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Legal Decisionmaking as a Responsible Intellectual Activity: A Continental Point of View

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LEGAL DECISIONMAKING AS A RESPONSIBLE INTELLECTUAL ACTIVITY: A CONTINENTAL POINT OF VIEW

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Abstract: The legal decision in a concrete case is never completely given in advance in the statute. A theory of legal decisionmaking that sees the decider as someone who merely "applies the law" is inadequate to explain what goes on in the process of legal decisionmaking. The legal decision is a value synthesis assessing the normative starting point with regard to the factual starting point, and vice versa. This means that a legal decision can only be made when the normative state of constituent facts of the case has been formed on the basis of the statute, when from the life case the legally-relevant state of facts has been worked out, and when it has been established that the latter is an example of the normative state of constituent facts to which a certain legal consequence is linked. The theory of argumentation described in this essay examines the nature of the process of legal deciding as such, and offers to legal decisionmakers an appropriate methodology for understanding their own actions, and for filling up the ambiguous space between norm and facts with arguments that will make the decision legally persuasive, if not legally secure. But beyond a prescription for rhetorical effectiveness, the theory of argumentation shows that above all legal decisionmaking is a responsible intellectual activity.

I. INTRODUCTION

Dialectical reasoning, which was an object of philosophical treatment in the ancient world and in medieval scholasticism,[1] is also today at the center of European thought concerning the theory of argumentation in law. As Valentin Kalan puts it, dialectical reasoning "takes place on the basis of probable statements, the criterion of the truth or untruth of a statement being its acceptability or unacceptability."[2] The acceptability or unacceptability of the premises and of the resulting conclusion is the characteristic that differentiates dialectical from analytical reasoning: the premises of analytical reasoning are inevitable or at least irrefutably true, and thus the conclusion—if the valid path of formal-logical inference is

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1. *See* Michel Villey, *La raisonnement juridique dans l'histoire: I. Droit romain et moyen-âge*, 1972 Die Juristische Argumentation 43; Theodor Viehweg, *Historische Perspektiven der juristischen Argumentation*, 1972 Die Juristische Argumentation 63.

2. Valentin Kalan, *Dialektika in metafizika pri Aristotelu* 52 (1981).

followed—is also inevitably true.[3] In dialectical reasoning, however, the transition from the premises to the conclusion is not inevitable. That is to say, dialectical reasoning permits the possibility of different decisions, and thus it can be said to mark off an area of freedom in legal decisionmaking.[4]

It is evident from these starting points that the field of argumentation in law lies between two limitations or extremes. At one extreme, there is no room for interpretation when "the assertion we make is obvious and its clearness is evident to any careful spirit."[5] In such a case "the truth imposes itself in a obligatory manner," and the decision's "obviousness" is such that it is experienced by the decisionmaker as leaving no freedom of choice. At the other extreme lies the wholly unconstrained decision. In the words of Chaïm Perelman, this sort of decision "takes place where the assertion is made arbitrarily, without giving any arguments on its behalf, and subordination to an authority is required, which imposes itself with rude force and without trying to achieve the agreement of the spirit."[6] It is between these two poles—absolute constraint and absolute freedom—that the field of argumentation lies.

Although the theory of argumentation refers to an area of freedom in decisionmaking that is constrained only by what is considered acceptable or unacceptable to the audience of the decision, this does not mean that it denies the importance of formal logic in general and of syllogistic inference in particular. It only means that the central preoccupation of the theory of argumentation is how rationally to ground the value side of legal decisionmaking and how to form persuasively both premises within a framework that makes possible the decision as a distinctly *legal* outcome. Only when this point is achieved can the result of legal decisionmaking be translated into the symbolism characteristic of formal logic—that is, into an instance of the so-called "legal" syllogism.

3. *See* Chaïm Perelman, *Logique Juridique: Nouvelle rhétorique*, in *Méthodes du Droit* 1 (Jean Carbonnier ed., 1976).

4. *See id.* at 2.

5. Chaïm Perelman, *Recht und Rhetorik*, in *Rhetorische Rechtstheorie* 237, 237 (Ottmar Ballweg & Thomas-Michael Seibert eds., 1982).

6. *Id.*

II. ELEMENTS OF THE NORMATIVE CONCRETIZATION OF THE STATUTE

This section investigates the dialectical process of legal decisionmaking by means of a model that is held up, in subsequent sections, for theoretical investigation and justification. The essential idea is that legal decisionmaking is the process by which the facts of the case enter into a conversation, as it were, with the statute—a conversation that takes the form of a series of acts of valuation by a human decisionmaker. The flesh-and-blood decisionmaker can then be seen as standing at the center of the process, as being the real agent by which the law is always made concrete.

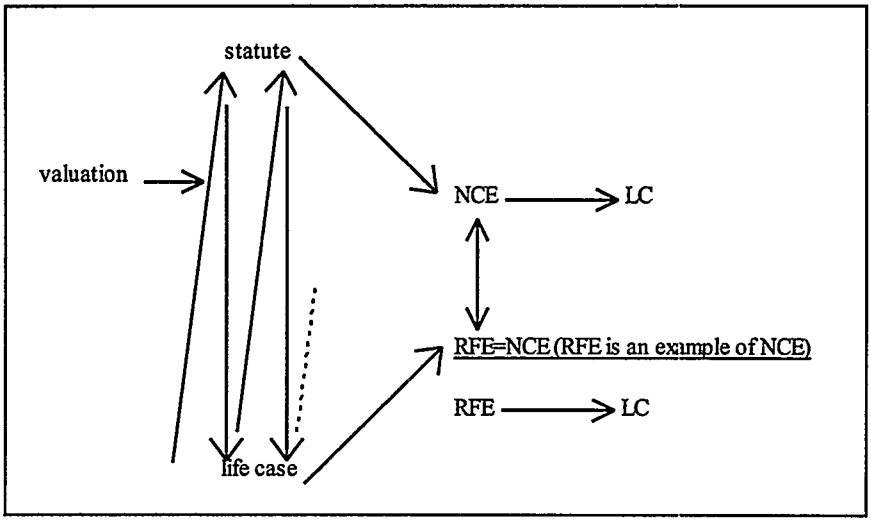
A legal decision is possible when, on the basis of the statute, the normative state of constituent elements of the case has been formed;[7] when, from the particular case at hand (here called the "life case"), the legally-relevant state of facts[8] has been worked out; when it has been established that the latter is an example of the normative state of constituent facts to which a certain legal consequence is linked; and when, finally, the legal consequence is put into concrete terms. Figure 1 gives a graphic depiction of the various stages just described.[9]

7. *Tatbestand*, in German. In this essay the *Tatbestand* will be called the "normative state" or the "normative constituent elements of the case."

8. *Sachverhalt*, in German. In this essay, the *Sachverhalt* will be called the "factual state" or the "relevant factual elements."

9. *Cf.* Karl Larenz, *Methodenlehre der Rechtswissenschaft* 261 (5th ed. 1983); Marijan Pavčnik, *Argumentacija v pravu* 27 (1991); Günther Winkler, *Sein und Sollen*, 10 Rechtstheorie 257, 275 (1979).

Figure 1



Legend: NCE=normative constituent elements (for example, insult or even more definitely, elements of insult); RFE=relevant factual elements (for example, *A's* slap across *B's* face—an action corresponding to the elements of insult); LC=legal consequence (for example, a pecuniary fine).

The distance between the normative and the factual state is always such that their contents are never identical. There is only a *correspondence* between them, because the normative starting point of deciding (the example used in Figure 1 is the concept of "insult" with legal consequence),[10] as well as the life case, are both open as to their contents. Their meaning is not defined only on the basis of themselves: the connection between them is based on a legal valuation that fills up the space between them—a space that is open as to *its* meaning (for example, the space of what is an insult and which concrete facts amount to an insult). It lies in the nature of the legal phenomenon that this valuation is based on the perception of an analogy between the factual state and the normative state. Just as the typical elements of the normative state issue from life cases that are similar to each other, so too the subsumption of the relevant factual state to the normative one consists in the discovery that the elements of the factual state correspond

10. The criminal offense and civil wrong of "insult" is discussed *infra* text accompanying notes 27–28.

(are analogous) to those elements of the normative state that are taken to be typical.[11]

The content of the legally-relevant factual state and its elements do not issue from the life case as such. The life case is only a slice of social reality—it is something that took place in history, at a particular place and time. Which facts are *legally* relevant and, as such, represent elements of the relevant factual state, only issues from a concrete comparison between the established facts that form the life case and the corresponding normative state of constituent facts. To put it another way, the relevant factual state is established by means of a *valuation* of the facts of the life case. That is, the relevant factual state consists in those facts that at the concrete level are taken to represent a counterpart of the elements that make up the normative state.

The concept "normative state of constituent facts of the case with legal consequence" consists in that part of the general and abstract legal norm that is designated as the primary hypothesis (the prerequisite of the primary disposition) or as the secondary hypothesis (the legal violation which is the prerequisite of the sanction). In the first case the normative state corresponds to the primary hypothesis (the prerequisite). The primary hypothesis defines in advance the constituent facts (elements) of the case, wherein the legal subject is seen as the holder of a legal "right,"[12] or as the bearer of a legal "duty."[13] Thus the basic entitlement and the duty are legal consequences that are linked to the predefined normative state of facts to which they correspond.

In this connection it is worthwhile to note that there is an important asymmetry between a right and a duty. A concrete right does not come into being automatically because whether the normative entitlement will be realized always depends on the will of the entitled subject.[14] In the case of a legal duty, however, the concerned legal subject does not enjoy, as an entitlement, the possibility of a unilateral forbearance to exercise her duty: as soon as real facts appear, which are also a case of

11. *See generally* Aristotle, *Nikomachische Ethik* I, 4, 1096b; V, 6, 1131a (4th ed. 1985); Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* 231 (1956); Arthur Kaufmann, *Analogie und "Natur der Sache"* (2d ed. 1982); Patrick Nerhot, *Legal Knowledge and Meaning: The Example of Legal Analogy*, in *Legal Knowledge and Analogy: Fragments of Legal Epistemology, Hermeneutics and Linguistics* 183, 183–97 (Patrick Nerhot ed., 1991); Francesco Romeo, *Analogie: Zu einem relationalen Wahrheitsbegriff im Recht* (1991); Boris Furlan, *Teorija pravnega sklepanja*, 10 Zbornik znanstvenih razprav 29 (1933–1934).

12. "Right" is used here in the sense of a basic entitlement: *Berechtigung*, in German.

13. "Duty" is used here in the sense of a primary obligation: *Verpflichtung*, in German.

14. That is, people do not always "stand on their rights."

the predefined normative state (the primary hypothesis), then also the duty binding the legal subject appears. Thereafter, the legal subject must concretize and realize the duty: if she acts in a different manner or remains passive, this is already a legal violation as to which an appropriate sanction can follow without regard to her will.

This so-called "legal violation" with a legal consequence is another case of correspondence to the normative state of constituent elements coupled with its legal consequence: if real facts appear, which are predefined in a normative manner as signs or elements of a legal violation (the secondary hypothesis), then the sanction (concrete legal consequence) should be activated. In this case the legal violation comes out in the definition of the conduct that conflicts with the main element of the legal norm (the primary disposition).

It is of prime importance for legal decisionmaking in concrete cases that the normative state of constituent elements with legal consequence is not completely given in advance. The normative state is only the result of *work*: of the decider's engagement with a statute that is accessible to the interpreter in the first instance only as a complex of linguistic signs. These signs need to be understood. In this context the normative state should by no means be conflated with this or that legal provision (prescription, paragraph, article, etcetera). Even when they partly or completely overlap, this is only a seeming correspondence as to contents. For the very least that a decisionmaker must do is make sense of the linguistic signs *as being* the normative state that they are, and thereby exclude the possibility that other interpretations are more appropriate, justified, or adequate.

III. THREE THEORETICAL JUSTIFICATIONS FOR LEGAL DECISIONMAKING

A number of theories have attempted to justify legal decisionmaking in concrete cases.[15] In this section, I focus on three such theories: the classical doctrine of conceptual jurisprudence, the theory of law-graduality, and the concept of the normative concretization of the statute. This brief survey does not aim at completeness, but is meant to

15. *See generally* Larenz, *supra* note 9; Ulfrid Neumann, *Juristische Argumentationslehre* (1986); Marijan Pavčnik *Juristisches Verstehen und Entscheiden* 130 (1993); Perelman, *supra*, note 3.

draw attention to the *problem* that the theory of argumentation takes as its special task to address.[16]

A. Legal Decisionmaking as the "Application of Law"

For the doctrine of conceptual jurisprudence, "application of law" consists in merely the transfer of a *content* (of the statute) to a concrete case. This transfer deduces the content of the legal decision from law conceived as a closed and dogmatically-formed system. It is of decisive importance that this inference is taken to be from an independent and self-contained legal system. The legal-dogmatical treatment of the statute, the analysis of its contents, and the scientific system[17] that is based on this conceptual analysis all offer the promise of conceptual clarity and normative direction. It is one of the advantages of conceptual jurisprudence that it seems to provide legal decisionmaking with the necessary certainty and security. Quite apart from this, however, it is only on the basis of something like conceptual jurisprudence that it is possible to establish the *conceptual framework* wherein the legal decision is placed. To this extent, it can be said that conceptual jurisprudence is an unavoidable concomitant of decisionmaking in concrete cases. But its role becomes questionable and perverted when the "cult of the logical" breaks loose, and legal concepts begin to take on the objectified aspect of a "direct reality."[18] Thus, the weak point of conceptual jurisprudence lies not in its conceptual filigree, but simply in the fact that as legal science it is alienated from the social, political, and moral reality of law.[19] This also makes it ideological, for it gives the impression that the legal decision is merely a mechanical reproduction of a set of entities that reside in the realm of a conceptual "reality."

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16. For discussions of the same problem, see generally Aulis Aarnio, *The Rational as Reasonable: A Treatise on Legal Justification* (1987); Robert Alexy, *Theorie der juristischen Argumentation* (1983); Karl Engisch, *Einführung in das juristische Denken* (7th ed. 1977); Esser, *supra* note 11; 3, 4 Wolfgang Fikentscher, *Methoden des Rechts* (1976); Kaufmann, *supra* note 11; Hans-Joachim Koch & Helmut Rüssmann, *Juristische Begründungslehre* (1982); Martin Kriele, *Theorie der Rechtsgewinnung* (2d ed. 1976); Larenz, *supra* note 9; Neil MacCormick, *Legal Reasoning and Legal Theory* (1978); Friedrich Müller, *Juristische Methodik* (3d ed. 1989); Aleksander Peczenik, *Grundlagen der juristischen Argumentation* (1983); Perelman, *supra* note 3; Theodor Viehweg, *Topik und Jurisprudenz* (5th ed. 1974); Günther Winkler, *Rechtstheorie und Erkenntnislehre* (1990); Jerzy Wróblewski, *The Judicial Application of Law* (Zenon Bankowski & Neil MacCormick eds., 1992).

17. The system, for example, could be the civil law as a whole or the component parts thereof.

18. This defect in conceptual jurisprudence is discussed very ably in Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* 433 (2d ed. 1967).

19. *See id.* at 401.

Unfortunately, the sediments of the pure theory of "application of law" are still very much with us. They are maintained by any legal theory which is satisfied with merely conceptual exegesis of valid formal legal sources. The object of conceptual jurisprudence is "law in the books" and not "law in action." It is obsessed with the linguistic, logical, and systematic analysis of the legal text as such, which is studied for its meaning irrespective of its functional context. Mechanical "application of law" radically stretches the significance of the statute to the life cases that require legal decisions: the statute is accepted as a complex of univocal and self-contained types of conduct that as such can be "transferred" to social life. Life cases, in turn, are conflated and then equated with legally-relevant states of facts that inertly wait to be taken up by a legal decisionmaker who is conceived as an automaton, whose only job is to subsume the facts under the statute.

Consciously or unconsciously, the classical conception is based on the hypothesis that the "application of law" is always posterior to law: that it is a mechanical action that merely reproduces law in a concrete social relation. This conception is characteristic both of classical natural law theory and of classical normative legal positivism: both forms of thought see the realization of law as unhistorical, as a "process in which *nothing* happens. The case and the statute remain as they were before, and *nothing* changes."[20]

B. Legal Decisionmaking as an Element of Law-Graduality

Legal decisionmaking in concrete cases cannot overlook the gradual structure of law. In this century, this old finding has experienced a theoretical reincarnation in the theory of graduality of legal norms, especially in Kelsen's pure theory of law.[21] It is of capital importance for

20. Arthur Kaufmann, *Vorüberlegungen zu einer juristischen Logik und Ontologie der Relationen*, 17 Rechtstheorie 257, 259–60 (1986) (emphasis added).

21. It has been said that Hans Kelsen, who came to the United States as a refugee from Nazism in 1940, was the most influential legal theorist outside the English-speaking world. Martin Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. Legal Educ. 441, 447 (1986). *See generally* Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans., 1945). Without discussing Kelsen's "pure theory of law" in detail, it can be said briefly that the theory's objective is knowledge of that which is essential to law, conceived as a *normative* science. Although law in Kelsen's theory concerns itself with the "ought," as opposed to the "is," law as a normative *science* means knowing the norm, including the highest basic norm (*Grundnorm*) on which all other norms are based. The function of the basic norm:

> to confer law-creating power on the act of the first legislator and on all the other acts based on the first act. To interpret these acts of human beings as legal acts and their products as binding

legal deciding in concrete cases that the creator of the legal act (say, a judgment) moves within a certain normative framework that is neither completely certain nor completely uncertain. The relative certainty and uncertainty of this framework enables the decisionmaker to act in a manner that is creative, or at least jointly creative. This framework can be uncertain either methodically or unintentionally; for example, its uncertainty may come from an ambiguity of words, from a lack of accordance between the will and its external expression, or from a conflict of two or more legal norms. In the present case it is of primary importance that the linguistic meaning of the legal norm is not univocal: the applier of law moves within a linguistic framework that allows several possibilities for the application of the norm.[22]

To conceive of the legal norm as a semantic *framework* out of which the legal decision in a concrete case emerges is to achieve an important insight into the nature of legal decisionmaking. Hans Kelsen, for example, does not consider this framework as fixed and absolute, as does the doctrine of conceptual jurisprudence. For him legal concepts are not productive in themselves, but the legal norm makes a framework that must be creatively filled up by the application of the law to a case. In the theory of law-graduality the legal decisionmaker is no longer seen as just a *viva vox legis*[23] who mechanically reproduces the statute—the

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norms, and that means to interpret the empirical material which presents itself as law as such, is possible only on the condition that the basic norm is presupposed as a valid norm. The basic norm is only the necessary presupposition of any positivistic interpretation of the legal material.

Id. at 116.

For Kelsen, because law is created or annulled by human beings, it is "positive" only under the condition that the total legal order is efficacious. The efficacy of the legal order is "a condition, not the reason for the validity of its constituent norms. These norms are valid not because the total order is efficacious, but because they are created in a constitutional way." *Id.* at 119. The task of legal science is to elucidate the various relations that hold between legal norms, but not to evaluate the ethical or moral status of the norms: "A science has to describe its object as it actually is, not to prescribe how it should be or should not be from the point of view of some specific value judgments." *Id.* at xiv. Thus, for example, "law-graduality" in Kelsen's theory refers to the way in which a lower-level legal norm is built on the basis of a higher-level norm, which in turn is built on the basis of a still higher one, and so on, until at last, the level of the *Grundnorm* is reached. In short, all these "legal norms belong to one and the same legal order because their validity can be traced back—directly or indirectly—to the first constitution. That the first constitution is a binding legal norm is presupposed, and the formulation of the presupposition is the basic norm of this legal order." *Id.* at 115. The original author of the theory of law-graduality is Adolf Merkl. *See* Adolf Merkl, *Prolegomena einer Theorie des rechtlichen Stufenbaues* 252 (1931); *cf.* Robert Walter, *Der Aufbau der Rechtsordnung* 53 (2d ed. 1974).

22. Hans Kelsen, *Reine Rechslehre* 228, 240–41, 348–49 (1983).

23. "Living voice of the Law."

normative starting point of deciding—in the manner of a "subsumption automaton"; now the decisionmaker steps forth into the light and is seen as a creator who jointly shapes the legal decision in a concrete case. But although the theory of law-graduality is an advance over purely conceptual jurisprudence, it still remains fixated on the normative structure, which is only *part* of the legal reality of decisionmaking.

C. *The Theory of the Normative Concretization of the Statute*

The theory of the normative concretization of the statute gives to the process of "application of law" (that is, legal deciding in concrete cases) the meaning of a historical event with definite coordinates of time and place. As such, what deciding decides—the legal decision as such—is a value synthesis when it creates the normative state of constituent elements out of normative materials and when, on the basis of the factual starting point, it shapes the legally-relevant state of facts that corresponds to the normative one. The relative creativity of the decision depends on the extent of ambiguity exhibited by the normative starting point and the life case. Within this scope, the legal decision *can* be creative; but it also can be obstructive and uncreative if it shapes normative and/or factual states that differ from "accepted" types and standards of conduct.

This area of human production of law is entered into directly by the theory of argumentation in law, which rejects legal decisionism as well as legal determinism. It rejects the former because decisionism overlooks the statute and claims the absolute significance of the life case; that is, because it views the legal decision as a pure act of will. It rejects the latter because determinism claims the absolute significance of the statute and neglects the significance of the life case as the factual starting point of deciding; that is, because it claims that the only right legal decision is something that is *completely* given in advance in the statute. The theory of the normative concretization of the statute (as one of the theories of argumentation) also accepts an "intermediate" solution: the legal decision consists neither in a pure application of the statute, nor in the applier's arbitrary will; rather, it is a rationally justifiable decision *in spite of* the greater or smaller openness of the statute and the life case as to their contents.[24]

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24. *See, e.g.*, MacCormick, *supra* note 16, at 265–74; Neumann, *supra* note 15, at 2–3; Pavčnik, *supra* note 15, at 7, 130.

To put it even more definitely, the starting point of the theory of argumentation is recognized legality and not a desire to extend the scope of the legal actor's possibilities. The theory of argumentation takes as its object the multihued shades of meaning present in legal deciding, and it offers legal decisionmakers a suitable methodology that enables them to give meaning to their actions. The concept of the normative concretization of the statute is not unique to the theory of argumentation,[25] but its unique ambition is to deal with legal criteria and arguments that can improve the legal determinability and predictability of the actions of legal decisionmakers.

IV. LEGAL-THEORETICAL CONSEQUENCES OF THE NORMATIVE CONCRETIZATION OF THE STATUTE

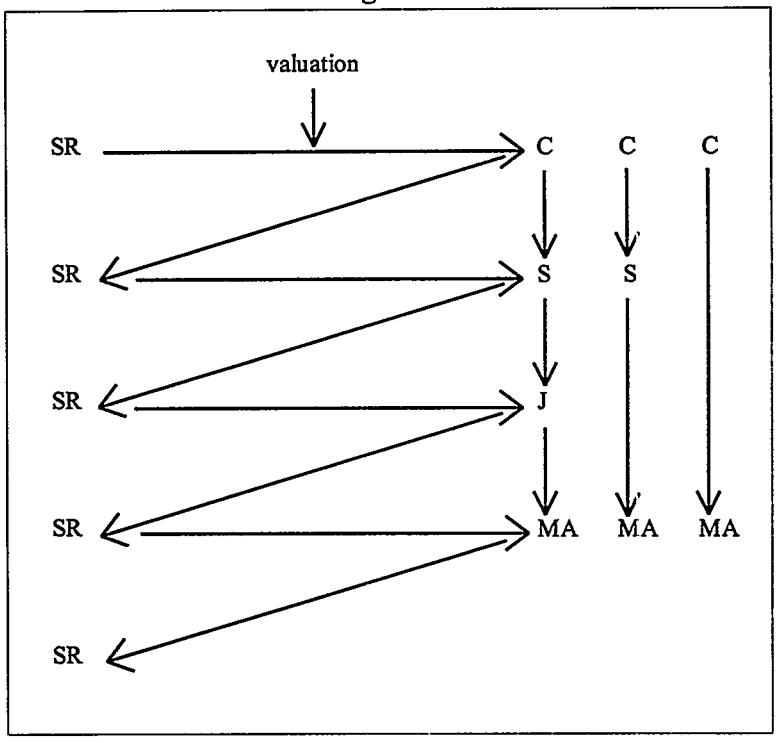
A. Normative Concretization of the Statute Instead of Law-Graduality

The theory of law-graduality is correct in recognizing that a lower legal stage represents a normative concretization of a higher one. Although the center of attention of the Merkl-Kelsen theory of law-graduality is the normative framework as such, the process of normative concretization of the statute involves the legal reality as a whole, of which the normative structure is only a part. Figure 2 represents legal reality as a dialectic between the social reality in which decisionmakers are embedded and the normative framework within which they find themselves in their capacity as *legal* decisionmakers.[26]

25. For an analogous use in international research, see Zenon Bankowski et al., *On Method and Methodology*, in *Interpreting Statutes: A Comparative Study* 9 (Neil MacCormick & Robert Summers eds., 1991). *See also* Robert S. Summers & Michele Tarufo, *Interpretation and Comparative Analysis*, in MacCormick & Summers, *supra*, at 461.

26. For a similar treatment, see Winkler, *supra* note 9, at 275 and Pavčnik, *supra* note 9, at 27.

Figure 2



Legend: SR=social reality; C=constitution (the constitutional legal norm that interpretation takes out of the constitution as a linguistic document); S=statute (more definitely, the statutory legal norm that interpretation takes out of the statute as a linguistic document); J=judgment; MA=material act (for example, repayment of the loan, payment of damages).

Figure 2 shows the sense in which the legal decision itself is never completely given in advance. What *are* given in advance are only the elements—in a more or less "raw" state—on the basis of which the decision in a concrete case is built. This means that the legal decision is neither the result of the statute, nor is it judge-made law; neither the simple product of a conflict of interests, nor the consequence of a conceptually smooth normative system; neither the outgrowth of the "case system," nor that of a normative approach; neither a manifestation of the method of "problem-solving," nor the outcome of systematic thinking. The legal decision is at bottom an evaluative *synthesis:* it values the particular conflict of interests immanent in the life case in light of the statute, and interprets the statute in light of the conflict of interests. This dialectical treatment is always problematic, yet at the same time is always inserted into the legal system. It leans either on

judicial precedents (characteristic cases) or on the usual rhetorical tools of the system, or on both of these, until at last the relevant factual state grows out of the life case and the normative state of facts grows out of the statute.

B. *The Significance of Individual and Historically Unrepeatable Life Cases*

The starting point of a lawyer's work is the life case—that which the lawyer must endow with legal meaning. For example, the starting point might be a case in which *A* slapped *B*'s face with a book, such that *B* fell to the ground. Which elements of this life case can be considered also elements of the legally-relevant state of facts will depend upon the circumstances of the slap, on its intensity, on the nature of the consequences to *B*, on the physical characteristics of the book, on the location of the slap, and so forth. For example, it may be especially controversial how to evaluate the slap (is it merely a light bodily injury or is it an "insult"?), or how to evaluate *A*'s use of the book (is it merely a harmless object or is it a dangerous instrument?). Moreover, what is included in the legal concept of "insult"? What are the legal dimensions of a "light bodily injury," as opposed to an "insult"? How is one to define the "dangerous instrument that may seriously injure the body"? And so forth.[27]

This means that the life case is only the factual starting point of legal deciding—one could say that it is the factual state *in statu nascendi*.[28] In social reality, life cases continuously occur, and no two of them are ever completely identical to one another. This is what it means to say that each life case is "open as to its meaning." As a historical event it is never self-evidently relevant, for by itself the life case is only a "shapeless factual state of affairs,"[29] from which the legal decisionmaker must extract the elements that constitute it *as* (in the form of) a legally-relevant state of facts.

Of course, many special questions are raised by fact-finding in legal practice, including those that cluster within the framework of norms known as the law of evidence, and even within the norms of legal

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27. *See, e.g.*, Slovn. Crim. Code arts. 133, 169, *reprinted in* 63 *Official Gazette of Slovenia* (1994).

28. "In the condition of being born." *See* Joachim Hruschka, *Die Konstitution des Rechtsfalles* 12 (1965).

29. Larenz, *supra* note 9, at 267.

equality and due process of law.[30] But the question of how facts are proved in court should not be confused with the observation that the life case as a historical event is the factual starting point for the legal decisionmaker. That is, the life case as a factual event is prior to the "facts of the case" in the legal sense, for the latter always gets formed as the relevant factual state *out of* the raw material of the life case.

C. *Interpretation as a Value (Re)construction of the Legal Norm*

It is a matter of convention whether every understanding of a statute is called an "interpretation," or whether this term is used only when the meaning of the linguistic signs of a statute are defined by means of a special interpretive procedure. It is more important whether the interpretation of the statute is taken to be just a "reconstruction of the thought inherent therein,"[31] which reconstruction is then "applied" to a concrete case. In the process of normative concretization, the legally-relevant type of conduct is determined in view of the already existing life case, which is unique and cannot be repeated. The uniqueness and unrepeatability—in a word, the *individuality*—of the life case confronts the types, moulds, and patterns of conduct that are communicated by the legislator by means of the statute. These latter descriptions are left deliberately open as to their contents. That is, in this context "openness with regard to meaning" does not signify a condition that is merely a consequence of a text that cannot avoid ambiguity; rather, the concept of openness as to meaning here names something that lies in the essence of modern law itself. A statute always equalizes anticipated cases by means of typical (and therefore abstract and general) elements, and therefore foresees as equal what in reality always occurs as a concrete and unrepeatable act. In a nutshell: modern law, at the level of the statute, is read to apply to an open set of *possible* life cases, and not to this or that *particular* life case. A statute that is not general and abstract in this sense is the antithesis of the modern conception of the "Rule of Law."

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30. It is an uncontroversial aspect of "equal protection" and "due process" of law that the legality of factual demonstration requires that both parties involved in the life case and interested in the solution of the dispute have, at least formally, the same possibilities when demonstrating what has happened. If one of the parties is either privileged or, on the other hand, barred from presenting evidence "confirming" his view of the life case, or reversing, amending, or supplementing the view of the opposing party, then it is possible to say that this is not a demonstration according to the principle of legal equality. *See generally* Twinning et al., *Reasoning on facts*, in 2 *Legal Reasoning* 419, 421–87 (Aulis Aarnio & Neil MacCormick eds., 1992); Hruschka, *supra* note 28; Wróblewski, *supra* note 16, at 131–88.

31. Friedrich Karl von Savigny, *System des heutigen Römischen Rechts* 213 (1840).

That is, it resides at the level of the arbitrary command—for example, the command that *this* man be executed, or that *this* woman be deprived of her property.

The opposite poles of life case and statute require a legal decision, a synthesis, in order to realize the concept of a statute that is *applied*; yet neither of them can be defined out of themselves, nor can they completely lean upon one other, because both of them are at least partly open as to their contents. Thus the interpretation of the statute is also a value construction, a final shaping of the "thought" that must lead to the legal decision.[32] The interpretive process no longer is seen to consist in just finding out the content—the sense and aim—of the legal norm that is contained in the statute completely and in advance. Now the legal norm is seen to be the result of the way in which the decisionmaker *understands* the statute, and of the interpretive procedure wherein the legal norm communicated by the legislator is (re)constructed.

Thus, in the context of the normative concretization of the statute, the term "statute" is not synonymous with law that can be repeated in light of the concrete case. In this context, the interpreter is the one who (1) "reconstructs" the possibilities contained in the statute; (2) articulates more precisely the contents of these possibilities; and (3) chooses the combination of possibilities that corresponds most closely to the legally-relevant features of the life case (which also must be interpreted). Thus the interpreter's productivity consists in recognizing a legal provision as referring to a *type* of conduct—for example, as recognizing that the statutory signs "exceeding the speed limit" refer to, inter alia, a type of behavior known as driving a car too fast through a town. The interpreter's choosing and valuing the type of conduct as such means that she connects it as the most appropriate type, with regard to its contents, vis-à-vis the characteristics of the concrete life case. Moreover, the decisionmaker has decided the case just *this* way, and this means that it is the decisionmaker, and not the "statutory text," who has excluded the possibility of any other legal solution.[33]

32. *See* Gustav Radbruch, *Einführung in die Rechtswissenschaft* 243 (9th rev. ed. 1958).

33. Continuing the example given in this paragraph, the decisionmaker's choice may exclude the possibility that driving too fast is justified by self-defense, as well as the possibility that it is excused by a state of emergency.

D. *Between the Normative Starting Point and the Factual Starting Point: The Significance of What Is Typical, Normal, and Average*

In summary, the theory of normative concretization of the statute holds that the normative state of facts and the relevant factual state are the products of a mutual valuation—of the normative starting point in view of the factual one, and of the factual starting point in view of the normative one. The important question that now emerges is how this dialectical path can be examined and provided with meaning. For example, are the normative and the factual starting points of deciding of equal importance? Is reasoning carried out via a typical norm (a paradigm case) that mediates and connects both levels? Is there present in the decisionmaker (consciously or unconsciously) a preconception or precomprehension that makes the connection of the normative and the factual possible? Does the nature of things as *tertium comparationis* show itself when and where the normative and the factual starting points correspond?[34] Is it enough to posit the possibility of decisionmaking based on equitable principles, or even a sense of justice, that would fill up the space between the premises? Does a conscious value synthesis necessarily accompany *every* legal decision? All of these questions overlap to a certain extent, and the differences between them sometimes depend more on the way they are emphasized than on their contents. The nuances among them are not unimportant, however: whether we take a particular legal decision to be the result of a mechanical "application of law," or to be the consequence of intellectually responsible lawyering, ultimately depends on these and kindred questions, and on the answers we give them.

This much is clear and binding: the connection between the normative state of facts and the relevant factual state in a concrete case is made by a real human being who makes a "value movement to-and-fro,"[35] as it

34. In conventional philosophical discourse, a "tertiary quality" is a property that depends on some other property. *See* A.R. Lacey, *A Dictionary of Philosophy* 41–42 (2d ed. 1976). The question in the text borrows this usage to ask whether the primary property of the normative and the factual states *corresponding* to one another brings forth some tertiary quality—for example, the "correctness" of the decision—that would then show itself to the rational mind. *See* Kaufmann, *supra* note 11, at 36.

35. *Cf.* Engisch, *supra* note 16, at 14–15 ("Für den Obersatz ist wesentlich was auf den konkreten Fall Bezug hat, am konkreten Fall ist wesentlich, was auf den Obersatz Bezug hat. Sieht man aber näher zu, so handelt es sich nur um eine ständige Wechselwirkung, ein *Hin- und Herwandern des Blickes* zwischen Obersatz und Lebenssachverhalt, nicht dagegen um einem fehlerhaften Zirkel.") (emphasis added) [Editor's translation: For the upper premise is essentially what concerns the concrete case, and for the concrete case is essentially what concerns the upper

were, between these two poles. This mutual valuation of the factual and normative states does not merely reproduce what has been done before, but also contains productive elements of its own. At the very least it is productive in recognizing the life case *as* a factual state and a group of legal provisions *as* the relevant normative state. As soon as they have been identified, they have also been connected to one another, and therefore the possibility of other legal connections has been excluded. But now an important new element emerges: although the choice of possibility in a particular case depends on a concrete human valuation of the life case and of the statute, within this framework the legal decision itself, as the *product* of the valuation, is generally qualified in its expression to correspond to what is considered typical, normal, and average by the audience of the statute.

It is the task of legal theory, legal dogmatics, and legal practice to make operative the "typical conduct" and the "typical cases" that serve as a connection between the two starting points of deciding. By this means legal decisionmaking acquires a solid basis in what is taken to be *average*—and this, in turn, serves as a precondition of the predictable and equal treatment of legal subjects. Yet this is not enough: even if typical cases and typical norms are very elaborate, their typicalness lies at a level of abstraction that is always more or less above the unrepeatable individuality of the life case. This is why it is always necessary to state the arguments justifying the decisionmaker's choice of the type of conduct to which the life case corresponds. Otherwise the typical case or some other similar "objective starting point" might be transparent as a criterion that binds no one, and that offers itself merely as a set of symbols that can be manipulated. In the absence of this insight, argumentative theory degenerates into a so-called "discursive technique," which is always blind if it is not based on an appropriate theoretical-legal starting point.[36] Likewise, any adequate theory of rational legal reasoning[37] must be based on certain prerequisites—for example, human dignity, basic rights and duties, the separation of powers, and the rule of law—the contents of which must have already become realized, or at least are immanent, in the world we live in.[38]

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premise. Examined more closely, this is actually a permanent exchange, a to-and-fro between views of the upper premise and of the life facts of the case, and is not a logically flawed circle].

36. Consider Kant's statement that thoughts without contents are empty, and insights without concepts are blind. *See* Immanuel Kant, *Kritik der reinen Vernunft*, in 3 *Immanuel Kant Werkausgabe* 98 (Wilhelm von Weischedel ed., 2d ed. 1990).

37. *Cf.* Alexy, *supra* note 16, at 361.

38. *See* Pavčnik, *supra* note 15, at 144.

E. The Significance of the So-Called "Legal Syllogism"

In light of what has already been said, the concept of the "legal syllogism" acquires a significance in the theory of argumentation that is different from the one it has in purely conceptual jurisprudence. The theory of argumentation strictly distinguishes between the starting points of deciding, the formation of both premises of syllogistic inference, the syllogistic conclusion itself, and the explanation stating legal reasons for the decision in a concrete case. Thus the "legal syllogism" is only a *stage* in the process of deciding—an important link, to be sure, but one that cannot replace the persuasiveness and justifiability of the legal decision as to its contents.

It is a separate question how legal deciding "really" takes place at a particular place and time, and how this or that particular decisionmaker arrives at the premises that logically entail the conclusion. All that can be recognized from the outside is the legal decision itself, together with the explanation that is offered to justify it. It is within this explanation that the syllogistic form is to be found, as the framework into which both premises must be placed. Of course, the modern conception of the Rule of Law requires that the major premise contain a general and abstract legal norm that in form deals equally and impartially with all relevant factual states—for example, all drivers of cars who go too fast in town, and not just *this* driver. Yet this is only a framework, and it remains to be filled up by the decisionmaker with legally persuasive arguments concerning the formation of the premises and their mutual connection. One might say that the syllogistic form "requests" the decisionmaker to act rationally—that is, to check whether the premises are legally persuasive (justified) and to state valid arguments justifying the decision.

F. Substantiation of the Legal Decision with Regard to Its Contents and Not Just Its Form

A majority standpoint within conventional European legal thought is that a decision is at least *formally* inside a "legal" framework if it is formed within both starting points: within the life case as the object of deciding, and within the formal legal sources (the statute) as the normative starting point.[39] One moves inside the contours of the life case

39. *See, e.g.*, Engisch, *supra* note 16; Hruschka, *supra* note 28; Joachim Hruschka, *Das Verstehen von Rechtstexten* (1972); Larenz, *supra* note 9, at 266–98; Müller, *supra* note 16, at 121; Wróblewski, *supra* note 16, at 11–22.

by defining the relevant factual state out of *it* and not out of something else—that is, by staying within the limits of what has happened. In judicial decisionmaking a special difficulty arises because it first has to be established what the real situation (in the sense of the life case) is, and what elements of it are being represented in court. It is a separate question how rules of procedure and evidence influence the establishment of the real situation, and how they set the pattern therefore in advance by predetermining the ways that the life case can permissibly become an object of demonstration. But quite apart from considerations of procedure and evidence, one goes beyond the limits of the life case if elements that are nowhere supported in reality are attributed to it, or if its scope is only established by making it correspond to the "expected" relevant factual state in the way that Procrustes made guests correspond to his infamous bed.

The contents of a legal decision can only be justified by stating persuasive arguments demonstrating how the factual and normative states have been determined as to their meaning within the legal framework, and how the legal consequence connected with the applied normative state has been concretized. An optimum legal decision is achieved when the factual state is subsumed under that normative state to which legally-relevant facts correspond most closely.[40] It lies in the nature of the legal phenomenon that this solution must be typical, normal, and average—typical in the sense of preformed *kinds* of conduct, or in the sense of imaginary types if the kinds of conduct themselves are unstable or only just emerging. The types must be suitable for the "universal" audience for which the formal legal source is intended, and not just for the audience that should be directly persuaded by the legal decision (for example, the parties). To put it in an even more definite manner: the typical audience of a formal legal source demands as its criterion of the decision's "correctness" that the decision would have been drawn up the same way by a rational legislator before whom stood an indefinite number of cases of the same kind.[41]

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40. *See* Furlan, *supra* note 11, at 46; Kaufmann, *supra* note 11, at 18.

41. This is the so-called "Huber's formula" in the Swiss Civil Code. Schweizerisches Zivilgesetzbuch [ZGB] art. 1 (1907) (Switz.) ("(1) Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach Wortlauf oder Auslegung eine Bestimmung enthält. (2) Kann dem Gezetze keine Vorschrift entnommen werden, so soll der Richter nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die er als Gesetzgeber aufstellen würde. (3) Er folgt dabei bewährter Lehre und Überlieferung.") [Editor's translation: (1) The Law finds application for all questions of law, for a determination is contained in the wording and interpretation. (2) If one cannot gather direction from the Law, then the judge shall take into account customary law, and, if this is unavailable, then decide on the rules, over which the judge is

V. FROM THE NORMATIVE AND FACTUAL STARTING POINTS TO THE LEGAL DECISION: ONE OR MORE POSSIBLE SOLUTIONS?

A. Neither "Hard" nor "Easy" Cases Exist

In many, even most, cases, legal deciding in concrete cases is not *felt* to be particularly difficult. The judge's or attorney's previous experience and knowledge of legal practice, theory, and law allow the decisionmaker to bring out the factual state relatively quickly, and then to subsume it under the appropriate normative state of constituent elements. Here the imputation of meaning to the starting points of legal deciding takes on the aspect of everyday routine. But it would be wrong and even dangerous to classify these cases as somehow "easy" at the level of the ontological. Even the simplest case can become a "hard" case if one of the elements of the legal decision changes. And vice versa, cases that were "hard" in the beginning become "easy" and "normal" when legal practice reacts to the challenge they present by forming a cluster of precedents, which then become firmly established and accepted as routine within the practice. A classic example is the problem that larceny of electricity presented to European legal practice at the beginning of this century. The problem centered around the definition of those objects (called "movables") the theft of which entailed criminal penalties under statutes that were enacted before the development of electricity as a technology. In German judicial practice, the accepted standpoint was that electricity did not belong to movables, and therefore the legislature needed to enact the basis for a new criminal offense ("larceny of electricity");[42] whereas in Dutch[43] and prewar Yugoslavian[44] judicial practice electricity was defined from the beginning as belonging to the category of movables, and hence the "larceny of electricity" was treated as just another case of the preexisting criminal offense of larceny.

One could say that one sign that a case is "hard" is the decisionmaker's felt need to refer in the decision to the *scope of meaning* of the normative state of constituent elements. As hallmarks of a "hard" case one sees, for example: teleological reduction via restrictive

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the established lawgiver. (3) The judge will follow established doctrine and traditions]. *See also* Slovn. Judicial Statute arts. 2, 3, *reprinted in* 19 *Official Gazette of Slovenia* (1994).

42. *See* Engisch, *supra* note 16, at 46.

43. *See* Perelman, *supra* note 3, at 60.

44. *See* Metod Dolenc, *Tolmač kazenskemu zakoniku kraljevine Jugoslavije* 471–72 (1929).

and extensive "interpretation," as well as the drawing of statutory "analogies" to the case at hand. Furthermore, there can be those cases that are "hard" because they refer to complex and composite life cases where it is felt to be difficult to establish what the legally-relevant group of facts is. And finally, concrete cases themselves may seem to be simple from one perspective, but as life cases they are always unique, individual, and unrepeatable; therefore a mere nuance can change the meaning that the case would have if this nuance were not present.[45] Thus, if cases that were once felt to be "hard" can become "easy" by means of the habituation of legal practice to precedent, "easy" cases can become "hard" again by a shift in perspective as to their facts.

B. The Legally Persuasive Decision Instead of the "Best" Decision

Although a "hard" case is not a fixed and immutable entity, it still raises the question whether it has only one right solution that the decisionmaker can find and substantiate as such. For example, it is the standpoint of the American legal philosopher Ronald Dworkin that a judge can construct *the* optimum solution of a case even in the absence of an express legal norm that would make the case "easy" to decide. For Dworkin, the judge's duty is to establish the rights of the parties as they existed before the dispute and then to make a decision that is wholly based on the rights thus established. To put it even more clearly, the judge has no discretion to define a legal norm *ex post facto* and thereby to define the rights of the parties themselves retroactively.[46] Dworkin strongly opposes the latter possibility, and summons the ideal judge Hercules to help him solve the dispute. Hercules' task is to discover the rights of the parties and not to create new rights. As the title of Dworkin's book says, for him it is a question of taking rights seriously.[47]

Of course, one reason Dworkin's theory is controversial is its value starting point: the antiutilitarian liberal conception of human rights, which takes rights as being prior to, and severed from, any criterion of social duties or social welfare. But in the context of argumentation theory, his assertion that even in a "hard" case it is possible to find one

45. For example, a testator might personally sign the will, but use a pseudonym, or just his initials, or he might sign at the top of the first page instead of at the end of the will, or his hand might be guided by somebody else. *See* H.L.A. Hart, *The Concept of Law* 12–13 (2d ed. 1994). Or consider a larceny that was committed at night (an exacerbating circumstance in Belgian criminal law), yet in a well-lit casino. Perelman, *supra* note 3, at 53.

46. Ronald Dworkin, *Taking Rights Seriously* 81 (5th ed. 1987).

47. *See id.* at 105–10.

and only one correct solution (the "right-answer thesis") is even more controversial. As should be evident from the path that this essay has already followed, Dworkin's provocative standpoint cannot be accepted. The right-answer thesis could only be accepted under the condition that there was available to the decisionmaker a hierarchically-organized catalogue of metarules that gave criteria for deciding (1) which interpretation of the statute is the best and only acceptable one; (2) which legally-relevant state of facts is the most typical expression of the life case; and (3) which factual and normative states show the closest correspondence. But this condition does not hold in the societies to which Dworkin addresses his theory. Western societies are varied and pluralistic as to their values, and whatever overall "systems" of values they do have are not at all watertight. There exists in them no "proto-norm," no *deus ex machina* who could, even hypothetically, cut the Gordian knot of every life case and give to each one its single best solution.[48]

Nevertheless, serious and sincere efforts to articulate theories that have as their goal the "ideal" or the "best solution" to legal problems should be welcome to anyone who, like the author, regards legal decisionmaking as a responsible intellectual activity. Such efforts include, for example, theoretical constructs like the ideal speaking situation (*ideale Sprechsituation*),[49] the "universal audience" to whom a solution is to be presented and who has to be persuaded of its legal rightness,[50] and even Dworkin's ideal judge Hercules,[51] who removes all possible obstacles, clears up the situation, and puts everything in its rightful place. In the lecture hall, in the chambers of a court, or when one is grappling with a legal problem on one's own, such methods can be great value as modes of work. Through them the decisionmaker can be forced to confront the normative *possibilities*, to find out in the most accurate way what "really happened," to listen with an open mind to counterarguments as the decisionmaker moves back and forth between

48. For persuasive criticisms of Dworkin on this score, see Aarnio, *supra* note 16, at 161–65, and Claudia Bittner, *Recht als interpretive Praxis: Zu Ronald Dworkins allgemeiner Theorie des Rechts* 215 (1988).

49. *See* Jürgen Habermas, *Vorstudien und Erganzungen zur Theorie des Kommunikativen Handelns* 174 (1st ed. 1984).

50. *See* Chaïm Perelman & Lucie Olbrechts-Tyteca, *Traité de l'argumentation: La nouvelle rhétorique* 40–41 (3d ed. 1979); *cf.* Pavčnik, *supra* note 15, at 139–41.

51. Dworkin, *supra* note 46, at 105 ("[A] lawyer of superhuman skill, learning, patience and acumen.").

the levels of the factual and the normative, and to express arguments justifying why one solution was chosen rather than others.

C. *What the Theory of Argumentation Can Contribute*

A theory of argumentation is sensible only if it is continuously examined and reexamined. It can only be productive if it is aware that legal decisionmaking is conditioned by history and implanted in a particular cultural milieu, and therefore that both starting points of deciding—the normative and the factual—are open as to their meaning. A theory that is not aware of these limitations overlooks the fact that every legal solution is also a *decision* by somebody, and that as a decision it always entails a choice between two or more possibilities, performances, or shades of meaning. In this sense, the decision can never be *just* the realization or the establishment of a completely preexisting solution. If someone does claim to have knowledge of such a solution, this claim is but a precursor to the imposition of a particular, and therefore contingent, system of values masquerading as objectively absolute.[52] Historical experience in Europe and elsewhere has proven that the generalized tendency to impose such value systems does not have much in common with human rights and human dignity.

The goal of the theory of argumentation cannot and should not be as "high" as providing a foundation for a scheme of univocal solutions to legal problems. It is not the task of the theory of argumentation to create or even improve a system of values that would make possible univocal deciding. On the contrary, argumentation theory describes legal decisionmaking as a historical phenomenon, as a going-on in the here and now—as legal deciding with fully-defined coordinates of time and place. It can only bring to decisionmakers a vision of the nature and structure of legal deciding, of the elements of which a legal decision consists, and of the merely possible legal arguments that define the context of legal deciding. It does not lie within its legitimate power to offer answers to questions in particular life cases that have occurred or will occur; but it *does* offer criteria for saying that a legal decision will be more legally persuasive the more coherent are the connection between the arguments on which it is based. On the other hand, the theory of argumentation is also flexible enough to see that sometimes the "best" decision in a case (for example, at the "borderline," where the decisionmaker confronts two or more contradictory solutions) will not

52. *See* Aarnio, *supra* note 16, at 165.

consist of an ordered series of arguments at all. In such a case, the main emphasis will be put on the so-called "decisive" argument that breaks new ground—for example, the decision may give the grounds for damages for an altogether new kind of immaterial loss, and its degree of decisiveness will depend on prevailing social trends, attitudes, and beliefs. If such a decision lies within the legal framework that makes it possible, and is at the same time in accordance with the *range* of values (taking into account all variations and conflicts) that are accepted in society, its persuasive power will be substantially greater than if it were based on a predetermined and detailed system of values that falsely offers itself as uncontroversial and absolute.

VI. LEGAL DECISIONMAKING AS A RESPONSIBLE INTELLECTUAL ACTIVITY

The most important contribution that the theory of argumentation makes is its awareness of the *complexity* of the legal decisionmaking process. One might say that the theory of argumentation is humble before its object. This means that even the most elaborate theory of argumentation cannot give an instant recipe to the decisionmaker for dealing with the questions that arise in the act of deciding itself. How the normative and factual states should be formed, when they should be held to correspond, and what legal consequences can be derived therefrom: in the last analysis, these questions can only be validly answered by the author of the concrete legal decision itself—by the judge, the attorney, the prosecutor, etcetera. These people are the ones who must work to find the right decision and to substantiate that decision in such manner that the audience of the statute or some other legal source (and not just the immediate audience of the legal decision) can accept the decision as legally well-founded and also as just within the limits of legal order. From the perspective of the theory of argumentation, legal decisionmaking can no longer "hide" behind a statute that justifies it in an "incontestable," "irrefutable," and "universal" manner. Now the legal decision emerges as a productive act in itself—one that sees itself as required to explain how the inference between the normative and the factual starting points was made, how the normative and the factual states have been formed, why they have been connected in just this way, and why the legal consequence has been derived in the way that it has. The factual starting point of deciding can be of any kind. The normative starting point of deciding can be of any kind. But the *connecting* of the one to the other, and the legal decision itself, are always responsible human acts, ones that create law in the fullest sense of the word.