Law and Philosophy Library

Jerzy Stelmach and
Bartosz Brożek

Methods of Legal Reasoning

Springer

The former variety of syllogism is intended to show the rightness of a thesis (it has therefore a distinctly normative tinge). An enthymeme, in turn, is a rhetorical (shortened) syllogism i.e. a syllogism in which one of the premises (an obvious one) is implicit rather than stated. It consists therefore of two parts – a supposition and a conclusion – and discounts a major premise owing to its being obvious (to give an example, it follows from the minor premise "Socrates is a man" that "Socrates is mortal"; the implicit – obvious and thereby unmentioned – major premise is "all men are mortal"). A rhetorical syllogism may be either logical (when both of its implicit and stated premises are descriptive sentences), or normative (when one or both of its premises – including the implicit one – assumes the form of a directive or a value judgment).[4]

Aristotle distinguished common and special *topoi*. He understood common *topoi – loci communes* – to be "places" (in thought or memory) referring to general (universal) issues, and constituting a starting-point, as well as a basis, for all practical discourses; by special *topoi – loci specifici* or *loci propriae causae* – in turn, he understood "places" inherent in a concrete case or located in a given branch of knowledge (*topoi* of the latter type were frequently use in legal discourse). To summarize, topics is a method for establishing relations between notions that are crucial in a given discourse (these notions appear in the thesis of a discussed problem and, later, in hypotheses that are supposed to explain and justify that thesis).

In *Topics*, Aristotle examines four kinds of relations: definitional relations, relations concerning *genus*, essential characteristics (*proprium*), and accidental characteristics (*accidens*). He concludes that problems emerging in every discussion fall under at least one of these relations. In the next eight books of *Topics*, Aristotle offers an analysis of mutual relationships between notions generated by combinations of the four types of relation. In consequence, he formulates 382 rules (he calls them *topoi*) that capture general interrelations between particular categories of notions.[5] Therefore, *topoi* are not purely material (since they do not refer to a concrete object or notion) – they always concern entire categories of notions and may therefore function in a discourse as "common places". Put differently, *topoi* constitute arguments which are simultaneously universal and "non-specific", because they do not belong to a concrete discipline (this is true with reference to *loci communes*, though of course not to *loci specifici*), and are not a type of purely scientific (logical) argumentation. The universality and "non-specificity" of dialectic and rhetorical syllogisms lies in the fact that they make possible – unlike classical formal logic – simultaneous argumentation in favor of two different

aspects of a disputed issue. Topics – an ancillary discipline of the type *ars inveniendi* – may help other philosophies of argumentation to find good reasons (arguments, premises), thus facilitating success in an interpretative controversy.

An interest in classical topic and rhetoric arose anew in the twentieth century, owing especially to schools of legal philosophy, which will be explored in more detail in Section 4.2.

Eristic and sophistry. Eristic and sophistry have the same philosophical origins (since eristic techniques were widely used and taught by sophists) and the same goal, which is to win a dispute at any price – *per fas et nefas* (i.e. by permissible and forbidden means) – without paying much heed to the plausibility of advanced reasons. By relating these disciplines to dialectics, Schopenhauer makes their scope even broader. Hence the reason he speaks, in his treaty on argumentation, about "dialectic eristic". This classification, introduced by Aristotle, takes into account not only logical and dialectic inferences, but also eristic and sophistic ones. In the case of eristic inferences, the form is correct, but the statements themselves are not true – they only appear to be true. As for sophistic inferences, their form is fallacious – it only creates an appearance of truth. However, it is difficult to agree with Schopenhauer's claim that the goal of dialectic eristic is to prove the rightness of advanced theses. This was the goal of dialectics (rather than dialectic eristic), which suggests that the justification of advanced theses' rightness was another – besides proving truth – objective of discourse. Justifying the rightness of an advanced thesis was the objective of rhetoric and topics, but certainly not of eristic and sophistry. Eristic and sophistic discourse had only one goal – to win a dispute; and each was to be evaluated only according to the criterion of efficiency. Rightness always makes reference to some morally acceptable good, whereas efficiency makes reference only to purely instrumental values. It is not merely by chance that neither Plato nor Aristotle held eristic in high esteem. According to Aristotle, eristic is a dishonest way of conducting a verbal struggle in a discussion, and the relationship between an adherent of eristic and a dialectician resembles the relationship between a person who draws false diagrams and a geometer.[6]

Eristic and dialectic use an extensive repertoire of methods and techniques. The most important and frequently used "eristic catches" are: (1) the use of eristic expansion, i.e. acting in a way that introduces chaos into an argument to confuse an opponent, (2) introducing side plots, which have little bearing on the discussed issue, with a view to diverting an opponent's attention from crucial theses, which, if developed, might be

"dangerous" for the other party, (3) appealing to the true or apparent acceptance of a thesis by the audience (by pointing out that an opponent's views are inconsistent with the views of the audience, irrespective of whether such inconsistency exists), (4) fighting an opponent with his own weapon, i.e. turning his arguments to one's own advantage (*retorsio argumenti*), (5) making use of *sui generis* dialectics of "thesis – antithesis", where an antithesis that is defended by an opponent is formulated in such an unconvincing and absurd manner that the opponent is led to question and reject it and thereby to assume a thesis which he initially rejected, (6) "fabricating consequences", meaning deriving, via fallacious inference, theses from an opponent's statements that those statements did not actually contain, (7) concealing the end one really pursues in an argument; this can be achieved, for instance, by "eristic expansion" and making a discussion drag on, (8) responding to an opponent's sophistic argument with another sophistic argument, (9) requiring an opponent to justify his self-evident theses, (10) ironically admitting one's incompetence in order to suggest that theses advanced by an opponent are simply preposterous.[7]

Most (it cannot be said for sure whether all) of the eristic and sophistic "methods" stand in contradiction with the rules of rational discourse, which serve to provide a right (and according to some philosophers even true) solution to the matter in hand. Rightness undoubtedly constitutes the basic criterion for evaluating a practical discourse, yet another important criterion is efficiency. Provided that an argument fulfils necessary requirements of "minimum morality", there is nothing to prevent it appealing to methods which ensure maximum efficiency, as well as – if it is at all possible – to eristic techniques (so long as these techniques do not violate the principles of rational discourse). Consider, for instance, *retorsio argumenti*, which amounts to turning an opponent's argument to one's own advantage (to give an example of this argument's application: when an opponent says "he should be indulged, since he is still a child", we may reply "since he is still a child, he should be punished so that these bad habits do not become rooted in him"). In a practical (normative) discourse in which two or more right solutions are possible, one is justified in using this kind of argument, all the more so as it does not necessarily infringe upon other rules of the rightness of a discourse. This observation is especially important, given that a generally negative opinion about eristic argumentation is expressed here.[8]

Schopenhauer, author of the treaty *Eristic, or Art of Leading a Dispute* which was devoted to eristic dialectics, initiated renewed discussion of eristic in the contemporary philosophies of argumentation.

Contemporary theories of argumentation. Contemporary theories of argumentation were most often formulated in response to growing conflict between the most important philosophies of argumentation. The "positivistic-analytic" and "phenomenological-hermeneutic" paradigms took their final forms. Besides, mainly owing to psychoanalysis, psychological interpretation maintained an important position in the humanities. Controversy over the choice of a method of humanistic interpretation became even more vigorous in connection with discussion – pursued mainly in the areas of metaethics and legal philosophy – concerning the epistemological (semantic-logical) characteristics of normative statements. In consequence, the main goal of theories of argumentation in the latter half of the twentieth century was to find an epistemological equilibrium – a *sui generis* "third way" between competing philosophies of interpretation. The philosophy of argumentation was supposed to substitute formal logic, together with analysis (which are inapplicable or applicable on a limited scale in practical – normative – discourse) and the "softer" method of phenomenological hermeneutics, relying upon intuition. The result of this process was the rise of a wide variety of philosophies of argumentation.

Some of these philosophies were still formulated on the basis of analytical philosophy – in connection with controversy over "good reasons" in ethics. An important contribution to construction of the analytical theory of practical discourse was made by Wittgenstein, Ayer, Stevenson, Austin, Hare, Toulmin and Baier, among others.[9] Thus, for instance, Hare bases his theory of argumentation on analysis of the language of morals and, in consequence, introduces a distinction between the descriptive and prescriptive (evaluative) meaning of ethical predicates. The two main rules – the rule of universality and the rule requiring ethical statements to be prescriptive – upon which every moral argumentation rests confirm this distinction. And even though the rules of moral discourse are different from the rules of argumentation in exact sciences, they appeal to the same criteria of rationality.

An investigation devoted to the use of constructivist method (logic) for the needs of practical advice was conducted by Lorenzen and Schwemmer. According to Schwemmer, "constructivist ethics" (rational moral discourse) relies upon two fundamental principles: the principle of reason (*Vernunftsprinzip*) – called also the principle of advice (*Beratungsprinzip*), and the moral principle (*Moralprinzip*).

As for Habermas, he found a basis for justifying the rational conception of discourse in the consensual theory of truth. This theory enabled him to distinguish an action and a discourse (a dialogue). He treats discourse as a process of rational communication which takes place in a

communicative community and, in addition, in an ideal situation of speech, which enables the participants of a discourse to arrive at "right conclusions", i.e. at an agreement (a consensus). Whilst theoretical discourse is to be evaluated according to the criterion of truth (since in this kind of discourse empirically verifiable and logically decidable theses are being formulated), a practical discourse is to be evaluated through the prism of rightness (since in this kind of discourse, attempts are made to justify the rightness of normative statements). However, the point to be stressed is that what constitutes the final criterion both of truth and rightness is consensus legitimated by the "force of the better argument" and reached in the process of rational language communication. This process can be said to fulfill the demands of rationality only if it observes some formal rules such as, for instance, the rule of the equality of participants in a discourse (the members of a communicative community), the rule of freedom of argumentation, the rule of veracity, and the rule canceling privileges, and the compulsion of any participant in a discourse.[10]

In a relatively short time, the discussion concerning rational discourse had permeated the field of legal philosophy. This process was mainly due to Viehweg, the author of *Topik und Jurisprudenz* (published in 1954) as well Perelman and Olbrechts-Tyteca, the authors of *La nouvelle rhétorique. Traité de l'argumentation* (published in 1958). The latter was the first of a whole series of works devoted to the problems of legal argumentation and written by the representatives of the Brussels school (especially by its leader, Perelman). One work that made a considerable contribution to the maintenance and revival of the diminishing interest in problems of legal argumentation was Alexy's *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der jurstischen Begründung*. Classical philosophies of argumentation, such as ancient topics and sophistry, provided a point of departure both for Viehweg and for Perelman. As for Alexy, he draws on different sources, in particular: the philosophy of Kant (the Kantian conception of practical reason), analytical philosophy and Habermas' discourse theory. As a result, his procedural theory of legal discourse has little in common with the ancient philosophies of interpretation. Both conceptions of discourse will be discussed at greater length in the next section.

4.1.2 Criteria of a Practical Discourse

A fundamental problem of every philosophy of argumentation concerns the choice of which criteria are to be used to "measure" a discourse, and thereby decide whether it should be accepted or rejected. It is suggested that this problem is not only the most important, but also the most

controversial one. First, a given criterion is at issue, next – the scope of its application: the problem here is whether a given criterion should be used only in the process of internal justification – *interne Rechtfertigung*, only in the process of external justification – *externe Rechtfertigung*, or in both (internal justification questions whether a proposed solution follows logically from premises assumed in a discourse, whereas external justification aims to assess the rightness of the very premises).[11]

Let us, however, return to the problem of the criteria of a practical discourse. The earliest theories of argumentation were intended to provide an answer to the question of when a given discourse should be accepted or rejected. This question was answered in at least three ways. According to some philosophers, the only acceptable and final criterion of an argumentative discourse is truth: if one can demonstrate that a proposed solution to a controversy is true, then acceptance of this solution is not only possible, but rather demanded from all the participants of a discourse. Other philosophers opted for a "softer" criterion – namely, that of rightness (a winning solution is one that can be demonstrated to be the most right – just – one). Having given up the claim to logical certainty (truthfulness), these philosophers wanted to relate the criterion of rightness to rationality (what is right in the ethical sense, must be rational as well; and conversely, a rational solution should be accepted as right by all participants in a discussion). Still other philosophers held that the only justifiable and valid criterion for evaluating a practical discourse is efficiency. A total separation of the criterion of efficiency from the criteria of truth and rightness led to a radically instrumental and relativistic understanding of argumentative discourse, which found its expression, for instance, in sophistic and eristic conceptions.

Truth. It was within those philosophies of argumentation which made allowance for the methods of logic and analysis that truth was regarded as a basic criterion for evaluating solutions advanced during a discourse. Aristotle had already pointed out that logic and analysis should serve as tools for deriving true (apodictic) conclusions. The situation of dialectics is more complex: it is to serve either truth alone (Plato), or both truth and rightness (Aristotle) – in the latter case, dialectics is a theory intended to yield conclusions which pass as valid or find themselves in circulation where they pass as valid (*probabilia*).

It should be stressed that the relationship between logic and dialectic has always been a close one (an analysis of a certain type of argument formulated within normative logics shows this clearly, as was shown in the above discussion of dialectics). Truth returns as a criterion for

evaluating argumentative resolutions in contemporary conceptions. The conviction, held by some representatives of the philosophies of argumentation, that this criterion can be applied may be a result either of the adoption of a cognitive view of the meaning of normative predicates and statements (directives and norms), or of some "moderately" non-cognitive views. If we assume that directives (norms) are statements which can be assigned logical values, then, of course, we can also assume that argumentation, invoking these kinds of statement, can be assessed by means of purely logical categories. In some cases, however, even if we deny that directives (norms) have cognitive sense, we are not thereby forced to forgo entirely the possibility of constructing certain types of logic (formal or informal) which might be used as a tool for constructing a criterion – based on truth – for evaluating a practical discourse.

Without getting involved in philosophical controversies which, in our view, cannot be resolved, we wish to point out that in the process of argumentation people very often appeal to theses and arguments that are simply true or false. These theses and arguments, however, are being formulated within a discourse that can be called theoretical. Theses and arguments of normative nature are formulated within the other kind of discourse – namely, practical. As usual, this kind of discourse appeals to other criteria: rightness and efficiency. The necessity of making a distinction between these two kinds of discourse was understood by Aristotle, who distinguished theoretical and practical philosophy. Let us recall that theoretical philosophy is based on the criterion of truth, whilst practical philosophy is based on the criterion of good – rightness. Also Kant distinguished, and even placed in opposition, two cognitive powers of the transcendental subject – namely, theoretical (scientific) reason, which appeals to the criterion of truth, and practical (norm-giving) reason, which appeals to the criterion of formally understood rightness. A distinction between the two kinds of discourse can also be found in Habermas' works. In his view, a theoretical discourse is measured by truth, whereas a practical discourse is measured by rightness, yet, ultimately, both discourses appeal to the same criterion, which is consensus reached in a rational way.[12]

In our opinion, the process of legal cognition (broadly understood as interpretation) encompasses two interlinked discourses: theoretical and practical. By mixing theses formulated within each type of discourse, participants in a discussion often become embroiled in heated, though at the same time fruitless, controversy. Multiple argumentative conclusions are fully discursive, cognitive and logically verifiable. We have at our disposal a whole repertoire of scientific means – both strictly formal (such

as, for instance, logic or "hard" analysis) and empirical. As is well known, there should be no controversy over logically provable and empirically verifiable conclusions. Thus, controversy may arise only as a result of incompetence or opportunism, becoming in consequence an expansive – eristic – sort of argumentation that aims to yield success at any price – even at the expense of truth. Confusion in argumentation will become aggravated if cognitive theses are given a normative sense (that is to say, if we discuss the rightness of statements which we have already recognized as unquestionably true), or if normative theses (that is to say, theses that are to be evaluated by means of other criteria than the criterion of truth) are given a fully cognitive sense. For that reason, one should thoroughly examine a thesis formulated in the process of a discourse before one decides whether it can be evaluated in terms of its truthfulness and falsity or, rather in terms of some other criteria – such as rightness, justice, validity, reliability, or efficiency. In our view, only the latter kind of theses can be the object of a "proper argumentation", i.e. a practical discourse.

At this point, we would like to turn our attention to some terminological issues. In discussing the concept of argumentation from a historical perspective, we have associated it with such terms as hermeneutics (though in a rather limited sense), logic, dialectics, rhetoric, and, finally sophistry and eristic. All these terms identified various philosophies, methods and techniques directly connected with an argumentative process (activity). At the same time, the concept of discourse has been used to analyze its two varieties – theoretical and practical. One could justifiably introduce further distinctions – for instance, between general and special discourse (the latter type of discourse embraces legal discourse, among others). The concept of discourse, however, may give rise to many doubts on account of its ambiguity (which is increased by the fact that it is "fashionable" in the sense that it is invoked by many areas of knowledge to explore essentially different processes). It seems difficult – if not impossible – to give a sound definition of this term: it would be difficult to build an analytic definition (i.e. reflecting the received – historical – sense) of the concept of discourse, since that would require that a whole range of intuitions concerning the meaning of this concept be taken into account. Accounting for all these intuitions would almost certainly make the concept fuzzy. More specifically, in the process of creating such a definition, it would be necessary to allow for the fact that the concept of discourse refers to cognitive process, communication, logical argumentation, discussion, making a speech, convincing through the medium of speech etc. Thus, the concept was used to designate both

general processes of cognition and communication, as well as special activities connected with ways of leading a discussion.

On the one hand, given the lack of a plausible criterion for choosing between these meanings, it must be conceded that the choice of only one of them would have to be qualified as arbitrary and therefore unjustifiable; on the other hand, a definition that accounted for many different meanings would be useless for more specialized kinds of analysis and, in addition, inconsistent with the principle of the economy of argumentation. A synthetic (stipulative) definition of the concept of discourse, in turn, would be arbitrary, for the simple reason that it would have to be based on only one intuitive view (that of the author) of which of the concept's many plausible meanings is "the most plausible".

Rightness. It follows from the preceding considerations that it is rightness that should constitute the measure, standard, or criterion for evaluating a practical discourse. If it is really the case that a practical discourse (argumentation) cannot be "measured" by means of the criterion of truth, it is necessary to adopt some other measure or criterion, such as that of rightness, for example. Of course, the concept of rightness is by no means clear, and, accordingly, in trying to provide its definition, we encounter the same problems we have run into when examining the concept of discourse. Thus, first, we have at our disposal many other concepts which in some cases can be used as its synonyms, especially the concepts of rationality (i.e. "trans-logical" rationality which is precisely rightness), fairness, validity, reliability, and even efficiency if it can be legitimated in a rational way). Second, rightness is always associated with certain moral values, which determine some "ethical minimum" which must be complied with for every practical discourse to be possible. Third, the concept of rightness may be interpreted materially or formally, i.e. procedurally (the latter interpretation seems more adequate if rightness is to be used as a criterion for evaluating practical discourse). Fourth, notwithstanding all the reservations outlined, rightness may be connected with truth, because both discourses – practical and theoretical – are interlinked. In consequence, as was emphasized by Habermas, truth in a sense legitimates rightness and rightness, in a sense, legitimates truth. Fifth, rightness may also be conceived of as efficiency. It may plausibly be argued that only what is right may work efficiently – bring about real effects (we mean here rational efficiency rather than "efficiency at any price", which is characteristic, for instance, of eristic). It is particularly evident in the case of economic arguments, which are frequently put forward in practical discourse: they imply that for a solution to be right it must be

economically efficient, i.e. that one should not sacrifice efficient solutions for the sake of solutions which realize some abstract ideal of fairness or rightness, yet are impossible to realize. Sixth, rightness can be replaced with other (most often formally – procedurally understood) criteria, for instance those of reliability or validity, on condition that these criteria have a moral dimension. Seventh, what is of special significance for the understanding of the criterion of rightness are its connections with the concept of rationality, especially when this concept is given more formal and procedural interpretation; accordingly, those things are right which are simultaneously – from the standpoint of formal rules of the accepted procedure – rational.

It seems that evaluation of the majority of theses formulated in the course of argumentative discourse is not possible unless the criterion of rightness is applied. We are, so to speak, doomed to apply this criterion, given the impossibility of directly applying strictly logical criteria, which would justify – by demonstrating their truthfulness – solutions adopted in discourse (these solutions can simply be directives or norms, or take the form of special kinds of normative statement). In addition, we also have at our disposal the instrumental criterion of efficiency; however, the use of it beyond an ethical context (without making due allowance for the requirements of rightness) may lead to multiple abuses in argumentation and, in consequence, to flagrantly unfair resolutions in a dispute. The thesis that other criteria – such as, for instance, fairness, rationality, validity or reliability – enable the construction of a more precise criterion for evaluating practical discourse is not very plausible: A "new word" may be gained, but the same definitional problems that plague the discussion of rightness remain.

Efficiency. Undoubtedly, efficiency can be one valid criterion for evaluating legal discourse, since what is ultimately at stake is success in an argumentative dispute. The problem boils down to the question: should success be achieved at any cost? Difficulty in offering a precise definition of this criterion stems from the fact that it can be understood in at least three different ways.

First, it can be interpreted in a purely formal and rational way. Efficiency in a practical discourse would be attained by applying a previously accepted procedure. In consequence, the result would be both fair (because consistent with the requirements of a procedure accepted by all members of a discourse) and rational (for the same reason). A procedure determines both the formally understood ethics and logic of a discourse. Efficiency, understood in this way, appeals to the concept of instrumental

rationality (the result of a practical discourse is legitimated by a procedure applied in a given case of argumentation). This is precisely how the problems of discourse and rationality (as a criterion for evaluating the results of discourse) were conceived in theories of communication (meaning the theories of Habermas and Apel), and in theories of system (above all Luhmann's theory[13]). The above interpretation of the concept of efficiency does not rule out the possibility of associating the concept with the criterion of rightness (as formally, or procedurally, understood), which we analyzed earlier.

Second, the criterion of efficiency may be referred to empirical reality rather than the social world presupposed by our normative considerations. Accordingly, a practical discourse can be described as efficient if it functions in the real – empirical – world. It was due to utilitarianism that this account of efficiency was introduced into philosophies of argumentation and then developed by the representatives of pragmatism and American legal realism. These three views – utilitarianism, pragmatism and American legal realism – suggest that actual law (law in action) is the law that produces real effects in a given social sphere. Thus understood, the criterion of efficiency certainly narrows the criterion of rightness, though it does not necessarily contradict it. Not every right (fair) solution is efficient, but every efficient solution is right (fair), since it realizes some values which are fundamental from the point of view of utilitarian, pragmatic or realistic ethics.

It becomes easier to examine this interpretative tradition when one analyzes legal cases. It may be the case that law (a legal verdict) which is fair (rational in a metaphysical sense) requires the impossible, or that law (a legal verdict) which is fair (both in a metaphysical and instrumental sense) turns out to be totally inefficient (for instance, from the economic point of view). What is to be done in such a situation? According to the advocates of the presented view, one should appeal to the criterion of efficiency. Efficiency understood in this way does not have to be (and, in fact, was not in the philosophies discussed) an ethically neutral category. These philosophies only assumed a different hierarchy of values, according to which the most fundamental values were those which enabled the construction of an empirical criterion for assessing the results of a practical discourse. For the representatives of utilitarianism this value was pleasure (happiness), for the adherents of pragmatism – utility, and, for instance, for the proponents of economic analysis of law – social wealth. Conflict between the criteria of rightness and efficiency might arise only if the latter criterion were entirely separated from an ethical context (i.e. values understood in a material or formal way) and used in a purely

instrumental – operational – way. Of course, in such a case priority should be given to the criterion of rightness.

Third, rightness may be referred only to a positive result, that is to say, to the assumption that an argumentative dispute has to be won at any price (*per fas et nefas*) – by using permissible and forbidden methods – in accordance with the principle "the end justifies the means". Success in an argumentative dispute was to be achieved by different sophistic and eristic techniques and methods, as well as by psychological artifices proposed within some contemporary philosophies of argumentation. Thus understood, efficiency has no ties with ethics – a practical discourse is not to be evaluated through the prism of fundamental values. Interesting in this context, is Perelman's distinction between two kinds of activity undertaken in the course of argumentation; these activities – convincing and persuading – are correlated with two types of audience, respectively, universal and particular. In those philosophies of argumentation which appeal to morality, it has always been emphasized that the function of a discourse is convincing, which is – in the last instance – directed at some "ideal audience". Convincing, relies both upon rightness and rationality, upon, as Perelman put it, the objective "validity of an argument": it is the main – and what's more, "ethically active" – goal of a practical discourse. Persuasion is a little different as it can only be evaluated using the criterion of efficiency, understood in a purely instrumental and subjective sense. Persuasion is directed at a particular audience, at concrete people upon whom one attempts to enforce some solution, irrespective of whether this solution satisfies even the minimum requirements of rightness and rationality. Hence, in the case of a particular audience, argumentative theses are regarded as justified even when accepted only by part of the auditorium. Thus, a situation may emerge where, in spite of errors (or even abuses) committed in a practical discourse, one may achieve the final result, that is to persuade part of the audience to accept the proposed solution, thereby succeeding in the argumentative dispute, in defiance of the requirements of rightness and rationality. This is the reason why it is argued here that a narrowly – instrumentally and subjectively – understood criterion of efficiency cannot be used automatically as the measure of a practical discourse.

4.2 TWO CONCEPTIONS OF A LEGAL DISCOURSE

It is possible to engage endlessly in controversies surrounding practical discourse's reception of the philosophy of argumentation, multiply divisions and classifications. However, the discussion here will be confined to

two, important and characteristic, conceptions of practical discourse: (a) procedural; (b) topical–rhetorical. Although these conceptions appeal to somewhat different philosophies of argumentation, they are nevertheless complementary to each other. In order to speak reasonably about legal discourse, it is necessary to explore not only the problem of the reception of philosophies of argumentation directed at legal discourse, but also (above all) the problem of the autonomy and specificity of this discourse, i.e. the problem of the relationship between general discourse and legal discourse.

According to the first view of this relationship, there exists only one – universal – general discourse. It is within the framework of this discourse that universally valid and rules are formulated to be applied later in all kinds of argumentation. Thus, there exists only one philosophy of argumentation, and its different applications (this kind of situation exists in hermeneutics, especially in its phenomenologically oriented variety, discussed in the following chapter). On the above understanding of philosophy of argumentation, the distinction between general discourse and particular discourses essentially loses its significance, retaining only a didactic meaning.

The second view describes these relations from the opposite perspective. The "argumentative reality" is the reality of concrete (particular) discourses – the only discourses that actually exist. Advocates of this view often assumed that a certain type of discourse, say legal or ethical, is of paradigmatic significance for all other practical discourses. According to Perelman, the paradigmatic discourse is the legal one. He asserts that the reasoning of a judge is exemplary, not only for other types of legal reasoning, but also for other – particular – practical discourses. Yet whether Perelman's view is correct is a matter of some dispute. In our opinion, the reasoning of a judge should be regarded as an "exception" rather than an "exemplary case", i.e. generalizable, "universal pattern". It is difficult not to notice the specificity of the reasoning of a judge even with reference to legal discourse: the judge is a fully autonomous arbiter, rather than a participant in a discourse who possesses the same – equal – rights as other participants. Participants in other particular discourses hardly ever make use of legal argumentation (and – *a fortiori* – of the type of the reasoning applied by a judge), one reason being that they lack the required legitimation (the specificity of legal discourse, which lies, in particular, in its close connections with valid law, make this kind of argumentation inaccessible to representatives of other humanistic disciplines).

Finally, according to the third view, legal discourse is a special case of general practical discourse – this view is the so-called *Sonderfallthese*,

formulated most distinctly by Alexy. He distinguishes three interpretative theses concerning the fact that legal discourse is a special case of general practical discourse: *Sekundaritätsthese*, *Additionsthese*, *Integrationsthese*.[14] We shall discuss them briefly. *Sekundaritätsthese*, i.e. a thesis about "the façade character of legal discourse", asserts that, in cases which cannot be decided exclusively on the grounds of the rules of valid law, it is general practical discourse that constitutes the real basis for making a decision; the role of legal discourse is to provide only "secondary legitimation" and thereby conceal "behind the façade of valid law" the real reasons for the decision. *Additionsthese*, i.e. a thesis about "the complementary character of general practical discourse", implies that legal argumentation is sufficient only up to the point where specific legal arguments are exhausted and, in consequence, it becomes necessary to supplement them with arguments from general practical discourse. *Integrationsthese*, a thesis about "the integrality of discourse", says that specific legal arguments should be used in conjunction – at every stage of a given discourse – with arguments from general discourse. *Sonderfallthese*, the thesis presented here, also gives rise to many doubts: note, for, instance, that the first two theses are descriptive, whereas the third one is arguably normative. True, it is hard to call into dispute the view that legal discourse is specific, yet it is not clear in relation to what it is specific (to a general discourse, or rather to other, particular practical discourses?). Furthermore, considering the fact that a general discourse can hardly be applied independently of some particular discourse, it may plausibly be argued that a general discourse does not exist as such – it exists only in concrete applications, that is to say, as some practical discourse. Only some general rules (common places – *loci communes*) have, so to speak, independent existence: they constitute a recurring element of every particular practical discourse and thereby fulfill the role of peculiar "argumentative axioms".

The above reservations notwithstanding, it seems that the third view is – on certain conditions – acceptable; we wish to stress, though, that should some additional presuppositions be accepted, the first view may also be defended. Contrary to appearances, these two views can be easily reconciled with each other.

4.2.1 The Topical–Rhetorical Conception of Legal Discourse

In the second half of the twentieth century many attempts were made to make use of ancient philosophies of argumentation for the purposes of the law. Intensification of the controversy over choosing a method of jurisprudence, the growing criticism – especially after 1945 – of legal

positivism, as well as disappointment with the methodologies proposed by analytical philosophy and hermeneutics, naturally contributed to increased interest in theories of argumentation. These theories were to enable construction of a philosophy of interpretation which would constitute a methodological alternative for legal theory – the *sui generis* "third way" between analytical philosophy and hermeneutics. It is presumably not by chance that the first conceptions of legal argumentation (those of Perelman and Viehweg) drew from the reliable traditions of ancient topics and rhetoric. It should be noted, though, that over time, the connections between legal argumentation and this tradition became looser (it is clearly visible both in later works of Perelman as well as in the German current *Methodenlehre*) and, accordingly, theories of legal argumentation started to be regarded as "specifically 'legal' methodologies".

Perelman. In 1958 *La nouvelle rhetorique*: *Traité de l'argumentation* by Perelman and Olbrechts-Tyteca was published. The authors treated this work as the renewal (reception) of the tradition of ancient rhetoric, especially as represented by Aristotle, Cicero and Quintilian. In his later works, Perelman frequently returned to issues connected with classical topics and rhetoric, yet he introduced multiple changes to solutions advanced in antiquity, especially by Aristotle. Both the continuity and change can be easily tracked, for instance, in his later work, *Logique juridique. Nouvelle rhétorique*, published in 1979.

Perelman considers topics to be an essential element of every possible theory of argumentation. In particular, he scrutinizes the Aristotelian problem of relations between common and special places. "Common places" (*loci communes*) – viewpoints or values to be taken into consideration during every discussion – enable a speaker to formulate theses, rules or maxims to be used in the process of a given discourse (usually in its initial phase). "Common places" stand in the same relation to "unspecialized reflections" as "special places" (*loci specifici*) stand in relation to special disciplines. To give an example, general principles of the law are only *loci specifici* of the law (as a special discipline), whereas the most general theses (like those analyzed by Aristotle in his *Topics*) are a point of departure for "an unspecialized reflection" and fulfill in every discourse a role analogous to the role fulfilled by axioms in a formal system. Having chosen "common places", a speaker must see to it that they become "present" in the consciousness of her interlocutors, or of the audience. This goal is to be realized by the various techniques (above all rhetorical ones) of a discourse. An especially important role in bringing "common places" to the consciousness of the audience is played by

rhetorical figures which include reinforcing (an oratory development of a theme), repetition, using apparently indirect speech, visualizing (an event is described suggestively so that it may be "seen" by the audience) and – finally – reversing tenses (this technique frequently leads to violation of the grammatical rules concerning the sequence of tenses, yet it enables a speaker to increase the effect of her argumentation).[15]

Perelman tries to describe the main types of legal topic, making a separate catalogue of arguments and legal principles.[16] Both types of topic fulfill the same role in legal discourse – that is, they enable the conducting and completion of an argument, and the interpretation of valid law. Topics do not possess a strictly logical structure, since, as Perelman points out, they do not refer to the form, but to the object of reasoning; in other words, they help establish principles on the basis of valid law. Perelman (following Tarell) numbers the following arguments amongst such *quasi*-logical arguments (i.e. arguments in a narrower sense): *a contrario*, *a simile* (or *per analogiam*), *a fortiori*, *a completudine*, *a cohaerentia*, *per reductio ad absurdum*, teleological, *ab exemplo*, systematic, naturalistic, psychological, historical and economic. He also analyzes a catalogue (drawn up by Struck) of 64 principles of the law (legal topics).[17]

Especially interesting in the context of Perelman's consideration of topics, is the question of relations (which we have already discussed) between "common places" and "special places". Specifically, it should be noted that an apparently distinct line between both types of topic (general and special) is no longer easy to draw in the case of legal discourse. This is due to two reasons. First, legal discourse depends on a whole range of external circumstances connected, *inter alia*, with the complexity level of an interpreted case, tradition and even the psychological situation of an interpreter. These circumstances will influence the choice of certain principles (which in point of fact make it possible to enter upon argumentation). It may turn out that the same topics will be regarded in some situations as general topics – unspecialized – *loci communes*, and in other situations – as special (detailed, specialized) topics – *loci specifici*. It is the context and time of use that will decide whether the same principles are used either as *loci communes* or as *loci specifici*.

Second, multiple legal topics (arguments and principles) are of universal nature. They can be used also in other practical discourses, where they fulfill the role of unspecialized general principles (this observation applies to such arguments as, for instance, *a simili*, *a contrario*, or *a fortiori*) or principles: *pacta sunt servanda* (contracts ought to be observed), *clara sunt interpretanda* (what is clear requires no interpretation) or *nemo iudex idoneus in propria causa* (no one can be a good judge in her own

case). Thus, one can hardly agree with the view that these topics are of a specifically legal nature and thereby constitute "special places" (*loci specifici*) only in legal discourse. According to Perelman, rhetoric is a technique of legal discourse aimed to bring about the "effect of presence" i.e. to make topics "present", both in the consciousness of interlocutors and the audience. However, the role Perelman attributes to rhetoric goes much further: it is on the basis of rhetoric that he builds his whole conception of argumentation. This "new rhetoric" decidedly exceeds the scope of rhetoric as understood in antiquity. It is by means of the "new rhetoric" that Perelman builds a procedurally oriented theory of legal argumentation (to be discussed in Section 4.2.2).

According to Perelman, the main task of rhetoric is analysis of those discursive techniques designed to elicit or strengthen support for theses submitted for discussion. As mentioned earlier, Aristotle defined rhetoric as the art of finding usable means of convincing in every situation. Now, Perelman accepts this definition, but he supplements it by adding four detailed theses of the nature of rhetoric: (1) The goal of rhetoric is to convince by means of a discourse. In the process of a discourse, one is allowed to make use of the techniques of rhetoric *sensu largo* (which, in addition, embraces topics, dialectics and all the other techniques applied during disputes and discussions), (2) Rhetoric makes no use of formal logic. In the process of a practical discourse, one does not attempt to locate truth (since it is not possible to prove the truthfulness or falsity of normative statements), but, rather, to convince the audience, (3) Truth – as an objective category – can be described as "impersonal", whereas convincing can be described as "personal" (since the act of convincing is always directed at a person or persons, i.e. to some audience), (4) The category of convincing can be graded. The degree to which a thesis is accepted may vary where a dispute concerns values other than truth. What is more, the degree to which a thesis is accepted may depend on the type of audience to which the argumentation is directed (the audience may be either universal or particular; it should be noted, though, that it is necessary to persuade, rather than convince, the latter type of audience).[18]

As has been illustrated, rhetoric and topic – two formerly distinguishable philosophies of argumentation – were tied by Perelman so that they now form a coherent whole – a new theory of legal argumentation, which, as will be shown, can also be interpreted procedurally.

Viehweg and the current Methodenlehre. *Topik und Jurisprudenz* – a book by Viehweg published in 1954 – gave rise to discussion about the possibility of applying topic in legal interpretation (this discussion can be

situated within the framework of the "fundamental discussion" pursued in the German science of law, where it is called *Methodenlehre*). As a matter of strict fact, it should be noted that in 1928 Salomon – a legal philosopher – spoke about topic as a method of jurisprudence; it remains true, however, that it was not until the book by Viehweg had been published that the main discussion of this issue developed. The ancient philosophies of argumentation, especially the topic of Aristotle and Cicero, provided a starting-point for Viehweg (just as for Perelman).[19]

Viehweg tries to show that legal reasoning, the work of lawyers and legal method each have the nature of a topic. Accordingly, his approach is decidedly anti-positivist. Let us recall that legal positivism – emphasizing the methodological autonomy of jurisprudence – stresses the systematic aspect of legal thinking (reasoning), whereas topic, proposed by Viehweg, exemplifies the anti-systematic, focused on specific problems, approach to legal method. Legal positivism (its two classical versions – *Gesetzposistivismus* and *Begriffsjurisprudenz* as well as Kelsen's normativism) presupposed that legal thinking (reasoning) – corresponding to the structure of the system of valid law – possesses a logical structure. This presupposition found its expression in the conception of a legal syllogism (regarded as the basic type of legal reasoning commonly applied in the process of legal interpretation), and, later, in the Kelsenian conception of a static system, i.e. one in which hierarchical connections between norms in a given system are unquestionably of a legal (inferential) nature (within such a system, one can directly derive the content of a lower norm from the content of a higher norm).

The method of topic is thoroughly different (the very word "method" is perhaps not quite appropriate in this context – Viehweg himself preferred describing topic as "an argumentative technique"). Topic is simply a certain technique of thinking focused on particular problems – the technique traces its origins back to rhetoric and its goal is to solve concrete dogmatic problems. It is by no chance that topic, in Viehweg's view, was always an immanent part of civil law (this was perfectly realized by Roman lawyers, who, as is well known, concentrated on solving genuine legal problems, trying to avoid superfluous formalisms). In being simultaneously anti-positivistic, anti-formalistic, anti-theoretical and anti-systematic, topic becomes in many respects close to the hermeneutic approach: topic appears to imply that all "activities" are to serve interpretation and, accordingly, that it is in the process of solving particular problems that "concrete law" comes into being. The approach based on topic remains in exact opposition to all those views (above all legal positivism) which are, so to speak, "of paradigmatic nature", i.e. which

assume some methodological axioms, true and universally valid types of reasoning, and appeal to the notion of an *a priori* accepted and uniquely possible system.

Of course, the topic approach to the method of legal reasoning (if it is a method!) may engender many doubts. In applying topics (both general and special) in legal discourse, one also introduces elements of systematic thinking and uses a sort of argumentative logic. Moreover, in legal discourse, these topics (arguments and principles) are continually applied, since they are considered to be the universally valid standards of legal thinking. One may, therefore, justifiably assert that legal topic is also associated with systematic thinking, because reasoning based on it relies upon the rules of some sort of – informal – logic.

Numerous philosophers, as well as the theorists of law representing the strand of *Methodenlehre,* took part in a discussion over the possibility of using topic as a method of jurisprudence. There was no lack of critical opinions of Viehweg's conception. The main objections raised were that the representatives of topic did not advance any plausible arguments against the systematic and formal (axiomatic–deductive) method of the analysis of law, and that the alternative method they put forth (which is in fact a mixture of questions unconnected with one another) implies that an accidentally invoked *topos,* rather than valid law, will determine a concrete legal solution. Esser – an otherwise moderate advocate of the method of topic – points out that it does not make much sense to radically oppose systematic reasoning and reasoning based on topic, given that topics themselves (being in fact general rules or principles) legitimate thinking in terms of a system (as already noted in the preceding paragraphs). The place of topic is, in Esser's view, in the area of jurisdiction. In particular, the interpretative activity of a judge is a paradigmatic example of thinking focused on particular problems (which is a characteristic of topic). All in all, according to Esser (as well as to Viehweg), the function of topic boils down to finding reasonable arguments, which help an interpreter to properly describe facts relevant to a given case, as well as to make the final decision (i.e. establish a legal norm appropriate for the case).

According to Kriele the essence of topic as applied in the science of law can be summarized by three theses: (1) legal arguments are not deductive, (2) these arguments are essentially legitimated by the opinion of the majority, (3) they must be analyzed in each particular case and may not neglect any single view or opinion. Even though Engisch and Larenz questioned multiple particular assumptions of Viehweg's conception, they nevertheless share his view that it is not possible to apply

the axiomatic–deductive method in legal reasoning. As for Zippelius, he asserted that legal topic plays a particularly important role in the process of interpretation concerning axiological gaps in the law (so-called *Wertungslücken*). More specifically, topic enables one to apply general clauses to a concrete case. Of primary importance for the rise of topical–rhetorical theories of argumentation were the works of representatives of the Brussels school (especially Perelman, whose conception of rhetoric and topic we have already discussed). What salvaged and intensified falling interest in the issues of legal topic was the work of Struck *Topische Jurisprudenz, Argument und Gemeinplatz in der juristischen Arbeit* (published in 1971).

At this point it would not be inappropriate to query whether the discussion devoted to the topical–rhetorical conception of legal discourse amounts to "much ado about nothing". It is submitted that the answer to this question should definitely be negative for the following reasons. In our view, topic and rhetoric open up the possibility of constructing realizable (applicable) philosophies of argumentation. The applicability of these philosophies flows, among other things, from the fact that "the elements of topics" are incessantly present in legal thinking (legal argumentation), which as a rule is focused on particular problems (particular cases). It is hard to overestimate the significance of a second reason: the problem of topic concerns an absolutely fundamental issue, namely whether the solutions to legal cases must be based solely on legal rules or norms. Positivists (for instance Hart and Kelsen) gave different, though always positive, answers to this question. According to Hart, legal decisions must be based on legal rules, yet judges are free to choose or formulate these rules (when, for instance, they establish a precedent). Kelsen, by contrast, asserted that judges have no such liberty: a norm is either derived (deduced) from an immediately higher one belonging to a system of valid law (in the case of a static system), or passed in accordance with a competence contained in a norm belonging to a system of valid law (in the case of a dynamic system). However, according to Dworkin – who, as is well known, rejects the positivistic approach – legal decisions may be taken on the basis of both legal rules and standards (the latter embraces principles and policies). In point of fact, the new word "standard" designates an old idea – namely, some legal topic. The first type of standard – principle – refers to basic moral values (justice, honesty etc.), whilst the second type – policies – refers to economic, political or social values.

It is worth pointing out one more – rather paradoxical – fact: the conception of law and legal discourse based on topic was initially realized in systems of precedent law, not in systems of continental law (the latter system is a direct descendant of the tradition of Roman jurisprudence,

which gave priority to thinking focused on concrete problems, and, accordingly, to the methods of interpretation based on topic).

4.2.2 Procedural Conception of Legal Discourse

The procedural approach enables one to look at the issue of legal discourse from a different – more abstract and formal – perspective. By no means do we wish to assert that only two approaches – namely, topical–rhetorical and procedural – are acceptable. Yet it remains the case that these two approaches played an essential role in shaping the contemporary philosophy of argumentation.

In the second half of the twentieth century, theories of argumentation formulated in the field of jurisprudence became paradigms for those examined in the fields of philosophy (ethics), sociology, political sciences and economics. It was also at this time that procedural and formal variants of theories of argumentation began to be formulated more frequently: given that these variants are essentially different from ancient conceptions of argumentation, they cannot be treated simply as acceptance of those conceptions. As a rule, these theories are strongly normative: they are not disturbed by the limitations built into real legal discourse, which depends on the complexity of the case being discussed and its entire interpretative context, tradition, and all the characteristics of those who directly participate in it (meaning limitations of a phenomenological nature – connected with the consciousness level of participants in a discussion – and limitations of a psychological nature, meaning the psychological experience of participants in a discussion). The main ambition of the authors of procedural theories is to create an ideal argumentative model, or, more precisely, to describe formal conditions which must be satisfied by each acceptable, i.e. right and rational, practical discourse. These theories, then, aim to provide a "universally valid", theoretical model to function as a measure of rightness and rationality for every possible practical discourse. Thus, the specified goals of procedural theories constitute both their strength – since if one accepts certain idealistic presuppositions, the goals will hardly be questionable – and their weakness – since, among other things, the goals are usually formulated on the meta-theoretical level, which makes it impossible to apply these theories directly in legal discourse. Besides, procedural theories contain not only purely normative theses, but also some, arguably unwanted, descriptive ones.

Perelman. As announced earlier, we once again return to Perelman's conception. Ancient topic and rhetoric constituted a starting-point for his philosophy of argumentation, and its final result is a procedurally

oriented theory of argumentation, called by him "the new rhetoric". At the root of "the new rhetoric" it is possible to find Aristotle's philosophies of argumentation (especially topic and rhetoric), which Perelman considerably supplements and modifies, as well as Kantian ideas of the transcendental subject and the categorical imperative. As mentioned earlier, the goal of "new rhetoric" is to convince the audience by means of a discourse in decision making situations, i.e. situations in which there exist different practical (normative) alternatives. Thus, the standard for evaluating of an argument is its persuasive force; the criterion of effectiveness is, in Perelman's view, of secondary importance. The main goal of every argumentation is to gain or strengthen the support of the universal audience. In order to achieve this goal, a speaker must adapt her speech to the demands of the universal audience.[20] Thus, the universal audience becomes a key notion in understanding any theory of practical, legal discourse. It is precisely due to this notion that this theory acquired procedural and formal characteristics. This is because the notion of the universal audience is interpreted by Perelman in an abstract, ideal and formal manner. The fact that an argumentation, i.e. certain reasons advanced in the process of a discourse, has been recognized by the universal audience implies that the argumentation is right, valid, rational and objective. Furthermore, the acceptance of argumentative decisions by the universal audience is likely to guarantee the efficiency of the relevant practical discourse.

Doubts may arise here as to whether criteria of efficiency may be established by the universal – purely formal – audience. Aristotle asserted that the task of rhetoric is to convince any unspecialized, but real, audience. In addition to the notion of the universal audience, Perelman introduces the notion of the particular audience. We think that the problem of efficiency should be associated with the latter type of audience: an argumentation can be called efficient if it is accepted by at least part of a particular audience. Moreover, even mutually exclusive argumentative theses can be described as efficient, provided that a speaker succeeds in persuading part of the particular audience to accept his argumentation. As mentioned earlier, Perelman distinguished the notion of convincing (*convaincre*) from the notion of persuading (*persuader*): the former is connected with an arguments' validity and, accordingly, with the concept of the universal audience, whereas the latter is connected with an arguments' efficiency and, accordingly, with the particular audience. The particular audience exists in a specific place and time, for some concrete discourse, whereas the universal audience is the criterion for assessing every possible kind of particular practical

discourse. Perelman emphasized that a speaker must use rational arguments, adjusting them to the categorical imperative as understood by Kant, and that her postulates and reasoning must be valid for the whole human community. The universal audience is made up of all well-informed and reasonable people – the whole community of potential participants in a discourse – or at least some ideal representation of such a community.[21]

Does the above definition of the universal audience provide sufficient reason for treating "the new rhetoric" as a theory of procedural type? It seems that even Perelman would have difficulty in answering this question, the reason being that his theory of argumentation constitutes a specific combination of rules and theses which can be interpreted materially (these rules and theses can be found as early as in the ancient philosophies of argumentation, especially topic and rhetoric), and purely procedural and formal rules and theses (introduced into considerations about practical discourse – practical reason – by Kant). This specific combination of material and formal elements in Perelman's theory is most clearly visible in the relationship between two types of audience: universal and particular.

Alexy. Free from these material intercalations is Alexy's procedural theory of practical, legal discourse. His theory of argumentation appeals to at least three philosophical traditions. These are the Kantian conception of practical reason, analytical philosophy and the theory of Habermas (especially his consensual theory of truth). Alexy presented his theory in the work *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung* (published in 1978).

Alexy makes a clear distinction between theoretical and practical discourse. He does not deal with theoretical (scientific) discourse, which appeals to the formally understood criterion of truth. His focus is on practical discourse, the goal of which is to provide justification for normative statements. Thus, the starting-point of Alexy's considerations is different from that of Habermas, who also distinguishes the two types of discourse, although he does not juxtapose them so decidedly as Alexy does. This is due to the fact that Habermas regards consensus as a criterion to be applied in evaluating those theses formulated during a theoretical discourse and those formulated during a practical discourse. Alexy's dualist account of both kinds of discourse enables him, by contrast, to justify the thesis of the cognitive specificity of a practical discourse. What is more, not only does a practical discourse appeal to

rules and principles other than those, which "govern" a theoretical discourse, but legal discourse itself is a special example of a general, practical discourse (*Sonderfallthese*).

The procedure of a practical discourse is determined by formal rules. Proceeding in accordance with these rules enables argumentative decisions to be made, which fulfill the requirements of rationality and rightness. The indefeasibility of the rules of a practical discourse stems from the fact that they are confirmed by many types of scientific and philosophical justification: technical, empirical, analytical, transcendental or universal-pragmatic.[22] Thus, to reject these justifications would be to reject elementary scientific intuitions (empirical and analytical) and philosophical ones (appealing to practical reason or common sense). The manner in which these rules are justified, as well as their purely formal character, make them universal; in consequence, these rules play the role of *sui generis* axioms in a practical discourse.

Alexy speaks of several types of formal rule "governing" a practical discourse. These include rules that are basic, appealing to reason, argumentative, justificatory, and, finally, the so-called rules of "passage". Basic rules are formulated on the basis of the most fundamental intuitions concerning the process of language communication; they embrace, in particular, the following rules: (1) no speaker may contradict herself, (2) every speaker may defend only what she herself believes, (3) every speaker who uses a certain predicate to designate a given object should use this predicate with reference to every other similar – in respect of relevant features – object, (4) different speakers may not assign different meanings to the same expression. The following, according to Alexy, is an example of a rule that appeals to reason: upon the demand of some other participant in a discourse, every speaker must justify her thesis and may not invoke any circumstances that would legitimate her refusal to provide such justification. As for argumentative rules, one may point to the rule, which forbids the justification of a situation in which one participant in a discussion treats another participant differently (better or worse) from others. Alexy associates justificatory rules with the principle of generalizability (*Verallgemeinerbarkeitsprinzip*) and he examines its three variants (proposed by Hare, Habermas and Baier). Rules belonging to the last group – i.e. the rules of "passage" – grant every participant in a practical discourse the right to appeal to the arguments of empirical, analytical or theoretical type. That is to say, they enable the participant to "pass", at any point in the discourse, from practical to theoretical discourse.[23]

According to Alexy, what is ultimately at stake in a legal discourse is the process of justifying (*Rechtfertigung*) adjudications (verdicts), i.e.

normative statements of a special kind. Two aspects of this process may come into play – namely, internal justification (*interne Rechtfertigung*) and external justification (*externe Rechtfertigung*). The former is intended to demonstrate that an adjudication (verdict) follows logically from premises assumed for its justification, while the latter is intended to demonstrate the rightness of those premises. The goal of practical, legal discourse is surely to demonstrate the rightness of normative premises assumed for the needs of justification. Alexy presents six groups of rules and forms of external justification: (1) rules and forms of interpretation, (2) dogmatic argumentation, (3) law-making adjudications (precedents), (4) practical argumentation, (5) empirical argumentation, and (6) special forms of legal argument (for instance, such argumentative forms as *a simili*, *a contrario*, *a fortiori*, or *ad absurdum*).[24]

The relationships between a general, practical discourse and a practical, legal discourse are captured in the form of three theses, which constitute the development and specification of the above discussed *Sonderfallthese*. Let us recall these theses: *Sekundaritätsthese*, that is a theory of "the superficial character of a legal discourse", *Additionsthese*, a thesis about "the complementary character of a general, practical discourse" and *Integrationsthese*, a thesis about "the integrality of a discourse". The first thesis asserts that, in cases which cannot be decided exclusively on the grounds of the rules of valid law, it is a general, practical discourse that constitutes the real basis for making a decision – the role of a legal discourse is to provide only "a secondary legitimation"; the second one implies that legal argumentation is sufficient only up to the point when specific legal arguments become exhausted and, in consequence, need to be supplemented with arguments from a general, practical discourse; the third thesis, in turn, says that specific legal arguments should, at every stage of a given discourse, be used in tandem with arguments from a general discourse. Movement from one discourse to another is, in light of the above mentioned theses, not only possible, but also, in many cases of argumentation, simply necessary.

A practical, legal discourse possesses a fully formal structure, made up of the rules of a general, practical discourse as well as special legal rules. Proceeding in accordance with the procedure determined by these rules enables an unquestionably acceptable – from the viewpoint of the criteria of rationality and rightness – result to be accomplished. The idea of procedurally understood rationality is ultimately expressed in the following six principles: (1) consistency, (2) teleological rationality, (3) verifiability, (4) coherence, (5) generalizability, and (6) veracity and openness.[25]