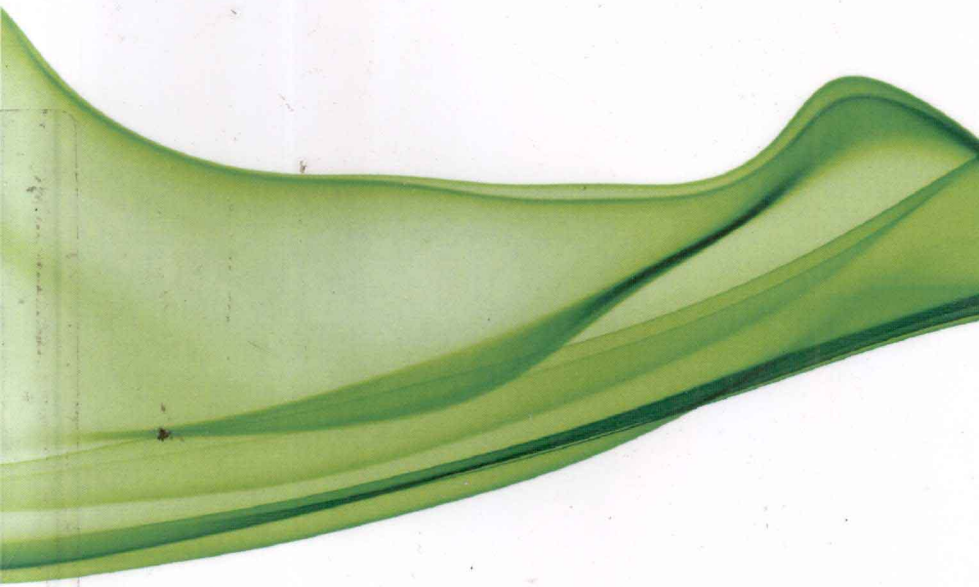
ROBERT ALEXY

A Theory of Legal Argumentation

The Theory of Rational Discourse as Theory of Legal Justification



OXFORD

A Theory of Legal Argumentation

The Theory of Rational Discourse as Theory of Legal Justification

ROBERT ALEXY

Translated by

Ruth Adler and Neil MacCormick

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide in

Oxford New York

Auckland Cape Town Dar es Salaam Hong Kong Karachi Kuala Lumpur Madrid Melbourne Mexico City Nairobi New Delhi Shanghai Taipei Toronto

With offices in

Argentina Austria Brazil Chile Czech Republic France Greece Guatemala Hungary Italy Japan South Korea Poland Portugal Singapore Switzerland Thailand Turkey Ukraine Vietnam

Oxford is a trade mark of Oxford University Press

First published 1989
First published in paperback 2010

British Library Cataloguing in Publication Data
Data applied for
Library of Congress Cataloging in Publication Data
Alexy, Robert.
[Theorie der juristischen Argumentation. English]
A theory of legal argumentation: the theory of rational discourse as theory of legal justification / Robert Alexy; translated by Ruth Adler and Neil MacCormick.
Translation of: Theorie der juristischen Argumentation.
Originally presented as the author's thesis (doctoral)—Georg -August University of Göttingen, 1976.
Bibliography Includes indexes.
1. Law—Methodology. 2. Semantics (Law) 3. Judgments.
I. Title.
K213.A4313 1989 340'.1—dc19 88–21866
ISBN 978–0–19–825503–1
ISBN 978–0–19–958422–2 (pbk.)

Printed in Great Britain
on acid-free paper by
MPG-Books Ltd., Bodmin and King's Lynn

Preface

In a leading decision of 14 February 1973 on decisions contrary to statute, the first panel of the German Federal Constitutional Court declared that all judicial rulings must 'be founded on rational argumentation'.[1] This demand for rationality in argument can be extended to any situation in which lawyers engage in debate. So questions about the nature of rational argumentation in general and rational legal argumentation in particular are not only of interest to legal theorists and philosophers of law. They are pressing issues for practising lawyers and a matter of concern for every citizen active in the public arena. Not only the standing of academic law as a scientific discipline, but also the legitimacy of judicial decisions depends on the possibility of rational legal argumentation.

The question of what is to be understood by 'rational legal argumentation', of whether and to what extent it is possible, is the subject-matter of this investigation. The subtitle: 'The Theory of Rational Discourse as Theory of Legal Justification' indicates how these questions are to be tackled. The answer proceeds in two stages. Parts A and B of the book attempt to work out a general theory of practical reasoning, whilst Part C applies this theory to legal argumentation. That the first two parts occupy considerably more space than the third is a reflection of the present objective to lay a foundation for a theory of legal argumentation. A further development of this theory is not only possible but also desirable. If this investigation succeeds in its aim, it will have laid the corner-stone for such future work.

The manuscript of this book was presented as a thesis in the Faculty of Law of the Georg-August University of Göttingen in 1976. The work would not have come to fruition without support from many quarters. I should particularly like to single out Professor Ralf Dreier from all those who helped along the way. It was he who first gave me many of my ideas during the course of countless discussions. My thanks also to Professor Malte Dießelhorst whose criticism saved me from several errors.

[1] *BVerfGE* (Decisions of the Federal Constitutional Court) 34,269 (287).

I should also like to record particular thanks at this point to my philosophy teacher Professor Günther Patzig. It would give me particular pleasure if his approach to philosophy were recognizable in the method of this investigation. Finally thanks are due to the *Studienstiftung des deutschen Volkes* which gave both intellectual and financial support throughout many years.

R. A.

Göttingen
January 1978

Preface To The English Edition

This book was first published in German in 1978. It is a great source of pleasure to me that it is now appearing in English. I should like to express special thanks to the translators, Ruth Adler and Neil MacCormick. They gave me their manuscript to read before it went to the printers, and I was very gratified to find that they had captured my meaning entirely, even in those places where differences in the two languages precluded a literal translation. I believe that the book has been improved by their work. I also owe many thanks to William Twining who initially supported the idea of a revival of translations of contemporary scholarly work in legal theory. Finally, I must express my gratitude to the editorial staff of Oxford University Press for the care they took in seeing the manuscript through the Press, and in particular for their detailed help with the bibliography.

R. A.

Kiel
September 1988

List of Logical Symbols used in the Text

$\neg$ = not (negation)

$\wedge$ = and (conjunction)

$\vee$ = or (disjunction)

$\rightarrow$ = if . . . then . . . (conditional)

$\leftrightarrow$ = if and only if . . . then . . . (biconditional)

(x) = for all x (universal quantifier)

O = it is obligatory that . . . (deontic operator)

Contents

List of Logical Symbols used in the Text xv

INTRODUCTION

1. The Problem of the Justification of Legal Decisions 1
2. The Fundamental Ideas of this Enquiry 14
3. Topic Theory and its Limits 20
4. Towards Assessing whether Contemporary Methodological Discussions Reveal a Need for a Theory of Rational Legal Argumentation 24

A. REFLECTIONS ON SOME THEORIES OF PRACTICAL DISCOURSE

I. Practical Discourse in Analytic Moral Philosophy 33

1. Naturalism and Intuitionism 34
   1.1. Naturalism 34
   1.2. Intuitionism 37
2. Emotivism 39
3. Practical Discourse as a Rule-Governed Activity 47
   3.1. The Foundations in Linguistic Philosophy: Wittgenstein and Austin 47
   3.2. Hare's Theory 58
   3.3. Toulmin's Theory 79
   3.4. Baier's Theory 93
4. Some Interim Results 99

II. Habermas's Consensus Theory of Truth 101

1. Habermas's Critique of the Correspondence Theory of Truth 101
2. Combining Speech Act Theory and a Theory of Truth 104
3. Distinguishing between Action and Discourse 105
4. The Justification of Normative Statements 107
5. The Logic of Discourse 111
6. The Ideal Speech Situation 119
7. Critical Discussion of Habermas's Theory 124

III. The Theory of Practical Deliberation of the Erlangen School 138

1. The Programme of the Constructive Method 138
2. The Presupposed Purpose of Constructivist Ethics 140
3. The Principles of Constructivist Ethics 142
4. The Critical Genesis of Norms 149
5. Points to Remember 153

IV. Chaim Perelman's Theory of Argumentation 155

1. The Theory of Argumentation as a Logical Theory (In the Wider Sense) 156
2. Argumentation as a Function of Audience 157
3. Demonstration and Argumentation 158
4. The Concept of the Universal Audience 160
5. Persuading and Convincing 164
6. Perelman's Analysis of the Structure of Argumentation 164
7. The Rationality of Argumentation 169
8. Points to Remember 173

B. OUTLINE OF A THEORY OF GENERAL RATIONAL PRACTICAL DISCOURSE

1. The Problem of the Justification of Normative Statements 177
2. Possible Theories of Discourse 180
3. The Justification of Rules of Discourse 180
4. The Rules and Forms of General Practical Discourse 187
   4.1. The Basic Rules 188
   4.2. The Rationality Rules 191
   4.3. Rules for Allocating the Burden of Argument 195
   4.4. The Argument Forms 197
   4.5. The Justification Rules 202
   4.6. The Transition Rules 206
5. The Limits of General Practical Discourse 206

C. A THEORY OF LEGAL ARGUMENTATION

I. Legal Discourse as a Special Case of General Practical Discourse 211

1. Types of Legal Discussion 211
2. The Special Case Thesis 212
3. Transition to a Theory of Legal Argumentation 220

II. The Outline of a Theory of Legal Argumentation 221

1. Internal Justification 221
2. External Justification 230
   2.1. The Six Groups of Rules and Forms of External Justification 231
   2.2. Empirical Reasoning 232
   2.3. The Canons of Interpretation 234
   2.4. Dogmatic Reasoning 250
   2.5. The Use of Precedent 274
   2.6. The Application of Special Legal Argument Forms 279
   2.7. The Role of General Practical Arguments in Legal Discourse 284

III. Legal and General Practical Discourse 287

1. The Need for Legal Discourse in View of the Nature of General Practical Discourse 287
2. The Partial Correspondence in the Claim to Correctness 289
3. The Structural Correspondence between the Rules and Forms of Legal Discourse and those of General Practical Discourse 289
4. The Need for General Practical Arguments in the Framework of Legal Reasoning 291
5. The Limits and Necessity of the Theory of Rational Legal Discourse 292

Appendix 297

Bibliography 303

Index 317

Introduction

1. THE PROBLEM OF THE JUSTIFICATION OF LEGAL DECISIONS

'It can ... no longer be seriously maintained that the application of laws involves *no more* than a logical subsumption under abstractly formulated major premises'.[1] This observation by Karl Larenz marks one of the few points of agreement in contemporary discussions of legal methodology. In many cases the singular normative statement which expresses a judgment resolving a legal dispute is not a logical conclusion[2] derived from formulations of legal norms presupposed valid[3] taken together with statements of fact which are assumed or proven to be true. There are at least four reasons for this: (1) the vagueness of legal language,[4] (2) the possibility of conflict between norms,[5] (3) the fact that there are cases requiring a legal statement which do not fall under any existing valid norm,[6] and finally (4) the possibility, in special cases, of a decision which is contrary to the wording of a statute.[7]

[1] K. Larenz, *Methodenlehre der Rechtswissenschaft*, 3rd edn. (Berlin, Heidelberg and New York, 1975), 154.

[2] On the concept of logical conclusion cf. A. Tarski, 'On the Concept of Logical Consequence', in his *Logic, Semantics, Metamathematics* (Oxford, 1956), 409 ff. On the possibility of relations of inference between normative propositions cf. below, pp. 188–9.

[3] What is to count as 'a legal norm presupposed valid' may remain an open question here. The claim made in the text also holds good where further sources of law such as precedent are recognized in addition to legislation and custom.

[4] Cf. H. L. A. Hart, *The Concept of Law* (Oxford, 1961), 121 ff. and id., 'Positivism and the Separation of Law and Morals', *Harvard Law Review*, 71 (1958), 606 ff.

[5] H. Kelsen, *Pure Theory of Law*, trans. M. Knight (Berkeley, Calif. 1967), 205–8.

[6] Cf. Larenz, *Methodenlehre*, pp. 354 ff.

[7] It is not only possible that this enumeration may be incomplete; one might also be of the view that it contains too many reasons. Thus on the one hand (3) and (4) are missing from the reasons cited by Kelsen for the 'indefiniteness of

A legal judgment J, which follows logically from formulations of legal norms N_1, N_2 ... N_n whose validity has to be presupposed together with empirical statements A_1, A_2 ... A_n, can be described as *justifiable* in terms of N_1, N_2 ... N_n together with A_1, A_2 ... A_n. However, if there are judgments which do not follow logically from N_1, N_2 ... N_n together with A_1, A_2 ... A_n, the question arises of how such judgments can be justified. This problem is the fundamental problem for legal methodology.

The theory of legal methodology could solve the problem of how fully to justify a legal judgment if it were able to provide rules or procedures according to which it could be shown either that the transition from N_1, N_2 ... N_n and A_1, A_2 ... A_n to J is permissible (even where J does not follow logically from N_1, N_2 ... N_n and A_1, A_2 ... A_n) or that in addition to the presupposedly valid norms and the proven empirical statements, further propositions with a normative content N'_1, N'_2 ... N'_n can be adduced such that J follows logically from N_1, N_2 ... N_n together with N'_1, N'_2 ... N'_n and A_1, A_2 ... A_n.

The most widely discussed candidates for the role of rules or

the law-applying act', while on the other, he cites the discrepancy between the will and the expression of the norm-stipulating authority as a reason (5) in addition to (1) and (2) (Kelsen, *Pure Theory of Law*, p. 350 and 'Zur Theorie der Interpretation', in *Die Wiener rechtstheoretische Schule* . . ., ed. H. Klecatsky, R. Marcic, and H. Schambeck (Vienna, Frankfurt, Zurich, Salzburg, and Munich, 1968), ii. 1365). (5) may be regarded as a reason for (4) or (1). What is problematic is whether and to what extent decisions classified under (3) and (4) are constitutionally admissible. In both instances the judge assumes a role in an area which, according to the principle of the separation of powers, would seem to be the province of the legislature. However, this problem cannot be discussed here. It will only be pointed out that there are cases of (3) (indirect breach of contract) and (4) (compensation for non-physical injury (*BGB*, para. 253)) in which the creation of new legal norms through legal judgments and the non-application of legal norms, has been generally recognized or held to be in accordance with the constitution by virtue of a declaration of the Federal Constitutional Court (*BVerfGE* 34, 269 (286–7)). The subject-matter of this book is not the question of the constitutionality of decisions falling under (3) and (4), but rather that of whether such decisions in their turn can also be rationally justified within the framework of legal methodology. However, an answer to this question should also be of significance in addressing the problem of their constitutional admissibility.

procedures to take on this task are the so-called 'canons of interpretation'.

Even the number of these canons remains in dispute. Savigny, for instance, distinguished the grammatical, the logical, the historical, and the systematic elements of interpretation.[8] According to Larenz there are five criteria of sound interpretation: the literal meaning of the statute; its contextual meaning; the regulatory purposes, aims, and normative intentions of the historical legislator; objective-teleological criteria; and finally conformity of interpretation to the constitution.[9] To cite a further example, Wolff recognizes philological, logical, systematic, historical, comparative, genetic, and teleological interpretations.[10]

More significant than the problem of the *number* of canons is the question of their rank order. Different canons may lead to quite different results. In the light of this fact, they would only be capable of yielding a single correct answer by way of a well-grounded result if it were possible to articulate strict criteria for ranking them. No one has as yet succeeded in doing this.[11] A further difficulty is the indeterminacy[12] of the canons of

[8] F. C. von Savigny, *System des heutigen Römischen Rechts*, vol. i (Berlin, 1840), 212 ff.

[9] Larenz, *Methodenlehre*, pp. 307 ff.

[10] H. J. Wolff and O. Bachof, *Verwaltungsrecht*, 9th edn. (Munich, 1974), vol. i, para. 28. III. c. (The paragraph number refers to Wolff's section of the textbook.)

[11] Cf. M. Kriele, *Theorie der Rechtsgewinnung*, 2nd edn. (Berlin, 1976), 85 ff.; J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung*, 2nd edn. (Frankfurt-on-Main, 1972), 124 ff. Larenz, who makes an attempt at a rank ordering, also observes that 'there exists no definite ranking between them' (*Methodenlehre*, p. 334). The difficulty of justifying a rank order is closely related to the difficulties of determining the goal of interpretation. A decision about the goal of interpretation presupposes a theory regarding the function of adjudication, and this in its turn presupposes an answer to the question whether and to what extent rational legal argumentation is possible. In this regard Engisch is to be supported in his view that it requires 'a more penetrating perspective to assign to each method of interpretation its relative validity and its particular logical setting' (K. Engisch, *Einführung in das juristische Denken*, 5th edn. (Stuttgart, Berlin, Cologne, and Mainz, 1971), 84. The theory of legal reasoning proposed here constitutes an attempt to discover such 'more penetrating perspectives'.

[12] Cf. Kriele, *Theorie der Rechtsgewinnung*, p. 86.

interpretation. A rule such as: 'Interpret every norm so that it achieves its purpose' leads to divergent outcomes when each of two interpreters has a different view as to the purpose of the norm in question.'[13]

The weakness of the canons of interpretation indicated above does not mean that they should be dismissed out of hand. But it does exclude the possibility of considering them as sufficient in themselves as rules for constructing justifications of legal judgments.

One might give up the search for a *system of justificatory rules* and try instead to establish a *system of propositions* from which the missing normative premises necessary for the purposes of justification could be deduced. Justification in terms of such a system would be conclusive whenever the system consisted solely of propositions derivable from the set of presupposedly valid norms. In such a case, however, the system would not contain any regulations which went beyond the presupposedly valid set of norms.'[14]

On the other hand, if, like Canaris for example, one understands by such a system, a system of the general principles of legal order (an 'axiological-teleological' system)[15] the question immediately arises as to how such principles are to be established. They do not follow logically from the presupposed norms. The application of such principles for the justification of legal judgments is also problematic.

The principles allow of exceptions and may be mutually inconsistent and even contradictory; they do not claim to have all-or-nothing applicability; their real meaning only unfolds through a two-way process of adjustment and limitation; and for their actual implementation, they require concretization via subordinate prin-

[13] In light of the uncertainty of the canons, it is open to doubt whether they are to count as rules at all. Thus Müller sees them as 'short-hand descriptions for certain ways of proceeding in an investigation' and Rottleuthner as instructions 'to ask for standards of relevance' (F. Müller, *Juristische Methodik*, 2nd edn. (Berlin, 1976), 167; H. Rottleuthner, *Richterliches Handeln* ... (Frankfurt-on-Main, 1973), 30). The question of the logical status of the canons is discussed in more detail below. See pp. 244–5.

[14] Cf. Kriele, *Theorie der Rechtsgewinnung*, p. 98.

[15] C.-W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz* (Berlin, 1969), 46 ff.

ciples and *particular value-judgments* with an independent material content.[16]

The axiological-teleological system is not such as to yield any unique decision about the proper weighing and balancing of legal principles in a given case or about which particular values should be given priority in any particular situation.[17]

This does not mean to say that it is impossible to base arguments on a system of values and goals, that is to argue from an axiological-teleological system, or on some other system. Arguments from systems, however these systems are characterized, play a significant part both in the practice of the courts and in the field of legal science.[18] However, it does make it quite clear that this type of argumentation is never entirely conclusive.

1.1 Suppose that there are situations in which the decision of an individual case does not follow logically from either empirical statements taken together with presupposed norms or strictly grounded propositions of some system however conceived, and also that such decisions cannot be completely justified by reference to rules of legal method. In such cases it must follow that the decision-maker has discretion inasmuch as the case is not fully governed by legal norms, rules of legal method, and doctrines of legal dogmatics. Accordingly there is a choice to be made between competing solutions.

It is this choice on the part of the decision-maker which

[16] Ibid., 52–3 (my italics). Cf. Larenz, who notes that 'at each stage of concretization, additional value judgments [are] needed, which must be taken on first by the legislature and only subsequently, within the framework of any remaining scope for judicial discretion, by the judge' (Larenz, *Methodenlehre*, p. 462).

[17] In view of this state of affairs, Wieacker considers whether it might not 'perhaps after all be better to abandon any postulated system of (relatively) closed deductive relations' (F. Wieacker's review of Canaris, *Systemdenken und Systembegriff*, *Rechtstheorie*, 1 (1970), 112). Cf. further Esser, *Vorverständnis und Methodenwahl*, p. 100, where he writes of the 'multiple valency of the evaluative content of a principle' and observes: 'It is not the principles which act but rather the person who has to determine the law. The correct relation cannot be "extracted from" the system without examining the problems of conflict.'

[18] For a number of examples which stress precisely this point cf. U. Diederichsen, 'Topisches und systematisches Denken in der Jurisprudenz', *NJW* 19 (1966), 698 ff.

determines which singular normative proposition is to be asserted (as the conclusion of a piece of legal research, for example) or to be pronounced by way of a judgment in a case. The content of such a singular normative statement is an assertion or determination of that which is required of, forbidden to, or permitted for certain individuals.[19] Hence the decision, regardless of the question at which level of justification it is reached, is a decision about what ought to or may be done or not done. In this decision a state of affairs or an action or type of behaviour on the part of one or more persons is given preference over other states or actions or kinds of behaviour on the part of these persons. Giving preference in this way involves a judgment that the chosen option is in some sense the better one, and to this extent there is a 'value-judgment'[20] as the basis of[21] the decision. Almost all contemporary methodological discussions emphasize the fact that law cannot dispense with such value-judgments.

[19] It is not being asserted here that all legal judgments directly express commands, prohibitions, or permissions. This is not the case in respect of judgments altering legal relations, for example. The weaker thesis that all judgments are reducible to basic forms which contain only those normative expressions which are basic deontic operators such as 'commanded' 'forbidden', and 'permitted', will not be put forward here, although there are arguments in favour of it. Here it will suffice to say that legal judgments at least imply commands, prohibitions, or permissions. Regarding this problem area, cf. W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', in his *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, ed. W. W. Cook (New Haven, Conn., 1923), 23 ff. and, in particular, A. Ross, *Directives and Norms* (London, 1968), 106 ff.

[20] On the concepts of 'giving preference', 'choice', and 'better' cf. G. H. von Wright, *The Logic of Preference* (Edinburgh, 1963), 13 ff. The expression 'value-judgment' can be used to designate either the actual giving of preference or the judgment that a particular alternative is the better one, or the rule of preference underlying this judgment (and thereby the preference). Concerning this last cf. A. Podlech, 'Wertungen und Werte im Recht', *AöR* 95 (1970), 195–6. Many use the expression to mean all these and more at the same time. Since there is no need for greater precision for present purposes, it will be omitted.

[21] Cf. Wieacker, 'Zur Topikdiskussion in der zeitgenössischen deutschen Rechtswissenschaft' in *Xenion*, Festschrift for P. J. Zepos, ed. E. von Caemmerer, J. H. Kaiser, G. Kegel, W. Müller-Freienfels, and H. J. Wolff (Athens, 1973), 407: 'Outwith the core of the law which is amenable to subsumption and particularly in the realm of making new law . . . all problems concerning the application of law . . . can be formulated as decisions between alternative value-judgements.'

Thus Larenz speaks of the 'insight that the application of law is not exhausted by a process of subsumption, but rather requires a wide range of value-judgments on the part of those applying the law.'[22] Müller is of the opinion that 'law devoid of decisions and value-judgments ... [would be] neither practical nor realistic'.[23] Esser observes that 'in all but the least problematic decisions ... value-judgments [are of] central significance'.[24] Kriele comes to the conclusion that one 'cannot by any means escape from evaluative, normative-teleological, and political elements inherent in every interpretation',[25] and Engisch is forced to recognize that

> even today, statutes, in all branches of the law, [are] constructed in such a way that both judges and administrators do not make and justify their decisions purely by subsumption under fixed legal concepts whose content will be revealed unambiguously through interpretation, but are rather called upon to judge independently and from time to time to decide and decree in the manner of legislators.[26]

The problem has been identified rather than resolved by the above observations. The question is where and to what extent value-judgments are required, how the relationship between these value-judgments and the methods of legal interpretation as well as the propositions and concepts of legal dogmatics are to be determined, and how these value-judgments can be rationally grounded or justified.

Finding answers to these questions is of great theoretical and practical significance. At the very least, the scientific status of jurisprudence is dependent on the answers we give. In addition, our answers will have considerable bearing on the problem of the legitimacy of regulating social conflicts by judicial decisions. For if it is the case that judicial rulings are based on value-judgments, and if these value-judgments cannot be rationally grounded, then at least in a large number of cases it is the *de facto*, extant, normative convictions or decisions of a professional body[27] which form the basis for such

[22] Larenz, *Methodenlehre*, p. 150.
[23] Müller, *Juristische Methodik*, p. 134.
[24] Esser, *Vorverständnis und Methodenwahl*, p. 9.
[25] Kriele, *Theorie der Rechtsgewinnung*, p. 96.
[26] Engisch, *Einführung in das juristische Denken*, p. 107.
[27] This holds true at least for courts presided over by professional judges.