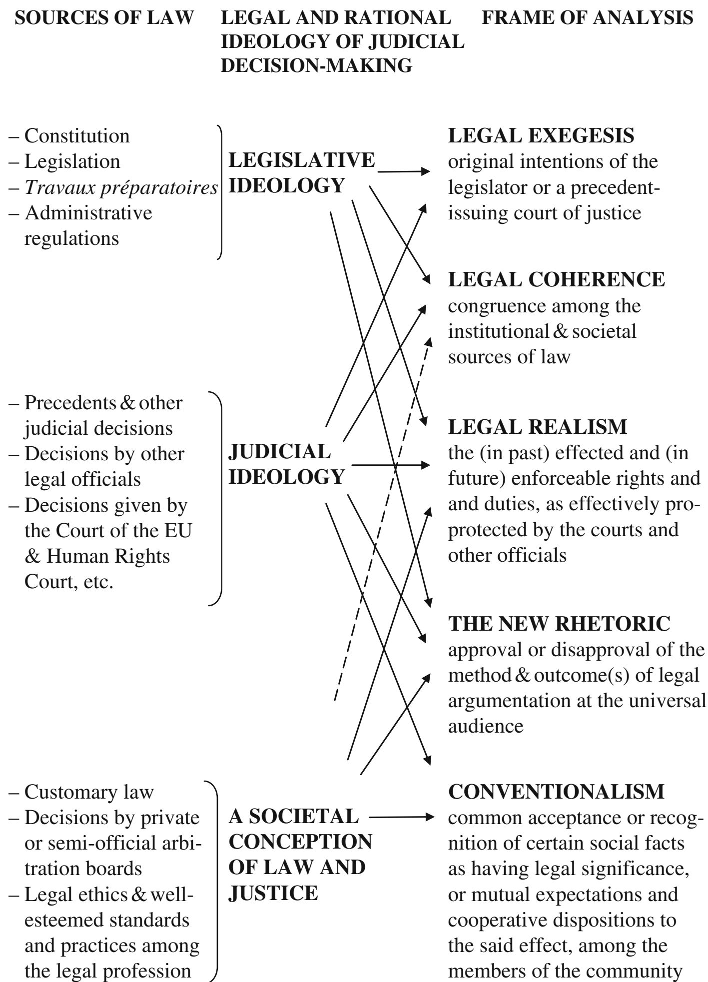

Diagram 12.2 The institutional and societal sources of law, the three constitutive elements of the legal and rational ideology of judicial decision-making, and the five frames of legal analysis entailed

support in the five distinct frames of legal analysis, i.e. legal positivism and legal exegesis, the coherence theory of law, analytical legal realism, the new rhetoric and legal argumentation theory, and legal conventionalism.

A *societal conception of law and justice* gives primary effect to the different kinds of non-institutional, societal sources of law, such as *lex mercatoria* and other manifestations of customary law; well-settled conventions, usages, and practices on the allocation of liability among the parties to a private law contract; decisions given by private and semi-official arbitration boards; and professional standards of esteem and professional ethics among the legal profession of some branch of law. Such

arguments may gain importance under the coherence theory of law, the new rhetoric, analytical legal realism, and legal conventionalism. In addition, the requirement of coherence may have impact on the mutual relations of different kinds of non-institutional, societal sources of law, if there are several societal elements involved. In the diagram, the broken arrow depicts such a phenomenon.

12.3 From a Synchronic to a Diachronic Approach: Two Sequential Models of Legal Reasoning

So far, the focus of analysis has been on a *synchronic* account of the criteria of legal construction and interpretation. However, legal reasoning as it actually takes place at a court of justice or other official most often follows a *sequential* pattern, justifying a switch to a *diachronic* mode of analysis in which different types of arguments may follow one another in a chronological order. In recent literature, two sequential models of legal reasoning stand out, viz. Neil MacCormick's theory of legal reasoning as defined in terms of the three C's of the *consistency*, *coherence*, and *consequences* of legal interpretation; and the model of legal argumentation adopted by the *Bielefelder Kreis*, defined in terms of the *linguistic*, *systemic*, *teleological-axiological*, and *intentional* arguments, to be utilized in that chronological order.[10]

In fact, sequential models are quite a commonplace in the legal source doctrine. Aleksander Peczenik's and Aulis Aarnio's three-part model of the *must*-sources, *should*-sources, and *may*-sources of law may be read in a sequential manner, where the one category of legal source material needs to be exhausted before turning to the following one.[11]

Thus, Kaarle Makkonen's catalogue of the three legal decision-making situations in terms of the isomorphic, semantically ambiguous, and unregulated cases of legal discretion could be read in a diachronic manner, to the effect that the judge's process of legal interpretation starts with a search for an isomorphic relation in the two fact-constellations at hand. If the search for isomorphism fails, the judge will then have recourse to the methodology of legal semantics at the presence of linguistic ambiguity. Finally, if that effort equally fails to settle the issue, reasoning based on analogy will then be adopted at the absence of any legal rule with normative bearing on the case at hand, according to Makkonen. Wróblewski's three-partite classification of the judicial ideologies could naturally be read in a similar manner, though neither Makkonen nor Wróblewski suggests such an interpretation.

[10]Similar models of argumentation can of course be found in the American literature on jurisprudence, as well. For instance, in Wilson Huhn's lucid presentation of the topic, *Five Types of Legal Argument*, the five categories of *text*, *intent*, *precedent*, *tradition*, and *policy* are analysed in light of the American experience. Cf. Huhn, *Five Types of Legal Argument*.

[11]Cf. Peczenik, *On Law and Reason*, pp. 319–371; Aarnio, *The Rational as Reasonable*, pp. 89–101.

12.3.1 *Neil MacCormick's Theory of the Three C's in Legal Reasoning: From Consistency and Coherence to the Consequences of Law*

Ota Weinberger (1919–2009) and D. Neil MacCormick (1941–2009) are the two founders of the *institutional* approach to legal theory, based on insights into "how to do things with words",[12] as now applied in the legal context. Austin's notion of the trilogy of *locutionary*, *illocutionary*, and *perlocutionary* speech-acts was loosely based on Ludwig Wittgenstein's late philosophy after his "linguistic turn" in the early 1930's. Now, the scope of legitimate uses of language was extended beyond the strict limits of the picture theory of language, making room for a great variety of *language-games* in society. Wittgenstein's ideas were taken up and further elaborated by the *Oxford school of linguistic philosophy*, i.e. *ordinary language philosophy*, in the 1950s and 1960s.

Neil MacCormick's and Ota Weinberger's institutional approach provides a credible account of how legal *institutions* (*in abstracto*) and their individual *instances* (*in concreto*), such as marriages, wills, contracts, mortgages, the legislative power of the Parliament, or the jurisdictional power of the Supreme Court of Justice, can initially be *created*, subsequently *altered* in content, *enforced* as to their legal effects, and ultimately *derogated* by means of certain linguistic expressions.[13]

In *Legal Reasoning and Legal Theory* and in his other writings on the issue Neil MacCormick has argued for a *sequential* theory of legal reasoning.[14]

According to MacCormick, legal reasoning at a court of justice or other law-applying official commonly takes place in the following order: from deductive *consistency* among the linguistic arguments to the attainment of legal *coherence* among the pertinent set of legal principles, if the deductive approach fails to resolve the issue, and ultimately to *consequentialist* arguments of the external social effects of legal adjudication and the values entailed therein, if the search for legal coherence

[12] Austin, *How to Do Things with Words*, passim.

[13] The *institutions/instances* dichotomy in institutional theory of law is parallel to the *type/token* dichotomy in linguistic philosophy.

[14] The late Neil MacCormick's main works in jurisprudence include *Legal Reasoning and Legal Theory* (1978), *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (1999), *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (2005), *Institutions of Law: An Essay in Legal Theory* (2007), and *Practical Reason in Law and Morality* (2008). The four books mentioned last make up the series *Law, State, and Practical Reason*. In addition, MacCormick was a member of the research group *Bielefelder Kreis* that produced two first-rate contributions to the topics of comparative legal argumentation theory: *Interpreting Statutes: A Comparative Study* and *Interpreting Precedents: A Comparative Study*. I have very warm personal recollections of Sir Neil from October 1998, when he acted as the official opponent at the public defence of my doctoral dissertation, *A Theory of Precedent*, and from August 2006, when he was the honorary guest at my post-graduate seminar, devoted to his legal philosophy under the title *Post-Sovereign Nations, Rhetorics, and the Rule of Law – A Seminar on Neil MacCormick's Institutional Philosophy of Law*.

equally fails to resolve the issue.[15] MacCormick's theory might be (re)labelled the *Theory of the Three C's in Legal Reasoning*: from linguistic *consistency* to the pursuit of principled, analogy-aligned *coherence* among legal principles and, ultimately, to the value-laden social *consequences* of law.

In outlining the final premises of law in analogy to Hans Kelsen's basic norm (*Grundnorm*) or H. L. A. Hart's rule of recognition, MacCormick introduces the notion of *underpinning reasons*. They are "reasons for accepting the [legal] system's criteria of validity", with reference to "*consequentialist* arguments which are essentially *evaluative* and therefore in some degree *subjective*."[16] MacCormick further argues that the two categories of *rightness reasons* and *goal reasons* in Robert S. Summers' typology of the two types of substantive reasons are essentially the "two sides of the same coin".[17] As is well known, Ronald Dworkin has put forth the argument to the effect that the *rights* of an individual, based on *legal principles*, ought to be recognized as legal *trumps* over social policies, based on *collective goals*. According to MacCormick, teleological or consequentialist reasons can always be transformed into value-laden rightness reasons, and vice versa. An institutional theory of law would seem to be more open to value-laden arguments than Kelsen's or Hart's analytical legal positivism.[18]

MacCormick's three-partite approach to legal reasoning would seem to match well with the isomorphism-oriented *isomorphic* theory of law at its first stage of striving for deductive linguistic consistency; with the *coherence* theory of law at its second stage of seeking to attain legal coherence among a set of legal principles; and with the pragmatism-oriented approach of social *consequentialism* under pragmatist terms at its third, final stage of analysis, where the external social consequences of law are deemed significant, even if the three successive alternatives are now defined in a somewhat less strict manner than above. Still, the main tenets of the three approaches are present even now: the inherent link to legal linguistics and formal deductive logic at the first phase[19]; the idea of legal coherence among a set

[15] A concise summary of MacCormick's early account of legal reasoning is in MacCormick, *Legal Reasoning and Legal Theory*, pp. 250–251. Cf. his later summary: "The conclusive or clinching point of argument when a case still stands open after such testing for *consistency* and *coherence* is an argument about *consequences* . . ." MacCormick, *Rhetoric and the Rule of Law*, p. 104. (Italics added.)

[16] MacCormick, *Legal Reasoning and Legal Theory*, pp. 64, 106.

[17] MacCormick, *Legal Reasoning and Legal Theory*, pp. 117–120 (with the coin metaphor is on p. 120); cf. Summers, "Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification", passim.

[18] In *Institutions of Law*, MacCormick takes a critical stance vis-à-vis legal positivism à la Kelsen and Hart, and labels his own thinking as a *post-positivist* philosophy of law. MacCormick, *Institutions of Law*, p. 279: "It is perhaps most sensible to say that this book presents an institutional theory of law, and that this theory draws inspiration both from some strands of thought previously advanced by self-proclaimed 'legal positivists' and from others derived from 'natural law' theorizing. It is post-positivist, if not anti-positivist."

[19] In *Rhetoric and the Rule of Law*, pp. 49–77 ("Defending Deductivism"), MacCormick defends the challenging idea that the deductive, syllogistic model of reasoning defines the inherent structure

of value-laden legal principles or standards at the second phase; and an eye on the social effects of law at the third phase of argumentation.

Summarizingly, Neil MacCormick's theory of legal reasoning would seem to match fairly well with the above outline of legal analysis, if analysis is restricted to the frames of law that focus on linguistic *consistency* under the *isomorphic* theory of law, *coherence* among legal principles under the *coherence* theory of law, and the external *consequences* of law in society under *philosophical pragmatism*.

12.3.2 The **Bielefelder Kreis***: A Sequential Order of the Linguistic, Systemic, Teleological-Axiological, and Transcategorical Arguments in Legal Reasoning*

The research group *Bielefelder Kreis* consists of first-class legal philosophers in the field of analytical jurisprudence, such as Jerzy Wróblewski, Neil MacCormick, Robert S. Summers, Robert Alexy, Aleksander Peczenik, Aulis Aarnio, Svein Eng, and the Italian comparatist Michele Taruffo.[20] The *Bielefelder Kreis* focused on a comparative and theoretical analysis of legal reasoning, drawing its methodological inspiration mostly from analytical jurisprudence and legal argumentation theory. The group was active from the mid-1980s to the late 1990s. It published two books: *Interpreting Statutes: A Comparative Study* (in 1991) *and Interpreting Precedents: A Comparative Study* (in 1997).[21]

The mode of reasoning in most of the highest national courts included in the analysis by the *Bielefelder Kreis* was seen to follow a *sequential* logic of legal argumentation; being reminiscent of the one adopted by Neil MacCormick, himself

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of law, even if the express justification of the decision were given in less formal terms. As a consequence, a legal decision can always be transformed into an instance of syllogistic reasoning, if the relation between the norm and fact premises and the outcome of such reasoning is questioned, which defines the "deeper" logic of reasoning in the Western legal systems.

[20] I had the privilege of acting as the secretary of the *Bielefelder Kreis* in two of its meetings, first in Bologna and Florence, Italy, and then in Tampere, Finland, in the mid-1990s, when the book *Interpreting Precedent* was being drafted. The standard of legal scholarship was exceptionally high in the group, with Jerzy Wróblewski (in sessions during the 1980s) usually acting as the "master of legal analytics", summarizing the discussion so far conducted from time to time, and Neil MacCormick and Robert S. Summers, as the two chairmen of the group, keeping the discussion on the right track, i.e. the current point of issue. Legal comparative issues were mainly taken care of by Michele Taruffo, the Italian legal comparatist, while all the other members of the *Bielefelder Kreis* were professionals in analytical jurisprudence and legal argumentation theory. – The description of the role held by Jerzy Wróblewski in the meetings of the *Bielefelder Kreis* in the 1980s is based on what Aulis Aarnio, himself a member of the group, once told me.

[21] Since over 10 years have passed since the publication of the latest work of the group and since some of the key members of group are now deceased, i.e. Jerzy Wróblewski (†1990), Aleksander Peczenik (†2005) and Neil MacCormick (†2009), and since the group has not been called in for the preparation of some new project, we may – regrettably – have to look upon the *Bielefelder Kreis* as a historical phenomenon nowadays.

a member of the group.[22] Even the naming of the categories of argument are quite similar, viz. logical and linguistic consistency at the first stage, coherence among principles of law at the second stage, and the value-laden consequences of law in society at the third stage in MacCormick's analysis; and the categories of *linguistic*, *systemic*, and *teleological-axiological* arguments in the analysis by the *Bielefelder Kreis*. It is only the fourth category added to the list by the *Bielefelder Kreis*, viz. the *transcategorical* argument, or the intentions of the lawgiver, that is a novelty here and fails to find a match in MacCormick's respective analysis.[23] Due to the ambivalent character of the transcategorical argument, one might perhaps do better without it.

According to the *Bielefelder Kreis*, the methodology utilized in the context of statutory law commonly makes use of four types of argument, each with several subcategories, with the following sequence of arguments:

A. Linguistic arguments:

(1) the argument from *ordinary* meaning;
(2) the argument from *technical* meaning.

B. Systemic arguments:

(3) the argument from *contextual-harmonization*, with reference to the legal systemic context of a statute or a set of statutes, as found in the same branch of law or the legal system in totality;
(4) the argument from *precedent*, with reference to the observance of the doctrine of stare decisis (sensu largo) and the idea of a *jurisprudence constante* in jurisdiction;
(5) the argument from *analogy*, with reference to the prior interpretation of some other statutory provisions in the same branch of law as the one now under consideration;
(6) *logico-conceptual* argument, with reference to a consistent interpretation of general legal concepts in a branch of law;
(7) the argument from the *general principles of law*, with reference to the weighing of such legal principles as have impact on the legal issue,
(8) the argument from *history*, with reference to historically evolving interpretation of a statute,

[22]The division of legal source material, and of arguments derived from them, in the two books by the *Bielefelder Kreis* is adopted from Aleksander Peczenik's model where such material is divided into the three categories of *must*-sources, *should*-sources, and *may*-sources.

[23]MacCormick and Summers, eds., *Interpreting Statutes*, pp. 512–525. – In his summary account of the results attained by the *Bielefelder Kreis*, MacCormick, though he briefly mentions it (on p. 125), yet bypasses the transcategorical argument in the further elaboration of the thematics. Cf. MacCormick, *Rhetoric and the Rule of Law*, p. 124 et seq. Summarizingly on the prima facie sequence of arguments, MacCormick and Summers, *Interpreting Statutes*, pp. 530–532.

C. Teleological-Axiological Arguments:

(9) the argument from *purpose*, with reference to the postulated "point and purpose", or purposes, of a statutory provision, as found in e.g. the *travaux préparatoires* of the enactment;
(10) the argument from *substantive* reasons, with reference to the such values entailed in a statutory provision as are deemed fundamental for the legal order.

D. The Argument from Intention:

(11) the *transcategorical* argument, with reference to the legislative *intention* at the back of legislation, by means of which the prior categories of argument may be "transcended" and priority be given to some specific linguistic, systemic, or teleological-axiological reading of law, due to its having the best match with the authentic intentions of the lawgiver.

The meta-level notion of a *transcategorical* argument that closes the sequence of putting forth of arguments in the *Bielefelder Kreis* catalogue is by far the most problematic of the four main types of argument discerned. *Linguistic* arguments either follow the ordinary use of linguistic concepts or some technical subcategory, such as the linguistic usage adopted in the field of engineering, statistics, medicine, or physics. The wide array of argument types under *systemic* arguments are relatively easy to identify in any legal system, and so is reference to the social purposes and values at the back of an item of legislation in all but excessively formalist modes of legal reasoning. The category of systemic arguments perhaps should be broken down into smaller units, as all the *legal*, i.e. institutional arguments, are entailed therein. *Teleological-axiological* arguments correspond to Neil MacCormick's idea of consequentialist arguments in legal reasoning, and that is where MacCormick ended the issue.

But *why* will some specific linguistic, systemic, or axiological-teleological interpretation be chosen among the various alternatives, each backed by some institutional or other kinds of arguments? The *Bielefelder Kreis* seeks to provide an answer with the *transcategorical* argument, or the intentions of the lawmaker. It is left for such a transcategorical, *meta-level* argument to determine the ranking order for the case at hand between the *first-level* arguments of linguistic, systemic, and teleological-axiological kind. Recourse to the transcategorical argument is open to critique, since there is no way of finding out whether the proposed content of such a closing argument in fact corresponds to the original intentions of the parliamentary at the time of issuing the enactment or those of a court of justice at the time of its giving out a precedent.[24] If the linguistic, systemic, and teleological-axiological

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[24]On the argument from intention, MacCormick and Summers, eds., *Interpreting Statutes*, pp. 522–525.

arguments cannot settle the issue, some kind of meta-level criterion is of course needed to resolve the argumentative deadlock. Still, it would be fairer to present the constitutive premises of any meta-level arguments in as open terms as is possible, without invoking a reference to any postulated entity that escapes scientific control, as the use of a transcategorical argument in effect does.