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Law and Philosophy Library 8

On Law and Reason

Preface by Jaap C. Hage



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empirical propositions, e.g., “Peter is older than John”, depends on facts. Analytical propositions are true or false in all possible worlds”, independently of facts. Their truth depends on concepts; e.g., the proposition “all bachelors are unmarried” is true due to the meaning of the words “all”, “bachelor”, “are” and “unmarried”. It will stay true even if the number of married persons increased dramatically. A special case of analytical propositions are logical propositions, e.g., “if one is married than it is not so than one is not married”, true or false due to the meaning of such logical words as “if... then”, “either... or”, “not”, “all”, “some” etc.

Two main categories of practical statements are value-statements and norm-statements. The main function of a value-statement is to express a value judgment, e.g. that something is beautiful, ugly, good or bad. The main function of a norm-statement is to express a norm and thus to influence people.

Already these distinctions, elementary and trivial, may be criticised. The borderline between different categories of statements may be fuzzy. For some purposes, it is better to speak about theoretical and practical (or non-theoretical) *meaning*, not statements. Cf. Evers 1970, 20 ff. But regardless all criticism, the fact remains that everybody, including the critics, can give unambiguous examples of empirical, analytical, normative and evaluative statements. I am assuming these distinctions as a working hypothesis, a point of departure of a further discussion.

1.5.2 *Legal Interpretatory Statements*

Keeping these distinctions in mind, one can ask the question, What is the character of legal interpretatory statements? Are they theoretical or practical? Let me return to the quoted case NJA 1950 p. 650 (cf. Section 1.2.2 supra). The case concerns a choice between two possible interpretations of Ch. 2 Sec. 1 of the Liability for Damages Act, which states that one intentionally or negligently causing a personal injury or a property damage should compensate the victim therefor. One may interpret the provision in two ways, as stipulating liability for a person whose action was either (1) a necessary condition for the result or (2) a sufficient but perhaps not necessary condition for it.

Suppose that one chooses the interpretation 2, and expresses the choice in the following interpretative statement: “If a person’s negligent action constitutes a sufficient but not necessary condition for a damage, then the person is not liable according to Ch. 2 Sec. 1 of the Liability for Damages Act.”

Since the interpretative statement expresses a choice between admissible interpretations, one can regard it as a *practical* statement, either evaluative, proclaiming that the interpretation 2 is right, or normative, demanding that one ought to follow the provision thus interpreted. On the other hand, the interpretative statement claims to report the true sense of the legal provision in question, that is, Ch. 2 Sec. 1 of the Liability for Damages Act. From this point of view, it appears to be a *theoretical* proposition.

In fact, the interpretative statement follows from a complex set of premises, some theoretical, some practical, including, for example, what follows:

1. a theoretical proposition, m , about the meaning of the interpreted provision;
2. theoretical propositions, p_1-p_n , e.g. about social results of a certain interpretation of the provision;
3. theoretical propositions, r_1-r_n , about the sources of law, e.g. precedents, relevant for the interpretation;
4. some theoretical propositions, s_1-s_n , about the commonly accepted legal interpretation norms;
5. a “closing” practical statement, such as “if the theoretical propositions m , p_1-p_n , r_1-r_n and s_1-s_n are true; and if a person, intentionally or negligently, did something that was a sufficient but not necessary condition for the damage in question, then this person is not liable according to Ch. 2 Sec. 1 of the Liability for Damages Act.

Legal interpretative statements have thus both a complex meaning and a complex justification.

Cf., e.g., Wedberg 1951, 252 ff.; Aarnio, Alexy and Peczenik 1981, 427 ff.; Peczenik 1983, 76 ff.; Aarnio 1987, 47 ff. and 180 ff.

1.5.3 The Main Problem: Knowledge, Truth And Rightness In Legal Reasoning

Complexity of meaning and justification of legal interpretative statements is a reason for some philosophical controversies concerning evaluation of their *correctness*. Such an evaluation of goals, reasons, methods, concepts and conclusions of legal reasoning is the core of jurisprudence, cf. sec. 1.1 supra.

This is a normative question. Such questions belong to the so-called context of justification. One must distinguish it from such descriptive questions, asked in the so-called context of discovery, as What factors did cause a given outcome of a legal dispute?, What reasons do the lawyers actually regard as convincing?, etc.

Justification of legal reasoning faces difficult philosophical problems.

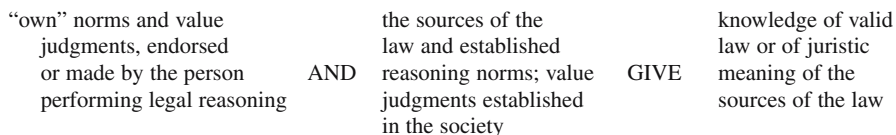
1. This form of reasoning presupposes apparently incompatible theses.
 - a. When one performs legal reasoning and seriously utters value judgments and norms, one assumes that these are right. The statement “I am arguing for p although p is not right” is strange. Even a liar hopes that others will believe that what he says is right; otherwise, why should he say it at all?
 - b. Yet, persons performing legal reasoning often admit that incompatible value judgments and norms may be possible and acceptable, without being absolutely right. From this point of view, legal reasoning is similar to practical advices. When Peter recommends holidays in Las Palmas (“because the climate is warm and the night life exciting”) and John recommends holidays

in Alaska (“because one can hunt and fish”), none of them needs to assume that the other is wrong. One person may simply think that the other has a different taste.

2. Legal reasoning constitutes a peculiar mixture of two different, ideally distinguishable, components. The first one is a description of the sources of the law, established evaluations, traditional legal reasoning norms etc. The second is a continual creation of value judgments that tell one whether to follow or not these sources, evaluations and norms. The first component is not enough. In section 1.5.2 supra, I have argued that both components affect the meaning and justification of legal interpretative statements. Let me give an additional example. Section 4 of the old Swedish Constitution (*Regeringsformen*), derogated as late as 1969, stipulated that “the King has the right to govern the realm alone”. The actually applied norm was, instead, “The *Government*, responsible to the Parliament, has the *executive power*”. Could one *read* the word “the King” as meaning “the Government responsible to the Parliament” and the words “the right to govern the realm alone” as meaning “the executive power”? Yet, legal reasoning is expected to be justified.

The main problem is what the word “justified” refers to in this context. Is legal reasoning justified if, and only if, it give us *knowledge* of the law? Is this knowledge the same as knowledge of statutes and other sources of the law?

The assumption that justified legal reasoning gives us a kind of knowledge leads to a serious problem. The following diagram illustrates this problem:



This creates a puzzle. In what sense, if any, a legal interpretative statements can give us knowledge? To say that a theoretical proposition gives us knowledge is the same as to say that it is *true*. Can a legal interpretative statement then be true, even if regarded as a practical statement, and justifiable in some sense by a set of premises containing a norm or a value judgment? It is difficult to see how practical statements, ultimately based on one’s feelings (cf. section 2.4.5 infra), can give one true knowledge of the law. Or can a legal interpretative statement be justified in any other sense? One must thus choose one or more of the following ways to characterise legal reasoning:

1. Legal reasoning, deviating from the wording of the law, is *unjustifiable*, wrong, irrational etc. But this thesis is unacceptable, since it contradicts centuries of social practice. How was it possible that generations of lawyers let a wrong method to determine their work?
2. Legal reasoning is deeply justified and right, if it gives a *true knowledge*. One may hereby distinguish between two versions.
 - a. Legal reasoning is deeply justified and right, if it gives a true knowledge of the special juristic *meaning* of the sources of the law. This thesis has the

advantage of reducing the problem of rightness to the well-known idea of truth. But again, how can a legal conclusion be true, even if it is justifiable by a norm or a value judgment? One must also explain why the same words and expressions have a special juristic meaning when occurring in the law and a different meaning when occurring elsewhere.

- b. Legal reasoning is deeply justified and right, if it gives a true knowledge of the *real valid law*, not identical with the sources of the law. This thesis has the same advantage and disadvantage as 2a supra. Moreover, it is not clear what the “real valid law” is. Where does it exist, if not in the legal texts? If it is unwritten, what is the mode of existence of it?
3. Legal reasoning is deeply justified and right, though it *does not give one a true knowledge*. To be sure, it has support of some value judgments and norms, but these are continually created by the person interpreting the law. Legal reasoning thus *transforms* the established law into something else, that is, the *interpreted law*.

I will argue for the third way to characterise legal reasoning. But what does it mean that legal conclusions can be right (or correct) though not true? One needs a theory of rightness as distinct from truth.

One can also say that legal (interpretative) conclusions are true propositions about the interpreted law. But this leads to the following difficulty. The interpreted law is created exactly at the moment of interpretation. On the other hand, true propositions are true because they correspond to something *preexistent*. The discussed view thus implies the strange idea that interpretative conclusions are true, because they correspond to... themselves.

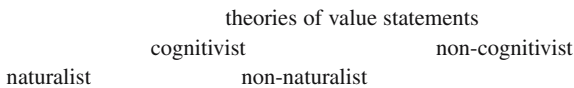
Chapter 2

Rationality of Moral Judgments

2.1 Cognitivism and Non-Cognitivism

At first, I must return to the preliminary question, Why not to assume that legal conclusions can be true, even if they are fully justifiable only by a set of premises containing a norm or a value judgment? Such an assumption implies another one, namely that norms or value judgments themselves possess truth values. This is, of course, the central problem of value theory. Let me thus make some observations, belonging to this area.

Different (meta-) theories of value statements compete with each other. One may classify them, as follows (cf., e.g., Moritz 1970, 9 ff.):



Cognitivist theories identify value statements with some theoretical propositions, true or false. Naturalist theories regard value statements as theoretical propositions about “natural” properties of persons, states of affairs, objects, actions etc.

One can, e.g., define a morally good action, as follows.

1. If and only if an action, H, increases happiness of other people, then H is morally good.
2. If and only if an action, H, fits a certain calculus of human preferences, then H is morally good.
3. If and only if an action, H, promotes fulfilment of human talents, then H is morally good.

However, all naturalist theories face Moore’s famous “open question argument” (Moore 1959, 15 ff.; cf. Moritz 1970, 74 ff.). One can thus meaningfully ask such questions as “To be sure, H increases happiness, but is H good?”, “To be sure, H fits the preferences, but is H good?” etc. The fact that such questions are meaningful shows that goodness is not identical with any naturalist property. If it were, such questions would be as meaningless as the question “To be sure, John is a bachelor but is he married?”. The latter is meaningless precisely because a bachelor is

identical with a man who never married. The former are meaningful, since to be good is *not* the same as to increase happiness etc.

The failure of the naturalist theories makes it understandable why the non-naturalist were created. Non-naturalist (yet cognitivist) theories regard thus value statements as theoretical propositions about “non-natural” properties of persons, states of affairs, objects, actions etc. One can, e.g., say that the statement “an action, H, is morally good” means “H has the property of goodness”, not identical with any “natural” property or a combination thereof. However, it is difficult to state anything precise about this property.

Certain philosophers have also assumed that people possess a “sense of value” (analogous to sight, sense of hearing etc.). One uses one’s eyes to see that something is red etc. Analogously, one uses the sense of value to “see” that an action etc. possesses such a non-natural value-property as goodness.

Theories of “the sense of values” are, however, controversial. Value-properties are unique in this respect that they only cause one single result, that is, affect the sense of value, and thus cannot be confirmed in any other way. If a person is “value-blind”, that is, lacking the sense of value, he cannot learn at all that an action etc. is good. The situation is worse than in the case of ordinary blindness. A blind person can use physical instruments to learn what colours a thing has but a value-blind one has no access to any value-indicators. Any discussion between a value-blind and a value-seeing person is thus impossible (cf. Moritz 1970, 35).

All cognitivist theories face also the following difficulty. Value statements are reasons for action. Suppose that Peter seriously claims that H is a morally good action and that nothing incompatible with H is better. It is then natural for Peter to have a disposition both to approve of H and to perform H, if he has an opportunity to do it. On the other hand, a pure description of properties, either natural or other, does not seem to be so intimately connected with action.

One may regard the *non-cognitivist* theories as a reaction against the difficulties unsolved by the cognitivist ones. The non-cognitivist theories regard value statements as merely expressing (not describing!) attitudes, feelings etc. One can, e.g., say that the statement “H is a good action” means “Hereby I am expressing my attitude: I like H”. Value statements are emotional projections and have no truth value. They can no more be true than numbers healthy.

Among non-cognitivists, one must mention *Axel Hägerström*. His views were built up around the following theses (cf. Hägerström 1929, 111 ff.). All knowledge concerns things extant in time and space. Value statements lack truth values, since they “describe” something outside of time and space. The value “existing” in an object does not exist in any definite sense at all. Suppose that a person, A, gave bread to a poor man, B, and this was a good action. It is meaningless to attempt at stating precisely where the goodness does exist, it A’s hand, in the bread, in B’s mouth etc. Neither can values exist in a world outside time and space, since no such world can exist. The expression “the world outside time and space” is self-contradictory. Value statements are self-contradictory, too, apparently telling something about the objects but in fact only expressing feelings; cf. section 5.5 infra.

An important version of non-cognitivism, elaborated by Charles L. Stevenson (cf. 1944, 20 ff.) assumes that the value statement “this is good” has two functions. First, it expresses a combination of approval and exhortation: “I approve of x and I want you to do so as well”. Second, it describes the the speaker’s attitude. However, one can also criticise the non-cognitivism.

1. Value statements, such as “H is good”, are object oriented. The statement “H is good” is thus a statement about H. But a non-cognitivist claims that this statement only *apparently* tells something the action H but *in fact* only expresses feelings. The non-cognitivist assumes thus a corrective attitude as regards the ordinary language. It is not easy to tell what gives him sufficient reasons to do so.
2. Value statements can meaningfully be, and often actually are, supported by reasons. When Peter says that John is a good person, he may add, e.g., “... *because* John has a disposition to help people”. Feelings, on the other hand, need no such support.
3. Non-cognitivists must deny that value statements, uttered by different persons, can be logically incompatible. No logical incompatibility exists between a description of the fact that Peter approves of H and a description of the fact that Paul disapproves of H. Yet, when Peter says “H is good” and Paul says “H is not good”, these value statements seem to be incompatible.
4. Suppose that Peter approves of telling the truth and disapproves of causing unhappiness. If John tells Paul the truth and thus makes him unhappy, Peter experiences two different feelings, approval of the action of telling the truth and disapproval of causing happiness. In other words, he experiences “mixed feelings”. It is perfectly possible to feel in this way. On the other hand, when morally evaluating the action of John, Peter cannot satisfy himself with a “mixed” judgment. He must make up his mind, that is, must weigh and balance the reasons for and against the conclusion that the action is good.

Moral statements have often a provisional, *prima facie* character. “*Prima-facie*” means, among other things, that other, overriding, reasons may justify the contrary conclusion. To tell the truth is thus a good action, *unless* it causes too much unhappiness, too much suppresses human talents etc.

Peter must thus tell in the concrete case whether the goodness of telling the truth outweighs the bad property of causing unhappiness.

5. Whoever utters a value statement, assumes that it is right (cf. Alexy 1989, 127 ff.).

Feelings, on the other hand, are neither right nor wrong, they simply are there.

The following story elucidates some of these difficulties. In many countries, pollution caused serious damage of the forest. Suppose that pollution is an inevitable result of industrial development, and the latter a necessary condition of high material standard of living. Suppose that a supporter of the high standard of living, A, discusses with an environmentalist, B. To be sure, they can have different beliefs concerning facts. A can, e.g., say that industrial output can increase without increasing pollution. B can claim that high standard of living is possible without

industrial growth. But even if they agree about the facts, the discussion can continue. One must often *decide* what is better, growth of the standard of living or protection of clean air. The question does not concern either A's or B's feelings. These are clear. A likes the increased standard of living more than protection of environment, B likes the latter more than the former. The discussion concerns, instead, the question who is right. Is protection of environment in this case more important than the growth of living standard or is it not? The question is practically important and both participants in the discussion claim that it is soluble.

To be sure, a moderate non-cognitivist can regard the discussion between A and B as mutual attempts to show the opponent that he endorses incompatible value statements. But so what? If one is a non-cognitivist, one must tell that value statements merely express feelings and these can be "mixed", see above. Moreover, if both A's and B's different value systems are logically consistent, the discussion must stop. If the non-cognitivists are right, one cannot attempt at showing which system is *better*.

There exists an interesting analogy between non-cognitivism in moral theory and scepticism in epistemology. A non-cognitivist argues that no knowledge of values can exist. A sceptic gives philosophical reasons for the conclusion that no knowledge at all is possible. The objective reality is not accessible for human beings. Our knowledge is based on observations but these are fallible, e.g., as a result of optical illusions. If an evil demon all the time deceived all of us, we could not know it. One cannot falsify scepticism, but in order to live a normal life, one must ignore it.

2.2 Practical and Theoretical Meaning of Practical Statements

2.2.1 Practical Meaning

I will now present another theory, attempting at unifying some cognitivist and non-cognitivist insights. The theory deals only with moral statements, albeit one can perhaps extend it to other kinds of practical statements.

A practical statement, i.e. a norm-expressive statement or a value statement has, first of all, a *practical meaning*.

Most elementary norm-expressive statements qualify a human action as prescribed (obligatory), permitted, or prohibited (forbidden). The statement "A should not park his car here" thus qualifies A's action of "parking the car here" as prohibited (cf. section 4.4.2 *infra*). More sophisticated norm-expressive statements will be discussed in section 5.6.5 *infra*. From another point of view, norm-expressive statements qualify a human action as conforming to or violating the norm in question.

A value statement characterises an object as good, bad, beautiful, ugly, etc. It expresses a value judgment. *Inter alia*, it expresses or encourages approval or disapproval of an object. It is also a reason for action. Suppose that a person,

A, seriously claims that H is a morally good action and that nothing incompatible with H is better. It is then natural for A to have a disposition to approve of H and to perform H, if an opportunity exists. If A has no such disposition, one may doubt whether the evaluative claim is serious. It would be strange to seriously claim that H is a morally good action and that nothing incompatible with H is better and yet to disapprove of H. It would also be strange not to perform H, given the opportunity.

The most important function of a norm-expressive statement is to affect people, that is, to bring about some actions and suppress other.

A norm-expressive statement is thus a reason for action. This is even clearer than in the case of moral value statements. Suppose that a person, A, seriously claims that H ought to be performed and that no overriding reasons tell against performing H. A has then a disposition both to wish that H is performed and to actually perform H, if an opportunity exists. It would be strange to seriously claim that H ought to be performed, to admit that no overriding reasons tell against performing H, and yet to wish that H is *not* performed. It would also be strange not to actually perform H, given the opportunity. In such a case, one would doubt whether the normative claim is serious.

2.2.2 *More About Practical Meaning. Norms and the Will*

An important question concerns the relation between a norm-expressive statement and the *will*. One must distinguish between four different things:

- a. An utterance or an endorsement of a norm-expressive statement is often a *causal result* of the fact that an individual wants to achieve a certain goal and regards this norm as a means therefor. A will of a politician to achieve a goal can, e.g., cause his participation in a legislative process.
- b. In some cases, however, one cannot identify an individual human being whose will the norm-expressive statement is supposed to express. A norm can be issued in the name of an institution, e.g., the parliament (cf. Olivecrona 1939, 32 ff. and 1971, 18 ff.).
- c. An utterance or an endorsement of a norm-expressive statement often *causes* the fact that some people think of someone whose will corresponds to it. If something is obligatory, they think that “one” wishes it, if something is forbidden, they think that “one” does not wish it. So is the case, regardless of whether people can tell whose will they think about.

A norm-expressive statement, in particular a legal one, can thus express an *independent imperative*. Its meaning is such that one understands it as if it were a command, regardless of whether one can tell whose will it expresses. Neither is it necessary to know to whom it is addressed. A genuine command, on the other hand, exists only if a definite individual wants something and tells another one to do it (cf. Olivecrona 1939, 42 ff. and 1971, 128 ff.).

- d. The *meaning* of a norm-expressive statement, e.g. imposing an obligation, is thus such that one cannot fully understand it, if one does not think about a will. This fact explains why many thinkers (wrongly) understood norms as meanings of acts of will (cf., e.g., Kelsen 1960, 4 ff.). Generally speaking, there is a link between the norm and an idea of the will of the person who follows this norm. The meaning of a norm includes a component which corresponds to the Latin word “*ut*” (“let it be that”; Opalek 1973, 222 and 1974, 49 ff.; cf. Hare 1952, 17 ff. on *neustic*). This component makes the norm “A ought to do H” a reason to perform the action H; and to perform an action presupposes an intention, that is, a will to act. But this is not the will of a person who enacted the norm but merely the will of a person who obeys it.

Cf. Harris 1979, 39: The idea that “(a)ll norms are meanings of acts of will (...) is acceptable provided it is understood as relating only to the logical category into which norms fall, not to any assumptions about actual willings.”

Only as regards socially established norms, such as enacted statutes, one also assumes that there is another link, between the norm and a will of its creator. An obligatory action is the action that “one” wishes to be performed; but to understand the socially established norm, one does not need to have an exact idea of the person whose will it is supposed to express.

2.2.3 *Theoretical Meaning of Practical Statements: Justifiability*

Another important property of the meaning of most, if not all, practical statements is that they *may be justified*. Justifiability is an important component of *theoretical* meaning of practical statements (cf., e.g., Alexy 1989, 127; cf. Popper 1966, 384–5).

The following classification is conceivable:

1. Some value statements are justifiable. One can support them with reasons. For instance, the following conversation makes sense: “-This picture is so beautiful! -Why? -Because it gives an impression of movement, and yet is so harmonious”.
2. Some (apparent?) “value statements” are perhaps not justifiable, as the following example indicates: “-This fish is so good! -Why? What a stupid question, I like it!”.
3. Some norm-expressive statements are justifiable. For instance, the following conversation is thinkable: “-Punishment ought to be stipulated for using drugs. -Why? -Because it would reduce the consumption of drugs. -But why ought one to reduce it? -Because using drugs is habit-forming and causes more pain than pleasure.”
4. Some commands and (apparent?) “norm-expressive statements” are perhaps not justifiable, as the following examples seem to indicate: “-Switch on the lamp! -Why? -What a stupid question, I *told* you, switch on the lamp!!”. Or: “-All citizen of this country should worship the Leader! -Why? -What a stupid question, they should!!”.

Yet, one can regard the “unjustifiable” value statements and norm-expressive statements as justified by tacitly assumed authority reasons. One thus proffers the authority of the person who makes a judgment or gives a command, etc. Justifiability implies that a person confronted with a practical statement can ask “why?” and thus demand reasons which support the statement. The faculty of asking “why?” is essential for our thinking and intersubjective communication.

There are many ways to justify practical statements. Let me discuss three, one based on the causal relation between goals and means, another supported by weighing and balancing of various principles, and the third one based on the logical relation between practical and theoretical statements (see *infra*).

The following, logically correct, inference exemplifies justification based on the causal relation between goals and means.

Premise 1 (a norm)	One ought to reduce the consumption of drugs
Premise 2 (a theoretical proposition)	The consumption of drugs can be reduced, if and only if punishment for using drugs is stipulated
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Conclusion:	Punishment ought to be stipulated for using drugs

Let me now give an example of a (logically correct) inference supported by weighing and balancing of various principles.

Premise 1 (a theoretical proposition)	Using drugs is a habit-forming practice and causes the user more pain than pleasure
Premise 2 (a <i>prima facie</i> moral principle)	If a practice is habit-forming and causes the user more pain than pleasure, then punishment ought to be stipulated for this practice, unless other moral principles, justifying the contrary conclusion, weigh more in this case
Premise 3 (expressing a weighing of principles)	The moral principles, justifying the conclusion that punishment ought not to be stipulated for using drugs, do not weigh more in this case than the reasons for stipulating punishment
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Conclusion:	Punishment ought to be stipulated for using drugs

The conclusion thus follows from a set of premises, consisting of (1) a theoretical proposition, (2) a *prima-facie* principle, and (3) a value statement, expressing an act of weighing.

2.2.4 Theoretical Meaning of Practical Statements: L-, S- and D-rationality

An important component of the theoretical meaning of practical statements can be characterised in the following, more general and abstract, manner.

Although moral value statements and norm-expressive statements possess meaning related to some feelings and constitute reasons for action, various circumstances *restrict arbitrariness* of moral reasoning.

1. A moral statement can often be presented as a *logically correct conclusion* of a certain set of premises. One can also inquire whether these premises are (a) *linguistically correct* and (b) *logically consistent*.
2. One can also inquire whether the premises are sufficiently *coherent*.
3. Finally, different individuals can *discuss* moral questions in an impartial and otherwise objective way.

In brief, one can *rationally justify* moral statements.

Both philosophers and lawyers show recently an increased interest in rationality. The concept of rationality is, however, both ambiguous and applicable to vastly different areas. One speaks about deductive rationality, inductive rationality, scientific rationality in general, rationality of actions, goal rationality, norm rationality, system rationality, ethical rationality, legal rationality, rational reasoning etc. In this work, I will discuss rational reasoning, that is, rationality of conclusions, with particular attention to practical, *inter alia* moral and legal conclusions.

One can thus distinguish between three different demands of rationality. These demands are general but vague. I do *not* intend to formulate precise, contentually rich and generally valid rationality criteria. Only the moral discourse can show *in concrete cases* how rational particular conclusions are. The present work deals merely with conceptual and philosophical problems connected with some examples of rational moral and legal reasoning.

Logical rationality (in brief L-rationality; cf. Aarnio 1987, 189) of a conclusion means that it

1. *follows logically* of a set of premises that are
2. *logically consistent* and *linguistically correct*.

L-rationality is a minimum demand. A “justification” based on either inconsistent or linguistically incorrect premises is obviously worthless.

Logic comprises inferences whose truth depends on their form alone, that is, on concepts; e.g., the inference “if one is married than it is not so than one is not married” is true due to the meaning of such logical words as “if ... then”, and “not”.

I assume that all such inferences are logical, even if the inferential link is placed between norms or value statements lacking truth value.

Substantial or *supportive* rationality (S-rationality) constitutes the basic idea of rationality, its point. A *perfect S-rationality* of a conclusion means that it *follows logically from a highly coherent set of premises*. Inconsistent or linguistically incorrect premises are not S-rational. But the demand of S-rationality is stronger. It is also related to *coherence*.

I will return to coherence (cf. section 4.1 *infra*). But the main idea is that the degree of coherence is determined by balance between a number of criteria, *inter alia*, the following ones: the greatest possible number of supported statements belonging to the set of statements in question; the greatest possible length of chains of reasons belonging to it; the greatest possible number of connections between various supportive chains belonging to the set of statements; and the greatest possible number of preference relations between various principles belonging to it.

A conclusion may follow from a set of premises whose significant part constitutes a coherent theory. Other premises, belonging to this set, are *perhaps* coherent with this theory, but coherence is not proved. Such a conclusion is *S-rational to a certain degree*.

One can say that this conclusion *has reasonable support*. The statement *p* (weakly) *supports* the statement *q* if, and only if, *q* belongs to a set of premises, *S*, from which *p* follows logically. The support is reasonable, if all these premises are reasonable.

A reasonable statement is not falsified. Neither is it arbitrary. That is, the hypothesis is not to a sufficiently high degree corroborated that this statement does not logically follow from a highly coherent set of premises. In other words, the hypothesis is not to a sufficiently high degree corroborated that this statement is not perfectly *S-rational*.

The concept of reasonable support will be discussed in sections 2.7.4 and 3.2.4 *infra*.

Discursive rationality (in brief D-rationality; cf. Aarnio 1987, 190) of a conclusion means that it would not be refuted in a *perfect discourse*. D-rationality includes both S-rationality and some additional demands. In some cases, both the conclusion and its negation follow from highly coherent sets of premises. One can then hope that a discourse would determine which of these weighs more.

2.3 More About Theoretical Meaning of Practical Statements. *Prima-Facie* Moral Statements

2.3.1 *Criteria of Moral Goodness*

There exists a considerable consensus of people, at least in the Western culture, that some principles are moral and that it is a morally good thing to pay attention to them. One can, e.g., mention the following principles.

1. One ought not to injure other people.
2. One ought to help other people.
3. One ought to work efficiently.
4. One ought to tell the truth.
5. One ought to keep one's promises.
6. One ought to show courage.

Consequently, one can imagine a set of theoretical propositions about fulfilment of the principles, e.g.:

1. A person, A, does not injure others people.
2. A person, A, helps other people.
-
6. A person, A, shows courage.

Moreover, such statements as the following ones are meaningful:

1. A is a morally good person, since he has a disposition not to injure other people.
2. A is a morally good person, since he has a disposition to help other people.
3. A is a morally good person, since he has a disposition to work efficiently.
4. A is a morally good person, since he has a disposition to tell the truth.
5. A is a morally good person, since he has a disposition to keep promises.
6. A is a morally good person, since he has a disposition to show courage.

These criteria fulfil the demand of L-rationality. In other words, they are *meaningful* in the following sense. The moral language is such that one can objectively (without relying on one's emotions) state the following. The rules of moral language do not prohibit one to conclude that if A helps others, works efficiently, tells the truth, keeps promises, shows courage, etc., then he is *prima-facie* a good person. The content of the *prima-facie* conclusion is that he is a good person, provided that no reasons for the contrary conclusion are stronger.

Theoretical propositions about some facts, such as a person's disposition not to injure others or his helpfulness etc., are thus meaningful reasons for the practical conclusion that this person is *prima-facie* morally good. In other words, criteria for the goodness are always determined, and not a matter of decision (cf. Jareborg 1975, 129 ff., quoting Philippa Foot and others).

Some other "moral criteria", on the other hand, would be *ceteris-paribus* linguistically unthinkable, that is meaningless without a special, often *ad-hoc* explanation, which goes beyond common sense. If somebody uttered the statement "A is a morally good person, since his nose is shorter than two centimetres", one would suspect that he is joking, does not know the language or is insane. To be sure, all absurdities can be saved by some *ad-hoc* hypotheses. For example, the absurd statement "A is a morally good person, since his nose is shorter than two centimetres" would gain some sense had one added to it a theory ascribing long noses evil qualities. But such a theory would be a strange one, indeed.

The established use of language thus determines some limits for arbitrariness of moral reasoning.

Moreover, the moral criteria are not only meaningful but also *supported* by coherent chains of reasons. One may argue for them. In this sense, they fulfil the demands of S-rationality.

2.3.2 *General Theories of the Morally Good*

Since a long time, philosophers regard such criteria as insufficiently profound and attempt at constructing general theories of moral goodness. These theories differ from mere criteria. Each general theory aims at stating an overriding formula, covering all morally good actions and persons. No concrete criterion implies such a claim.

It is plausible to say generally that morally good action has something to do with showing *consideration* for others. But the word "others" is vague. It

certainly covers other people. One may argue that it also covers all creatures whose interests may be affected by the action regulated or evaluated by a moral statement. In other words, one may argue that it covers all creatures who can suffer, feel pleasure, think etc. The expression “showing consideration” is vague, too. One can show consideration to others by respecting their preferences, happiness, talents etc.

A special question concerns moral values attached to some products (in German philosophy called *Werkwerte*). One can argue that it is a morally good action to produce art, technology etc. But one may also argue that creating such cultural products is good only when it promotes interests of people, at least in the long run.

Several competing moral theories are thus admissible, each implying a definition of a good (or a right) action.

For the sake of simplicity, I disregard here a plausible distinction between the morally good and the morally right, according to which the former notion generally refers to the subjective dimension of actions: a good action is a virtuous action.

Inter alia, the following definitions are possible.

1. If and only if an action, H, increases happiness of other people, then H is morally good.
2. If and only if an action, H, fits a certain calculus of human preferences, then H is morally good.
3. If and only if an action, H, promotes fulfilment of human talents, then H is morally good.
4. If and only if an action, H, fits some goals and standards of perfection, inherent in established social practices, then H is morally good.

Each general theory of this kind defines the morally good and, at the same time, stipulates a general norm for a moral action. The theories express, in other words, various *meaningful* (L-rational) and well *supported* (highly S-rational) premises, supporting the conclusion that one *prima-facie* ought to perform a certain action. I am omitting the complex question to what extent different theories imply different evaluation of concrete actions.

Some “moral theories”, on the other hand, would be *ceteris-paribus* meaningless without an explanation which goes beyond common sense. For example, the statement “an action, H, is morally good if and only if it increases the number of white stones in Scania” would gain some sense only if one had added to it a strange theory, e.g. ascribing white stones in Scania immortal souls.

2.3.3 *Prima-facie Character of Moral Theories and Criteria*

Many criteria and general theories of the moral good are both meaningful and reasonable. I will argue, however, that they have a provisional, *prima-facie* character. The argument consists of the following steps.

Step 1 is to describe some well-known facts. Many criteria and theories of moral goodness compete with each other.

At the level of criteria, there exists “the well-known variation in moral codes from one society to another and from one period to another, and also the differences in moral beliefs between different groups and classes within a complex community” (Mackie 1977, 36). Moreover, a single individual often endorses mutually competing moral criteria. For example, a doctor endorses simultaneously the view that he ought to inform the patient about his sickness and the view that he ought to help him as efficiently as possible. But the doctor’s disposition to tell the truth can in some cases harm his patient. The doctor must then make a choice between telling the truth and efficiently helping the patient. Or, a person making a moral judgment may “pick up” the peaceful disposition and helpfulness of a certain individual and concludes that this individual is morally good. He decides then not to use the other criteria (e.g., willingness to work, disposition to tell the truth etc.) when making moral evaluation in a concrete case.

At the level of general theories of moral good, there also exists a great variation. Sceptics disagree with objectivists. Rights theorists disagree with utilitarianists. Natural law theorists disagree with various kinds of historicists. Rule utilitarianists disagree with action utilitarianists. One can give reasons not only in favour of each theory but also against it.

Step 2 is the following hypothesis, explaining the described facts. Moral opinions of an individual do not constitute a consistent system of precise rules. Already Aristotle noticed the problem. “The Aristotelian approach starts with the premises that Practical Philosophy is concerned with principles of action and that the world in which we act is a world of ‘things capable of being otherwise than they are’ (EN. 1140 a31 and elsewhere.) In this untidy world of the contingent and the unforeseen, universal knowledge... is not to be had... ‘To look for demonstration in practical matters is as vulgar an error as it is to accept less than demonstrative reasoning in mathematics’” (EN. 1094 b26; quoted from Nowell-Smith 1973, 316).

Precise rules adapted to some cases of moral judgment thus tend to conflict with other cases. “And despite the prominence in recent philosophical ethics of... utilitarian principles, and the like, these are very far from constituting the whole of what is actually affirmed as basis in ordinary moral thought” (Mackie 1977, 37.). To be sure, a general theory may be changed and adapted to counter-examples. But then, new counter-example would appear. A gain of consistency at one end leads to loss at the other.

Step 3 consists in the following hypothesis. A rational choice of criteria and theories of moral good is often based on *weighing and balancing*.

As regards criteria, this thesis is both plausible and rather trivial. For example, a doctor performs an act of weighing, which decides whether telling the truth (one moral criterion) weighs in the actual case more or less than avoiding harm (another criterion).

As regards general theories, the weighing hypothesis is more controversial, yet in my opinion true. Assume, for example, that an utilitarianist claims generally that an action which fits a certain calculus of preferences is both good and obligatory. He decides then not to pay attention to other normative theories, basing the moral goodness and obligatoriness on happiness, established practices, natural rights etc.

Of course, he may employ very different arguments to justify this choice. He may, e.g., regard his theory as the only one logically consistent, the only one correctly describing or reflecting the established practice of moral judgment etc. Such claims, however, have a rather intolerant character. If a competing theory of the moral good actually is inconsistent, it can very often be converted into an improved theory, consistent and still competing with the chosen one. At the end of a day, an advocate of a certain moral theory states very often that it contains *more important* moral insights than its competitors. This judgment of importance implied an act of weighing and balancing.

Step 4 consists in another hypothesis. The role of weighing in moral contexts together with the empirical fact that no general theory of moral goodness so far succeeded to defend his assumed monopoly makes it plausible to claim that *all* criteria and theories of moral goodness have a *prima-facie* character. (*Re* the concept of “*prima facie*”, cf. Ross, W.D., 27–28). That is, they are provisional, since other considerations, justifying an incompatible conclusion, may weigh more.

One can object to it and point out that many established systems of morality, as well as many philosophical theories of moral goodness, contain norms which, according to claims put forward in such systems or theories, have a definitive, not merely *prima-facie* character. Take, e.g., Catholic morality. It claims that the norm forbidding the intentional killing of an innocent is a definitive (not merely *prima-facie*) rule. Utilitarianists, e.g., claim often that one definitively ought to adapt one’s actions to preferences of other people. One can also imagine a perfectionist who claims that one definitively ought to perform actions promoting fulfilment of human talents, fitting some goals and standards of perfection, inherent in established social practices; etc.

Yet, it is not difficult to refute the objection. To be sure, such claims are actually put forward, but they are wrong. If life of billions could be saved by killing one innocent person, one ought to kill this person. If preferences of other people, or established social practices, include elements of cruelty, racial prejudices etc., one ought to disregard them. The impression of definitiveness is caused by a very great weight the rules in question have. But one can always imagine justifiable exceptions. Moreover, the exceptions are justifiable by recourse to weighing and balancing, showing that other considerations weigh more in certain situations than the main rule. Consequently, such rules may be regarded as merely *prima-facie*.

One must, however, make a distinction between the following concepts of *prima-facie*.

1. A practical statement has the *prima-facie-1* character (a *weak prima-facie*) if, and only if, the *language* in question *does not make it strange* for one to consider it within the act of weighing and balancing which determines one’s practical opinion or conduct (action or forbearance).
2. A practical statement has the *prima-facie-2* character (a *strong prima-facie*) if, and only if, the *culture* in question *compels* one to consider it within the act of weighing and balancing which determines one’s practical opinion or conduct (action or forbearance).

Without a serious attempt to make it precise, let me give two examples of reasonable interpretations of the vague expression “the culture in question compels one to consider a norm- or value-statement”:

- a. Any normal person, belonging to the culture, in any particular case, to which this statement is applicable, would *regard it as strange* not to consider this statement and yet to insist that one has performed a justifiable act of weighing and balancing in order to answer the question whether H *definitively* is obligatory or good.
- b. Any normal person, belonging to the culture, in any particular case, to which this statement is applicable, would act in a manner which implies that he *obeys the rule*, according to which one ought to consider this statement when performing such an act of weighing.

The following two concepts of *prima-facie* are less important.

3. A practical statement has the *prima-facie-3* character if, and only if, the *culture* in question *does not make it strange* for one to consider it within the act of weighing which determines one’s practical opinion or conduct (action or forbearance).
4. A practical statement has the *prima-facie-4* character if, and only if, the *language* in question *compels* one to consider it within the act of weighing and balancing which determines one’s practical opinion or conduct (action or forbearance).

Whenever I write “*prima-facie*” without index, I mean *prima-facie-1*.

The following relations between these concepts of *prima-facie* are plausible:

- I. If a practical statement has the *prima-facie-2* character (the strong *prima-facie*), it has also the *prima-facie-1* character (the weak *prima-facie*).

That is, if the *culture* in question *compels* one to consider a practical statement within such an act of weighing and balancing, the *language* in question *does not make it strange* for one to consider it within this act of weighing and balancing.

Indeed, one cannot imagine a situation in which the language alone is sufficient to make it strange to consider the statement, and yet any normal person, belonging to the culture which uses this language, takes for granted that one should consider it, that it is strange not to consider it, etc.

- II. If a practical statement has the *prima-facie-4* character, it has also the *prima-facie-3* character.

That is, if the *language* in question *compels* one to consider a practical statement within such an act of weighing and balancing, the *culture* in question *does not make it strange* for one to consider it within this act of weighing and balancing.

One cannot imagine a situation in which the language alone compels one to consider the statement, and yet any normal person, belonging to the culture which uses this language, thinks that it is strange to consider it.

Logically incompatible actions can be, at the same time, *prima facie* good. One can also simultaneously have a *prima facie* duty to perform logically incompatible

actions. The “normal” logic is thus not applicable to moral *prima-facie* statements. Suppose, e.g., that A killed B. One *prima-facie* reason, for instance circumstances of his act, can justify a life imprisonment of A, another, for instance A’s psychical condition, can support a milder punishment.

2.3.4 *The Step From Theoretical Propositions to Prima-facie Practical Conclusions*

This concept of *prima-facie* allows one to fruitfully discuss the question whether a practical statement can follow from a set of premises *solely* consisting of theoretical propositions. I will discuss here only *moral* norms and value-statements, thus leaving aside the problem whether other practical statements have the same properties. (*Re* theoretical meaning of moral value judgments in general, cf. Peczenik and Spector, 441 ff.).

(1) *Ought- and Good-Making Facts*

First of all, the language alone decides which facts are and which are not strange for one to consider in one’s act of weighing and balancing which answers the question whether A’s action H is obligatory or good. In principle, one does not need to make a recourse to weighing and balancing in order to find out which facts belong these two categories. Keeping in mind the definition of the “*weak prima-facie*” (*prima-facie-1*), one may claim that the following theses are plausible explications of analytic relations:

(1.1) There exists at least one consistent description of an ought-making fact, such that the following holds good: if this fact takes place, then A ought *prima-facie* to do H, in the *weak* sense of “*prima-facie*”

and

(1.1*) There exists at least one consistent description of a good-making fact, such that the following holds good: if this fact takes place, then the action H is *prima-facie* good, in the *weak* sense of “*prima-facie*”.

Such relations may also be called “logical”, provided that one follows von Wright’s advice (1963, 167) and “enlarges the province of logic”.

By the way, I disregard here the problem whether the list of these ought- and good-making facts is finite or infinite. I also disregard the question of mathematical notation, one would need to express the idea of an infinite list.

Let now the symbols $F_1\text{OUGHT}(aH)$ - $F_n\text{OUGHT}(aH)$ stand for all facts which are included in the complete list of established moral criteria of what one ought to do; and the symbols $F_1\text{GOOD}(H)$ - $F_n\text{GOOD}(H)$ stand for all facts which are included in the complete list of established moral criteria of the good. Both lists are possible to elaborate by a study of social practice, without any recourse to weighing and balancing.

Now, one may claim that the following theses are plausible explications of analytic relations between practical statements and, on the other hand, good- and ought-making facts:

(1.2) If at least one ought-making fact $\{(F_1\text{ OUGHT}(aH) \text{ or } F_2\text{ OUGHT}(aH) \text{ or, ... or } F_n\text{ OUGHT}(aH))\}$ takes place, then A ought *prima-facie* to do H, in the *weak* sense of “*prima-facie*”

and

(1.2*) if at least one good-making fact $\{F_1\text{ GOOD}(H) \text{ or } F_2\text{ GOOD}(H) \text{ or, ... or } F_n\text{ GOOD}(H)\}$ takes place, then H is *prima-facie* good, in the *weak* sense of “*prima-facie*”.

For example, if an action, H, increases happiness of other people, then H is *prima-facie* morally good or obligatory, in the *weak* sense of “*prima-facie*”.

To avoid misunderstandings, let me emphasise the following. Since the weak *prima-facie* in this sense does not commit one to any action, the theses (1.1) - (1.2*) establish no bridge from the “Is” to the “Ought”.

The following theses are also plausible explications of analytic relations:

(1.3) If at least one ought-making fact $\{(F_1\text{ OUGHT}(aH) \text{ or } F_2\text{ OUGHT}(aH) \text{ or, ... or } F_n\text{ OUGHT}(aH))\}$ takes place, then it is reasonable that A ought *prima-facie* to do H, in the *strong* sense of “*prima-facie*”

and

(1.3*) if at least one good-making fact $\{F_1\text{ GOOD}(H) \text{ or } F_2\text{ GOOD}(H) \text{ or, ... or } F_n\text{ GOOD}(H)\}$ takes place, then it is reasonable that H is *prima-facie* good, in the *strong* sense of “*prima-facie*”.

As stated above, a practical statement has a *prima-facie-2* character (the *strong prima-facie*) if, and only if, the *culture* in question *compels* one to consider it within the act of weighing and balancing which determines one’s practical opinion or conduct (action or forbearance).

The theses 1.3 - 1.3* state that the culture in question compels one to consider in one’s act of weighing any practical statement which the language does not make strange to consider. Such a statement may be refuted by arguments only, not simply ignored. This implies that if F is a fact which the language does not make strange to consider in an act of weighing concerning the question whether an action is definitively good or obligatory, then the hypothesis is reasonable that all normal people within the corresponding culture take for granted, at least implicitly, that F should be thus considered.

The strong *prima-facie* has a practical force. It commits one to consider some things when performing an act of weighing. Yet, the theses (1.3) and (1.3*) establish no bridge from the “Is” to the “Ought”. The conclusions they validate are no practical statements, but merely meta-statements, according to which some practical statements are reasonable. “(W)ithin the context of a given moral discourse there are certain moves which are upheld, not by semantic rules, but rather by the conception of reasonability embedded in the moral discourse itself” (Peczenik and Spector, 473).

The statement “at least one good-making fact $\{F_1\text{GOOD}(H) \text{ or } F_2\text{GOOD}(H) \text{ or, ... or } F_n\text{GOOD}(H)\}$ takes place” is logically equivalent to the **propositional content** of the statement “H is *prima-facie* good, in the *strong* sense of “*prima-facie*”. It is also equivalent to the **propositional content** of the statement “H is, all things considered, good”. Moreover, the statement “at least one ought-making fact $\{F_1\text{OUGHT}(aH) \text{ or } F_2\text{OUGHT}(aH) \text{ or, ... or } F_n\text{OUGHT}(aH)\}$ takes place” is logically equivalent to the **propositional content** of the statement A ought *prima-facie* to do H, in the *strong* sense of “*prima-facie*” and to the propositional content of the statement “A ought, all things considered, to do H”. (Cf. Peczenik and Spector, 451 ff.).

2.3.5 Permissibility-Making Facts

One can extend this discussion to other *prima-facie* norm statements, in particular concerning *rights*. There are not only ought-making but also permissibility-making, claim-making facts, etc.

Let me start with permissibility. How can a moral permissibility be justified? Let me divide the argument in two parts. 1) At first, I will report the well-known arguments, according to which a sphere of freedom is justified, because it is necessary for action and communication. 2) Then, I will discuss the problem, how *extensive* the free sphere ought to be.

I. Justification of a Sphere of Freedom

Let me, at first, consider the relation between freedom and *action*. The fact that one’s sphere of freedom is necessary for one’s action supports the conclusion that one ought to have a sphere of freedom. The following intellectual steps elucidate this idea:

1. I do act intentionally, for my purposes.
2. A sphere of freedom to act for my purposes is a necessary condition of all my actions.
3. I ought *prima-facie* to have what is a necessary condition of all my actions.
4. Consequently, I ought *prima-facie* to have a sphere of freedom.
5. All people are similar in principle to myself.
6. All people are purposive agents.
7. A sphere of freedom to act for one’s purposes is a necessary condition of all actions of anybody.
8. Anyone ought *prima-facie* to have what is a necessary condition of one’s actions.
9. Thus, everybody ought *prima-facie* to have a sphere of freedom.

(This is a paraphrase of Gewirth’s theory, cf. Hudson 1984, 115 ff. But I have added the assumptions 5–8).

This justification includes two assumptions, (3) and (8), from theoretical propositions to *prima-facie* ought-statements. The assumptions are plausible

precisely because the conclusions have the *prima-facie* character. Moreover, (3) and (8) can be interpreted as meaning postulates, characterising a possible sense of the concept of “ought” within our moral culture.

Another justification of a sphere of freedom is based on requirements of human *communication*. Let me follow *Robert Alexy’s* idea that a social order not taking individuals seriously, and thus not recognising any sphere of freedom at all, cannot be justified in a rational discourse. One may thus reason in the following way.

- I. Each participant of a rational discourse, in which one justifies norms, must take seriously the addressees of his argument. Otherwise the discourse would be impossible. Neither would it be possible to understand why a rational discourse is better than emotional manipulation. One must thus assume that other persons, in order to participate in the discourse, must be autonomous individuals, having a sphere of freedom. A society in which individuals do not have such a sphere, though logically possible, is discursively impossible, unjustifiable (cf. Alexy 1986).

The following intellectual steps elucidate this idea:

1. I discuss the problem of justification of norms with others.
2. Such a discourse is possible only if I assume that other persons, participating in it, have a sphere of freedom.
3. Anyone ought *prima-facie* to have what is a necessary condition of one’s capacity to participate in the practical discourse.
4. Thus, everybody ought *prima-facie* to have a sphere of freedom. Again, this justification includes an assumption, (3), which can be interpreted as a postulate, characterising a part of the meaning of the concept of “*prima-facie* ought” in our culture.

- II. Each participant of a practical discourse, thus qualified as an autonomous person, acts against his interest in preserving the autonomy, if he consents to establishment of a social order which does not recognise any sphere of freedom at all (cf. Alexy 1986).

The following intellectual steps elucidate this idea:

- 1* If I had consented to establishment of a social order which does not recognise any sphere of freedom of other people, I would have a small chance of my own sphere of freedom being accepted.
- 2* Acceptance of my own sphere of freedom by others is a necessary condition of preserving my autonomy as an individual.
- 3* I ought *prima-facie* to have what is a necessary condition of my preserving my status as an autonomous individual.
- 4* I ought *prima-facie* not to consent to establishment of a social order which does not recognise a sphere of freedom of others.

This justification, too, includes an assumption, (3*), which can be interpreted as a postulate, characterising a part of the meaning of the concept of “*prima-facie* ought” in our culture.

II. Justification of the Extension of Freedom

As regards the *extension* of freedom, one may regard the following thesis as a plausible explication of an analytic relation:

- (2.1) There exists at least one consistent description of a (permissibility-making) fact, such that the following holds good: if this fact takes place, then it is permissible for A to *prima-facie* do H (in the *weak* sense of “*prima-facie*”).

Moreover, one may base the answer to the question, What actions ought to be (morally) permissible?, on the complete list of socially established “permissibility-making” facts, such as basic human wants, needs, interests etc. Let the symbols $F_1PaH - F_nPaH$ indicate theoretical statements about these facts. If an action H of the person A is on this list, it follows that it is *prima-facie* permissible for A to do H (in the *weak* sense of *prima-facie*). It is thus not strange in the light of the language to consider these facts in one’s act of weighing and balancing. One may assume that there is a plurality of permissibility-making facts. One may speak about them in an abstract way. On the other hand, it is difficult to state precisely what these facts are. One may give some examples, but it is doubtful whether they prove a theory of **fundamental values**, such as, e.g., *Finnis’s* (1980, 59 ff. and 81 ff.).

One may then claim that the following theses are plausible explications of analytic relations:

- (2.2) If at least one permissibility-making fact $\{F_1Permissibility(aH)$ or $F_2Permissibility(aH)$ or, ... or $F_nPermissibility(aH)\}$ takes place, then it is *prima-facie* permissible for A to do H, in the *weak* sense of “*prima-facie*”; and
- (2.3) if at least one permissibility-making fact $\{F_1Permissibility(aH)$ or $F_2Permissibility(aH)$ or, ... or $F_nPermissibility(aH)\}$ takes place, then it is reasonable that it is *prima-facie* permissible for A to do H, in the *strong* sense of “*prima-facie*”.

This implies that if F is a fact which the language does not make strange to consider in an act of weighing concerning permissibility, then the hypothesis is reasonable that all normal people within the corresponding culture take for granted, at least implicitly, that F should be thus considered.

2.3.6 Claim-Making Facts

The concept “a moral right” is used, however, not only in the sense of freedom (permissibility) but also to cover a *claim*.

One person has a right, or a claim, not to be exposed to (not to bear, *non pati*) a given action of another person. This claim corresponds to a duty of the other to forbear from a given action (*non facere*). For example, a person, A, has a right not to be molested in his home, and others have a duty not to molest him.

Cf. Petrazycki 1959–1960, vol. 1, 103 ff. Cf. Lindahl 1977, 15 ff. on Bentham’s analogous concept.

This claim of A is not the same as his freedom to perform any action. What an action could it be? Neither is it the same as its competence (power) to do anything, e.g., to sue a trespasser. A claim of A not to be molested is satisfied (fulfilled) as no one molests him, without any necessity of A to do anything. Kelsen 1960, 133–134, calls such a claim a *Reflexrecht*, since it is merely a “mirror picture” of another person’s duty. Cf. also Lindahl 1977, 26 on Hohfeld’s corresponding concept. Also according to S. Kanger, A’s claim against another person, B, that F means the same as B’s duty to see to it that F, cf. Lindahl 1977, 44.

In a similar manner, one can discuss a claim of a person to receive (or to accept) something (*accipere*); this claim thus corresponds to a duty of another to perform a *positive action* (*facere*). One may thus say: “a baby has a claim to be fed by its mother” (cf. Petrazycki 1959–1960, vol. 1, 103 ff.). There is an interesting difference between the claims to forbearance and those to positive action. The former can be universal and unconditional, like A’s claim that nobody may kill him. The latter, on the other hand, are almost always limited to some persons (cf. Levin, 91). The “social and economic rights”, e.g., such as the right to work etc. make sense only if there exists, or at least ought to exist, an identifiable person, B, having the duty to give A work, and so on.

Let me now pass to the question of *justification* of claims. The answer to this question must have something to do with such facts as human wants, needs, interests etc. supporting this claim. Cf. Peczenik 1969b (1970, 154–5). Feinberg 1980 thinks that “the sort of beings who *can* have rights are precisely those who have (or can have) interests” (167), including animals but not vegetables (169).

One may thus attempt at elaborating an abstract justification of claims, based on claim-making facts. One may then claim that the following thesis is a plausible explication of an analytic relation:

- (3.1) There exists at least one consistent description of a (claim-making) fact, such that the following holds good: if this fact takes place, then A has a *prima-facie* claim that B does H, in the *weak* sense of “*prima-facie*”.

If one assumes the list of socially established claim-making facts, one may also regard the following theses as plausible explications of analytic relations:

- (3.2) If at least one of the claim-making facts { F_1 Claim(abH) or F_2 Claim(abH) or, ..., or F_n Claim(abH)} takes place, then A has a *prima-facie* claim that B does H, in the *weak* sense of “*prima-facie*”; and
- (3.3) If at least one of the claim-making facts { F_1 Claim(abH) or F_2 Claim(abH) or, ..., or F_n Claim(abH)} takes place, then it is reasonable that A has a *prima-facie* claim that B does H, in the *strong* sense of “*prima-facie*”.

Moreover, it is plausible to state that if a person, A, has a claim that another person, B, does H, then B has a duty to do H.

The *reverse* implication is more complex. Sometimes a duty exists without a corresponding claim (cf. Petrazycki 1959–1960, vol. 1, 70 ff.; cf. Feinberg 1980, 144). But if a person, B, has a duty to do H, *and* a “claim-making” relation between

B and another person, A, exists, then A has a *prima-facie* claim that B does H. Let me mention two kinds of these relations.

1. The duty constituting (legal or moral) norm may thus explicitly state that A's duty is related to B, e.g., the norm "a mother ought to feed her baby" states that it is the baby who is to be fed.
2. But a norm of the type "B has a duty to do H" may support a norm of the type "A has a claim that B does H", even though the first norm does not mention A. Assume that (1) B has a duty to do H and, at the same time, (2) some established "claim-making" relations between A and B exist, identifiable without recourse to weighing and balancing. Assume, e.g., that B's doing H importantly increases the degree of fulfilment of A's wants, needs, interests or benefits. This assumption implies three conclusions (1) A has a *prima-facie* claim that B does H; and (2) B has a duty to do H and (3) B has a duty to do H *because* A has a *prima-facie* claim that B does H.

One may thus conclude that the following thesis is a plausible explication of an analytic relation:

- (4.1) There exists at least one consistent description of a (claim-making) relation between A and B, such that the following holds good: if A and B are thus related to each other, then A has a *prima-facie* claim that B does H, in the *weak* sense of "*prima-facie*".

Furthermore, assuming an established list of claim-making relations, one may also regard the following theses as plausible explications of analytic relations:

- (4.2) If B ought to do H and at least one claim-making relation between A and B (F_1baH or F_2baH or, ... or F_nbaH) takes place, then A has a *prima-facie* claim that B does H, in the *weak* sense of "*prima-facie*"; and
- (4.3) If B ought to do H and at least one claim-making relation between A and B ($F_{1b}aH$ or F_2baH or, ... or F_nbaH) takes place, then it is reasonable that A has a *prima-facie* claim that B does H, in the *strong* sense of "*prima-facie*".

Such facts as wants, needs, interests etc. are *not identical* with the rights they support; cf., e.g., Opalek 1957, 302. To justify rights, they must be morally relevant. Cf., e.g., Martin 1986, 158.

2.3.7 Competence-Making Facts

One can also consider some theses relating *prima-facie competence* with some competence-making facts.

A has a competence to create B's deontic (normative) position D if, and only if, A *can* bring it about that B has the normative position D. The following abstract thesis seems to be plausible:

- (5.1) There exists at least one consistent description of a (competence-making) fact, such that if this fact takes place, then A has a *prima-facie* competence to create B's normative position D, in the *weak* sense of "*prima-facie*".