Aleksander Peczenik

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On Law and Reason

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associated with Ronald Dworkin. Dworkin represents a weak version of this doctrine: he claims that there is always one right solution, but not that it is always found. An ideal judge ("Hercules J" in Dworkin's terminology), who fulfils the highest standards of impartiality, has full information and knows all the rules of interpretation, can find this one right solution.

Aleksander Peczenik criticises such theoretical models. Throughout his entire long career in legal science, Peczenik has sought to formulate a legal theory that, without fundamental or practical weaknesses, would recognise that a legal norm can be interpreted in more than one way. To this end he has developed the concept of "deep justification" by asking under what circumstances legal interpretation can be justified. This question, again, concerns the place of valuations in the interpretative process.

Peczenik has the same point of departure as Wróblewski. In many ways, valuations are built in into legal justification. But why does this insight justify a criticism of the doctrine of the one right solution? The reason is a simple one. If we accept the theory of objective values, then Dworkin's line of thought is acceptable. In such a case, Hercules J is capable of discovering these values. He can possess knowledge about objective values. Peczenik, however, is a value relativist. He denies that there are objective values. To be sure, he writes about "good-making facts", but these merely tell us what is *prima-facie* valuable. A definitive, all-things-considered, value cannot be derived from empirical facts. Different valuations can compete in society, and it is impossible to demonstrate that any one of these is false.

Since values are an integral part of legal interpretation, and often play a key role in interpretative activity, it is natural to reject the doctrine of the one right solution. A certain interpretation I1 can be based on certain valuations, whole another interpretation can be based on another set of valuations. In such cases legal "truth" is relative in respect of the background valuations. Does this mean that, ultimately, legal interpretation is arbitrary? Are there as many interpretations as there are interpreters of the law?

11. Before we discuss this problem, it is necessary to define our terms more precisely. The difference between various interpretations can in practice often be explained by factors other than valuations. The person interpreting the law can have insufficient knowledge about sources of law, and he may perhaps be careless in his use of interpretative rules. It may also happen that his terminology is unclear, vague or ambiguous. But such random elements have been eliminated from Peczenik's model, since the person interpreting the law is assumed to be reasonable. On the other hand, it is important to emphasise the difference between feelings and valuations. The former are not open to discussion. Feelings can be compared to tinted glasses. They form prejudices that hamper a reasonable discussion. On the other hand, a feature typical for valuations is that they can be based on reasons, within certain limits. This feature is characteristic of both instrumental and so-called basic or intrinsic values.

An instrumental value is involved when, for example, one says that "this is a good axe". The property of being good is a feature of the axe. It is instrumental

when it is possible to use the axe as a tool for achieving a goal. Statements that connect this property with the axe express an instrumental valuation. It is always possible to ask "why?", or in other words to study what reasons justify the statement referring to the goodness of the axe. The answer refers to the result that can be achieved with the help of the axe.

A basic value, such as equality, is something else. It is not a mere instrument for achieving something "external". Instead, it is a goal in itself. Despite this, a basic value can be justified. One can ask "why?" and receive certain reasons for the valuation. However, somewhere there is a limit that cannot be passed. The chain of justification must be cut off: something is good because it IS good. Here we find the core of value relativism. Many incompatible chains of justification are possible. One can assume more than one justified perspective.

12. We have always assumed that the person interpreting the law and his adverse party - the person posing the legal question - are behaving as reasonable people. If we do not accept this assumption, we cannot avoid arbitrariness, and thus we cannot achieve legal certainty. Law and reason is therefore a well chosen title for a book that deals with models for legal justification.

Let us, e. g., assume an enactment L1 for which five different semantic (linguistically possible) alternative interpretations can be presented. On the basis of the sources of law and the rules of legal interpretation three of the semantic possibilities (11–13) can preliminarily be eliminated. Thus, the legal material leaves open the final choice between 14 and 15. Legally, the sources of law justify both alternatives. In this situation, the final interpretation will be based (at least in part) on valuations, in other words on a certain assumed priority order among sources of law. Rationality is involved both when the legally "impossible" alternatives (11–13) are eliminated and when the final choice is made between the remaining interpretations. If the activity of the person interpreting the law had not fulfilled the general criteria of rationality, we would not be willing to accept the interpretation as legal. Why not? The reason is simple. The legal interpretation must guarantee predictable results and a non-rational decision is not predictable.

A great deal of Aleksander Peczenik's work thus consists of an analysis of the concept of rationality. Peczenik has reformulated and modified the criteria of rationality that Robert Alexy originally established in his monumental work, "Theorie der juristischen Argumentation" (1978). Peczenik defines rationality with the help of certain general principles and such concepts as "support" and "coherence". Rationality is bound by criteria and principles of coherence, for example the principle demanding generality of justification. At the same time, this does not imply that Peczenik would accept a rationalist doctrine of natural law. He does not suggest that a reasonable person can always discover the objective values. Rationality guarantees that interpretative activity is reasonable, but it permits the two reasonable to evaluate differently.

Law, morality and reason are thus combined. The connection is not a result of arbitrary definitions, assumed by law theorists. It is based on our concepts, *inter alia* on everything that we deem legal in our Western legal culture. Not only law

and morality, but also the concept of "reason" are cultural phenomena. They assume that certain moral and rational demands are fulfilled in legal interpretation.

On the other hand, Peczenik does not intend to argue that people are reasonable or that, as a result of certain development, they will become reasonable. People try to be reasonable and make mistakes. Rationality is an ideal that can be realised more or less. Despite this, human culture needs such a measure, among other things in order to know what is just and what is not, and to identify the optimal framework for action. To be sure, the demand for rationality changes along with the development of society. We do not think today in the same way as did the inhabitants of the Roman Empire 2000 years ago, even though we have inherited the Roman tradition. In particular, we cannot demonstrate that reason is an integral (necessary) element of the definition of man or that we are rational due to our nature. But it is the case that our language and our concepts are constructed so that we expect that judges shall behave in a rational manner. In this sense, the concept of rationality is a necessary element of our culture.

13. Different valuations are not the only source of differences in legal interpretation. If we disregard insufficient knowledge about the sources of law and linguistic usage, there still remains a fundamental basis for differences in interpretation. Different interpretations can be based on different theoretical concepts. Here we meet the second function of legal dogmatics, the systematisation of legal norms.

Concepts are used in all human thinking. One of the most important goals of scientific activity is to construct concepts. The same is true of legal dogmatics. Theoretical concepts and theories are tools of presentation of scientific results. They are also instruments for thinking about the objects of experience. Let us say, for example, that in front of us there is an object that we call a "chair". Nothing is a chair without the concept of "chair". We analyse and systematise a certain complex of facts with the help of this concept. For us, the world as it is because we use such analytical tools. The concept of "resistance" in the study of electricity is another good example. Without the concept, it is not possible for us to identify such a phenomenon. All that we can do is to note the results of certain measurements our instruments give us. These are then interpreted with the help of the concept of "resistance". Thus, the concept is a scientific tool for capturing and making sense of reality.

In the legal field, concepts and constructions of concepts have a similar position. In civil law, we speak about the invalidity of an agreement. During the 1950s, the Finish analytical school developed this concept in a very detailed manner. The view was formulated that the invalidity could be either (a) absolute or relative, depending on which group of persons was in question (*contra omnes* or *inter partes*), (b) final or subject to correction through, e.g., acceptance of the agreement, (c) to be stated *ex officio* or only on the basis of a complaint, a claim and so on. The point was that one could not ask in general whether or not an agreement was valid; instead, one had to ask in what sense an agreement could be called invalid. In this way, we find an increasing number of ways of asking questions, and more sophisticated questions

provide better possibilities of analysing the legal situation. The dichotomy between valid and invalid is too schematic in complicated legal conflicts, even if it is sufficient in typical cases.

This means that our knowledge of law depends on our concepts. Formation of concepts normally requires systematisation of phenomena. As we have already noted, there is a necessary connection between systematisation and interpretation. Legal interpretation is impossible without the formation of concepts, while practical systematisation must often be corrected by interpretation. This is the case when interpretation needs more precise concepts than those that can be provided by the prevailing theory. There is thus an interplay between interpretation and systematisation. This interplay ultimately and finally produces the coherence that is so important for Peczenik's model of thinking.

14. This is a particularly important phenomenon when we try to understand the growth and progress of legal dogmatics. If one asks whether legal dogmatics has made any progress over the past 100 years, the answer can be formulated only with reference to the change of the legal concepts. A progress of legal dogmatics would not be possible without conceptual change. Peczenik's theory of coherence provides some criteria for evaluation of conceptual changes. On the other hand, two persons interpreting the law may highly fulfil all the demands of rationality and coherence, and yet reach different results, due to the fact that they use different concepts. It is thus possible for person A, interpreting the law, to deem an agreement to be null and void, and for person B to deny this. The reason for the disagreement can be that, for B, "null and void" refers only to invalidity that is absolute, final and *ex officio*, while A understands this concept as covering some other types of invalidity as well.

When Aleksander Peczenik analyses the legal paradigm, the law as a cultural phenomenon, and the demands of coherence, he deals with these basis problems. He has succeeded in his book in combining the analysis of legal interpretation with the most central philosophical, moral and cultural problems of our time. For this reason, Peczenik's present work is one of the most important contributions to the Nordic theory of law.

Chapter 1
The Dilemma of Legal Reasoning: Moral Evaluation or Description of the Law?

1.1 A Theory of Legal Reasoning

This is a book in legal theory. Its purpose is to justify the legal method.

There are many different types of legal research. Such disciplines as history of law, sociology of law, law and economics, philosophy of law etc. apply, first of all, a historical, sociological, economical, philosophical or another *non-legal* method. Another type of legal research, occupying the central position in commentaries and textbooks of law etc., implements a specific legal method, that is, the systematic, analytically-evaluative exposition of the substance of private law, criminal law, public law etc. Although such an exposition may also contain some historical, sociological and other points, its core consists in interpretation and systematisation of (valid) legal norms. More precisely, it consists in a description of the literal sense of statutes, precedents etc., intertwined with many moral and other substantive reasons. One may call this kind of exposition of the law "analytical study of law", "doctrinal study of law", etc. In the Continental Europe, one usually calls it "legal dogmatics". The standard German word is Rechtsdogmatik.

> The word "legal science", frequently used in many European countries, is ambiguous. It may refer to the legal dogmatics, pure or containing some elements of legal sociology, history etc. It may also refer to any kind of legal research.

The specific legal method constitutes not only the core of the "legal dogmatics" but also characterises the legal, *inter alia* judicial, decision-making. Of course, there are also some differences. For example, compared with judicial method, legal dogmatics lacks the decision component; it is more abstract and less bound to a "given" case; it deals with many examples of real and imaginary cases. The most profound difference consists in the fact that legal dogmatics often claims to be more rational than legal practice, that is, more oriented towards general theses, supported by extensive arguments. The similarities are, however, far deeper than the differences.

The central part of *jurisprudence*, on the other hand, has another object of research and another method. It constitutes a "metadiscipline", similar to theory of science (cf. Peczenik 1974, 9 ff.). It is not a part of legal dogmatics but a theory *about* legal dogmatics and legal decision-making. It thus does not interpret legal

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norms but includes a theory of their legal interpretation. Consequently, it has a specific method, closely related to philosophy.

This part of jurisprudence contains the following.

1. A *description* of the legal method. One attempts at describing systematically and extensively
   - the goals of such legal practices as statutory interpretation, interpretation of precedents, justification of judicial decisions etc.;
   - particular legal reasons, e.g. statutory analogy, and *argumentum e contrario*;
   - various legal methods, such as literal, teleological and historical interpretation etc.
2. An *analysis* of fundamental legal concepts such as "valid law". One describes the concepts and their relations, proposes a precise reconstruction of vague concepts, etc.
3. An *evaluation and justification* of these goals, reasons, methods, concepts and conclusions based on them. One tries to answer such questions as, Is statutory analogy a valid reasoning?, Is the concept "valid law" theoretically meaningful and practically useful?, Does legal reasoning render true knowledge of the law?, etc.
4. *Philosophical* considerations, necessary for the evaluation. To answer, e.g., the question, Is statutory analogy a valid reasoning?, one must, *inter alia*, deal with such problems as, What does validity of legal reasons consist in?, What is the relation between valid reasons and truth?, and so on.
5. *History* of legal philosophy.

1.2 Legal Decision-Making and Evaluations

1.2.1 Introduction. Subsumption in Clear and Hard Cases

A legal solution of the case under consideration must fit the law. One may present the solution as a logical consequence of a set of premises, containing a statutory provision, precedent etc. together with other relevant norms, value statements and the description of the facts of the case. Establishment of this logical relation is called "*subsumption*" (cf. Alexy 1989, 221 ff. and 1980, 192; Aarnio, Alexy and Peczenik 1981, 154 n. 66).

In "easy" cases, the decision follows from a legal rule, a description of the facts of the case and perhaps some other premises which are *easy to prove*.
Assume, e.g., that John parks his car without paying the required charge. A carpark attendant comes and John is fined 150 *kronor*. The following subsumption justifies the attendant's decision:

Premise 1 (a rule)	If a carpark attendant finds a car at a place where charge is required and the charge is not paid, he shall impose a fine 150 *kronor* on the driver

Premise 2	The carpark attendant Svensson found John's car at a place where charge was required and the charge was not paid
Conclusion	The carpark attendant Svensson shall impose a fine 150 *kronor* on John

A "hard" case, on the other hand, "presents a moral dilemma, or at least a difficult moral determination" (Morawetz 1980, 90). The decision does not follow from a legal rule and a description of the facts (cf. Dworkin 1977, 81). However, it follows from an expanded set of premises containing, *inter alia*, a value statement, a norm or another statement the decision-maker assumes but cannot easily prove. Suppose, e.g., that John threatened a cashier of a bank with a pistol and thus got some money. Later, the pistol turned out to be a toy. The Supreme Court decided (in the case NJA 1956 C 187) that such an act was a robbery. (A corresponding change of the statute followed soon). The decision presupposes a subsumption, containing the following components:

Premise 1 (Ch. 8 Sec. 5 of the Swedish Criminal Code at the moment of decision)	Whoever steals through violence or threat constituting acute danger…is to be sentenced for robbery…
Premise 2	John got some money through a threat that the victim (wrongly) interpreted as an acute danger
Conclusion	John is to be sentenced for robbery

The conclusion does not follow from premises 1 and 2. To obtain logical correctness one must add a premise. The following inference is thus correct.

Premise 1 (see above)	Whoever steals through violence or threat constituting acute danger… is to be sentenced for robbery…
Premise 2	John got some money through a threat that the victim (wrongly) interpreted an acute danger
Premise 3	A threat that the victim (wrongly) interprets as an acute danger is to be judged in the same way as a threat actually constituting such a danger
Conclusion	John is to be sentenced for robbery

Premise 3 is a norm, endorsed by the court. Its justification consists, *inter alia*, of the following reasons. A value judgment: An apparent threat is not better than an actual one. A prediction of consequences: A milder decision would increase the number of such crimes. It would also create expectation that the pistol used to threat the victim is a mere toy. This would encourage the victims to disregard threats and thus risk their lives. Another value judgment: This risk is unacceptable. Of course, the value judgment involved could be elaborated much more. Was it, e.g., not sufficient to regard such cases as gross larceny? One must consider the fact that, in Sweden, the maximal punishment for the latter crime is the same as for robbery. On the other hand, one may pay attention to the fact that the ordinary victim of such a crime perceives the situation as nothing less but a robbery. And so on.

1.2.2 Interpretative Problems - Ambiguity, Vagueness and Value-Openess

A lawyer must make value judgments, *inter alia* in order to make a choice between different interpretations of a statute, a precedent, another source of the law, a contract etc. This possibility of choice is a result of vagueness and ambiguity of the law. One may also speak about "open texture" (Hart 1961, 121 ff.) and "fuzziness" of the law (Peczenik and Wróblewski, 24 ff).

A decision does not follow from a vague or ambiguous legal norm. It follows, however, from an expanded set of premises, containing such a norm together with some reasonable premises, *inter alia* value statements.

Vagueness consists in the fact that the meaning of a word allows for borderline cases. For example, Sec. 36 of the Swedish Contracts Act stipulates that "undue" contractual conditions may be disregarded. Obviously, the borderline between due and undue conditions is not sharp.

The vague words, occurring in the law, are often *value-open* (cf. Alexy 1980, 190 ff. and Koch 1977, 41 ff. See also Moore 1981, 167 ff.). One must, e.g., employ evaluations in order to make a precise interpretation of the expression "undue contractual condition".

One can thus state the following.

1. This term has a practical meaning. By calling a contractual condition "undue", one expresses or encourages a disapproval of this condition.
2. This term has also a theoretical meaning, related to some facts which constitute criteria indicating that a particular contractual condition is "undue".

Suppose, for example, that an unexperienced businessman enters into a contract with a big company, dominating the market. According to the contract, the company may unilaterally decide whether future disputes are to be decided by a general court or arbitration. A dispute occurs. The businessman sues the company before a general court but the company claims that the case shall be referred to arbitration. Is the arbitration clause "undue"? A reason for this conclusion may be that it deprives the weaker party of the possibility to have his right examined (cf. NJA 1979 p. 666). This example elucidates the fact that the sentence "the contractual condition C is undue" has a connection with some theoretical (fact-describing, "value-free") propositions. *Inter alia*, it follows from the proposition "the contractual condition C deprives the weaker party of the possibility to have his right examined by an impartial court" together with some reasonable value statements.

The following (logically correct) inference elucidates a part of the theoretical meaning of the expression "undue contractual condition":

Premise 1 (a theoretical proposition?)	The contractual condition C deprives the weaker party of the possibility to have his right examined by an impartial court
Premise 2 (a reasonable value statement)	If the contractual condition C deprives the weaker party of the possibility to have his right examined by an impartial court, then the contractual condition C is undue
Conclusion	The contractual condition C is undue

3. The theoretical meaning of the term "undue contractual condition" is vague. It is not clear, *inter alia*, what the expression "deprives the weaker party of the possibility to have his right examined by an impartial court" exactly means. For example, what kinds of arbitration deserve the name "impartial"? How much weaker the "weaker" party must be? What circumstances constitute a "deprivation"?; and so on. Neither is it clear what other facts make the contractual condition undue.
4. One thus must weigh and balance various considerations, in order to decide in a concrete case whether the contractual condition is or is not undue.

One may distinguish between a contextual and a lexical vagueness, the first in a particular context, the second determined by general rules of language (cf. Evers 1970, 16.). For example, the word "forest" is lexically vague (How many trees do constitute a forest?). But in a given context, it may be entirely clear that a given area is a forest, for example, if a map indicates it as such. The value-open term "undue contractual condition" is doubtless lexically vague. It would be contextually precise if one could *prove* in any particular case whether the condition is "due" or undue. Can one prove value statements, such as "If the contractual condition C deprives the weaker party of the possibility to have his right examined by an impartial court, then the contractual condition C is undue"? There are reasons against this possibility. Vagueness may be caused by historical peculiarities, such as old age of the statute in question, its foreign origin etc. A statute can also have a number of different goals; some requiring preciseness, some not. One goal can be, e.g., to guide judicial practice, another to influence conduct of private persons. While the former often demands as great preciseness as possible, the latter does not. A vague but persuasive expression can have greater influence than a precise but "technical". Another reason against the possibility of proving value statements is more philosophical. The conclusion is plausible that one can only prove a provisional, *prima-facie*, value statement, such as "If the contractual condition C deprives the weaker party of the possibility to have his right examined by an impartial court, then *a reason exists for concluding* that the contractual condition C is undue". On the other hand, the answer to the question whether a condition *definitively* is or is not "undue" depends on an act of weighing and balancing. Rightness of this act is not demonstrable (see section 2.4.6 infra).

Ambiguity consists in the fact that a word has more than one meaning. Consider the following case, constituting a simplified version of the Swedish decision NJA 1950 p. 650. A person injured by a car lost his working capacity and, in consequence of it, a part of his income. A little later, it was discovered that he had suffered from a gastric ulcer that would have made him incapable to work, even if he had not been injured. The Municipal Court held the driver liable in torts, since the car accident had been a *sufficient* cause of the incapacity. The Court of Appeals reduced the compensation to 50%. Three different standpoints were represented in the Supreme Court. With support of some procedural rules, the Court did not hold the driver liable for the part of the loss for which the ulcer alone had been a sufficient cause. The reason for this decision was that the car accident had not been a *necessary* cause of the loss. The main question was thus whether one is liable in torts for an action constituting a sufficient but not necessary cause of a loss.

The answer to this question does not follow from the wording of the Swedish Liability for Damages Act (Ch. 2 Sec. 1), which stipulates that one intentionally or negligently causing a personal injury or a property damage should compensate the victim therefor. The word “to cause” is *ambiguous*, that is, it has two meanings, (1) to do something that is a necessary condition for the result, and (2) to do something that is a sufficient condition for the result, regardless whether it also is a necessary condition of it.

Ambiguous words, occurring in the law, are often value-open. For example, one must employ evaluations in order to make a choice in the case under consideration between interpreting the word “to cause” as related to a necessary condition or as related to a sufficient condition.

One may distinguish between a contextual and a lexical ambiguity, the first in a particular context, the second determined by general rules of language; e.g., the word “house” is lexically ambiguous, since it means, *inter alia*, both a building and a family (e.g., the House of Windsor), but contextually unambiguous in such sentences as “I live in a red house”.

Value-openness is a special case of both ambiguity and vagueness. Such value-open words as “good”, “evil”, “just”, “unjust”, “courageous”, “cowardly”, “generous”, “stingy”, “undue” etc. have the following properties.

1. They have a practical meaning, related to feelings, attitudes, action etc.
2. The have also a theoretical meaning, related to some facts.
3. Their theoretical meaning is lexically vague or ambiguous.
4. In a particular case, one needs weighing and balancing of several considerations in order to determine whether the word in question refers to this case.

1.2.3 Gaps in the Law

Legal reasoning in some hard cases also involves value statements necessary to fill up the so-called gaps in law. Such a gap can occur in the literal sense of the established law, such as a a statute, or in the set of norms one obtains by interpreting the established law in the light of traditional legal methods. Let me discuss here only the former kind of gaps. The latter will be dealt with in section 5.4.6 infra. (One may also speak about gaps in the set of legal *reasons*. Cf. Raz 1979, 53 ff.).

A gap means that (1) the established law does not regulate a given case (an insufficiency gap); (2) the established law regulates the case in a logically inconsistent way (an inconsistency gap); (3) the established law regulates the case in a vague or ambiguous manner (an indeterminacy gap); or (4) the established law regulates the case in a morally unacceptable way (an axiological gap; cf. Wróblewski 1959, 299 ff.; Opalek and Wróblewski 1969, 108 ff.).

1. *Insufficiency gaps* result, *inter alia*, from the fact that the literal text of the statute does not regulate a given case.

Achourrón and Bulygin 1971, 15 ff. have formulated the following classical example. Assume that a statute stipulates that (1) the restitution of legal estate is obligatory, if the transferee is in good faith, the transfer is made with consideration and the transferor is in bad faith; and (2) the restitution of legal estate is obligatory if the transfer is made without consideration. Assume now that the transferor is in good faith and the transfer is made with consideration but the *transferee* is in bad faith. Is the restitution of legal estate obligatory? The norm does not answer the question. A gap occurs.

One can *establish* such gaps in an objective, "value-free" manner but to *fill them up*, one must complete the statute with an additional norm, such as the following one: An action is permitted, if it is not explicitly forbidden by the law (cf. a more precise formulation in section 7.4 infra). Such a norm may be established in a statute or another source of the law. If it is not, then filling up of the gap demands that one makes a value judgment.

The "*genuine gaps*" are a special case of insufficiency gaps. A legal norm stipulates, e.g., that one can demand compensation in a given situation but leaves it open who has to pay the compensation. Another example is this. A (higher) norm stipulates that a certain norm should be enacted or a certain legal action performed (e.g., appointment of an official). However, such a norm can be enacted, or such an action performed, only if the law states precisely who may do it and how it may be done. The gap consists in the fact that the law leaves these questions open. (I omit here several possible distinctions. Cf. Opalek and Wróblewski 1969, 109; Larenz 1983, 356 ff.; Kelsen 1960, 254; Zittelmann 1903, 27 ff.).

For example, the Polish constitution contained a provision that judges shall be elected, but no legal norms stated precisely by whom and how. No established legal norm helps one to fill up such a gap.

2. Gaps may also result from *logical inconsistency of legal norms* (cf. Ziembinski 1966, 227). One norm may, e.g., forbid and another permit the same action. For example, the Danish constitution contained both a provision that the first chamber of the parliament must not have more than 78 members, and another, implying that there must be 79 members. One can establish such gaps in an objective, "value-free", manner but to fill them up, one must complete the statute with a collision-norm, stipulating, e.g., what follows: A less general legal rule must be interpreted as an exception from a more general one, incompatible with it. Such norms are established within the legal tradition. But they may be vague. In some cases, e.g., one cannot tell which norm is more general (cf. section 7.6 infra). Filling up the gap requires then a value judgment.
3. *Indeterminacy gaps* result from *vagueness or ambiguity* of the established legal norms (cf., e.g., Schweitzer 1959, 64–76; Alchourrón and Bulygin 1971, 33 ff.). It is doubtful whether they deserve the name "gap" at all. Certainly, a distinction is often drawn between filling indeterminacy gaps and ordinary interpretation of statutes. The distinction is, however, obscure. In any case, one can establish the fact that a statute is vague or ambiguous in a "value-free" manner. On the other hand, to remove vagueness or ambiguity, one needs an expanded set of premises, containing some reasonable value statements. Cf. Section 1.2.2 supra.

4. Finally, *axiological* gaps occur when the established law regulates a given case in a morally unacceptable way (cf., e.g., Alchourrón and Bulygin 1971, 94 ff.). A typical gap of this kind exists when the law lacks a norm it ought to contain from the moral point of view. Or, the law contains a norm it ought not to contain.

Of course, one cannot establish axiological gaps in a "value-free" manner. To fill them up, one must rely upon moral value judgments.

In brief, one can establish some gaps in the law in an objective, "value-free" manner. To establish other gaps, one needs an expanded set of premises, containing some reasonable value statements. Some gaps may be filled up, some not. To fill up the former, one must make some (moral) value judgments.

1.2.4 Evidence of Facts

Value judgments may also have a role to play in connection with evidence of facts which are relevant for the case. Suppose that Peter plays poker with strangers and loses much money. A witness says that one of the players manipulated the cards. The other party objects and claims that the witness is not reliable, since he is a close friend of Peter. Besides, it turns out that one of the players, under one night's game, three times showed four kings. A statistician estimates probability of this as one of billion. Is this evidence sufficient to condemn the winners for cheating?

One must thus answer several questions of fact. Has the statistician counted correctly? Is the witness really a close friend of Peter? Does friendship make it probable that he lies? Only the first question can be answered in an exact way. The second and the third require a vague, perhaps intuitive, estimation of probability.

Another important question is "probability - of what?". One has a choice between two methods. Assume that a witness says he saw that X happened. The "theme-of-proof method" estimates probability that X happened. The "value-of-proof method", on the other hand, estimates probability that X caused the observation the witness made and reported. It thus pays attention only to the cases in which the witness actually saw X, not merely guessed that X happened.

Complex questions concern also chains of "evidentiary facts", contrary evidence etc. Cf. Koch and Rüssman 1982, 272 ff.; Stening 1975 and Ekelöf 1982, 7 ff.

One must also answer some moral value questions, e.g. Ought the judge to base his decision on a statistical probability? To answer such value questions, the court may to some extent rely on some established norms of evidence, supported by precedents and other sources of the law. It must, however, make genuine (moral) value judgments, too.

1.2.5 Choice of a Legal Norm

Moreover, value judgments may affect the choice of one of many legal norms, applicable to the case to be decided (cf. Frändberg 1984, 84 ff.). In other words, one

must make a choice of one of many possible subsumptions. One thus selects the norm from which - together with the appropriate additional premises - it follows logically what kind of decision is legally possible in this case. Let us suppose that A repeatedly hits B with malicious pleasure but at the same time intends not to inflict any bodily injury on his victim, not wanting to leave evidence of his action. Despite A's "caution", however, B sustains severe concussion. One can subsume A's action under three provisions of the Swedish Criminal Code: Ch. 3 Sec. 5 assault and battery); Ch. 3 Sec. 6 (gross assault and battery) and Ch. 3 Sec. 8 (the causing of bodily injury or illness). A has deliberately "caused another person pain" (cf. Sec. 5 and 6) and had also "through lack of care inflicted grievous bodily harm on another person" (cf. Sec. 8). The choice between these alternatives involves value judgments. For evaluative reasons, one must regard A's action as *gross* assault and battery (Sec. 6), not as assault and battery *simpliciter* (Sec. 5). Moreover, one must not qualify A's action as the causing of bodily injury (Sec. 8). The commentary to the Code states, what follows: "The scale of penalties for gross assault and battery has such a high maximum that the penalty for assault and battery can be permitted to consume the penalty for causing bodily injury." (Beckman *et al.*, 106. Cf. the case SvJT 1966 rf. 57).

The problem of choice of the applicable legal norm arises not only in penal law but also in other parts of the legal system, *inter alia* in international private law ("the choice of the applicable statute"). Also in private law of a particular state, one often must answer the question which of many applicable statutory provisions is to be implemented in the case at bar.

The choice of the applicable legal norm requires value judgments. How can one state precisely that the penalty for assault and battery can be permitted to consume the penalty for causing bodily injury? To answer such value questions, the court may, to some extent, rely on established norms, expressed in statutes, precedents, commentaries and other sources of the law. It must, however, make genuine (moral) value judgments, too.

1.2.6 Choice of a Legal Consequence

Having solved the problems of interpretation, evidence and choice of a legal norm, one must often choose a legal consequence (cf. Rödig 1973, 174 ff.; Wróblewski 1974, 44 ff.). For example, one sentences the person guilty of gross assault and battery to five years in prison; the law stipulates imprisonment between one and ten years.

Of course, the choice of a legal consequence requires value judgments. To some extent, the court may rely on some established norms, expressed in statutes etc. The Criminal Code stipulates, e.g., that when judging assault and battery as gross, the court must consider whether the accused endangered the victim's life, inflicted grievous bodily harm or serious illness, or otherwise showed particular ruthlessness. But the court must make a moral judgment to decide whether the act in question was "particularly ruthless".

The choice of a legal consequence is important not only in criminal but also in civil cases. For example, Sec. 36 of the Swedish Contracts Act stipulates that "undue" contractual conditions may be modified or disregarded. Having established that the condition is "undue", the court must choose between these two alternatives. It may also face a choice between several possible modifications of the contractual condition. To make the choice, the court may consider the content of the contract, the situation at the time it was concluded, later facts and "other circumstances". Weighing and balancing of all this requires a value judgment.

1.2.7 Obsolete Laws and Desuetudo

In some cases, one must answer the question whether a certain statutory provision is valid or applicable at all. Suppose, e.g., that A produces sausages containing some controversial chemicals, and does not ask proper authorities for approval according to the law. B buys a sausage. A zealous prosecutor accuses the buyer on the bases of Ch. 1 Sec. 10 of the Swedish Commercial Code of 1734. The provision stipulates, what follows: "The goods that *stadens vräkare* should behold and examine may not be taken by the buyer before that happened; or both buyer and seller are to be fined 10 *dalers* each" (cf. Strömholm 1988, 314 ff.). Is this old provision applicable to modern cases? Logically, it is possible. To be sure, no *stadens vräkare* exist any more. This old Swedish word, hardly comprehensible today, designated more or less a "municipal heaver". Yet, one can assume that present supervisory authorities correspond to them. Or is the provision *obsolete*, that is, so much out of date that the courts, although recognising its validity, *may* ignore it? Or even more than that, does newer custom cause that the provision already lost its legal validity (the so-called *desuetudo derogatoria*) and thus *must* be ignored?

The process of in which a provision customarily loses its validity takes some time. At first, the courts are inclined to frequently "forget" the provision, without entirely precluding the legal possibility of its application in other cases. They would perhaps call it "half-valid", if the legal language permitted them to do so. Instead, one calls the provision "obsolete". Later, however, one may find that no reason any longer justifies such an uncertainty. The provision has definitively lost validity through *desuetudo*.

Questions of obsolescence and *desuetudo* require, of course, value judgments, although one may, to some extent, rely on certain established norms, expressed, e.g., in some precedents. The court must, however, make genuine value judgments, as well.

1.3 The Concept "Legal Decision-Making"

A lawyer thus must make value judgments, *inter alia* in order to perform a subsumption (section 1.2.1.); to interpret a statute or another source of the law

(Section 1.2.2.); to establish and fill up gaps in the law (Section 1.2.3.); to establish facts of the case (Section 1.2.4.); to choose the applicable norm (Section 1.2.5.); to choose a legal consequence (Section 1.2.6.) and to answer the question whether a statute is obsolete (Section 1.2.7.).

This role of values affects the very concept of "legal decision-making". A decision of a court or an authority deserves the name "legal", if the following conditions are fulfilled.

1. The decision is supported by a statute and/or another source of the law, such as precedent, legislative history, custom, juristic literature etc.

Instead of "legal decision-making", the Continental law theorists often speak about "application of law" (in German, *Rechtsanwendung*).

A legal dogmatist applies the law in a week sense. He does not make decisions but gives *advices* how to decide cases.

2. In "hard" cases, the decision is also supported by moral value statements.
3. One can reconstruct legal decision-making as a logically correct process of reasoning.

Keeping in mind these conditions, one may summarise our discussion in the following manner.

One may distinguish between the following operations, involved in legal decision-making: (1) interpretation *in abstracto* of a legal norm, (2) application of the norm to a particular case, and (3) choice of a legal consequence (cf. Peczenik 1974, 54 ff.; Agge 1969, 63).

1. Interpretation *in abstracto*. Interpretation *in abstracto* comprises two operations:

   a. One interprets a statutory provision (e.g., concerning assault, Ch. 3 Sec. 5 of the Swedish Criminal Code), a precedent, an opinion included in legislative preparatory materials (*travaux préparatoires*) etc. according to its *literal sense*.
   b. One interprets the statutory provision, the precedent, the opinion included in legislative preparatory materials etc. in the light of particular *legal concepts, reasons and methods*.

2. Application of the statutory provision, the precedent etc. to *a particular case*. It comprises five operations.

   a. Consideration of *other relevant norms and value statements*, possibly modifying the sphere of application of the implemented legal norm, for instance stipulating some exceptions. To apply the provision concerning assault, one must thus consider the norm about intent (Ch. 1 Sec. 2 of the Criminal Code).
   b. Establishment of the *facts of the case*.
   c. *Subsumption*. One presents the solution of the case under consideration as a logical consequence of a set of premises, containing the statutory provision, precedent etc. together with other relevant norms, value statements and the description of the facts of the case.

d. The *choice of one of many possible subsumptions*. One thus decides to judge the case according to the provision concerning gross assault and battery (Ch. 3 Sec. 6 of the Criminal Code), not assault *simpliciter* (Sec. 5).

3. A choice of a *legal consequence*. For example, one sentences the person guilty of gross assault and battery to five years in prison; the law stipulates imprisonment between one and ten years.

In most cases of application of law, the decision-maker performs all of these operations, but not in a predetermined order. The operations influence one another (cf., e.g., Esser 1972, 82).

1.4 Why do the Lawyers Need Special Interpretation Methods?

1.4.1 Expectation of Legal Certainty

Why should value judgments, based on weighing and balancing of various considerations, play such a great role in legal reasoning, particularly in legal interpretation? The answer is based on the fact that the interpretation and application of law is to some extent *rational* and, for that reason, promotes *legal certainty* in material sense, that is, the optimal compromise between predictability of legal decisions and their acceptability in view of other moral considerations.
The term "legal certainty" is a literal translation of the German word *Rechtssicherheit*. The English legal terminology has no corresponding word although, of course, the very phenomenon of legal certainty is as important in the Common Law systems as elsewhere. The best approximation is "the rule of law".

Terms such as "legal certainty", "legal security", "the rule of law" etc. are often used in a *formal* sense, as synonymous to "predictability of legal decisions". Among others, Opalek 1964, 497 ff. advocated a "formalist" terminology, identifying the rule of law with adherence of authorities to the law. Cf., e.g., Hayek 1944, 72 ff.; Oakeshott 1983, 119 ff.; Raz 1979, 210 ff.; Zippelius 1982, 157 ff. In Sweden, this terminology is shared, e.g., by Frändberg 1982, 41 ("legal security" as synonymous with "legal predictability") and Strömholm 1988, 394 (predictability and uniformity).

To be sure, this terminology constitutes a linguistically possible interpretation of vague words, such as "*Rechtssicherheit*", which in many European languages correspond to the expression "legal certainty". The formal sense of "legal certainty" may be adequate for some purposes, e.g., in criminal law. But in the present work, dedicated to the problem of legal method, the material sense is more appropriate, among other things because the formal one has the following strange consequences.

1. Jews under Hitler's rule could predict that they would be discriminated. Did they possess a high degree of "legal certainty"?

2. Assume for a moment that "legal certainty" is the same as "predictability of legal decisions", and nothing more pretentious. One must now state precisely what is the *ground* for predictions.

   a. Is predictability based on valid legal rules? If so, then, *ceteris paribus*, the better the interpretation of the rules, the higher the degree of legal certainty. But what is the yardstick of goodness of interpretation? *Ceteris paribus*, the higher the degree of **moral acceptability**, the better the interpretation. The use, if not the content, of the concept of "legal certainty" in the formal sense implies thus indirectly the material sense: "Predictability of legal decisions" implies "predictability of legal decisions based on legal rules"; the latter implies "predictability of legal decisions based on morally acceptable interpretation of legal rules"; and this implies "predictability and moral acceptability of legal decisions".
   b. Or, is it plausible to speak about legal certainty as predictability *contra legem*, e.g., when legal decisions inconsistent with the law are based on actual loyalty of officials towards the ruling Party, the leader personally etc.? In this case, Soviet Union under Stalin would be an example of a country possessing a fairly high degree of legal certainty.

In many works, I claimed that "in legal practice there is a compromise between the principle of the strict observance of law and the principle of justice", cf., e.g., Peczenik 1967, 138. This view was influenced by Opalek and Zakrzewski 1958, 19 and 31–35. Later, in a close cooperation with Aulis Aarnio, I changed the terminology (though my views concerning the correct legal method remained unchanged) and defined the "rule of law" (that is, legal certainty) as the fact that "legal decisions are simultaneously predictable and morally acceptable"; cf. Peczenik 1983, 78. Cf. Aarnio 1987, 3 ff.

The present terminology constitutes a further refinement. It pays attention to the fact that predictability is one of many moral values. I thus interpret "legal certainty" in the material sense, as the optimal compromise between predictability of legal decisions and their acceptability in view of other moral considerations.

This material sense of "legal certainty" should not be confused with another, also called "material", in which "legal certainty" is identified with any kind of protection the law provides individuals, collectives and the state itself, e.g., against crimes. This use of the term may be called "extended material one". It dominated the Soviet legal theory and appeared in some Swedish contexts, too (cf., e.g., Report "Ekonomisk brottslighet i Sverige", *SOU* 1984: 15). The rationale of it is to play down protection of an individual against abuse of public power and to advocate protection the state provides against other risks. Though such protection is important, I find it confusing to call it "legal certainty"; cf. Mattsson 1981, 459 ff.

In modern society, people expect in general that legal decisions be highly predictable and, at the same time, highly acceptable from the moral point of view. *Ceteris paribus*, the higher the degree of such predictability, the higher the chance of an individual to efficiently plan his life. And, *ceteris paribus*, the higher the degree of moral acceptability of legal decisions, the higher the chance of one to make the life

thus planned satisfactory. A normal individual expects to be able to plan a satisfactory life. I assume that such expectations create responsibility; decision-makers thus have a *social responsibility* for legal certainty in the material sense.

Predictability results from the fact that legal decisions are based on general norms. It is justifiable by the principle "the like should be treated alike".

In other words, people expect that the law consists of general norms. This expectation influenced the historical evolution of the concept of *Rechtsstaat*, inspired by codification of the law in 18th century's Prussia and philosophical influence of *Kant* and *Humboldt*, and fully developed by German lawyers of 19th century.

In some cases, however, the wording of the law collides with moral opinions of its interpreter. The like shall be treated alike but the text of the law establishes some criteria of likeness whereas the interpreter has reasons to prefer other criteria. An increased predictability, based on the wording of the law, can thus cause the fact that the decision in question pays a lesser attention to other moral considerations. On the other hand, an increased role of other moral considerations can result in a decreased predictability. A very exact legislation concerning, e.g., invalidity of undue contractual provisions, can thus, in some cases, result in injustice whereas a just general clause can make it difficult to predict legal decisions. In such cases, legal certainty means that one tries to find the best compromise between predictability and other moral considerations.

The expectation of legal certainty has the following consequences. Legal decisions should be based on legal norms (item 1 below). In some cases, an interpreter of the law must creatively correct these norms (item 2). Courts and authorities should not refuse to apply a legal norm, however unclear this norm may be (item 3).

1. Courts and authorities have thus a duty to support their decisions with legal norms.

Mattsson 1984, 374, demands also that, the range of normatively possible application of legal rules must be highly determined.

If no statutory provision applies to the case under consideration, one must support the decision with other authority reasons, such as precedents, legislative history, competent juristic literature etc.

This duty permeates the conceptual apparatus of the lawyers. Many lawyers understand the concept of legal reasoning in a way supporting the following thesis: If decisions in a given kind of cases are made without any support of authority reasons, these decisions are, by definition, not legal.

2. On the other hand, courts and authorities must use special interpretation methods to adapt legal norms to moral requirements. This duty, too, affects the concepts. One can understand the concept of legal reasoning in a way supporting the following theses: If decisions in a given kind of cases are made without attention to the established juristic tradition of reasoning, they are, by definition, not legal. If they are made without attention to moral considerations, they are, by definition, not legal, either.
3. Legal certainty implies, finally, that courts and authorities must not refuse to make decisions. Refusal to decide (*denegatio iustitiae*) is not morally acceptable,

since people expect access to justice. *Denegatio iustitiae* is thus forbidden by written or customary law of many countries. As an example, one can quote Sec. 4 of the French Code Civile, stipulating criminal responsibility of a judge who refuses to decide the case because the law is silent, unclear or insufficient.

The demand that legal interpretation, e.g., statutory interpretation, interpretation of precedents etc. promotes legal certainty, that is, results in the fact that legal decisions follow a reasonable compromise between predictability and other moral considerations, can be explained by two factors, practical character of legal interpretation (item 1 below) and the connection of legal interpretation with the use of official power (item 2).

1. Since legal interpretation affects important decisions, it is natural that people expect that it not only follows the wording of the law but also the demands of morality.

Interpretation in general helps one (1) to obtain and communicate knowledge (theoretical interpretation) and (2) to influence people (practical interpretation). Theoretical interpretation occurs in literary criticism, historical research and the work of translators, actors, musicians etc. Practical interpretation characterises, first of all the law, theology and political ideologies.

2. Practical importance of legal interpretation results from the fact that legal order is intimately connected with exercise of power. The lawyer interprets authoritative texts, created by power-exercising institutions. Moreover, the interpreter himself is a component of a power-exercising institution.

But why to use interpretation to adapt the law to moral demands? Is it not better to achieve the adaptation via change of legal statutes? The answer to this question must take into account the character of moral evaluations and professional skills of a judge.

1. The law-giver cannot predict in advance or acceptably regulate all cases that can occur in future practice. The evaluations to be done in legal practice, among other things concerning the question whether a decision of a given kind is just are easier to make in concrete cases, not *in abstracto*.
2. Historical evolution of the method of legal reasoning has adapted it to the purpose of weighing and balancing of the wording of the law and moral demands. The judge has a far greater practical experience in applying this method to concrete cases than any legislative agency can have.

This fact has recognised since antiquity. In Roman republic, the praetor could thus order the judge to assume the fiction that the demands of *ius civile* were fulfilled in the case under adjudication. The praetors, acting in a close contact with judicial practice, thus developed an entirely new legal system. A partly similar evolution took place in medieval England.

1.4.2 The Law and Democracy

In a democratic society, however, the moral component of the legal decision-making receives both an additional justification and a richer content.

The modern concept of democracy evolved historically, under influence of various moral and prudential considerations. Consequently, it is vague and value-open. When calling a social order or a state organisation democratic, one thus expresses a certain acceptance of it. Democracy is, in other words, a special case of a good organisation of society.

It is logically possible that even some undemocratic states and ways to organise the society are good, but I disregard this problem.
The point of the value-open concept of democracy consists in its usefulness for an evaluative political debate. For other purposes, one can stipulate various "value-free" definitions of democracy, e.g., a "formal" definition identifying it with the majority rule (cf., e.g., Heckscher, 54). The value-laden concept of democracy can be called "material" (cf., e.g., Taxell 1987, 9 ff.).

For both historical and linguistic reasons, it is natural to primarily apply the concept of democracy to the state, the organisation of the society as a whole, as well as to the public decision making. In a merely secondary sense, one can also call other organisations and their decisions democratic. "Democratisation" of such industrial enterprises, universities etc. promotes values and causes problems which are not identical with those connected with democracy in the primary sense (cf. Taxell 1987, 42).

The fact that the concept of democracy is value-open does not mean, however, that it lacks a definite sense. Democracy is the same as *the power of the people*. This is the main idea of democracy.

According to Ross 1963, 92 ff., the concept of democracy as power of the people is an ideal type. The facts can approximate it more or less, depending on such things as the number of persons involved in decision-making, effectiveness of their influence and extension of the sphere submitted to the control of the people.

To be sure, the expression "the power of the people" is vague. Nevertheless, a ("value-free") study of the political *language* shows that it makes sense to proffer some facts as reasons for the conclusion that a state or a social order is democratic. These criteria of democracy make the central idea of the power of the people clearer. *Inter alia*, one may consider the following, partly overlapping, criteria: 1) political representation of the interests of the citizens, 2) majority rule, 3) participation of citizens in politics, 4) freedom of opinion, 5) some other human and political rights, 6) legal certainty, 7) division of power and 8) responsibility of those in power. Each criterion corresponds to a different *value*, which can be realised to a certain *degree*, more or less. It follows that there are degrees of democracy (cf. Ross 1963, 92 ff.).

The main idea of democracy, the power of the people, is more or less intimately related to each criterion. It has thus a clear conceptual connection with the fact that those in power represent the interests of the citizens, follow the will of the majority and permit the citizens' participation in politics. The connection with freedom of opinion, other basic rights, legal certainty, division of power and responsibility is less obvious. One may reasonably interpret the concept of democracy in two ways. According to one interpretation, enforcement of the rights, legal certainty, division

of power etc. merely constitute a *causal* condition of democracy. According to another interpretation, they constitute a *conceptually* necessary condition of a fully developed democracy.

In any case, there is an analytic, conceptually necessary relation between basic rights and the well-known institution called in the Continental political philosophy *"Rechtsstaat"* (the state based on the law). Many reasons support the conclusion that legal validity of basic rights constitutes a conceptually necessary condition of a fully developed *Rechtsstaat* and, at the same time, when no *Rechtsstaat* at all exists, one cannot, for conceptual reasons, speak about the validity of basic rights.

Both the main idea of democracy and the criteria have a relatively general character. They are equally relevant, e.g., for the Swedish, West-German and North-American democracy. But the political language and hence the list of necessary conditions of democracy may change. Today, everybody regards the principle "one man one vote" as the consequence of the majority rule, and thus a precondition of democracy. Yet, some generations ago, women and persons less well off lacked the right to vote in the states generally considered as democratic. On the other hand, no single criterion is sufficient for democracy. One can perhaps hope to find some combinations of criteria jointly constituting such sufficient conditions. In practice, however, one faces great difficulties.

Assume, e.g., that a state fulfils to some extent all the mentioned criteria but the ruling party controls both trade unions and employers' associations, dominates all big companies, owns almost all newspapers etc. The opposition acts freely but has no chance to take over the political power. In such a situation, one can doubt whether the state is democratic. The question deserves a debate, in which one weighs the criteria the state in question fulfils and those - perhaps newly created - it does not fulfil.

The criteria of democracy are not only established in the ordinary language but also morally justifiable. One also needs moral considerations to state the criteria more precisely and apply them to concrete societies. One can give reasons both for and against the conclusion that a given state, which to some extent fulfils some criteria but sets aside others, is democratic. One must weigh and balance those reasons. One may need an act of weighing even when applying a single criterion; e.g., how great respect for the basic human and political rights makes a state democratic? How great importance of majority decisions in a given society makes a state democratic, even if it severely restricts human rights? An so on…

1. *Political Representation of Interests*. One of the most important properties of democracy consists in the fact that those in power protect common interests of citizens and weigh various particular interests against each other (cf., e.g., Eikema Hommes, 31 ff.).

The moral judgments, permeating legal decision-making, must thus have a connection with common interests of citizens. Other criteria of democracy, first of all legal certainty, determine, however, some limits for the role of the common interests. Equality before the law (cf. Sections 2.5.2 and 4.1.4 infra about "universalisability") excludes, at the same time, an adaptation of legal decision-making to interests of particular social groups. On the other hand, interests of the parties have a special

position. Any citizen can be involved in a legal dispute. His legal certainty is promoted by the fact that he can rely upon the court's respect for his interests.

2. *Majority Rule*. Even an absolute monarch can pay attention to the interests of the people. A democratic state, however, respects not merely the interests but also the will of the citizens.
   One can justify majority rule, *inter alia*, as follows.

   a. It is an approximation of the calculus of human *preferences*, often regarded as the core of morality. To decide what actions are morally good, one must thus pay attention to both the number of people having certain preferences and to the strength of the preferences (cf. section 2.5.2 infra).
   b. Furthermore, one can justify majority rule as promoting some values people usually respect, e.g., *freedom* and *equality*. See also Kelsen 1929, 3. Taxell 1987, 32 ff. mentions also *security*.

Majority rule thus presupposes that a general election is free and approximates the egalitarian principle "one man one vote" (cf., e.g., Ch. 1 Sec. 1 par. 2 of *Regeringsformen*). On the other hand, it does not imply either the citizens' equal ability to participate in politics or their economic equality.

   c. The third way to justify the majority rule is, what follows. Political views compete with each other and it might be practically impossible to prove which is the right one. A majority decision is then a good means to achieve a *peaceful solution*. (According to Kelsen 1929, 101, democracy thus is a consequence of value relativism, though an objectivist can also be a democrat).

The relation between the majority rule and the political representation of interests raises difficult problems. It is not certain that the representatives actually protect the interests of the citizens. Their knowledge is limited, they must follow their party leaders and pay attention to other prudential reasons, etc. But the more their practice reflects the interests of the voters, the more democratic the state organisation is.

A total fulfilment of the majority rule implies that clear statutory provisions are interpreted literally, and that general clauses and other vague laws are interpreted according to the instructions the legislators give in the *travaux préparatoires*. In a democratic state, however, the majority rule ought not to entirely dominate the decision-making. Instead, one must find a harmony, a reasonable compromise between the wording of the law and moral considerations, *inter alia* concerning rights, legal certainty and division of power. Several examples, *inter alia* the history of the French revolution, show that unlimited power of a democratically elected legislative assembly does not prevent oppression.

3. *Participation*. Participation of citizens in politics is another criterion of democracy (cf., e.g., Anckar, 53 ff.). Democracy implies a kind of "amateur rule". It is also important that even the citizens who have no public duties exercise pressure on those in power, e.g., through public criticism. An organisation of courts, admitting both professional judges and lay judges, expresses a reasonable

balance of the idea of participation and the professional lawyers' skill to perform rational legal reasoning.

4. *Freedom of opinion*. Democracy requires, conceptually or at least causally, a free formation of public opinion (cf., e.g., Ch. 1 Sec. 1 and Ch. 2 Sec. 12 par. 2 of the Swedish Constitution, *Regeringsformen*). The citizens must be free to express their views and to attempt at carrying out them in practice. Free formation of public opinion is related to rational debate about political and other practical questions. If citizens, instead, were manipulated by appeal to their emotions, the development of public opinion would only formally be free but, in fact, affected by the demagogues.

To facilitate free formation of opinion, legal decisions should be accompanied by comprehensible justification; cf. section 6.5. infra.

5. *Rights*. Besides, democracy requires (conceptually or causally) other rights. Democracy is no dictatorship of majority. There are many, more or less established, lists of rights. One can perhaps regard them as interpretations of such *basic values of democracy* as freedom and equality. Let me merely mention freedom of opinion, freedom of the press, freedom of information, freedom of movement, freedom of assembly, freedom of demonstration, freedom of association, freedom of religion; right to life, protection of physical integrity, right to privacy, protection of family life, right of private property, protection of correspondence; freedom from inhuman or denigrating treatment, freedom from compulsory labour, freedom from discrimination, right to due process of law; and equality before the law (cf., e.g., Ch. 2 of the Swedish Constitution and the European Convention of Human Rights). I disregard here the complex problem of the so-called social and economic rights, such as right to employment, education etc.

Such lists vary in time and space. But a social order in which citizens have no rights at all is hardly democratic. Among many reasons of principle for the rights, let me mention the following: (1) Many governments tried to promote welfare at the expense of the rights and the result was always the same: decay of culture and economics. (2) Some rights are necessary to understand the point of such basic social practices as rational discourse. If, e.g., one denies other participants of a debate a right to be taken seriously, one cannot understand why a rational argument is better than bribery and other kinds of emotional manipulation (cf. Alexy 1986).

The point of legal decision-making is either to establish and enforce the rights of the parties, or at least to decide to what degree their interests should be protected. Collective goods and policies may be taken into account but never to such a degree that the rights are entirely ignored; cf. section 5.9.2 infra.

6. *Legal Certainty*. Democracy requires conceptually or at least causally legal certainty (section 1.4.1 supra). On the other hand, legal certainty presupposes a certain degree of respect for democratic values. Legal certainty thus means that legal decisions express a compromise between predictability and other moral considerations. The latter include the basic values of democracy.

Legal decisions should be loyal to the democratically elected legislature. The Swedish doctrine of the sources of law thus recommends that a person interpreting the law pays attention to the instructions the legislators give in the *travaux préparatoires*, even if these collide with his moral opinion. On the other hand, the great European tradition of legal certainty assumes that a judge must find a reasonable compromise between the wording of the law and moral considerations. The preparatory materials ought not to entirely dominate the decision-making.

7. *Division of Power*. A division of power promotes the legal certainty, the rights, the free majority decisions and the political representation of the interests of the electorate. A monopoly of power is always a threat to freedom of an individual. Not even the parliament should have the whole public power. Independent courts, relatively independent civil service, the division of power between the state and municipalities etc. thus constitute a causal, and perhaps also a conceptual, condition of democracy..

Though the Swedish constitution (*Regeringsformen*, Ch. 1 Sec. 4 and 6, etc.) in principle denies the division of power and regards the parliament as a supreme representative of the sovereign people, it emphasises independence of the courts and, to a lesser extent, state bureaucracy. No one, not even the parliament, may instruct the courts how to interpret the law in a concrete case (Ch. 11 Sec. 2).

But why to use judicial interpretation to adapt the law to moral demands? Is it not better to achieve the adaptation via continually changing legislation? *Re* this problem, cf. section 1.4.1 supra.

A relatively strong position of the courts is an important component of the system of division of power; e.g., a person affected by an administrative decision must be able to appeal to a court. General courts are perhaps most appropriate to decide in such cases, *inter alia* because of their long tradition of independence. Other reasons, such as professional skill, support establishment of special administrative courts. A special question concerns the courts' review of constitutionality of statutes. In Sweden, Ch. 11 sec. 14 of the *Regeringsformen* provides *inter alia* that, in the case under consideration, no court or authority may apply a regulation issued by the parliament or the government if it is obviously incompatible with the constitution. But one can wonder whether a special Administrative Tribunal would not be a better solution from the point of view of both independence and professional skill.

One can also argue for a strong position of various non-public organisations, such as parties, unions, enterprises etc., even if not all of them are organised according to the majority principle. (Cf. e.g., Eikema Hommes, 44; cf. Encyclopaedia of Philosophy, vol. 2, 340 *re* various theories of division of power).

8. *Responsibility of Those in Power*. Responsibility is another causal factor, promoting legal certainty, rights, free majority decisions and political representation of the interests of the electorate. One can even interpret the concept "democracy" in such a way that the division of power becomes conceptually necessary for democracy. Democracy presupposes responsibility of the government before the parliament (cf. Ch. 1 Sec. 6 and Ch. 12 Sec. 1–5 of the *Regeringsformen*). Criminal responsibility of officials for abuse of power also promotes democracy

(cf. Ch. 20 of the Swedish Criminal Code). An informal responsibility of the members of the parliament before the electorate is promoted by the fact that an unpopular representative risks not to be re-elected. Another kind consists of the fact that those in power are exposed to wide range of pressures (cf., e.g., Encyclopaedia of Philosophy, vol. 2, 339). However, responsibility of those in power before the electorate is efficient only if the citizens are well informed about the public decision making. The democratic law contains thus some provisions securing information (cf., e.g., Ch.2 Sec. 1 and 11 of the *Regeringsformen*).

As regards legal decisions, the following form of responsibility is of a peculiar importance. The decisions should be accompanied by clear and honest justification; cf. section 6.5. infra. This makes it possible for everybody to check their correctness.

Thus, democracy demands a legal decision making which harmonises respect for both the wording of the law and its preparatory materials and, on the other hand, moral rights and values, including freedom and equality. It also demands that the decisions are justified as clearly as possible. It does not demand a servile following of the text of the statutes or preparatory materials.

1.5 Legal Knowledge?

1.5.1 Introductory Remarks on Theoretical and Practical Statements

Peculiarities of the legal method affect the character of legal interpretatory statements. In order to understand this problem, let me draw, at first, some elementary distinctions.

Both the wording of the law and moral value judgments affect legal interpretation and legal reasoning in general. It is thus natural that any juristic text, e.g., a justification of a decision, an opinion supporting a legislative draft, or a scholarly work, contain not only law-describing propositions but also law-expressing norm-and value-statements. The former, sometimes called "spurious legal statements" report "value-freely" the content of statutes and other sources of law. When a lawyer utters a law-descriptive proposition, he certainly acts in a way similar to that of a scientist. The law-expressing statements, on the other hand, often called "genuine legal statements" do not describe but *express* norms and value judgments. They express an opinion that something ought to be done, is valuable etc. When a lawyer utters such a statement, his speech act is rather similar to a moral judgment or a legislative act.

Law-descriptive propositions are thus theoretical, whereas law-expressive statements are practical.

The most important function of a *theoretical proposition* is to give information. Its meaning is thus descriptive. A theoretical proposition is either true or false. Two main categories of theoretical propositions are empirical and analytical. Truth of