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On Law and Reason

Preface by Jaap C. Hage

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dividing recipients of some goods in two classes only, instead of choosing a quantitative distribution in proportion to needs, merits etc., one may claim that welfare of the poor has a *greater weight* than all reasons for proportional distribution.

Torstein Eckhoff (1971, 38 ff.) has also discussed the following *principles of equal weight*:

1. Good ought to be repaid with good.
2. Evil may be repaid with evil.
3. Damage ought to be made good. (The optimal balance of considerations in the law of torts is, however, a matter of complex weighing, cf. Hellner 1972, 304 ff.).
4. A person whose interests are favoured by someone should also accept the fact that his benefactor assigns him some burdens.

Such principles of reciprocity and balance express the so-called *commutative justice*. One can imagine more such principles, e.g.:

5. Nobody should appropriate to himself a value if some other person will thereby lose a greater value (cf. also v. Wright 1963, 207 ff.).

One can also proffer principles demanding some balance between advantages and disadvantages (cf., e.g., Tammelo 1977, pp. 9, 39 and 54), e.g.:

6. A person whose interests are favoured by an action should also bear the costs of the action: *ubi emolumentum ibi onus* (cf., e.g., Esser 1964, 99 note 43).
7. Nobody should benefit from his own wrong (cf., e.g., Esser 1964, 99).

Some principles of justice are more difficult to analyse. Let me merely mention one example:

8. There must be a reasonable proportion between the crime and the punishment.

Both the norms for distributive justice and the norms for commutative justice are intimately connected with weighing and balancing. When various principles collide, one must weigh and balance them against each other. (Cf. Perelman 1963, 33: "pure compromise". Cf. Friedrich 1963, 43: "balanced evaluation… on the ground of values prevalent in the political community concerned". Cf. Weinberger 1978, 208).

The norms of justice thus have a *prima-facie* character. A distributor of goods must certainly consider the question to what extent the distribution fits the merits, works, needs etc. of the recipients. But he has no clear criteria for definitive distribution. The discussed theory identifies justice with the fact that beings of one and the same essential category are treated in the same way. The statement "A treats B justly" is thus equivalent with the statement "A treats B equally with other members of the same essential category". If the latter statement had been a theoretical proposition, the theory would be cognitivistic or, to put it more precisely, a naturalistic one. But this statement is vague. To interpret it in a precise manner assumes that one tells *who* belongs to the same essential category. To state this precisely, one

must perform an act of weighing. In consequence, the theory has both a theoretical and a practical meaning, the first related to the connection between justice, equality and several *prima-facie* criteria of equality, the second attached to the role of weighing and balancing in the process of deciding who is equal with whom.

2.6.2 The Role of Weighing In John Rawls's Theory of Justice

John Rawls has elaborated another conception of justice.

1. Rawls has not studied directly what a just *action* is but has discussed the question of a *just organisation of the society*.
2. The starting point of the theory consists in a *hypothetical social contract*. An organisation of the society is just if it *would* be accepted by reasonable individuals in "the original position of equality". Rawls has adapted this "position" to a compromise (a "reflective equilibrium") of two conditions: 1) it must ascertain impartiality, and 2) it must lead to unanimous acceptance of reasonable principles of justice.

Rawls has characterised this "reflective equilibrium" as follows: "By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments…, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted" (Rawls 1971, 20).

The original position of equality has the following properties.

a. *Rationality*. Whoever is in the original position performs a rational choice between different organisation of the society.
b. *Egoism*. The choice is determined by the intention to protect one's own interest.
c. *The veil of ignorance*. "Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like… This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances" (Rawls 1971, 12).
d. Some *information*. The veil of ignorance does not eliminate all information. The discussed individuals know that their task is to make a choice of basic principles for the organisation of society. They also know which own interests they must protect (cf. Rawls 1971, 136 ff.). But since they do not know anything about their particular situation, they must conceive these interests in a very abstract manner. In consequence, the chosen principles of justice do not concern distribution of any goods whatever but merely some primary goods, such as liberty and opportunity, income and wealth, and, above all, self-respect (cf. Rawls 1971, 440 ff.).

4. The individuals in the original position would, according to Rawls, choose the following principles:

"1 Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all…
2 Social and economic inequalities are to be arranged so that they are both:

a. to the greatest benefit of the least advantaged, consistent with the just savings principle, and
b. attached to offices and positions open to all under conditions of fair equality of opportunity" (cf. Rawls 1971, 302).

In my opinion, the Second Principle expresses the political point of the theory: it is just to protect the least advantaged.

5. The individuals in the original position would, moreover, accept the following priority rules. The first principle is "lexically" (unconditionally) prior to the second, and the second is "lexically" prior to efficiency, wealth etc. (cf. Rawls 1971, 302–303). This does not mean, however, that all kinds of freedom take priority over the second principle. Were it the case, the second principle could not support compulsory redistribution. Such a redistribution must restrict freedom of the persons whose goods are taken away. Since Rawls clearly admits compulsory redistribution, he must intend his first principle to protect, not liberty in general, but merely such specific civic liberties as freedom of speech, freedom of conscience etc. (cf. Simmonds 1986, 48–49).
6. These principles and their priority order *define* justice. Since Rawls also claims that justice is the highest value, they also define the idea of the right. "The right" is prior to "the good", 31 ff. The latter concept, but not the former, allows certain variations between different individuals, cf. Rawls 1971, 446 ff. Cf. Rawls 1980, 515 on "the Kantian roots of that conception".

Rawls's theory is, however, open for objections, each revealing the great role of weighing and balancing in a theory of justice.

1. The starting point of the theory consists in a set of initial assumptions concerning both the original position of equality and reasonable principles of justice. These initial assumptions are then adapted to each other by means of the "reflective equilibrium". The result is a highly coherent set of assumptions. But what happens if several coherent sets are possible? How should one make a choice between them, if not through weighing and balancing of several *prima-facie* pro- and counter-arguments?
2. It is strange that the theory has no place for *desert*. No doubt, it is just to protect the least advantaged. But it is also just to recognise merits and desert. Rawls (1971, 311–2) claims that "the idea of rewarding desert is impracticable" because "the initial endowment of natural assets and the contingencies of their growth and nurture… are arbitrary from a moral point of view". This includes "the effort a person is willing to make" which also is "influenced by his natural abilities and skills". One's talents, willingness to make sacrifices, and thus one's

merits, are results of a genetic lottery. However, should those who make sacrifices for the common good receive no more recognition than the individuals who do not care about anything but their own profit? (cf. Lucas 1980, 190 ff). To answer this question, one needs weighing and balancing of the genetical-lottery argument and the counter-arguments.

3. One can doubt whether rational individuals in the original position would choose Rawls's principles. They would certainly do it, were they afraid of taking risks. Otherwise, they might do something else. To be sure, they would protect themselves from the worst catastrophes, thus assigning the least advantaged a certain decent minimal standard of life. Once this "utility floor… below which no one should be pressed" (Rescher 1966, 29) is provided, they would rather try to maximise their chance to receive as great an amount of goods as possible. To determine this "utility floor", they would be forced to weigh and balance several moral considerations.

It may also be highly *improbable* that one becomes the least advantaged person. But the veil of ignorance is specifically designed to be "thick", not "thin", that is, to prohibit the individuals in question to pay attention to such probability. One may doubt whether this limitation is justifiable. "Rawls does nothing to establish that the original position makes probability calculations impossible because he gives no reason for thinking that a thick rather than a thin veil ought to be dropped over that situation of choice" (Pettit 1980, 173; cf. Simmonds 1986, 45.

One may wonder whether a choice between competing versions of the veil of ignorance can be rationally made without a kind of weighing and balancing of several considerations.

4. The principle of the greatest possible benefit of the least advantaged is just under some circumstances, but it might not be, were its price to consist of a radical decrease in the production of goods, and in losses for everyone except the least advantaged, perhaps losses exceeding profit. Since Rawls has neglected the connection between distribution and production, his theory best fits a society in which "things fall from heaven like manna". (Nozick 1974, 198; cf. Wolff 1977, 210; Weinberger 1978, 208).

Assume the following simple model. The society consists of three persons, A, B and C, who produce and consume cakes. Assume further that the production system is such that inequality highly promotes efficiency. More precisely, one has to make a choice between two alternative organisations of this society, I and II, characterised by the following distribution of cakes:

I. A gets 5 cakes. B gets 6 cakes. C gets 7 cakes.
II. A gets 4 cakes. B gets 8 cakes. C gets 16 cakes.

Rawls would choose I, thus assuring the greatest benefit of the least advantaged, A. But if already 4 cakes suffice for a decent standard of life, it is by no means clear why the production ought to be restricted to 18 cakes, instead of 28, in order to give A 5 cakes instead of 4.

In general, "(i)t may be said that (Rawls's) principles pay absurd attention to the position of the worst off person, and that they have the following intolerable results: that so long as the worst off are at the same level the principles would be indifferent between two systems in one of which people other than the worst off are much better treated than they are in the other, and that so long as it improved by a little the position of the worst off person, the principles would prefer a system that greatly impaired the lot of those other than the worst off" (Pettit 1980, 177). "(W)hereas Rawls is concerned only with the underdog, justice is concerned with everybody and seeks to maximise not only the minimum pay-off but every pay-off"; Lucas 1980, 67. Rawls's response is to say that "it seems probable that if the privileges and powers of legislators and judges, say, improve the situation of the less favored, they improve that of citizens generally. Chain connections may often be true, provided the other principles of justice are fulfilled" (Rawls 1971, 82). This rebuttal is nothing better than an *ad-hoc* empirical hypothesis, specifically designed to save the theory. No independent empirical reasons exist to assume that this hypothesis is true.

Indeed, the value of Rawls's principles can hardly be decided by purely empirical means. In my opinion, any choice between competing principles of justice requires not only empirical knowledge but also weighing of risks and gains their application would create.

5. Rawls's list of "primary goods" to be distributed according to the second principle of justice is vague. This is important, since the second principle is designed to justify redistribution or primary goods. Are one's organs, e.g., one's eyes and kidneys, primary goods? If so, may they be redistributed to save others? If not, why? (Simmonds 1986, 46 ff.; cf. Pettit 1980, 170 ff.). Obviously, one needs weighing and balancing of various considerations in order to ascertain what goods are and what are not primary.
6. It follows from Rawls's theory that the first principle is applicable only to some civic liberties, not to liberty in general. But what justifies the choice of just *those* basic liberties? Obviously, an answer to this question requires weighing and balancing of multiple considerations.
7. According to Rawls's priority rules, the first principle is unconditionally prior to the second, and the second is unconditionally prior to efficiency, wealth etc. This priority order is, however, very strange in starving societies, such as a great part of Africa. First of all, hungry people would prefer bread to liberty. Moreover, they may prefer to make sacrifices to assure continual progress and increasing prosperity of future generations.

Rawls (1971, 287), on the other hand, has expressed the following view: "When people are poor and saving is difficult, a lower rate of saving should be required; whereas in a wealthier society greater savings may reasonably be expected since the real burden is less. Eventually once just institutions are firmly established, the net accumulation required falls to zero."

Indeed, it is difficult to agree with any unconditional order of such values. It is more plausible to regard justice as a matter of weighing and balancing of many considerations.

Rawls's theory identifies justice with the *fact* that the organisation of society corresponds to his principles. One can then criticise it by means of Moore's "open question argument": "To be sure, the organisation of society S corresponds to the principles but is it just?" Since this question is meaningful, justice cannot be identical with fulfilment of these principles. Thus the following remark is fully justified: "Suppose somebody says 'In the original position I would opt for a social system ruled by the principle of utility, because this would maximise my chances; but morally I reject such system as unjust.' According to Rawls it would be self-contradictory to say such a thing, but it does not appear to be self-contradictory and may even be true" (Tugendhat 1979, 88–89; cf. Hare 1973, 249; Browne 1976, 1; Höffe 1977, 423).

No doubt, there exists *a* connection between justice and ideals of liberty, equality and protection of the least advantaged. The statement "The organisation of society S is just" has a *similar* (albeit not identical) meaning as the statement "S fulfils the demands impartial observers would formulate, concerning liberty, equality and protection of the least advantaged". But the latter statement is vague. To interpret it in a precise manner assumes that one performs an act of weighing of various properties of the society, ultimately depending on one's will, emotions and feelings. Rawls offers *one* interpretation but others are also possible.

In consequence, Rawls's theory has both a theoretical and a practical meaning. The first is related to the connection between justice and the ideals of liberty, equality and protection of the least advantaged. The second is attached to the role of weighing and balancing for deciding what the precise meaning these ideals ought to have.

2.6.3 The Role of Weighing In Robert Nozick's Theory of Justice

Robert Nozick has criticised, **inter alia**, Rawls's theory of distributive justice for not having recognised that many things are from the beginning attached to definite persons. Assume again that the society consists of three persons, A, B and C, who produce and consume cakes, and that one has to make a choice between two alternative organisations, I and II, characterised by the following distribution of cakes:

I. A gets 6 cakes. B gets 6 cakes. C gets 6 cakes.
II. A gets 4 cakes. B gets 4 cakes. C gets 10 cakes.

In this situation, any egalitarian would choose I but Nozick insist that II may, after all, be just *if* it has come about as a result of voluntary exchanges from the starting point which consisted of I. What determines justice is not the pattern of distribution but "historical entitlement" (Nozick 1974, 155 ff).

1. Nozick thus assumes that people have rights, e.g., the property right to justly acquired objects, independently from the positive law, moral conventions and

other social institutions. Each person has an exclusive right in his own person and his own labour, and no rights in other persons (cf. Nozick 1974, 174 ff.). This assumption resembles the classical natural-law doctrine of the *suum*, including a person's life, body, good reputation and actions. One has a natural right to one's *suum*. According to Nozick, one has such a right to justly acquired objects.

2. A just "historical entitlement" is determined by three sets of principles, that is, (a) principles of acquisition, (b) principles of transfer and (c) principles of rectification of injustice which resulted from violation of a or b.

Nozick has thus formulated the following principles whose fulfilment is a necessary condition of justice.

"If the world were wholly just, the following inductive definition would exhaustively cover the subject of justice in holdings.

(1) A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
(2) A person who acquires a holding in accordance with the principle of justice in transfer, from one entitled to the holding, is himself entitled to the holding.
(3) No one is entitled to the holding except by (repeated) application of 1 and 2" (Nozick 1974, 151).

3. In this connection, Nozick has developed the following ideas, mostly corresponding to Locke's theory (Nozick 1974, 174 ff.).

   a. An initial acquisition of an object is just if one has "mixed one's labour with it". One's entitlement extends to the whole object rather than to the added value one's labour has produced, provided that no one suffers a loss in consequence of the acquisition.
   b. A transfer is just if based on a free will of the entitled person.

4. According to Nozick, a historical development of this kind, that is, a free market, would inevitably upset any "patterned" distribution, such as an equal distribution of money, freedom etc. (Nozick 1974, 160 ff. and 219 ff.).

On the other hand, a perfect market, based on free will of the persons involved, would promote equal chance of everybody to make a free choice, that is, to use his resources to buy precisely the goods he wants, whereas any redistributive mechanism rather gives him the goods the deciders choose for him.

5. To apply these thoughts to the relation between individuals and the state, Nozick has argued, as follows (Nozick 1974, 88 ff.):

   a. In an imaginary state of nature, or a state of anarchy, no institution restricts one's freedom.
   b. The state of nature must evolve into an organised society. Nozick imposes the following restrictions upon this transformation: (ba) It should be a result of self-interested and rational actions of various persons; and (bb) it should not include any violation of the indicated principles of justice. No other moral restrictions are imposed.

c. In this situation, people will be forced to buy protection from various risks anarchy causes. A number of protective agencies will thus evolve. A natural selection of these would then lead to a dominating protective agency. This agency would be the same as an "ultra-minimal" state. At this stage, some people would stay unprotected. But those operating the ultra-minimal state would be morally required to organise taxation to provide some funds for people unable to buy the protection. They would also be required to buy out persons who do not want to be protected. Since people, in fact, would do what morality requires of them, a *minimal state* would evolve, giving everybody a minimum of protection but otherwise not engaged in any redistribution of goods (Nozick 1974, 149 ff.).

6. One can thus only justify the minimal state, not the modern welfare state, performing an extensive redistribution of goods.

Nozick's theory must, however, face the following objections, revealing the importance of weighing and balancing of several considerations of justice.

1. No doubt, a person is entitled to the full value of his labour. But why should he be entitled to the whole object with which he has "mixed his labour", e.g. to a natural resource he utilised, such as iron, oil and gas? (cf. Simmonds 1987, 56 ff.). Nozick may answer that the acquisition of the whole object is just if no one suffers a loss in consequence of it. This answer reveals, however, a consideration of an independent character, not connected with the principles of "historical entitlement". Such considerations must, indeed, be taken into account. But their weight must be determined by an act of weighing and balancing.
2. In the process of production, objects are refined by actions of interdependent individuals. In consequence, the principle of just acquisition applies not only to individual but also to collective ownership. One's option for private property must thus rest on other grounds than Nozick's. It is plausible that it must rest on weighing of pro- and counter-arguments for both systems of property.
3. A difficult question concerns new members of the society, born or immigrated after most things had already been acquired by others. Should these have no property at all? Or should one allow for a redistribution? (cf., e.g., Steiner 1977, 151). What is the *extent* to which redistribution is just? The answer to this question obviously requires weighing and balancing of several considerations.
4. Why must the "ultra-minimal" state evolve into a minimal state? No doubt, the people operating the former would be morally required to provide some funds for those unable to buy the protection. They would also be morally required to buy out persons who do not want to be protected. But how can Nozick know that they would do what morality requires? (cf. Pettit 1980, 98 ff.). The outlined evolution may, in fact, produce a society in which some people have no rights at all. Nozick's hypothesis that this would not happen is perhaps influenced by his moral opinion. No doubt, such a society would be unjust. But let me add that the best way to justify this moral opinion is to perform an act of weighing and balancing of several ethical considerations, some "historical", other "patterned".

Nozick's theory identifies justice with a result of a historical process, including the fact that some people "mixed their labour" with some things, voluntarily transferred the things to others, bought a kind of protection, and other such *facts*. One can then criticise it by means of Moore's "open question argument": "To be sure, all these facts occurred but is the resulting society just?" Since this question is meaningful, justice cannot be identical with these facts. Nor can it be identical with the causal result of them.

To be sure, there exists *a* connection between justice and such ideals as respect for work and free contracts. The statement "The organisation of society S is just" has a similar meaning as the statement "S evolved through a historical process consisting of productive work and voluntary agreements." But the latter statement is not identical with the former. Justice also demands paying attention to some other considerations, e.g., concerning the newly born and newly arrived members of the society. One must perform an act of weighing and balancing of various such considerations, ultimately depending on one's will, emotions and feelings.

In consequence, Nozick's theory has both a theoretical and a practical meaning. The first is related to the connection between justice and the respect for work and free agreements. The second is attached to the role of weighing and balancing these and other morally important considerations.

2.6.4 Some Concluding Remarks on Justice

Very little can be said about the most general idea of justice, except that its point is to make a justifiable distinction between what values different individuals ought to possess, what treatment they ought to receive etc. This point corresponds to a broad interpretation of the famous Roman distinction between what is one's own and what belongs to others. *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi* (Ulpianus, Dig. I,I.10, pr; cf. Tammelo 1971, 95).

More precise definitions have little prospect of success. There are many competing theories of justice. Some of them were briefly discussed in the preceding sections. Different authors have thus proposed three theories which, in my opinion, attempt to state precisely some reasonable intuitions, *inter alia* expressed in the following vague principles:

1. relevantly like people ought to be treated alike (*see* equality theories, section 2.6.1.);
2. the least advantaged people ought to be protected (cf. Rawls's second principle, section 2.6.2.); and
3. rights acquired in a justifiable manner ought to be protected, cf. Nozick's principles of justice, section 2.6.3.

One can support a just action or a just organisation of a society by each one of these principles, together with some other norms, e.g. demanding freedom

(cf. Rawls's first principle). The idea of "support" in this connection means that though the conclusion about justice of a particular action or society does not follow logically from the principle alone, it follows from a set of reasonable premises, to which the principle belongs (cf. sections 2.7 and 3.2 infra).

> When A thus gives various reasons for his opinion that an action is just (or unjust), his quoting such a principle might increase "force" of the argument. This increase might create a problem for B, who disagrees with A, and might in some cases even justify reversal of the burden of argumentation: B must now show that A is wrong.

But none of such principles can grasp the idea of justice as a whole. Justice has many dimensions. To act justly is to take *all* relevant considerations. Justice is thus an optimal balance of considerations (cf., e.g., Tay 1979, 96). In other words, justice determines some all-things-considered moral duties. In many cases, the conclusion about justice of a particular action or a particular society follows logically from a set of reasonable premises containing more than one of the discussed principles of justice.

From each of these general and vague principles together with some reasonable premises, one can derive some more precise norms of justice, e.g. (a) One ought to treat each individual according to his merits; cf. section 2.6.1.; (b) Social and economic inequalities are to be arranged so that they provide the least advantaged with a decent standard of life; cf. section 2.6.2.; and, (c) A person who acquires a holding through his work is entitled to that holding; cf. section 2.6.3. But such more precise norms of justice do not make the vague and general principles unnecessary. The vague principles facilitate understanding of the more precise norms. They may also provide one with a starting point for a deliberation which results in the fact that one creates more precise norms. They thus give a deliberation and discussion concerning justice a point and a framework. But the estimation of whether a particular action or a organisation of society is more just than another requires weighing of several considerations.

One can also argue (in a manner indicated in section 2.3.3 supra) that justice is no supreme value.

Cf. Tammelo 1971, 51 and 57–58; 1980, 35 and 1977, 134–135; Feinberg 1975, 116 and Nowell-Smith 1973, 320 ff. Rawls 1971, 3, has expressed a contrary opinion.

It is merely a component of the optimally balanced ethical theory, that is, a theory which has support of considerations regarding as many morally relevant circumstances as possible, and as many criteria of coherent reasoning as possible (cf. sections 2.4.2 supra and 4.1 infra). Morally relevant circumstances concern not only justice but also utilitarian morality, moral principles, rights and duties, virtues, etc.

Judgements of justice, and moral judgments in general, are based on both factual criteria and acts of weighing. The former determine the theoretical meaning of the concept, the latter its practical meaning. Cognitivists emphasise the former, non-cognitivists the latter. We need a synthesis.

2.7 Support in Moral Reasoning

2.7.1 Gaps and Jumps in Moral Reasoning

Moral reasoning constitutes often a kind of a dialogue where one presents, weighs and balances different reasons and counter-arguments. One may, however, present the *final result* of the reasoning as a *logical conclusion* of the reasons that weigh more than the counter-arguments, competing with them. To achieve logical correctness one must, however, often supplement the reasoning with a complex set of additional premises.

The preceding sections contain several examples of reasonable but logically incorrect reasonings. They also include examples showing how to convert some of these to logically correct inferences.

A person making a moral judgment may, e.g., perform the following reasoning:

Premise 1	B does not harm others
Premise 2	B usually helps others
Conclusion	B is a good person

The reasoning contains a gap. To make it logically correct, one must fill the gap with at least one set of additional premise. One can, e.g., formulate the following inference:

Premise 1	B does not harm others
Premise 2	B usually helps others
Premise 3	If B does not harm others and helps them, then B is a good person
Conclusion	B is a good person

When the person making moral judgment formulates the premise 3, he decides, as stated before, to pay attention to some moral criteria and to ignore others (such as B's disposition to work, keep promises, show courage etc., cf. Section 2.3.1). He would, e.g., regard B as a good person, even if B had been a lazy coward.

Though reasonable, premise 3 is neither certain, nor taken for granted in the culture under consideration, nor derived from certain and/or presupposed premises. This fact indicates that the step from the premises 1 and 2 to the conclusion is a *jump*.

Let me now introduce the concepts "jump", "reasonable jump" and "support". If the conclusion follows from many premises jointly but not from any of them separately, one can say, what follows. Each premise alone supports the conclusion. The step from any particular premise to the conclusion is a jump, provided that the rest of the set does not solely consist of certain, presupposed and/or proved premises. The jump is reasonable if all the premises are reasonable. The step from the whole set of premises to the conclusion is no jump.

2.7.2 The Concept of a Jump

A *jump* from a set of premises S to a conclusion q exists if, and only if

1. q does not follow deductively from S; and
2. one cannot expand or change S in such a way that a set of premises S1 occurs which fulfils the following conditions:
   a. the conclusion q follows deductively from S1, and
   b. S1 consists solely of certain premises, premises presupposed in the culture under consideration and proved premises.

The discussed example can be modified. One can, e.g., formulate the following inference:

Premise 1	B does not harm others
Premise 2	B usually helps others
Premise 3′	If B does not harm others and helps them, then it is *reasonable* that B is a good person
Conclusion 2	It is reasonable that B is a good person

If one regards premise 3′ as analytically true, one must also admit logical correctness of the following direct inference:

Premise 1	B does not harm others
Premise 2	B usually helps others
Conclusion 2	It is reasonable that B is a good person

In other words, the step from premises 1 and 2 to the conclusion 2 is no jump, because one may convert this step into logical deduction by adding a *certain* (in this case, analytically true) premise 3′.

2.7.3 The Concept of a Reasonable Premise

A jump from the set of premises S to the conclusion q is *reasonable* if, and only if, one can convert the jump to a deductive inference through adding some reasonable premises. All such premises are meaningful and not falsified. But some meaningful and not falsified premises are not reasonable. The statement, e.g., "there are birds in the star system Alfa Centauri", though not falsified, is unreasonable, since nothing indicates that it is true.

There are, however, many kinds of reasonable premises. Some are certain, some taken for granted within a particular practice belonging to the considered culture, some proved. But there also exist reasonable premises that do not belong to any of these three categories. A little more precisely, one can thus say, what follows:

A jump from the set of premises S to the conclusion q is reasonable, if one can convert the jump into a deductively correct inference through adding some new premises to S, or through changing some premises already belonging to S, and in

this way create a finite and logically consistent set of premises that solely contains

1. old premises that already belong to S; and/or
2. new certain premises; and/or
3. new premises that are presupposed (taken for granted) within a particular practice belonging to the culture under consideration; and/or
4. new proved premises; and (always)
5. new premises that are reasonable, although neither certain, nor taken for granted in a particular practice belonging to the culture under consideration, nor proved.

Though the concept of reasonableness is difficult to define, one can claim that a reasonable premise is not falsified and not arbitrary. A premise is thus reasonable if, and only if, the following conditions are fulfilled:

1. The premise is not falsified; cf. section 3.3.2 infra on Popper's theory. The more attempts to falsify a premise fail, the more reasonable the premise is.
2. The hypothesis is not to a sufficiently high degree corroborated that this premise does not logically follow from a highly coherent set of premises. Cf. section 4.2.2 infra *re* the relation of reasonable statements to *data*! In other words, the hypothesis is not sufficiently corroborated that this premise is not highly S-rational.

It is also *not evidently improbable* that a reasonable premise logically follows from a highly coherent set of statements.
General moral theories are reasonable in this sense. It is, e.g., not evidently unlikely that utilitarianists can show that their views follow from a highly coherent set of premises. On the other hand, this theory of the reasonable rules out much of political manipulation. It *is*, e.g., very unlikely that one could show that whatever promotes supremacy of the Arian race is morally good.

2.7.4 The Concept of Reasonable Support

Finally, let me introduce the concepts of weak support and reasonable support. In section 3.2.4 infra, I will add the important concept of strong support. All three concepts will be defined as a *logical* relations between premises and conclusion. A psychological fact that some people regard p as support for q is not enough. Though many people regarded epidemics as supporting the belief that there were witches, this belief lacks any support.

The statement p *weakly supports* the statement q if, and only if, p belongs to a set of premises, S, from which q follows logically.

No doubt, any p1 together with an arbitrarily added premise supports any conclusion whatever. Consider, e.g., the reasoning "since it is raining, I am the Chinese emperor". Of course, the conclusion "I am the emperor" does not follow from the

premise “it is raining”. Yet, the reasoning will be logically correct, if one adds the false premise “if it is raining, then I am the emperor”.
One obtains then the following correct inference:

The original premise 1	It is raining
The added premise 2	If it is raining, then I am the Chinese emperor
Conclusion	I am the Chinese emperor

However, this weak concept of support may be used as a starting point of discussion. Inappropriate additional premises are to be eliminated by other means, among other things the theory of coherence, discussed below, and the theory of *reasonable* support.

The statement p *reasonably supports* the statement q if, and only if, q belongs to a set of *reasonable* premises, S, from which p follows logically.

Chapter 3
Rationality of Legal Reasoning

3.1 Support of Legal Reasoning. Introduction and an Example

3.1.1 Fixity of Law. Extensive Support of Legal Reasoning

In Chapter 2, I have discussed various circumstances restricting arbitrariness of moral reasoning.

1. A moral statement can often be presented as a logically correct conclusion of a 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.

Consequently, I have also put forward three different demands of rationality, that is, the demand that the conclusion is logically and linguistically valid (L-rationality), follows from a highly coherent set of statements (S-rationality), and would not be refuted in a a perfect discourse (D-rationality).

These demands of rationality thus restrict arbitrariness of moral reasoning, but they do not entirely eliminate it. Mutually incompatible moral statements can, simultaneously, to a high degree fulfil the rationality requirements. This fact explains the need of legal reasoning, more predictable than the moral one.

The law is more stable, so to say more "*fixed*" than morality. Legal decisions are more predictable than purely moral ones. This is the case because legal reasoning is supported by a more extensive set of reasonable premises than a pure moral reasoning. This support includes numerous statements about statutes, other socially established sources of the law and some traditional reasoning norms.

Since the relatively fixed law thus makes legal reasoning more predictable, it increases the chance of consensus in legal matters. However, the greater fixity of law is not necessarily the same as its lesser arbitrariness. An unjust but rigid law can be both highly arbitrary and highly fixed. But fixity of the law, resulting in predictability of legal decisions, has a moral value, among other things because it

A. Peczenik, *On Law and Reason*,

promotes peaceful cooperation between people, assures that like cases are treated alike etc. *If* a result of legal reasoning in a particular case is not *worse* from the point of view of other moral values, then it is, all things considered, *better* than a result of a purely moral reasoning would be, and thus less arbitrary. In brief, fixity of law makes legal reasoning *ceteris-paribus* less arbitrary than moral reasoning.

3.1.2 An Example of Extensively Supported Legal Reasoning

Legal reasoning is thus supported by a more extensive set of reasonable premises than purely moral reasoning. One can give the following example, elucidating this thesis. A haulage contractor's, B, car was damaged. During the time when the car underwent repairs, B could not provide work for some employees. He could dismiss them temporarily but did not do so, fearing that they would not come back when needed again. Instead, he paid them their full salaries. B's claim for compensation for the salaries was not granted by the Supreme Court. The majority of the Justices pointed out that "no such connection - between the damage and the mentioned expenses of B - can be considered to have existed that the compensation should be awarded" (NJA 1959 p. 552).

Such a decision can be justified more or less completely. To justify it as completely as possible, one must weigh, *inter alia*, the following considerations:

1. an analysis of some legal concepts, among other things the concept of "adequate" (that is, not too remote) causation;
2. various substantive reasons (cf. Summers 1978 *passim*), among other things (a) moral principles, (b) general moral theories and (c) moral judgments of a concrete case; and
3. legal authority reasons, that is, (a) such sources of the law as statutes, precedents, legislative history etc. and (b) norms of legal reasoning.

This role of legal concepts (item 1) and authority reasons (item 3) causes the relatively greater fixity of the results of legal reasoning in comparison with the purely moral one.

3.1.3 An Example of Analysis of Legal Concepts – the Concept of Adequacy

The expression "no such connection can be considered to have existed that the compensation should be awarded" suggests that the Supreme Court made a judgment of so-called adequacy of the causal connection in question. An unwritten principle of the Swedish law of torts stipulates that one has to compensate a damage only if it has been an "adequate" result of the action for which one is liable.

But when is the causal connection "adequate"? The concept of adequacy is vague, perhaps ambiguous. To put it more precisely, it is value-open. To decide the case under consideration, one must thus make a choice between the different normative theories of adequacy (cf. Peczenik 1979, 153 ff.).

In this connection, one may make the following remarks.

I. There exists an established list of normative theories of adequacy.

Inter alia, the following theories of adequacy are established in the juristic literature:

1. The causal connection between an action and a damage is adequate if, and only if, any action of this kind is apt to bring about (or relevantly increases probability of) a damage of this type.
2. The causal connection between an action and a damage is adequate if, and only if, this action makes a damage of this type foreseeable for a very cautious and well informed person (a cautious expert, a *vir optimus*).
3. The causal connection between an action and a damage is adequate if, and only if, this action is a not too remote cause of the damage.
4. The causal connection between an action and a damage is adequate if, and only if, this action is a substantial (important) factor in producing the damage.

I am omitting here the complex question how often various theories imply different evaluation of adequacy in concrete cases.

II. Each formula of this kind has been proposed as the general theory of adequacy, guaranteeing just and morally acceptable decision making. But each one, although reasonable, is not proved. One can give reasons not only in favour of it but also against it. In order to avoid rather futile controversies between them, one may thus combine all these formulas with each other. More precisely, one may regard them as mere *prima-facie* reasons for, or *criteria* of adequacy, not general theories.

A general theory claims to cover all cases of adequacy. A criterion does not imply such a claim.

Even if the theories of adequacy are regarded as mere criteria, they imply some increase of fixity of the law and, *ceteris paribus*, a restriction of arbitrariness of legal reasoning. One can objectively (freely from emotional bias) study the legal language and practice and thus show that all of them include both *meaningful* (L-rational) and *reasonable* (highly S-rational) arguments for the conclusion that the causal connection in question is adequate.

III. The hypothesis is not falsified that if one had possessed

1. more information about the use of legal language;
2. better knowledge of how other lawyers judge various actual and hypothetical cases;
3. more clarity as regards one's own evaluation of future legal cases; and
4. more information about the logical connection between one's own judgments concerning various legal 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 normative theories of adequacy*.

IV. Yet, one cannot objectively (freely from emotional bias) formulate the *sufficient* condition for the conclusion that causal connection between an action and a damage is, *all things considered*, (not only *prima facie*) adequate.

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

As soon one claims that a certain condition is, all things considered, sufficient, one faces the question "Why?". The answer can be supported by some reasons. But the reasons are open for *weighing and balancing* against some counter-arguments.

A special case is, what follows. When performing such an act of weighing and balancing, one may, *inter alia* say, what follows:

1. The causal connection between an action and a damage is adequate if any action of this kind is apt to bring about (or relevantly increases probability of) a damage of this type, unless

   - this action did not make the damage sufficiently foreseeable for a *vir optimus*; or
   - this action is a too remote cause of the damage; or
   - this action is not a sufficiently important factor in producing the damage.

   ……

4. The causal connection between an action and a damage is adequate if this action is a substantial factor in producing the damage unless

   – it is not so that any action of this kind is apt to bring about (or relevantly increases probability of) a damage of this type; or
   – this action did not make the damage sufficiently foreseeable for a *vir optimus*; or
   – this action is a too remote cause of the damage.

   And so on…

The opinion that some reasons weigh more than others can also be weighed and balanced against thinkable counter-arguments. From the logical point of view, the process of weighing can thus continue infinitely. But in practice, one must *finish* the reasoning, sooner or later. If the reasoning does not constitute a logical circle, one must arrive at an ultimate reason, fundamental for the whole argumentative structure. This ultimate reason must be assumed without any reasoning whatsoever. Had one continued the reasoning, the "ultimate" reason would *not* have been ultimate.

In such a way, a reasoning ends with an arbitrary assumption. I assume that the ultimate reason for weighing involves feelings, the will etc.; cf. section 2.4.5 supra.

Sooner or later, a lawyer making a judgment of adequacy must thus under some influence of his will and feelings "pick up" some theories and disregards others. For example, he points out the importance of increased probability of damage and the foreseeability. He decides then not to pay attention to other normative theories, such as the theory of remoteness of damage, or the theory of substantial factor.

V. Another kind of weighing and balancing is necessary when one performs a precise interpretation of the notoriously vague terms the theories of adequacy contain, such as "a damage of this type", "a *vir optimus*", "a too remote cause of the damage" or "a sufficiently important factor in producing the damage". For example, it is easy to foresee that a traffic accident would lead to a result defined as "economic loss", but difficult to foresee that it might lead to "economic loss in consequence of paying salaries to temporarily dismissed employees".

The juristic activity, consisting in "picking up" a precise interpretation of the concept of adequate causation is thus to some extent similar to a *moral* activity, consisting in "picking up" some theoretical propositions as reasons for the conclusion that an action or a person is morally good.

3.1.4 An Example of Substantive Reasons in the Law. The Purpose of Protection. Influence of Moral Theories and Criteria

To some extent, one can proffer moral reasons justifying the choice between thinkable criteria of adequacy. Moreover, one can find moral reasons for the conclusion that a person shall not compensate a damage, even if he had adequately caused it. According to the theory of the "purpose of protection" (*Schutzzweck*), the tortfeasor is thus liable only for the damage against which the norm in question is intended to give protection. *Schutzzweck* is an extra condition of liability, distinct from adequacy (cf. Peczenik 1979, 299 ff.).

Does the purpose of compensation cover the situation in which a traffic accident leads to economic loss in consequence of paying salaries to temporarily dismissed employees? No clear rule answers this question. One must rely upon weighing and balancing of various considerations, including some moral judgments.

We have seen how complex moral reasoning is. It is, among other things, difficult to find some uncontested general theory of moral goodness. Can one then, at least, find a normative theory that ought to govern the law of torts? According to, *inter alia*, *Calabresi* (1970 *passim*), the law of torts should be arranged so that it will deter from causing damage. The purpose is not to impose all costs of damage on the person who caused it but to make those liable who have such a position that they can influence others not to cause damage. But can one thus regard general deterrence as the ultimate goal of the law of torts? It is not certain. One cannot dismiss, without any reasoning, the view that, e.g., restitution of a situation existing before the damage, or just distribution of losses constitute independent goals of compensation (cf. Hellner 1972, 321 ff.).

How can one then argue for the conclusion that something constitutes the ultimate goal of compensation? If one wishes to support the reasoning with something more than one's own intuitive judgment, quotations of what others think or a description of the use of language, one must leave the law of torts and search for general moral theories of a wider range. The law of torts constitutes a part of the legal order, and this order is merely a component of the complex cluster of norms, regulating social life. It is thus improbable that compensation has a single ultimate goal, unconnected with other areas of human life. On the contrary, one must *argue* for one's view of the purpose of the law of torts. Restitution, distribution of losses, prevention etc. can constitute a goal of compensation *because* they help to fulfil such ultimate goals as satisfaction of human preferences, promotion of some social practices, justice etc. (cf. section 2.5.2). The reasoning about the goals of damage thus does not necessarily end in the law of torts but may continue outside its limits, and must end first when approaching the foundations of morality. "Behind" legal problems, one finds moral reasoning, with all its complexity, described in chapter 2 supra. It this way, legal reasoning "inherits" both practical and thus emotional and arbitrary components of morality and all L-, S- and D-rationality factors, restricting arbitrariness.

3.1.5 An Example of Legal Authority Reasons. Brief Remarks on Precedents

The analysis of our example would be incomplete if one omitted legal *authority* reasons, such as statutes, other sources of the law and reasoning norms. In legal reasoning, one thus has access to a more extensive set of premises than in the realm of morality. Together with a high fixity of the sources of law, this fact constitutes, *ceteris paribus*, an additional restriction of arbitrariness. Being supported by a more extensive set of premises, legal conclusions possess a higher degree of S-rationality and thus promote foreseeability of decisions, constituting an important component of the complex phenomenon of legal certainty; cf. section 1.4.1 supra. I will later return to the problem of the sources of law. Here, one may merely point out that many precedents deal with the question of adequacy and some approach the purpose of protection.

As regards the latter question, one may *inter alia* quote the following precedents: NJA 1950 p. 610, NJA 1962 p. 799, NJA 1968 p. 23, NJA 1974 p. 170 and NJA 1976 p. 458.

Different precedents can, however, support incompatible norms. The person interpreting them must then perform weighing and balancing, *inter alia* compare the weight of the precedents.

In this manner the act of weighing and balancing, connected with the concept of the purpose of protection, must be supplemented with another one, essential for interpretation of precedents. When the purpose of protection remains uncertain, the tortfeasor has to compensate the damage only if precedents supporting the liability weigh more than those which support the conclusion that the tortfeasor is not liable.

Finally, some authority reasons and some moral reasons in the law relate to administrative and procedural concerns, and only indirectly to the substantive question to be decided. One thus asks various questions regarding procedural rules applicable to the case, moral underpinning of such rules etc.

When performing such acts of weighing and balancing, one receives some guidance from various sources of the law. In same cases, however, this help is not sufficient. Ultimately, the decider must rely on moral reasoning.

3.2 Analysis of Support in Legal Reasoning

3.2.1 Legal Reasoning As a Dialogue. Reflective Equilibrium and Hermeneutical Circle

The goal and often the result of such weighing is a kind of *reflective equilibrium* of considerations.

One usually characterises the concept of reflective equilibrium as a balance of mutually adapted, general and individual, practical statements. One can thus argue in favour of general value statements and norm-expressive statements by showing that they are supported by (coherent with) some individual ones. On the other hand, one can argue in favour of the latter by showing that they are supported by the former. If there is no coherence, one can modify each of the components. Sometimes, an individual statement is easier to explain away; sometimes it is easier to stick to it and change a general one (cf. Rawls 1971, 20; Prawitz 1978, 153).

The idea of reflective equilibrium is similar in important respects to three other ideas; the first concerns the reciprocal relation between observation and language, the second the idea of the so-called theory circle and the third the "hermeneutical circle".

1. All observations are dependent on a language. Consider an example. My eye registers a changing field of colours and shapes and I recognise a datum, or a fact: this swan is white. But when I call something "a white swan", I do it in a language which contains general concepts. Observation of a swan is more than a registering of "flashes, sounds and bumps"; it is "a calculated meeting with these as flashes, sounds and bumps of a particular kind" (Hanson 1958, 24), determined by the *concept* of "swan". A "statement such as 'This swan here is white' may be said to be based on observation. Yet it transcends experience… For by calling something a 'swan', we attribute to it properties which go far beyond mere observation…" (Popper 1959, 423). *Inter alia*, the concept of "swan" refers to *all* swans, also those which nobody ever observed.
2. Consequently, all observations are dependent on theories which underly the concepts belonging to the language used by the person who makes the observation. In general, many thinkers emphasise the existence of a "theory circle": One

judges a theory in view of data and data in view of a theory. "The unit of empirical significance is the whole of science" (Quine 1953, 42. Cf. Quine 1960, 40 ff.). Yet, knowledge need dot be based on a vicious circle.

a) People do not literally justify p by q and q by p, at the same time, but rather are engaged in a justificatory "spiral": at first, p justifies q; later, q constitutes a reason justifying a modified version of p, say p'; still later, p' constitutes a reason justifying a modified version of q, say q'.
b) Consequently, the "theory circle" is rather a "theory spiral". $Data_1$ justifies $Theory_1$, which justifies $Data_2$ justifies $Theory_2$, which justifies $Data_3$, etc. The description of $Data_2$ thus presupposes theoretical terms with regard to $Theory_1$ but not with regard to $Theory_2$ (cf. Kutschera 1972 vol. 1, 258; Hermerén 1973, 73 ff.). In natural science, one can always make the conceptual distinction between data and theory.

3) As regards many humanistic theories, one cannot say clearly which propositions report observational data and which are expressions of theories. *Stegmüller* (1975, 84–85; cf. Aarnio 1979, 154–155) regards this property as an explication of the so-called hermeneutical circle, ordinarily characterised as follows: "the whole of a cultural product (be it literary or philosophical opus, or the entire work of a thinker or a period) can be only understood if one understands its component parts, while these parts in their turn can be understood only by understanding the whole" (Rescher 1977, 103).

In is thus not surprising that one may modify and thus mutually adapt one's interpretation of various legal considerations, *inter alia* (a) theories and criteria elucidating such concepts as "adequate causation"; (b) substantive reasons concerning the goals of compensation etc.; and (c) various authority reasons, e.g., precedents pulling in different directions. Such an adaptation of reasons occurs often in a *dialogue* of different persons (a *pro aut contra* reasoning, cf. Naess 1981, 80 ff.).
One can, for instance, imagine the following dialogue.

B's pro-argument: A should compensate the damage because he negligently caused it.

A's counter-argument: But the causal connection was not adequate, since the result was too remote, cf. the adequacy criterion 3 (section 3.1.2). A is thus not liable in torts.

B's pro-argument: A should, after all, compensate the damage because his negligent action made the damage foreseeable for an expert, and thus adequate according to the criterion 2.

A's counter-argument: However, such a compensation is outside of the purpose of the law of torts (section 3.1.3). This makes A not liable.

B's pro-argument: Yet, some precedents support the conclusion that A should compensate the damage.

A's counter-argument: Nevertheless, a greater number of precedents support the opposite conclusion… Etc.

When one presents legal reasoning as a dialogue, one pays attention to the *process* of reasoning. The dynamic character of the dialogue expresses itself, *inter alia*, in the fact that one modifies some, originally quite reckless, statements. Originally, B has perhaps said simply: A caused the damage, and thus he must compensate it. Later, he has modified his thesis and claimed, e.g., what follows: A should compensate the damage because he negligently caused it; and his negligent action made the damage foreseeable for an expert; and some precedents support his duty to pay the compensation; etc.

3.2.2 Legal Reasoning As an Inference. An Example

If one, on the other hand, only considers the reasons that "survived" the dialogue, one may present the *final result* of the reasoning as a *logical conclusion* of them.

If the legal conclusion in question logically follows from a consistent and highly coherent set of linguistically correct premises, it fulfils important demands of L- and S-rationality; cf. section 2.2.4 supra. To achieve this form of rationality, one must, however, often supplement the reasoning with a complex set of additional premises.

For example, the following inference, constituting the starting point of reasoning in the discussed case, obviously constitutes a (logically *not* correct) jump.

(1) A non-controversial legal norm, cf. now Ch. 2 Sec. 1 of the Tortious Liability Act, Sec. 18 of the Car Traffic Liability Act etc.	A person who caused damage in consequence of traffic with an engine-driven vehicle should compensate the damage if, and only if, there exists a legal ground therefore
(2) A non-controversial premise: the customary rule of adequacy	A legal ground for the conclusion that one should compensate the damage exists, if the causal connection between one's action and the damage was adequate
(3) A non-controversial premise: a description of facts	A caused negligently a traffic accident in which Bs car was damaged. During the time when the car underwent repairs, B could not provide work for some employees. Yet, he paid them their full salaries, fearing that they would not come back when needed again.
Conclusion	A should not compensate B's loss in consequence of paying salaries to not working employees

If one expands the reasoning, for example through adding premises 4–11 quoted below, one obtains both deductive correctness and a more profound insight into the case. But not even the following inference pays attention to *all* considerations, relevant in the discussed case.

(1) A non-controversial legal norm, cf. now Ch. 2 Sec. 1 of the Tortious Liability Act, Sec. 18 of the Car Traffic Liability Act etc.	A person who caused damage in consequence of traffic with an engine-driven vehicle should compensate the damage if, and only if, there exists a legal ground therefor.
(2) A non-controversial premise: the customary rule of adequacy	A legal ground for the conclusion that the tortfeasor should compensate a damage exists, if the causal connection between his action and the damage was adequate.
(3) A non-controversial premise: a description of facts	A caused negligently a traffic accident in which B's car was damaged. During the time when the car underwent repairs, B could not provide work for some employees. Yet, he paid them their full full salaries, fearing that they would not come back when needed again.
(4) An added non-controversial: premise: a list of established criteria of adequacy	One may choose the following facts as reasons for the conclusion that the causal connection between an action and a damage is adequate: 1) any action of this kind is apt to bring about (or relevantly increases probability of) a damage of this type; 2) this action makes a damage of this type foreseeable for a very cautious and well informed person; 3) this action is a not too remote cause of the damage: 4) this action is a substantial (important) factor in producing the damage.
(5) An added and reasonable premise: the chosen criterion of adequacy	The following criterion of adequacy should be used in the case under consideration: (2) the causal connection between an action and a damage is adequate, if the action makes the damage of the type T foreseeable for a very cautious and well informed person.
(6) An added and reasonable premise: restriction of liability which exceeds the purpose of protection	The tortfeasor shall not compensate the damage, not even the adequately caused one, if the law of torts is not intended to give protection against it.
(7) An added and reasonable premise: an authority reason	When the purpose of protection remains uncertain, the tortfeasor has to compensate the damage only if precedents supporting the liability weigh more than those which support the conclusion that the tortfeasor is not liable.
(8) An added and reasonable premise: an estimation of adequacy	The action in question made a damage of the type T (that is, a loss in consequence of paying salaries to not working employees) foreseeable for a very cautious and well informed person.
(9) An added and reasonable premise: a judgment of the purpose of protection	It is uncertain whether the law of torts is intended to give protection against a damage of the type T.
(10) An added and reasonable premise: an interpretation of precedents	Precedents supporting the liability do not weigh more than those which support the conclusion that the tortfeasor is not not liable.
(11) An added and reasonable premise: a description of valid law	No other legal ground exists for the conclusion that A should compensate B's loss in

	consequence of paying salaries to not working employees.
Conclusion	A should not compensate B's loss in consequence of paying salaries to not working employees

This extended inference contains the initial and non-controversial premises 1–3 together with a set of additional premises 4–11. The additional premises convert the jump to a logically correct inference. But many of the additional premises are *contestable*. For example, premises 5, 6 and 10 are neither certain, nor presupposed within the legal "paradigm" (that is, within the established tradition of legal reasoning, cf. section 3.3.3 infra), nor proved within this paradigm. One must thus either deduce the conclusion from contestable premises or perform non-deductive, logically incorrect, reasonings from non-controversial premises.

3.2.3 Legal Reasoning As a Reasonable Jump

In section 2.7 supra, I have defined the concepts of "jump" and "reasonable jump". Let me repeat the definitions together with some comments concerning the discussed example.

A *jump* from a set of premises S to a conclusion q exists if, and only if (1) q does not follow deductively from S; and (2) one cannot expand or change S in such a way that a set of premises S1 occurs which fulfils the following conditions: (a) the conclusion q follows deductively from S1, and (b) S1 consists solely of certain premises, premises presupposed in the culture under consideration and proved premises. A jump from the set of premises S to the conclusion q is reasonable, if one can convert the jump into a deductively correct inference through adding some new premises to S or through changing some premises already belonging to S, and in this way create a finite and logically consistent set of premises that solely contains (1) some old premises that already belong to S; and (2) new reasonable premises.

In our example, one thus had to add premises 4–11, that is, a list of established criteria of adequacy; a statement expressing a choice between such criteria; an established norm concerning the so-called purpose of protection; an authority reason concerning precedents; some premises concerning the facts of the case; an interpretation of the relevant precedents and a general description of the law in force. We will see below that all these premises are reasonable.

I have also defined the concept of "support" and "reasonable support". Using these concepts, one can state the following. A legal conclusion in a hard case does not follow from set of premises solely consisting of legal norms and a description of facts. The conclusion follows, however, from an extended set, including additional reasonable premises, some analytical or empirical, some normative or evaluative. Some are perhaps certain, or presupposed within the tradition ("paradigm") of legal reasoning, or proved. Some other are neither.