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Law and Philosophy Library 8

# On Law and Reason

*Preface by Jaap C. Hage*



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Further theses are expressed with help of the following symbols. Competence<sub>pr</sub>aHbD means that a person, A, has a *prima-facie* competence to create through an action, H, another person's (B's) normative position, D. In other words, A can bring it about that another person, B, has a *prima-facie* normative position, D. (For more details, cf. Lindahl 1977, 212 etc.). The symbols  $F_1$ Competence(aHbD) -  $F_n$ Competence(aHbD) thus indicate what belongs to a certain list of competence-making facts. The following theses are thus plausible explications of an analytic relations:

- (5.2) If at least one competence-making fact,  $F_1$ Competence(aHbD) or  $F_2$ Competence(aHbD) or, ... or  $F_n$ Competence(aHbD), takes place, then A has a *prima-facie* competence to create B's normative position, D, in the *weak* sense of "*prima-facie*"; and
- (5.3) If at least one competence-making fact,  $F_1$ Competence(aHbD) or  $F_2$ Competence(aHbD) or, ... or  $F_n$ Competence(aHbD), takes place, then it is reasonable that A has a *prima-facie* competence to create B's normative position, D, in the *strong* sense of "*prima-facie*".

### 2.3.8 Complex Right-Making Facts

"Rights to holdings" or "rights to a property" can be analysed as complexes of permissibility, claims and competences. Let me take the concept of "ownership" as an example. According to, e.g., Alf Ross (1958, 170 ff.), "ownership" is an "intermediate" concept, related to two clusters of norms, the first determining conditions of becoming an owner, the second prescribing legal consequences of being an owner. Let me pay attention to the first cluster only. Let me also restrict the discussion to ownership of material objects. (Concerning complex rights in general, cf. Lindahl 1977, 34 ff.). A thus has the right to the property G with regard to the person B if,

- it is permissible for A to use the property G; and
- A has the claim that B does not interfere with A's use of G; and
- A has competence to create A's own claim against the court, C, together with the duty of the court to perform a certain action directed against B's interference with A's using G; and
- A has competence to perform an action, such as entering into a sale-purchase contract, shaping B's normative position, D, with regard to the property G.

A set of permissions, claims and competences is thus unified into one right to a property. This unification makes it possible to modify each component of the set without changing the identity of the composite right itself (cf., e.g., Finnis 1980, 202). Now, one can develop the following thesis regarding rights to holdings:

- (6.1) There exist at least one consistent description of a (right-making) fact, such that the following holds good: if this fact takes place, then A has a *prima-facie* right to the holding, in the *weak* sense of "*prima-facie*".

Assuming an established list of right-making facts, one can state:

- (6.2) If at least one complex right-making fact,  $F_1a\text{Right}(G)$  or  $F_2a\text{Right}(G)$  or ... or  $F_na\text{Right}(G)$ , takes place, then A has a *prima-facie* right to the holding H, in the *weak* sense of “*prima-facie*”; and
- (6.3) if at least one complex right-making fact,  $F_1a\text{Right}(G)$  or  $F_2a\text{Right}(G)$  or ... or  $F_na\text{Right}(G)$ , takes place, then it is reasonable that A has a *prima-facie* right to the holding H, in the *strong* sense of “*prima-facie*”.

## 2.4 Weighing and Balancing

### 2.4.1 Principles and Values

Some criteria of the morally good correspond to some moral *principles* (see Section 2.3.1 supra). I will discuss only the following sense of the ambiguous word “principle”. A *value principle*, establishes an *ideal*. The ideal can be carried into effect to a certain degree. The higher the degree, the better from the point of view of the principle (cf. Alexy 1985, 76).

The word “principle” can also designate a general norm, an important norm etc. (Cf. Alexy 1985, 72 ff.; Dworkin 1977, 14 ff.; Eckhoff 1980, 145 ff. with references to Scandinavian literature).

Ch. 1 Sec. 2 of the Swedish Constitution (The Instrument of Government, *Regeringsformen*) thus stipulates, what follows: “The public power shall be exercised with the respect for equal value of all human beings and for each individual person’s freedom and dignity.” The greater respect for equality, freedom and dignity, the better from the point of view of the provision. In fact, the provision expresses *three* principles: (1) Those in power shall respect equal value of all human beings. (2) Those in power shall respect freedom of each individual. (3) Those in power shall respect dignity of each individual.

Each principle expresses an ideal, in other words a *value*, for instance it stipulates that equality, freedom and dignity are valuable. A value can be defined as a criterion of evaluation. Each criterion can be fulfilled to a certain degree, more or less (cf. Alexy 1985, 130 ff.). One can express nearly the same content in two different terminologies, speaking about principles or values. The difference is only this: a principle says what is *prima-facie* obligatory, a value decides what is *prima-facie* the best (Alexy 1985, 133).

Many principles express various *individual values*, such as individual standards of action (e.g., justice, inoffensiveness, benevolence, care or love) and individual goals (e.g., pleasure, happiness of an individual, fulfilment of his talents, dignity or virtue). Individual values correspond often to *moral rights of an individual*, e.g., right to a just treatment, protection of physical integrity and other forms of security, right to a certain private sphere including private property, freedom of opinion and many other forms of freedom, etc. Other principles protect such (indivisible)

*collective values* and achievement values (*Werkwerte*; cf. Radbruch 1950, 147 ff.) as, e.g., environment, order, equality, culture and progress. The moral good is not reducible to a single value. The good in general is even less reducible. There is a variety of goodness (cf. von Wright 1963 *passim*).

Each principle, or value, can be a *prima-facie* reason of action. But they can collide in such a way that, e.g., an increased respect to equality in the particular case under consideration can cause a decrease of freedom and *vice versa*. One needs then meta-reasons (“super-reasons”) to choose between them. Consequently, one has merely a provisional, *prima facie* duty to follow the wording of the principles. The same types of values and principles can be quoted on the “ground floor” of moral thinking, at its meta-level, at a meta-meta level etc.

The difference between value principles and *rules* is more important. (The following analysis is a result of a discussion with *Aulis Aarnio*). If one is in a situation regulated by a *rule*, one has only two possibilities, to obey the rule in question or not. The rule thus establishes a borderline - precise or vague - between the obligatory and not obligatory, the forbidden and permitted etc. If an action or a state of affairs is on the right side of the borderline, the norm is obeyed, no matter how close to the limit it is. The Swedish Road Traffic Decree, Sec. 64, thus stipulates that the speed of a vehicle in a built-up area should not exceed 50 kilometres per hour. In the light of this provision, it does not matter whether one drives at the speed 49 kmh or 20 kmh. In both cases, one drives correctly. A rule qualifies a human action as conforming to or violating the rule. An important property of this mode of qualification is its binary, either-or, 0-or-1 character. A value principle, on the other hand, establishes an ideal that can be carried into effect to a certain degree, more or less. It qualifies an action, a person etc. as more or less perfect in the light of the principle. A principle is a yardstick of graded qualification. This mode of qualification is *not* binary but graded, more-or-less.

## 2.4.2 *All-Things-Considered Practical Statements*

One has an *all-things-considered* moral duty to follow the best compromise, achieved through *weighing and balancing* of different value-principles (or value-statements).

A practical statement is *definitive* only if by uttering it one declares that one no longer is prepared to pay attention to reasons which justify the contrary conclusion. Our culture demands that definitive moral statements are all-things-considered moral statements.

In order to state this demand more precisely, one needs the following distinction.

A practical statement has the all-things-considered quality *sensu stricto*, if and only if it has support of considerations regarding (a) all morally relevant circumstances, that is, all facts relevant in practical reasoning about ethics, utilitarian morality, moral principles, rights and duties, virtues, justice etc., and (b) all criteria

of coherent reasoning (cf. section 4.1 *infra*). No human being has resources sufficient to formulate all-things-considered statements *sensu stricto*.

Our culture compels us merely to endorse definitive moral statements only if these have the all-things-considered quality *sensu largo*. A practical statement is all-things-considered *sensu largo*, if and only if it has support of considerations regarding (a) as many morally relevant circumstances as possible and (b) as many criteria of coherent reasoning as possible.

The expression “as many... as possible” indicates here that no moral consideration, and no criterion of coherent reasoning, is independently sufficient but must be weighed against other such criteria and other values. For example, in a case of emergency, one should spontaneously save a person in mortal danger rather than perform a time consuming moral reasoning.

Logically incompatible actions *cannot* be all-things-considered good at the same time. Neither can one simultaneously have a definitive duty to perform logically incompatible actions. If A, e.g., ought definitively to pay B 100 kronor, it is logically impossible that A ought not to do it. Logic is thus applicable to all-things-considered practical statements. In this manner, these differ from *prima-facie* statements, cf. section 2.3.3 *supra*.

### 2.4.3 *Weighing and Balancing of Principles*

In order to justify an all-things-considered practical statement, one must weigh and balance *prima-facie* practical statements which support it against such statements supporting the contrary conclusion.

One shall thus see to it that, e.g., a small increase of equality in the considered case does not cause a too great limitation of freedom; nor shall a small increase of liberty be “paid” by a too great inequality. In other words, the higher is the degree to which a particular action contradicts one principle, the more important is that it conforms to the other one. When freedom decreases, a greater and greater increase of equality is required to compensate a further decrease of freedom.

This duty to weigh and balance principles can also be expressed as a duty to weigh and balance corresponding *values* (cf. section 2.4.1 *supra*). In this context, one may consider two ways to express the same thing.

- a. One may follow Alexy who regards principles themselves as commands to weigh (Alexy 1985, 71 ff.). Such a command is a *norm*, telling one what to weigh and balance. This norm differs from *rules* as regards its content: it demands that one performs an act of weighing, while a rule demands that one performs another action.
- b. On the other hand, *Aulis Aarnio* claims that the command to perform weighing is not a part of the meaning of the principle, but a separate meta-norm, necessarily related to this meaning. This meta-norm is no principle but a “*technical*” rule having the following content. Whoever wishes to ascertain what is, all things considered, morally good, must weigh and balance all

applicable value principles (or values), constituting *prima-facie* criteria of moral goodness, together with some established reasoning standards etc.

The difference between those two ways of speaking thus concerns the question whether the command to weigh, necessarily accompanying a principle, is “inside” or “outside” of the meaning of this principle. This difference has no material consequences in moral or legal philosophy.

Let me now give an example of weighing and balancing of principles - the Swedish case NJA 1984 p. 693. A foreigner A, who had considerable ties to both Sweden and the Federal Republic of Germany, owned a car, registered in the latter country. He borrowed a sum of money, giving the right to the car as security (a so-called “security transfer”). Later, a person rented the car and visited Sweden. The Swedish authorities sequestered the car as security for A’s unpaid taxes. The dispute concerned the question whether the German security transfer should prevent sequestration in Sweden. The Supreme Court stated, what follows: “The demand for order and simplicity of the system together with difficulties for the creditors in Sweden to judge the credit risks otherwise than according to Swedish rules constitute the main reason against ascribing security transfer according to foreign law an effect against the transferor’s creditors here in Sweden... The interest of the creditors in Sweden to be able to assess their credit risks according to Swedish law competes with the interest of the foreign transferee/creditor not to risk a loss of his right because the property without his participation has been moved to Sweden... One should weigh the proffered reasons against each other and one must then pay attention to the development of the international trade and to more and more intense commercial cooperation between various countries.” The Supreme Court overruled the sequestration.

The reason consisted in the act of weighing and balancing of, *inter alia*, the following principles. (1) A right, acquired abroad, to property that without participation of the foreign transferee/creditor has been moved to Sweden, should (*prima-facie*) not be valid in Sweden if its validity would cause a relatively great increase of complexity of the Swedish legal system. (2) A right, acquired abroad, to property that without participation of the foreign transferee/creditor has been moved to Sweden, should (*prima-facie*) be valid in Sweden if its validity would cause a relatively great increase of legal certainty of the foreign creditor. In the case at bar, the Court performed a weighing and balancing of these two principles. In other words, it performed a reasoning whose conclusion was that one ought to recognise in such Swedish cases security transfer according to German law, since this recognition would cause a relatively great increase of legal certainty of the foreign creditor and only a relatively small increase of complexity of the Swedish legal system. One of the reasons, supporting this weighing of principles consisted of the thesis that the recognition of the German security transfer in Sweden would promote the development of the international trade and commercial cooperation between various countries. Other reasons are difficult to reconstruct but, no doubt, the Court paid attention to the assumptions concerning the sources of the law and legal method, characterising the contemporary legal culture or, technically speaking, legal paradigm in Sweden (see section 3.3.3 *infra*).

In brief, the decision is derivable from a set of statements containing some presupposed premises, characterising this paradigm, together with the additional statement claiming importance of international trade and commercial cooperation. However, international trade should not be the only factor, deciding about how the Swedish law treats rights, acquired abroad. One must consider other values and principles, as well, e.g., the claim of the foreign creditor to be treated fairly, the principle of reciprocity in relations between states, etc.

Most of such considerations can be graded, and then weighed against each other. One act of weighing depends on all other acts of weighing, included in the same chain of reasoning. For instance, weighing of legal certainty of the foreign creditor against simplicity of the Swedish legal system depends of weighing of the latter against international trade and commercial cooperation. Or weighing of freedom against equality may depend on weighing of equality against cultural progress. As a result, we have *one* relation of many components. Each case of weighing is characterised by such a relation.

A typical all-things-considered moral statement concerns an individual situation: a precisely determined person ought to perform a precisely determined action, H; or a precisely determined object is good, etc. Preciseness means here that all circumstances, all the context of this situation is considered.

One can now make a choice between two views.

1. One may assume that each situation is morally unique, that is, includes at least one morally relevant circumstance not shared by any other situation. Each case of moral weighing is then “contextual” (cf. Rentto 1988, 64 ff.), that is, unique, characterised by a unique cluster of considerations to be weighed. We can say something like this: In the situation  $s_1$ , the value  $v_1$  fulfilled to the extent  $e_1$  precedes the value  $v_2$  fulfilled to the extent  $e_2$ ; and in the situation  $s_2$  the opposite relation holds: the value  $v_2$  fulfilled to the extent  $e_2$  precedes the value  $v_1$  fulfilled to the extent  $e_1$ .
2. One may assume that individual situations may be classified into moral *types*. All situations belonging to such a type are weighed in the same way. We can then say *generally* that in the situation of the *type*  $S_1$ , the value  $v_1$  fulfilled to the extent  $e_1$  precedes the value  $v_2$  fulfilled to the extent  $e_2$ ; etc. Under this assumption, a general rule or a general value-statement can have a *ceteris-paribus* all-things-considered character, in the following sense: If circumstances remain unchanged, that is, nothing new and morally relevant happens, then one always ought to follow the rule. Or, if all morally relevant circumstances remain unchanged, then an object of a certain type is good, etc.

The choice between these assumptions is not easy. But even if the second one is chosen, one may still claim that no general rule at all can be, all thing considered, *eternally* binding. Nor can a general value-statement be, all things considered, eternally right. One may thus claim that future can always bring new circumstances which may gain moral relevance.

For that reason, I do not believe that even the best philosophical minds ever can succeed in creating a *calculus* which precisely determines the *content* of weighing.



### 2.4.4 *Weighing Rules*

However, not only principles but also some *rules* create a merely *prima facie* duty. This is true about both moral and legal rules.

For example, one ought not to kill people. The moral rule forbids *prima facie* all killing but to state that a given individual, all things considered, ought not to be killed, one must also pay attention to other rules, stipulating exceptions; for instance, in a defensive war, one may kill the aggressors. The all-things-considered morality is then determined by a complex, consisting of the main rule and the exceptions. In section 2.3.3 *supra*, I have discussed other examples, concerning rules formulated in general theories of moral goodness.

The natural way to identify such exceptions is to perform *weighing and balancing* of various considerations. A reasonable politician must, e.g., see to it that following preferences of the voters does not to an unacceptable degree impede development of human talents or set aside some important standards of perfection, inherent in established social practices. He has an all-things-considered duty to follow the best weighing and balancing of preferences, promotion of talents, established standards of perfection, and so on. In the same way, one can state that one, all things considered, ought to follow the best weighing and balancing of the prohibition to kill, the *prima facie* duty to defend one's country and perhaps some other considerations.

*Weighing in the law* also concerns both principles and rules. *All* socially established legal norms, expressed in statutes, precedents etc., have a merely *prima facie* character. The step from *prima-facie* legal rules to the all-things-considered legal (and moral) obligations, claims etc. involves evaluative interpretation, that is, weighing and balancing (see section 5.4.1 *infra*).

For that reason, one may doubt whether the distinction between rules and principles is important. To answer this question, one must evaluate the following differences between rules and principles. (The list of differences has been elaborated in cooperation with *Aulis Aarnio*).

1. Unlike a principle, the rule in question may be obeyed or not. There are no degrees of obedience. The rule does not claim to be obeyed as much as possible. It rather claims to be obeyed in so many cases as possible.
2. Unlike a principle, the rule in question does not express a single value but a compromise of many values (and corresponding principles). If, e.g., a legal rule says that an undue (unreasonable) contractual provision may be ignored, the determination of unreasonableness is to be made by weighing of many values and principles.
3. In *routine* ("easy") cases, one ought to follow socially established legal rules without any necessity of weighing and balancing. An act of weighing and balancing is then necessary only in order to ascertain whether the case under adjudication is an easy one or not. Only if the case is not easy but "hard", must one perform a value-laden legal reasoning, that is, an act of weighing and balancing. One the other had, no cases of application of *principles* are easy. All such cases



are hard in this sense. One must always pay attention to more than one principle and perform an act of weighing and balancing.

4. A collision of rules has partly another character than a collision of principles. A *total* logical incompatibility of *rules* may be ascertained analytically and *in abstracto*, without concerning particularities of the case; one rule prohibits exactly the same another one permits or orders. On the other hand, there exists no such, analytically demonstrable, incompatibility *in abstracto* of *principles*. Collision of principles occurs only in particular cases: in order to follow one principle to an increased degree, one must decrease the degree of following another principle. In order to ascertain whether such a collision occurs or not, one must pay attention to the contingent facts of the case. And to decide the case, one must weigh and balance various considerations.

### 2.4.5 *Final Act of Weighing and Balancing*

As soon one claims that a certain principle weighs more than another, one faces the question “Why?”. The answer can be supported by further reasons, *inter alia* principles. These, too, can be weighed and balanced against thinkable counter-arguments. From the logical point of view, the process of weighing can thus continue *ad infinitum*. But in practice, one must *finish* the reasoning, sooner or later.

If one aims at the best possible weighing, one must take into account *as many relevant reasons for and against the conclusion in question as possible* and establish their relative weight. One can thus assume that the objectively best weighing takes into consideration *all* relevant reasons for the conclusion in question and *all* relevant counter-argument (that is, reasons for the opposite conclusion).

The hypothesis is not falsified that if one had possessed

1. more information about the use of moral language;
2. better knowledge of how other people morally judge various actual and hypothetical cases;
3. more clarity as regards one’s own evaluation of future cases; and
4. more information about the logical connection between one’s own judgments concerning various moral questions; then one would be able to use all this information to formulate objectively (that is, freely from emotional bias) a *complete list, containing all thinkable reasons for and against* the conclusion that a given action is *prima facie* good and obligatory. The fact that a so expanded list of reasons and counter-arguments is complete means that *no further reasons or counter-arguments can be added to it*.

This applies, among other things, to the moral theories and criteria, discussed above. The hypothesis is thus not falsified that if one had possessed more information, then one would be able to formulate objectively (that is, freely from emotional bias) a complete list, containing all thinkable moral theories and criteria.

Assume now for the sake of argument that one can formulate the *sufficient* condition for the conclusion that the action in question is, *all things considered*, (not only *prima facie*) good and obligatory. The fact that a moral reason or a combination of reasons is a sufficient condition for this conclusion means that *no thinkable counter-arguments weigh more*.

Such a sufficient condition would consist of (1) the complete list of *prima-facie* moral criteria and theories, established or newly created, applicable to the case under considerations, and (2) the complete list of statements determining the relative weight of these criteria and theories in this case.

To be sure, one can argue that

1. such complete lists of thinkable reasons for and sufficient conditions of goodness and obligatoriness cannot be finite, and
2. one has no way to formulate an infinite list.

Though plausible, the first thesis is, however, philosophically controversial. More important, the second thesis is probably false. Modern mathematics possesses means to deal with infinite sets. Analogously, it seems to be possible to find a finite method to formulate an infinite list of moral reasons.

Since the list is by definition complete, one cannot add more reasons to it. Any reasoning in favour of the conclusion that the listed reasons outweigh the counter-arguments must thus mean that one merely repeats some reasons already belonging to the list. *If all of these are already taken into consideration, the reasoning must stop.*

The discussed list may *consist of many levels*. At the lowest level, there are reasons for and against the conclusion that a given action is good and ought to be performed. At a higher level, there are reasons of the second order, for one or another weighing of the reasons and counter-arguments. Some reasons of the second order state, e.g., that certain reasons of the first order outweigh the corresponding counter-arguments. The list can, for instance, contain ten reasons for and twelve against the conclusion that a given action ought to be performed, and a “super-reason” stating that the ten weigh more than the twelve. These “super-reasons”, too, can be weighed and balanced against thinkable counter-arguments. There can thus exist reasons of the third order, etc.

The list is complete and cannot be extended to further reasons. This assumption applies to all the levels. One cannot add to it any reasons at all, either of the first, second or n-th order. A reasoning in favour of the conclusion that the listed reasons outweigh the counter-arguments means that one merely repeats some reasons of a higher order, already belonging to the list. If the listed reasons do not constitute a logical circle, the list must thus include an ultimate reason of the n-th order, fundamental for the whole argumentative structure. This ultimate reason must be assumed without any reasoning whatever.

In such a way, a reasoning ends with an arbitrary assumption.

However, this fact does not make the weighing and balancing worthless. Although its ultimate point is arbitrary, one knows at least *what* is to be weighed and balanced (cf. Alexy 1985, 149–150).

The final step of weighing may consist of a concrete judgment. If the contextuality thesis is not true (cf. section 2.4.3 *supra*), then the final step in some cases may also consist of an assumed general rule, determining a priority order between principles in question. On the other hand, it is inconsistent to say that a *principle* constitutes the final step of weighing. A principle is, as said before, no sufficient reason for a moral conclusion; it must be weighed against other principles. How then can it be the final *step* of weighing?

### 2.4.6 *A Step From Theoretical Propositions to Definitive Practical Statements?*

This role of weighing and balancing makes moral theories and criteria contestable. For that reason, it is interesting to discuss a minimal consensus theory, according to which an action is obligatory and good, if (although *not* only if) it simultaneously fulfils *all* such theories and criteria.

The hypothesis is not falsified that if one had a more extensive knowledge, one could be able to objectively (that is, freely from emotional bias) formulate an extended list, containing *all* meaningful moral theories and criteria which make the *prima-facie* moral goodness and moral obligatoriness dependent on some facts, described in *theoretical* propositions. One may now argue that moral value statements and norm-expressive statements are related to such theoretical propositions in the following way. The fact that an action *simultaneously fulfils all the claims made by all thinkable moral theories and criteria* of this kind is a sufficient condition for the conclusion that the following practical statements are *reasonable*: (a) the action in question is *all-things-considered* (not merely *prima-facie*) good; and (b) the action in question ought all-things-considered to be performed.

Let me, e.g., consider the following reasoning:

Premise	The action in question increases people's happiness <i>and</i> fulfilment of their talents; <i>and</i> it expresses people's preferences <i>and</i> fits various social practices; etc.
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Conclusion	The action in question is (all things considered) morally good
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The word "etc." indicates that the list of moral theories and criteria can be expanded to contain some additional, so far unknown ones. An important method to expand the list is to complete it with theories providing a foundation of those already listed. See section 3.2.5 *infra*!

This reasoning appears to be acceptable, although one may doubt whether it is logically correct. One can, however, add the following "bridging" premise 2: If the action in question increases people's happiness *and* fulfilment of their talents; *and* it expresses people's preferences *and* fits various social practices; etc., then the conclusion is reasonable that the action in question is (all things considered) morally good. In this way, one obtains the following, logically correct, inference.

Premise 1	The action in question increases people's happiness <i>and</i> fulfilment of their talents; <i>and</i> it expresses people's preferences <i>and</i> fits various social practices; etc.
Premise 2	If the action in question increases people's happiness <i>and</i> fulfilment of their talents; <i>and</i> it expresses people's preferences <i>and</i> fits various social practices; etc., then the conclusion is reasonable that the action in question is (all things considered) morally good
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Conclusion	The conclusion is reasonable that the action in question is (all things considered) morally good

Apparently, it is reasonable to derive a practical conclusion from some theoretical propositions. This inference assumes, however, that premise 2 is true.

One can also try to derive the conclusion that an action, all things considered, ought to be performed.

Premise 1	The action in question increases people's happiness <i>and</i> fulfilment of their talents; <i>and</i> it expresses people's preferences <i>and</i> fits various social practices; etc.
Premise 2	If an action increases people's happiness <i>and</i> fulfilment of their talents; <i>and</i> expresses people's preferences <i>and</i> fits various social practices; etc., then the conclusion is reasonable that the action ought, all things considered, to be performed
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Conclusion	The conclusion is reasonable that the action in question ought, all things considered, to be performed

Again, it seems to be reasonable to derive a practical conclusion from some theoretical propositions, provided that the additional premise 2 is true.

Both this conclusion and Premise 2 are not merely reasonable. It would also be unreasonable to deny them. In general, it is unreasonable to say: The action in question simultaneously fulfils all claims made by all thinkable moral theories and criteria, yet it is not (all things considered) good.

Let now the expressions "an ought-making fact" and "a good-making fact" refer to any fact of this kind *or any combination of such facts*, regardless its degree of complexity. One may then express the following theses:

(7.1) There exists at least one consistent description of an ought-making fact, such that the following holds good: if this fact takes place, then it is reasonable that A ought all-things-considered to do H

and

(7.1\*) there exists at least one consistent description of a good-making fact, such that the following holds good: if this fact takes place, then it is reasonable that H is all-things-considered good.

Let me now assume that the symbols  $F_1$  OUGHT(aH) -  $F_n$  OUGHT(aH) and  $F_1$  GOOD(H) -  $F_n$  GOOD(H) once again indicate the facts that belong to a socially established list of facts which meaningfully can be proffered as reasons for the conclusion that an action is good and/or obligatory.

One can now argue that the following theses are plausible explanations of analytic relations:

(7.2) If all the ought-making facts  $\{F_1 \text{ OUGHT}(aH) \text{ and } F_2 \text{ OUGHT}(aH) \text{ and, } \dots \text{ and } F_n \text{ OUGHT}(aH)\}$  take place, then it is reasonable that A ought all-things-considered to do H

and

(7.2\*) if all the good-making facts  $\{F_1 \text{ GOOD}(H) \text{ and } F_2 \text{ GOOD}(H) \text{ and, } \dots \text{ and } F_n \text{ GOOD}(H)\}$  take place, then it is reasonable that H is all-things-considered good.

The theses correspond to premise 2 in the examples, discussed above.

Though philosophically interesting, theses 7.2 and 7.2\* are not *practically* important for the following reason. Many moral theories and criteria are thinkable (linguistically meaningful), each indicating different properties of an action (i.e., different p's) as deciding whether it is good and ought to be performed. One can doubt whether there exist such actions at all that simultaneously possess *all* of these properties.

The following question is also philosophically interesting. Can one omit the words "it is reasonable that" and claim that the following theses

a. If all the ought-making facts  $\{F_1 \text{ OUGHT}(aH) \text{ and } F_2 \text{ OUGHT}(aH) \text{ and, } \dots \text{ and } F_n \text{ OUGHT}(aH)\}$  take place, then A ought all-things-considered to do H

and

b. if all the good-making facts  $\{F_1 \text{ GOOD}(H) \text{ and } F_2 \text{ GOOD}(H) \text{ and, } \dots \text{ and } F_n \text{ GOOD}(H)\}$  take place, then H is all-things-considered good

are plausible explanations of analytic relations?

An affirmative answer to this question would mean that there is a "bridge" from theoretical premises to practical conclusions. Many philosophers would regard this fact as a sufficient condition for the negative answer. Following Hume, they assume that ought-judgments are not implied by premises among which there are no ought-judgments. Yet, Hume's "guillotine" is not beyond any doubt, as the following quotation exemplify:

("T)he role of reason in the world as a survival mechanism for the agent (and his species) requires that it functions as a unitary mechanism capable of focusing fully on the fundamental unity of the world both as the subject matter of contemplative thinking and as the object of change by practical thinking.... There *must*, therefore, be bridging implications connecting propositions and practical noemata" (Castaneda 1975, 333).

However, the following reasons tell *against* the view that (a) and (b) are logically true.

1. The *practical* meaning of practical statements includes immediately that they are reasons for action, whereas the meaning of the statements of fact does not.

The meaning of the former is thus richer than that of the latter. A richer conclusion cannot follow from premises that have less extensive meaning (cf. Peczenik and Spector, 471).

One can answer this objection, as follows. Perhaps one *can* regard the conjunction-proposition describing coexistence of all thinkable ought- and good-making facts as a sufficient reason for action. One can perhaps argue that this conjunction, after all, has a practical meaning, making it logically contradictory to say “the action A fulfils all thinkable moral criteria of this kind and yet it is not good”.

2. Two actions can at the same time fulfil all the claims made by the thinkable moral theories and criteria and still be incompatible, impossible to perform simultaneously. Suppose, e.g., that A sold the same thing twice to two different buyers, B and C. The moral theories demand perhaps that the thing is to be delivered to both B and C, but this is impossible. Consequently, it is not reasonable to conclude that A ought simultaneously to deliver the thing to both buyers.

One can answer this objection, as well. The moral obligation can, e.g., be formulated as an alternative: A ought to deliver the thing to B *or* C. Another solution is to assume that the moral criteria also include some collision norms, stating precisely the priority order between incompatible *prima-facie* obligations.

Although one can answer the objections, the answers can be criticised, as well. I thus do not commit myself in this work to the view that the theses (a) and (b) are logically (necessarily) true.

Such problems make it interesting to discuss another relation of moral goodness and obligatoriness to good- and ought-making facts. One may thus assume that an action, fulfilling *the most important* moral theory or criterion is (all things considered) good and obligatory. The following inference seems to be correct.

Premise 1	The action in question fulfils claims made by the most important moral theory or criterion
Premise 2	If an action fulfils claims made by the most important moral theory or criterion, then the action is (all things considered) morally good
Conclusion	The action in question is (all things considered) morally good

Of course, one can, in the same way, derive the conclusion that an action, all things considered, ought to be performed.

Premise 1	The action in question fulfils claims made by the most important moral theory or criterion
Premise 2	If an action fulfils claims made by the most important moral theory or criterion, then the action, all things considered, ought to be performed
Conclusion	The action in question, all things considered, ought to be performed

Let me call the fact that the action in question fulfils claims made by the most important moral theory or criterion, “the most important ought-making fact” and

“the most important good-making fact”. The following theses are plausible explanations of logical relations:

(8.1) If the most important ought-making fact takes place, then A, all things considered, ought to do H

and

(8.2) If the most important good-making fact takes place, then H is, all things considered, good.

One may wonder whether there is a need to be cautious and, instead of the theses 8.1 and 8.2 merely state the following (see Peczenik and Spector, 474):

if the most important ought-making fact takes place, then it is *reasonable* that A, all things considered, ought to do H

and

if the most important good-making fact takes place, then it is *reasonable* that H is, all things considered, good.

The reference to reasonableness, weakening the link between the most important ought- and good-making fact and, on the other hand, the Ought and the Good, would be necessary if the statement “the action in question fulfils claims made by the most important moral theory or the most important moral criterion” were purely theoretical, lacking the practical component. It would be a mystery, if a purely theoretical statement implied the practical conclusion, expressing the ought or the good. But the statement in question is not purely theoretical, since it expresses the *evaluation* of a moral theory or criterion as the most important one. The discussed inferences thus do *not* constitute a step from a purely theoretical set of premises to a practical conclusion. The cautious addition “... then it is reasonable that...” is perhaps redundant, *if* one assumes that the same process of weighing and balancing which determines which moral theory or criterion is the most important one decides what actions are all-things-considered (not merely *prima-facie*) good and obligatory. In both cases, one must weigh and balance various moral theories and criteria.

Consequently, the following direct inference is also logically correct.

Premise 1	The action in question fulfils claims made by the most important moral theory or criterion
<hr/>	
Conclusion	The action in question is (all things considered) morally good and it ought (all things considered) to be performed

Estimation of importance, and thus weighing, plays the same role in the context of all-things-considered *rights*. Consider the following example. It is wrong to kill an innocent in order to transplant his organs to several persons, whose lives thus will be saved. The innocent has an all-things-considered right not to be killed for the sake of transplants. On the other hand, it is right to kill an innocent to prevent a nuclear holocaust. The innocent has no *all-things-considered* right not to be killed for the sake of preventing the nuclear holocaust. The difference is only how many



lives one saves by killing one innocent person. This shows that the borderline between having and not having an all-things-considered right is a result of weighing and balancing of various considerations. (For this example, I am indebted to Robert Alexy).

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

- (8.3) If the most important permissibility-making fact, justifying A's freedom to do H, takes place, then it is, all things considered, permissible for A to do H;
- (8.4) if B, all things considered, ought to do H and the most important claim-making relation between A and B takes place, then A has, all things considered, a claim that B does H;
- (8.5) if the most important claim-making fact takes place, justifying A's claim that B does H, then A has an all-things-considered claim that B does H;
- (8.6) if the most important competence-making fact takes place, justifying A's competence to create B's normative position D, then A has an all-things-considered competence to create B's normative position, D;
- (8.7) if the most important complex right-making fact takes place, justifying A's right to the holding G, then A has an all-things-considered right to the holding G.

The theses hold good, *if* one assumes that the same process of weighing and balancing which determines what is "the most important" decides what actions are the all-things-considered (not merely *prima-facie*) rights.

I have thus separately dealt with justifiable permissibility, claims, competences and rights to holdings. But, at the *prima-facie* level, these rights of different kinds can collide with each other. One must then weigh them together. A certain permissibility-making fact may, e.g., justify B's *prima-facie* freedom not to do H, and, at the same time, a certain claim-making fact can justify A's *prima-facie* claim that B does H. One can thus imagine the following situation: a farmer, B, has an interest which justifies his *prima-facie* liberty to use a certain kind of fertiliser. At the same time, his neighbour, A, has a need to be protected from pollution this fertiliser must cause; this need justifies A's *prima-facie* claim that B does not use the fertiliser. However, such a weighing is impossible at the level of all-things-considered rights. These are a *result* of weighing, and cannot be subject to additional act of weighing. When B has an all-things-considered liberty to use the fertiliser, A *cannot* have an all-things-considered claim that B does not use it, and *vice versa*. One must thus avoid contradictions between all-things-considered rights. The best way is to cumulatively consider all of them, each time one performs weighing in order to decide which fact is the most important permissibility-making fact, *or* claim-making fact, *or* competence-making fact, *or* right-to-holdings-making fact. This means that these importance-indicating concepts are mutually dependent. Knowledge of the all-things-considered duties and rights thus presupposes a very complex act of weighing and balancing of several kinds of ought-, and right-making facts. Weighing is indispensable. Neither is it possible to definitively replace this complex act of weighing by a series of mutually independent simple acts.

### 2.4.7 *The Step From Practical Statements To Theoretical Conclusions*

The following (correct) inference elucidates further fragments of the theoretical meaning of practical statements.

Premise 1	The action in question is (all things considered) morally good
Premise 2	If the action in question is (all things considered) morally good, then it increases people's happiness <i>or</i> fulfilment of their talents; <i>or</i> it expresses people's preferences <i>or</i> fits various social practices; etc.
<hr/>	
Conclusion	The action in question increases people's happiness <i>or</i> fulfilment of their talents; <i>or</i> it expresses people's preferences <i>or</i> fits various social practices; etc.

The same conclusion follows from the normative premise "the action in question ought (all things considered) to be performed" together with the appropriate premise 2.

The circumstance that the action in question is, all things considered, good or such that it ought to be performed is thus a *sufficient condition* for the thesis that this action fulfils claims made by at least one moral theory or criterion, established or possible to construct in the moral language.

The following theses, corresponding to premise 2 in the last example, are thus plausible explanations of analytic relations (cf. Peczenik and Spector, 467 ff):

(9.1) If A ought, all things considered, to do H, then at least one ought-making fact takes place

and

(9.1\*) if H is all-things-considered good, then at least one good-making fact takes place.

In other words, there is a logical "bridge" from the "ought" to the "is" (cf. Peczenik and Spector, 470).

One may also formulate corresponding theses concerning the *prima-facie* ought and good:

If A ought *prima-facie* to do H, then at least one ought-making fact takes place

and

if H is *prima-facie* good, then at least one good-making fact takes place.

These theses hold good both as regards the *weak* and the *strong* sense of "*prima-facie*". Indeed, they follow from the theses developed in the section 2.3.4 *supra*.

The "mirror picture" of the discussed example is this.

Premise 1	The action in question does not increase people's happiness <i>or</i> fulfilment of their talents; <i>nor</i> does it express people's preferences <i>or</i> fit social practices; etc.
Premise 2	If an action does not increase people's happiness <i>or</i> fulfilment of their talents; <i>nor</i> does it express people's preferences <i>or</i> fit social practices; etc. then this action is not morally good nor ought it to be performed

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Conclusion            The action in question is not morally good nor such that it ought to be performed.

The fact that the action in question fulfils claims made by at least one moral theory or criterion, established or thinkable, is thus a *necessary condition* for the thesis that this action is good or such that it ought to be performed.

Consequently, it is inconsistent to say that the action in question is good or such that it ought to be performed, yet it does not fulfil claims made by any, not even a single one, meaningful moral theory or criterion.

One can thus deduce an alternative of theoretical propositions from a practical statement! To this extent, our discussion supports the case of moral cognitivism. But the support is rather weak, since we cannot tell *which* moral theory or criterion must be fulfilled to make an action good or obligatory.

#### **2.4.8 Concluding Remarks Concerning Logical Relations Between Theoretical and Practical Statements**

The relations of various moral value-statements and norm-expressing statements to certain theoretical propositions, formulated in the discussed theses, constitute an important component of the theoretical meaning of these practical statements. The theoretical meaning of moral statements is, however, vague. Vagueness results from the following circumstances.

1. The description of the good-making, ought-making, right-making facts etc. is invariably vague or controversial. For instance, utilitarianists have done much work to state precisely what promotion of happiness or fulfilment of preferences mean. Yet, these problems are far from being solved.
2. There is no way to prove that a given list of such facts really is complete. To be sure, it is not logically inconsistent to believe that one can formulate a complete list of that kind. But how can one know that all important reasons for and against a given action have been taken into consideration? How can one know that no unknown counter-arguments weigh more? In other words, how can one know that the ultimate assumption of the moral reasoning in question is right? Due to such factors as limited knowledge and free will of human beings, one cannot by Reason alone, objectively (that is, freely from emotional bias) and, at the same time, definitively justify such beliefs.

The theory, developed above, is a synthesis of cognitivism and non-cognitivism. Among other things, the cognitivists are right that a *prima-facie* practical statement is derivable from some theoretical propositions. They are also right that some theoretical propositions follow from practical statements. On the other hand, the non-cognitivists rightly point out that an *all-things-considered* practical statement does not follow from a set of premises solely consisting of theoretical propositions. A practical statement is related not only to facts but also to the action, will and feelings. A practical statement thus has both a theoretical and a practical meaning.

If one sees only one or another but not both simultaneously, one is, so to say, one-eyed or half blind.

## 2.5 Some Examples of the Role of Weighing in Moral Theories

### 2.5.1 *Introductory Remarks*

Weighing and balancing thus plays an important role in all moral contexts. Let me now give some more elaborate examples. In fact, some examples have already been discussed. In Section 1.4.1, I have thus pointed out that the concept of legal certainty presupposes weighing and balancing of predictability of legal decisions and other moral considerations. Section 1.4.2 deals with weighing and balancing of various criteria of democracy. More examples would, however, make the situation clearer.

### 2.5.2 *Weighing Preferences: Hare's Utilitarianism*

Although R.M. Hare's theory is a continuation of a long tradition of British utilitarianism, including such thinkers as Bentham and Mill, it shows a remarkable originality. Hare supports his theory with an analysis of the moral language. He assumes that moral judgements are 1) overriding, 2) universalisable and 3) prescriptive.

Moral judgements thus *override* other evaluative judgements. If an action which follows a moral principle violates, e.g., an aesthetic principle, one ought to follow the moral principle. Hare gives the following example. Assume that Hare's wife gave him a magenta cushion to put over his scarlet sofa in his room in college. An aesthetic principle says that one ought to avoid such a combination of colours. A moral principle states that one ought not to hurt one's wife's feelings. The moral principle overrides the aesthetic, and Hare thus ought to accept the gift (Hare 1981, 55).

Moral judgements are also *universalisable*. Any moral judgment follows from a universal principle applicable to *all* persons, situations, actions etc. of a certain kind. The like ought to be treated alike. If one makes different moral judgments about situations which one admits to be identical in their universal descriptive properties, one contradicts oneself (Hare 1981, 107 ff.). If one thinks, e.g., that John ought to earn more money than Peter, one must support this conclusion with a universal principle, e.g., that one's income ought to fit one's performance. Such a justification would be meaningless if only attached to individual names, e.g., "John ought to earn more because he is John". It follows that if a distinction

between oneself and others is not universalisable, it lacks moral relevance. From the moral point of view, one ought to treat others in the same way as oneself.

Hare is thus a rule utilitarianist. He does not hold that one ought to evaluate individual actions directly by reference to their utility. One should not ask oneself whether breaking a promise particular, killing a particular person etc. would have the best consequences. Rather one ought to ask whether a universal rule permitting such actions would do it. This option allows Hare to avoid two forms of the standard anti-utilitarianist criticism. (1) First, a critic may point out that a particular action may have the best consequences, yet be morally unjustifiable because a universal practice to perform such actions would not have the best consequences. This criticism is fatal for act-utilitarianism, but not for rule-utilitarianism. (2) A critic may also ask, Why ought one to concern oneself with interests of other people at all? Hare could answer: Moral language is such that *if* I wish to use it, I must respect interests of others.

Finally, moral judgements are *prescriptive*; they entail norm-statements (“imperatives”). If a person assents orally to a moral judgment that an action ought to be performed in a certain situation, and yet does not perform it in this situation, he must be assenting insincerely. Prescriptivity is connected with the concept of preference. To have a preference is to accept a corresponding prescription (Hare 1981, 21 ff.).

Hare is thus a preference-utilitarianist, not a happiness-utilitarianist. He does not hold that one ought to evaluate actions by reference to happiness they may create. Rather one ought to ask whether they correspond to human preferences. This option allows Hare to avoid the standard anti-utilitarianist criticism, according to which a moral thinker may not impose own conception of happiness on everyone, including those who prefer *not* to be happy in the sense he has chosen.

A consequence of universalisability and prescriptivity of moral judgments is that *each person ought to adopt other people’s preferences as his own*. “(T)he method of critical thinking which is imposed on us by the logical properties of the moral concepts requires us to pay attention to the satisfaction of the preferences of people (because moral judgements are prescriptive and to have a preference is to accept a prescription); and to pay attention equally to the equal preferences of all those affected (because moral principles have to be universal and therefore cannot pick out individuals)”; Hare 1981, 91.

Furthermore, it follows that one ought to treat others as they want to be treated. “It follows from universalisability that if I now say that I ought to do a certain thing to a certain person, I am committed to the view that the very same thing ought to be done to me, were I in exactly his situation, including having the same personal characteristics and in particular the same motivational states. But the motivational states he actually now has may run quite counter to my own present ones. For example, he may very much want not to have done to him what I am saying I ought to do with him... But... if I fully represent to myself his situation, including his motivations, I shall myself acquire a corresponding motivation...” (Hare 1981, 108–109).

In brief, one ought to treat others in accordance with a calculus of preferences, taking account of what they want, how many people have a certain preference, and how strong their preferences are.

Such a calculus of preferences is not the same as simple addition and subtraction. Had it been the case, the theory would be vulnerable for a standard criticism concerning distribution. Let us imagine that the society consists of three persons, A, B and C, who produce and consume certain “units of welfare”, e.g., cakes. Let us then make a choice between two alternative organisations of this society, I and II, characterised by the following distribution:

- I. A gets 10 cakes. B gets 10 cakes. C gets 10 cakes.
- II. A gets 2 cakes. B gets 2 cakes. C gets 30 cakes.

In this situation, a person solely concerned with maximising welfare would have to choose II, although this choice contradicts moral intuitions of most people. Yet, a utilitarianist is not forced to do so. He must also pay attention to diminishing marginal utility (cf. Simmonds 1986, 32). He may thus easily point out that the additional 10 cakes given to the rich man will make a negligible contribution to satisfaction to his preferences, whereas additional cakes given to the poor would be much more significant, perhaps enabling him to avoid starvation.

This is, however, not the whole story of weighing and balancing of preferences. Other factors must also be weighed and balanced, for example the role of unequal distribution as an incentive to encourage people to work hard, the costs of maintaining some redistributive institutions and so on (cf. Simmonds 1986, 32 ff.)

The statement “x is morally good” is thus based on the statement “combined preferences of people for x weigh more than their combined preferences against x”. Is the latter statement a theoretical proposition? Were this the case, Hare’s theory would be naturalistic. But Hare *denies* it. To establish, e.g., that John’s preference for freedom weighs more than Peter’s preference for security, a moral thinker must not only describe the preferences but also decide to adopt them as his own *and then weigh and balance them in the same manner as his own preferences* for freedom and security.

This form of weighing creates some problems. It “involves putting oneself... thoroughly into other person’s place, so that one takes on his desires, tastes, preferences, ideals, and values as well as his other qualities... But then it hardly makes sense to talk of putting *oneself* in his place; hardly any of oneself is retained. Rather, what one is trying to do is to look at things from one’s own and from the other person’s point of view at once, and to discover action-guiding principles... which one can accept from both points of view. Or rather, since there is not just one person but infinitely many, from all actual points of view... But... it is doubtful whether any principles will pass so severe a test... We must lower our sights a little, and look not for principles which can be wholeheartedly endorsed from every point of view, but for ones which represent an acceptable compromise between the different actual points of view” (Mackie 1977, 93).

One of Hare’s original contributions is the following theory of *two levels of moral thinking*. The *critical* level includes a complete knowledge of other people’s preferences in all thinkable cases, together with weighing and balancing of these preferences. Only an “archangel” could perform such a task. The opposite of the “archangel”, a “prole”, lacks ability to think “critically”. He must stay at the

*intuitive* level, that is merely follow his own moral intuitions and some established moral principles, e.g., that one ought not to live at other person's expense, lie to one's friends, neglect one's children, torment one's dog etc. The archangel could show that some intuitions and principles more or less correspond to the calculus of preferences. The prole does not know it but still acts rightly. Ordinary people are neither archangels nor proles but rather an approximation of both. They have some moral intuitions, follow some principles *and* have some ability to check whether these correspond to what other people wish (Hare 1981, 44 ff.).

One often criticises utilitarianism in general and Hare's theory in particular by giving some counter-examples. Assume, e.g., that most people show a (consistent and universalisable) system of preferences including a preference to seek happiness in liquors. Ought we then to create a community of alcoholics where spiritous drinks are for free? Assume that such a system includes a preference to exterminate people regarded as endangering the purity of the race. Ought we to kill the "subhumans"?

One may regard such counter-examples as reasons for completing utilitarianism, regarded as a theory of the Good, with a theory of the Right, based on some fundamental norms. A special case of the latter can consist of a theory of *rights*. All people have thus a right to live, regardless others' preferences. But one can try to reconcile the rights with Hare's utilitarianism. One can, e.g., assume that an individual's preference for living is so strong that it outweighs the preference of a great number of racists for killing one. On the other hand, hypotheses concerning strength of preferences are not easy to test. Perhaps they must be based on some theories of human nature.

To answer such objections, Hare simply assumes that most people are neither drunks nor murderers. In this way, his theory comes close to natural-law conceptions, based on assumptions concerning human nature. Moreover, if people actually had such preferences, the archangel would be able to show them that, in the long run, the results of drinking and killing would strongly jeopardise some other things they prefer even more. He would thus show that a system including a preference to abuse alcoholic drinks or to exterminate some people cannot be consistent and universalisable.

To be able to tell this, one must also make assumptions about human nature. But Hare could perhaps reply that *no* general moral theory is conceivable without such assumptions. Another known objection is that at least some preferences of different persons are incommensurable. One has no right to regard some person's satisfaction as a sufficient compensation of others' harm. In some cases, the objection is very plausible. One certainly ought not to kill John and transplant his organs to save five other people. In other cases, however, the utilitarian standpoints seems to prevail. It is plausible to assume that one *may* kill John, if this would prevent a nuclear holocaust with millions of victims. One needs weighing and balancing of various considerations to state which cases are which. And Hare would no doubt point out that an archangel would be able to perform such act of weighing.

On the other hand, a critic may say that Hare assumes things he cannot know, first that people are good and then that the archangel would be able to correctly weigh preferences of different persons.



Moreover, Hare assumes implicitly that the archangel would correctly weigh and balance John's and Peter's preferences, as if they were his own, and then state precisely that, e.g., his preference for liberty outweighs his preference for security. But can one make such weighing and balancing objectively correct, *entirely* rational? An act of weighing and balancing ultimately rests on one's will, feelings and emotions, cf. section 2.4.5 *supra*. Perhaps there can exist different archangels having different will and different emotions.

If Hare had assumed that the statement "H is a good action" is equivalent to the statement "H corresponds to an actual (consistent and universalisable) system of preferences of other people", his theory would be cognitivistic or, to put it more precisely, a naturalistic one. But he has not made such an assumption. His theory implies something else, namely that the former statement is equivalent to the statement "H corresponds to an actual (consistent and universalisable) system obtained through weighing and balancing of both other persons' and one's own preferences". This statement is not theoretical, since it expresses one's act of weighing, ultimately depending on one's will, emotions and feelings.

Hare's theory thus has both a theoretical and a practical meaning, the first related to the connection between goodness and other person's preferences, the second attached to the discussed role of weighing and balancing between them and one's own preferences.

### 2.5.3 *Weighing Practices: MacIntyre's Theory of Virtue*

The central idea of *Alasdair MacIntyre's* theory (MacIntyre 1981) is that the moral good is analytically related to virtue. He received the idea from Aristotle. The virtue of a horse makes it a good horse which runs well, well bears the rider and well holds his ground against the enemy (Aristotle, 1105b; cf. Marc-Wogau 1970, vol. 1, 217). Similarly, the virtue of a human being consists in the conduct through which he is a good person and carries out his work well.

The conceptual relation between "human being" and "good human being" resembles the relation between "chess player" and "good chess player". A good chess player is virtuous, since he is good at playing chess. In other words, he highly fulfils the standards of excellence characterising chess. He can find weak points in a chess position. If he has an advantage, he can find a winning plan of game. He can calculate many variants. He makes few mistakes etc. Such properties constitute *intrinsic values* of chess. They come into existence only when people play chess. Chess is a *practice*.

Other practices may be more difficult to analyse but one can always characterise them by some presupposed goals, standards of excellence and intrinsic values. When one, e.g., establishes a family, one starts a practice whose complex goal includes taking care of one's children. When one accepts a public position, one starts a practice whose intrinsic values include following the law.

In this way, MacIntyre's theory is based on the idea that x is good for some purpose, defined by a practice. Different practices influence each other and constitute a complex and changing system.

The same applies to actions of an individual. To understand the connections between actions, one must know his “narrative history”. “We place the agent’s intentions... in causal and temporal order with reference to their role in his or hers history; and we also place them with reference to their role in the history of the setting or settings to which they belong.” (MacIntyre 1981, 194).

A morally good, that is, virtuous human being has both ability and disposition to find the golden mean between competing goals, standards of excellence and values characterising various, historically evolved, practices connected with his family, town, nation, duties, property etc. This connection between virtue and the golden mean is typical for Aristotle’s philosophy.

But the balance is not easy to find. The process of finding out is like a spiral of learning. “The virtues... are to be understood as those dispositions which will not only sustain practices and enable us to achieve the goods internal to practices, but which will also sustain us in the relevant kind of quest for the good... (T)he good life for man is the life spent in seeking for the good life for man, and the virtues necessary for the seeking are those which enable us to understand what more and what else the good life for man is.” (MacIntyre 1981, 204).

A virtuous chess player *deserves* to win against a less virtuous one. A virtuous parent deserves to have his children, a virtuous official deserves his position etc. It is *just* to give positions to virtuous officials. A morally virtuous person deserves praise.

MacIntyre thus differs from some moral philosophers eliminating the idea of desert, *inter alia* because virtue is allegedly a product of a genetic lottery (cf. section 2.6.2 *infra*).

MacIntyre’s theory is intimately connected with weighing and balancing.

1. Weighing and balancing is necessary to state precisely the golden mean of intrinsic values, standards of excellence and goals expressed in various practices.

In this connection, one must ask two questions:

- a. How can one state precisely the intrinsic values, standards of excellence and goals characterising such a complex practice as, e.g., political life? A utilitarianist would find its goal in maximising utility, a liberal in protecting liberty, a conservative in enforcement of historically developed order, and a socialist in equality. This is the case because different ideologies imply different weighing and balancing of *prima-facie* values, competing with each other in political life.
- b. How can one find the golden mean of intrinsic values, standards of excellence and goals expressed in *many different* practices? Some people evaluate family life above all, others pursue professional career etc. Where does the golden mean lie between such ideals? The answer requires an act of weighing and balancing.

The central point of MacIntyre’s theory can be summarised, as follows: The statement “A is a morally good person” is equivalent with the statement “A has both

ability and disposition to find the golden mean between competing goals, standards of excellence and values characterising various, historically evolved, practices.” If the latter statement had been a theoretical proposition, the theory would be cognitivistic or, to put it more precisely, a naturalistic one. One could then criticise it by means of Moore’s “open question argument”. One could thus meaningfully ask such questions as “To be sure, A has ability and disposition to find the golden mean between competing goals, standards of excellence and values characterising various practices, but is A a morally good person?”. The meaningful character of the question reveals that to be good is not identical with having this ability and disposition.

But the statement “A has ability and disposition to find the golden mean... etc.” is vague. More exactly, it is value-open. To interpret it in a precise manner assumes that one performs two acts of weighing and balancing, each ultimately depending on one’s will, emotions and feelings. The first one is necessary to establish the goals, standards of excellence and values characterising various practices; the second is a necessary condition of finding the golden mean between the practices. In consequence, MacIntyre’s theory has both a theoretical and a practical meaning, the first related to the connection between goodness and established practices, the second attached to the role of feelings etc.

## 2.6 Examples of Weighing in Theories of Justice

### 2.6.1 *Justice, Equality and Weighing*

The morally good is connected with the just. According to many authors, justice means that the like ought to be treated alike. This conception of justice is thus related to Hare’s demand of universalisability of all moral statements; see section 2.5.2 supra.

*Chaim Perelman* has thus formulated the “formal” principle of justice, according to which beings of one and the same essential category must be treated in the same way (Perelman 1963, 16).

This principle must be completed with a number of more precise norms for distributive justice, that is, just distribution of goods (or values), thus defining membership of the same essential category as determined by one’s merits, works, needs etc. Perelman has discussed six “formulas of concrete justice”. One may present these, as follows (Perelman 1963, 6 ff).

1. One ought to treat each individual in the same manner.
2. One ought to treat each individual according to his merits.
3. One ought to treat each individual according to his works.
4. One ought to treat each individual according to his needs.
5. One ought to treat each individual according to his rank.
6. One ought to treat each individual according to his legal entitlement.

Obviously, one may extend the list of such formulas through adding, e.g., the following ones:

7. One ought to treat each individual according to his sacrifices and suffering.
8. One ought to treat each individual according to his capability of using goods distributed or bear burdens imposed.
9. One ought to treat each individual according to his placing in time and space, e.g., in a queue (cf., e.g., Eckhoff 1971, 46; Rescher 1966, 73 and Lucas 1980, 164 ff.).

Since one cannot simultaneously distribute the goods in proportion to all such criteria, one must make a compromise between them. Perelman has pointed out that such a compromise is required by *equity* (Perelman 1963, 32 ff.). Of course, the compromise requires weighing and balancing.

In this connection, one may ask the question, What values are to be distributed justly, i.e. equally between equally entitled recipients?. The following alternatives may be considered (cf. Peczenik 1972, 523–524 and 1971b, 21; cf. Welinder 1974, 86–87 on Adolph Wagner, F.Y. Edgeworth and A.C. Pigou):

- a. The goods to be distributed are these which are at the disposal of the distributor; an employer, for example, pays wages from his bank account.
- b. The goods to be distributed are not only these which are at the disposal of the distributor but also goods which the recipient already has and which are to be redistributed. Such a corrective justice takes as its starting point that the recipients' *position as a whole* should be regulated in proportion to one's merits, works, needs etc. In agreement with this, social benefits and taxes, are distributed not equally but quite unequally, with a view to *make* people more equal.

An argument for corrective justice implies a political position as regards the question of redistribution. It is plausible to assume that such questions require weighing and balancing, *inter alia* of an individual's claim to keep what is his own and his claim to receive help when needed.

The Norwegian jurist *Torstein Eckhoff* has discussed another important question, that is, What relation is to exist between the possession of the relevant qualities (merits, needs etc.) and the share given to each person? One can think about the following possibilities (Eckhoff 1971, 44 ff.):

- a. The distribution of values may be graded quantitatively in proportion to merits, works, needs etc.
- b. The recipients may be divided into two classes, the entitled and the not entitled. If a person is entitled, i.e. has sufficiently large needs, merits etc., he will participate in the distribution of goods, otherwise not.
- c. A hierarchy of recipients may be based on works, needs, merits etc.; a recipient who is higher in the hierarchy will get the goods in question earlier, but all will get an equal amount until the goods come to an end. Those who are lower in the hierarchy will get nothing.

One may argue for each of these solutions. But most such arguments imply weighing and balancing of various considerations. For example, in order to support