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On Law and Reason

Preface by Jaap C. Hage

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(J.11) Every dogmatic proposition must be able to stand up to a systematic testing…

In this testing, one checks whether the proposition is logically compatible with and justifiable by other statements of legal dogmatics.

This test is, of course, a test of coherence.

(J.12) Whenever dogmatic arguments are possible they should be used.

This is also a special case of a criterion of coherence, that is, the criterion requiring a great number of justified statements; cf. section 4.1.4 supra.

Alexy formulates also the following rationality rules for interpretation of precedents.

(J.13) If a precedent can be cited in favour or against a decision it should be so cited.

(J.14) Whoever wishes to depart from a precedent carries the burden of argument.

These rules are, again, connected with the criterion of coherence which requires a great number of justified statements; cf. section 4.1.4 supra.

Alexy's system includes also two, especially legal, argument forms (J.15 and J.16), constituting logically correct components of the arguments *e contrario* and *ex analogia* (see section 7.4 infra).

Finally, Alexy formulates the following rationality rule.

(J.18) Special legal argument forms must have the reasons for them stated in full - that is, must achieve saturation.

This rule, too, is connected with the criterion of coherence which requires a great number of justified statements; cf. section 4.1.4 supra.

4.4 Why Shall Legal Reasoning be Rational?

4.4.1 Introduction. Why Shall Theoretical Propositions Be Consistent and Highly Coherent?

Let me now turn to normative problems concerning rationality. Why should legal reasoning be rational? I will discuss the question in two steps, corresponding to the two components of legal reasoning, theoretical propositions and practical statements.

Let me start from some more or less established theses concerning rationality of theoretical propositions.

1. Why should theoretical propositions be *L*ogically rational? In particular, why should theoretical propositions formulated within the legal reasoning, e.g. prop-

ositions about the literal sense of a statute, constitute a logically consistent set, that is, a set of propositions free from logical contradictions? If a set of theoretical propositions does not fulfil the demands of L-rationality, in particular the demand of logical consistency, then it cannot be true. There is only one world. If p constitutes an accurate description of a given part of the world, non-p cannot do it. The words "non-", "not" and other negation words have a meaning which excludes simultaneous truth of p and non-p.

The following technical norm corresponds to these analytic remarks. If one intends to use the negation words in accordance with their actual meaning, one must not utter theoretical propositions violating the demands of L-rationality.

2. Why should theoretical propositions be *S*upportively rational? In particular, why should theoretical propositions formulated within the legal reasoning, e.g. propositions about the literal sense of a statute, belong to a highly coherent set of statements? These answer has already been formulated in the section 4.2 supra: *Ceteris paribus*, the more coherent a theory, the greater amount of true information it gives and the closer it comes to true information.

If one wishes to approximate truth, one must have a disposition to formulate coherent sets of theoretical propositions.

This use of the concept of "disposition" is affected by a lecture *Horacio M. Spector* gave in Buenos Aires in August 1984, let it be that he dealt with a different problem.

Moreover, "to argue" *means* to give reasons supporting the conclusion. If one wishes to argue, one must have a disposition to support theoretical propositions one utters with reasons. Such a support is the first criterion of coherence.

4.4.2 Why Shall Practical Statements Be Logically Consistent?

The problems are more complex in connection with practical statements. Why should practical statements be L-rational? In particular, why should value statements and norm-statements formulated within the legal reasoning, e.g. "The Liability for Damages Act is a good law" or "One ought to follow the Liability for Damages Act", constitute a logically consistent set?

Such a value statement has both a practical and a theoretical meaning. Its theoretical meaning consists, *inter alia*, of the fact that some theoretical propositions are *prima facie* reasons for the conclusion that, e.g., "the Liability for Damages Act is a good law". The demand of L-rationality is certainly justifiable if the same reason is chosen in connection with a value statement and its negation. One should not simultaneously say "The Liability for Damages Act is a good law" and "The Liability for Damages Act is not a good law", if one actually means "The Liability for Damages Act is a good law, since it prevents damage of the the type T" and "The Liability for Damages Act is not a good law, since it does not prevent damage

of the the type T". In such a case, one would utter inconsistent theoretical propositions, and I have already argued for the conclusion that one should not do it.

The situation is more complex when one simultaneously says "The Liability for Damages Act is a good law" and "The Liability for Damages Act is not a good law", and means "good in one respect, not good in another", e.g. "The Liability for Damages Act is a good law, since it increases security of the persons suffering damage of the type T" and "The Liability for Damages Act is not a good law, since it does not prevent damage of the the type T". As stated in section 2.3.3 supra, the problem is actual only as regards all-things-considered practical statements, not *prima-facie* practical statements. Logically incompatible actions can thus be, at the same time, *prima facie* good. One can also simultaneously have a *prima facie* duty to perform logically incompatible actions. The "normal" logic is thus not applicable to moral *prima-facie* statements. Suppose, e.g., that A killed B. One *prima-facie* reason, for instance circumstances of his act, can justify a life imprisonment of A, another, for instance A's psychical condition, can support a milder penalty.

One can then argue, as follows. Assume that a given person, A, sincerely utters the following statement: "x is all-things-considered good and x is all-things-considered not good". Or assume that he sincerely utters the statement "B ought all-things-considered to do H and B ought all-things-considered not to do H". Formal logic expresses the meaning of propositional connectives such as "not", "if… then" or "and". Such connectives are applicable not only in the theoretical but also in the practical context. The words "not", "if… then", "and" etc. have such a meaning that a conceptual anomaly occurs if one accepts both an all-things-considered value statement and its negation, or if one accepts an all-things-considered value statement but does not accept its logical consequences (cf., e.g., Weinberger and Weinberger 1979, 96 ff.). In brief, formal logic is applicable to all-things-considered practical statements. Consequently, if one does not wish to create a conceptual anomaly, one should not sincerely utter value statements that violate the demands of L-rationality.

But *is* formal logic applicable to all-things-considered practical statements? Perhaps the meaning of the words "good" and "ought" is such that the logical words "not", "or" etc. mean something else in connection with them as in the theoretical context? Though strange, this view deserves some discussion. Let me thus say something about the relation between the meaning of "ought" and "good" with the meaning of logical connectives.

As stated above (cf. section 2.2.1 supra), norm-expressive statements qualify human actions, events etc. as prescribed, permitted, forbidden etc. I disregard here more complex types of normative qualification. The statement "A should not park his car here" thus qualifies A's action of "parking the car here" as prohibited. One can regard normative qualification as, so to say, inverted truth. A theoretical proposition, p, is true if and only if p describes the facts in a given way, and the facts are such as p describes them. Consequently, a theoretical proposition is false if it does not correspond to the facts.

In the present context, I disregard the relation between facts and "truth-makers", cf. section 4.2.4 supra.

The relation between a norm-expressive statement and actions, events etc. it qualifies is reverse. The norm-expressive statements are not qualified as true or false. On the contrary, a norm-expressive statement qualifies some actions, events etc., e.g. as conforming to or violating the norm in question. Now, one may perhaps use this qualification as a foundation of a logic of norms. Assume, for example, that the meaning of two norm-expressive statements, n_1 and n_2, is such that each action etc. qualified in a given way by n_2 is qualified in the same way by n_1. It is then plausible to assume that n_1 entails n_2 (cf. Peczenik 1967, 133; 1968, 119 and 1969, 46 ff.; = 1970 pp. 31, 11 and 60 ff).

In a similar manner, one may generally define the logical connective "if… then" in the realm of norms. Then, one may also define other logical connectives, such as "not", "and" etc., in a manner importantly analogous to corresponding definitions in the realm of theoretical propositions.

However, analogy is limited. In the realm of theoretical propositions, only one kind of qualification is relevant for entailment: propositions are qualified as true or false. A theoretical proposition, p, entails another one, q, if these propositions are qualified by truth-makers in such a way that p cannot be true and q simultaneously false. In the realm of norm-expressive statements, on the other hand, two kinds of qualification are relevant. One compares the actions etc. p qualifies as prescribed etc. with those q thus qualifies; but the purpose of this comparison is to establish such a relation between p and q that if p is qualified as valid, correct, right etc., then q is thus qualified.

A further important reason against the anti-logical view of "ought" allows for a moral duty to do the logically impossible, for example "B ought to do H and B ought not to do H". The postulate "No one has an all-things-considered (not only *prima-facie*) duty to do what is impossible" is in such a way linked to the idea of "moral ought" that it is conceptually strange, anomalous, to sincerely claim that B ought all-things-considered to do H and yet ought all-things-considered not to do H.

If one does not wish to create a conceptual anomaly, one should not assume views whose consequence is that one has an all-things-considered duty to do the impossible.

To be sure, one can conceive a moral or legal predicament. Assume that B sold his dog to C and then to D. He ought to give C the dog, and yet he ought not to give it to C (but to D). Whatever he does, he violates his moral duty. But this moral duty is a merely a *prima-facie* one. B must now weigh and balance his prima-facie duties and achieve the final conclusion whether or not he, all things considered, ought to give C the dog. A moral philosopher who thinks that such predicaments are definitive, not merely *prima-facie*, simply does not share my view that moral thinking is intimately connected with weighing and balancing. An established legal rule, for example a statutory provision, can also demanding of one to do the impossible. But this demand is only a *prima-facie* legal duty. The corresponding all-things-considered duty is a result of weighing and balancing the contradictory demands posed by the law.

Another reason against the anti-logical view of "ought" and "good" is the link between these words and wants, goals and intentions. If a given person, A, sincerely claims that x is all-things-considered good, then he has a disposition to want definitively (not only prima *facie*) that x exists (unless something else, incompatible with x, is even better). If A then sincerely claims that x is good and, at the same time,

sincerely claims that x is not good, then he has at the same time a disposition to definitively want that the mutually contradictory propositions "x exists" and "x does not exist" be true. But these propositions cannot be simultaneously true (cf., e.g., Moritz 1954, 95 ff.; Alchourrón and Bulygin 1981, 106 ff.); this is the case because of the meaning of logical connectives such as "not". The incompatible goals cannot be simultaneously fulfilled. Consequently, it is an anomaly to utter logically incompatible (mutually contradictory) definitive and, consequently, all-things-considered (not only *prima facie*) value statements.

I assume here that the concepts "to want" "to intend" and the like have a reasonable interpretation in which they mean "to definitively want", "to definitively intend" etc. Then, the following is true: if a person knows that something is impossible, then it is anomaly for this person to definitively want it.

> But another interpretation is also reasonable, in which such words merely mean "to *prima-facie* intent" etc. So is the case especially if one uses such words as "to wish", instead of "to want"; e.g. "I wish I were more intelligent than Albert Einstein, although I know it is impossible". This statement expresses a *prima-facie* wish, not a definitive one.

If one does not wish to create a conceptual anomaly, one should not sincerely utter value statements that violate the demands of L-rationality.

4.4.3 Why Shall Practical Statements Be Highly Coherent? Some Conceptual Reasons

Why should practical statements be S-rational? In particular, why should value statements and norm-statements formulated within the legal reasoning, e.g. "The Liability for Damages Act is a good law" or "One ought to follow the Liability for Damages Act", belong to a highly coherent set of statements?

One answer to this question is based on some properties of language and thus resembles a "*definitional* justification" in Alexy's sense, cf. section 4.4.4 infra.

1. The fact that one can arrange one's norm- and value-statements concerning a certain practical problem into a coherent whole means that one can *think* about this problem in an intensive and extensive way. As stated in section 4.2.1 supra, one could try to explicate the very concept of rational thinking as an effort to obtain a balance between various criteria of coherence. If one intends to think about practical matters, one should have a disposition to arrange one's practical opinions into a coherent system.
2. At the same time, that there is a correspondence between coherent thinking and *correctness*, see section 4.2.1 supra: It is difficult to doubt that a judgment which is supported by argument is better in what concerns rationality and correctness than a judgment which has no such support. If one intends to correctly think about practical matters, one should have a disposition to arrange one's practical opinions into a coherent system.
3. Let me now elucidate the connection of S-rationality of practical statements with support as the first criterion of coherence. Why should one support practical state-

ments with reasons? If one does not wish to create a conceptual anomaly concerning the concept of "arguing", one should have a disposition to argue S-rationally, that is, only by proffering reasons supporting one's conclusion. An important property of the meaning of most, if not all, practical statements is that they may be justified. One can meaningfully argue for them, and "to argue" *means* to give reasons supporting the conclusion. The language is thus adapted to the practice of supporting practical statements by reasons. Consequently, it is an anomaly to sincerely utter legal or moral value-statements or norms and yet refuse to argue for them. For example, it would be strange to say "A is liable for damage in question although no reasons support the conclusion that he is liable". One may also consider the following example. Assume that a political leader, Adolf, thinks that killing Jews is a good action. One asks him repeatedly for reasons for this judgment and gets none except "I *know* that it is so" and "Your question shows that the Jews already have corrupted you". One may now say that Adolf uses the word "good" in a strange sense, perhaps different from the sense this word has to rational people.

4. Another argument concerns weighing and balancing. We all assume that an act of weighing and balancing can be right or wrong. It is right only if justifiable by further reasons. It would be strange to say "x weighs more than y although no reasons support the conclusion that x weighs more than y". If one does not wish to create a conceptual anomaly concerning the concept of "weighing", one should have a disposition to proffer reasons supporting one's acts of weighing and balancing. The only exception is the final, ultimate act of weighing; see section 2.4.4.
5. Passing to universalisability (that is, another criterion of coherence), one may state the following. Universalisability of a statement is the same as the fact that it follows from a universal statement, the latter concerning *all* members of a certain kind. Morality requires that the like should be treated alike. A judgement that two persons ought to be treated differently is thus no moral one, unless it can be completed with a set of reasonable premises pointing out relevant differences between them. In legal reasoning, universalisability implies that similar cases should be solved in a similar way.

A conceptual anomaly would thus occur if one seriously uttered a moral or legal value statement, and yet claimed that no universal principle supports this view. It would be strange to say: "Peter and John are similar in all respects, yet they ought to be treated differently".

If one does not wish to create a conceptual anomaly, one should have a disposition to support moral and legal practical statements with universalisable reasons.

4.4.4 Some Conceptual Reasons For Rationality of a Practical Discourse

One must also ask the question why to follow Alexy's rules of rational practical discourse. To justify his theory, Alexy introduced four mutually combined methods of justification, technical, definitional, empirical and universal-pragmatic. Let me,

at first, discuss the definitional justification. This form of justification can be described, as follows. Firstly, one presents the system of rules of rational practical discourse. Secondly, one hopes that the presentation of this system will "constitute a reason or motive for its acceptance, regardless of whether or not any further reasons are given" (Alexy 1989, 184).

Let me further elucidate this mode of justification. What does "rational discourse" mean? The answer is given in terms of Alexy's rationality rules. To "argue" in a manner violating D-rationality, for example by using lies, random changes of the sense of words, violence, and so on, means that one "argues" by other means as reasons. This means that one does not argue at all. If one then intends to argue, that is, to utter a highly coherent, S-rational cluster of statements, one should have a disposition to follow the rules of D-rationality.

4.4.5 Why Shall Practical Statements Uttered Within Legal Reasoning Be Rational? Some Conceptual Reasons

Legal reasoning is a chain of arguments consisting of theoretical and practical statements. It thus consists, *inter alia*, of the following components:

1. theoretical statements about the literal sense of socially established norms (a) contained in such sources of the law as statutes, precedents, etc., and (b) embodied in the tradition of legal reasoning;
2. (moral) value- and norm-statements, endorsed by the person who performs the reasoning, stating precisely what is a right interpretation of the socially established norms and how one ought to interpret these norms.

The theoretical part of legal reasoning should be rational for the same reasons as other theoretical propositions. The practical part of legal reasoning should be rational for the same reasons as moral statements. In particular, practical statements belonging to legal reasoning are related to rationality for the following conceptual reason. It is a conceptual anomaly to sincerely express a legal opinion, and yet not to have a disposition to support it by legal *reasons*. Practical statements in the law are justifiable. As already stated, in section 2.2.3 supra, justifiability implies that a person confronted with a practical statement can ask "why?" and thus demand reasons which support the statement. The statement "B ought legally to pay income tax, though no legal reasons exist for his paying income tax" is thus strange. It is also strange not to intend to make the reasons as coherent as possible. If one does not wish to create a conceptual anomaly, one must have a disposition to support one's legal opinions by highly coherent reasons, that is, by S-rational thinking.

But there also exist some special reasons for rationality of legal reasoning. One of them concerns the concept "valid law". This concept refers not only to the socially established law but also to the interpreted law. For example, many Swedish norms concerning causation in torts are commonly recognised as valid law, albeit

they exist merely in some influential textbooks, whose purpose is to *creatively* interpret statutes and precedents, not merely to describe their literal content; cf. section 5.5.7 infra. This interpretation is commonly expected to be rational. The expression "this interpretation of a statute is valid law, yet it is not rational" is strange and thus constitutes a conceptual anomaly. If one does not wish to create a conceptual anomaly, one must have a disposition to regard a result of a legal interpretation as valid law only if this interpretation is rational.

4.4.6 The Concepts and Life

In sections 4.4.2–4.4.5, I thus have formulated, *inter alia*, the following "technical norms", stating necessary means for assumed purposes.

1. Concerning L-rationality: If one does not wish to create a conceptual anomaly, one should not sincerely utter value statements that violate the demands of *L*ogical rationality. In particular: If one does not wish to create a conceptual anomaly, one should not assume views whose consequence is that one has an all-things-considered duty to do the impossible.
2. Concerning S-rationality: If one intends to think at all about practical matters, one should have a disposition to arrange one's practical opinions into a coherent system. If one intends to *correctly* think about practical matters, one should have a disposition to arrange one's practical opinions into a coherent system. If one does not wish to create a conceptual anomaly concerning the concept of "arguing", one should have a disposition to argue S-rationally, that is, only by proffering reasons supporting one's conclusion. If one does not wish to create a conceptual anomaly concerning the concept of "weighing", one should have a disposition to proffer reasons supporting one's acts of weighing. If one does not wish to create a conceptual anomaly, one should have a disposition to support moral and legal practical statements with universalisable reasons.
3. Concerning S- and D-rationality: If one intends to argue, that is, to utter a *S*upportively rational cluster of statements, one should have a disposition to follow the rules of *D*iscursive rationality.
4. Concerning rationality of legal reasoning: If one does not wish to create a conceptual anomaly (concerning the concept "valid law"), one should have a disposition to regard a result of a legal interpretation as valid law only if this interpretation is rational.

The basis of these technical norms consists of some *concepts*, such as "value statement", "moral reasons", "legal duty", "weighing", "arguing", "valid law", "legal interpretation" etc. But cannot our concepts be misleading? Should one not rather *change* the concepts in order to separate them from the difficult, vague and controversial demands of rationality? In fact, members of such philosophical movements as the Uppsala school did precisely that. For example, they defined value

statements as a pure expression of feelings. In this context, let me make the following brief comments.

A radical change of some concepts would change our life in a manner difficult to imagine. In this context, one may speak about "a form of life" (cf. section 3.3.4 supra). The form of life is our picture of the world expressed in our everyday actions and concepts. Many actions would be incomprehensible had one not at least a vague idea of some legal concepts. One, e.g., "buys" food in a shop "owned" by a "company" and "pays" with "money".

But would the form of life change radically had we abandoned the discussed, quite abstract, moral and legal concepts, such as "weighing", "valid law", "legal interpretation" etc.? One can present the following hypothesis. If these concepts were abandoned, rational discourse of legal and moral problems would be impossible. This would in particular be the case, if the idea of moral duty were changed so that the statements such as "B ought (all things considered) to do H and yet B ought not (all things considered) do H" no longer constituted a conceptual anomaly. This would also happen if moral and legal concepts acquired a new meaning, no longer presupposing any possibility of justification of moral value-statements and normative statements.

In consequence, fatal chaos would occur. This applies particularly to the *legal* concepts, because of the connection between the law and organised force. Political life would thus be dominated by manipulators who would directly affect emotions of people. (Imagine a mob at a football ground shouting "one people, one state, one leader". Or consider political songs as a means to win elections.) The lawyers, emotionally unstable and susceptible to irrational manipulation, would arouse common contempt. One could win legal disputes only by being most pleasant to the judge and sharing his opinions, tastes and prejudices. At the end, no one would trust anybody. People would be isolated form each other. Our culture, our form of life, would change radically.

If one does not with to create a radical change of our form of life, one should have a disposition to avoid anomalies concerning practical, especially legal, concepts. Indeed, if the meaning of these concept no longer were related to reason, one had to create new concepts, practical and yet thus related. Since these concepts presuppose rationality, legal reasoning should be rational.

4.4.7 Why Shall Practical Statements Be Highly Coherent? Some Empirical And Technical Reasons

In addition to conceptual reasons for S-rationality, that is, a high degree of coherence, of practical statements, one may also state the following empirical and technical reasons.

1. People often arrange practical statements in coherent systems; in particular, everybody often supports practical statements with reasons. To be sure, one can

emotionally reject a set of norms and/or value statements highly fulfilling the criteria of coherence. But most human beings have a disposition to endorse coherent systems. I omit the question whether this disposition is determined genetically or merely socially. In the first case, human nature is perhaps rational. In the second case, one can at least say that *modern* people have a disposition to think rationally, that is, coherently. In both cases, one may *explain* this disposition by biological and/or social evolution.

Can everybody be wrong? This justification by recourse to a common practice constitutes a kind of *empirical* justification in Alexy's sense (cf. 1989, 182 ff.).

2. One can also present a *technical*, (teleological, goal-oriented) justification in Alexy's sense (cf. 1989, 181–2). To arrange practical statements in a coherent system is thus important for the following reasons.
   a) Coherence makes our opinions *stable*. First of all, the very concept of coherence implies that, *ceteris paribus*, the most coherent theory available in a given situation is the most stable one. At least two criteria of coherence include a temporal dimension, broadness of scope covered by the theory in question and generality of concepts. *Ceteris paribus*, general concepts are applicable to a class of situations invariable in time, or at least extending for a long period. Another connection between coherence and stability is this. *Ceteris paribus*, a more coherent norm- or value-system contains a greater number of statements and connections between them. This makes the hypothesis plausible that it is more difficult for an individual to reject such a system than to reject an isolated statement. Increased coherence thus causes an increased stability.

If one intends to make one's practical opinions stable, one should have a disposition to arrange one's practical opinions into a coherent system.

   b) Various individuals can then compare their systems and state precisely how much these resemble each other. A comprehensive resemblance of whole systems tends to endure longer than a similarity concerning a single practical statement. If one intends to create *stable consensus* concerning practical matters, one should have a disposition to arrange one's practical opinions into a coherent system.

One may assume that the pursue of stable consensus is the point of practical reasoning. We aim at constructing normative systems and value systems which others may endorse during a long period. If the reasoning, on the other hand, shows that the value systems of various individuals are different, the persons in question gain a better knowledge about what they disagree. This facilitates the use of various consensus-generating procedures, such as voting.

   c) Moreover, a stable consensus facilitates achievement of such goals as efficient organisation, minimisation of violence and, ultimately, *survival* of the species.

In a chaotic crowd of people, where consensus appears and disappears in an unexplainable manner, one would never know how others react to one's action.

Such a crowd would never constitute a community complex enough to create and maintain a civilisation. In an extreme case, it would not be able to survive. Practical reasoning, on the other hand, makes a stable consensus within a community likely, and thus promotes survival of mankind. Assuming that survival of people in general, or at least survival of our modern culture is a good thing, one may also *justify* coherence of practical theories as a condition of survival.

If one intends to increase the chance of survival of mankind, one should have a disposition to arrange one's practical opinions into a coherent system.

4.4.8 Why Should a Discourse be Rational? Empirical, Technical and Universally-Pragmatic Reasons

In addition to conceptual reasons for *D-rationality*, one may point out some empirical, technical and universal-pragmatic reasons.

1. The theory of rational discourse based on Alexy's rules may be checked *empirically*, by showing that people often act as if they had applied these rules.

   I disregard here some problems, e.g., does the widespread practice of "arguing" by irrational means, e.g., populist manipulations in politics, weaken the empirical justification?

2. One may also argue (*"technically"*) that by using this kind of rationality, people can survive and often achieve such goals as efficient organisation, minimisation of violence, some forms of justice, and so on.
3. Finally, one may point out that rationality rules are necessary conditions for knowledge, understanding and intersubjective communication. This is the *"transcendental"* or *"universal-pragmatic"* justification (cf. Alexy 1989, 185–6). Since knowledge, understanding and communication are here assumed as goals, and rationality rules are treated as means, this mode of justification is a special case of the "technical" one.

The universal-pragmatic justification is particularly important. Let me thus make some further remark related to it.

Why shall *theoretical* propositions be D-rational? If a set of such propositions fulfils the demands of D-rationality, it probably has a better chance to approximate truth than a set of propositions which does not fulfil these demands would have. The closer a discourse comes to such ideals as sincerity, uniform use of words, openness, non-violence, testability, impartiality etc., the greater is the chance that the discourse generates true knowledge. (Such a hypothesis is also the core of a rationalist version of the theory of consensus as a criterion of truth, cf. section 4.2.2). If one wishes to approximate truth, one should have a disposition to obey the demands of D-rationality.

Why should *practical* statements also be D-rational? In particular, why should one submit value statements and norm-statements formulated within the legal

reasoning, e.g. "The Liability for Damages Act is a good law" or "One ought to follow the Liability for Damages Act", a discourse following Alexy's rationality rules? The closer a discourse comes to the ideals of sincerity, uniform use of words, openness, non-violence, intersubjective testability, impartiality etc., the greater is the chance that the discourse generates efficient communication and stable consensus of people, and thus increases the chance of survival of the society etc.; cf. section 4.4.7 supra.

4.4.9 Why Should Practical Statements Uttered Within Legal Reasoning be Rational? Some Further Reasons

In addition to the conceptual reasons for rationality of legal statements, one may state the following.

An important reason for rationality consists in the following connection between rationality and legal certainty. People expect in general that legal decisions fulfil the demands of legal certainty, that is, are highly predictable and, at the same time, highly acceptable from the point of view of other moral considerations (cf. section 1.4.1 supra). S-rationality of legal decisions is a necessary condition for existence of a high degree of legal certainty.

a. If legal reasoning had not highly fulfilled the demands of rationality, its results would be unpredictable. Rational reasoning based on relatively fixed rules makes legal reasoning relatively more certain, more predictable than the moral one.

One can thus present a legal conclusion as logically following from a set of consistent, linguistically correct and reasonable premises. In legal reasoning, one also has access to a more extensive set of premises, such as statutes, other sources of the law and reasoning norms; cf. Section 3.1.1 and 3.1.5 supra. These premises can be characterised as certain, presupposed, proved or otherwise reasonable; cf. Section 3.3 supra. A rational discourse about legal problems further increases predictability of juristic conclusions.

b. If legal reasoning had not highly fulfilled the demands of rationality, its results would be arbitrary and thus unacceptable from the moral point of view. Moral acceptability would be out of question if the lawyers had no disposition at all to fulfil demands of S-rationality, that is, to support their conclusions by highly coherent reasons.

Legal interpretatory statements are not true in the literal sense. But they can fulfil to a high degree the requirements of *L*ogical, *S*upportive and *D*iscursive rationality. They thus can be both *coherent* and *acceptable* in the light of both morality and the legal paradigm. Consequently, they can fulfil important criteria of *truth*, coherence and consensus. For that reason, L-, S-, and D-rationality are indications of their *correctness*.

To be sure, one may emotionally reject a set of value statements which to a high degree fulfils demands of coherence and consensus. But at the present state of development of human societies, most people have a disposition to endorse a coherent and commonly accepted value system. In this broad sense, the human *nature* is rational.

But if human nature had been more servile than rational, the obligation to obey the law would be better justifiable by reference to commands, of God or the authorities.

Chapter 5
What is Valid Law?

5.1 What is Valid Law? – Introductory Remarks

5.1.1 Starting Point: Rationality and Fixity

We are now prepared to discuss the classical question, What is valid law? As a starting point, let me make an abbreviated restatement of theses defended in the preceding chapters.

1. Most human beings actually have a disposition to endorse coherent systems and to act as if they had intended to approximate a perfectly rational discourse.
2. An analysis of some moral and theoretical concepts justifies the conclusion that if one intends to correctly think about practical matters, one should have a disposition to arrange one's practical opinions into a coherent system and to follow the rules of discursive rationality. If the concepts were abandoned, rational discourse of legal and moral problems would be impossible. In consequence, our form of life would change radically.
3. Coherence makes our opinions *stable*. The hypothesis is plausible that it is more difficult for an individual to reject a highly coherent system than an isolated statement. If one intends to make one's practical opinions stable, one should have a disposition to arrange them into a coherent system.
4. If one intends to create *stable consensus* concerning practical matters, one should have a disposition to arrange one's practical opinions into a coherent system and to follow the rules of rational discourse.
5. A stable consensus facilitates achievement of such goals as efficient organisation, minimisation of violence and, ultimately, *survival* of the species. If one intends to increase the chance of survival of mankind, one should have a disposition to arrange one's practical opinions into a coherent system and to follow the rules of rational discourse.

All this is applicable not only to purely moral but also to legal reasoning. Not only the former but also the latter should be highly coherent and discursively rational. In consequence, it is plausible that the very *concept* of valid law should contribute to coherence and discursive rationality of the law.

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Moreover, analysis of the concept of valid law justifies the conclusion that if one does not wish to create a conceptual anomaly, one should have a disposition to regard a result of a legal interpretation as valid law only if this interpretation is rational.

Finally, people expect in general that legal decisions are highly predictable and, at the same time, highly acceptable from the point of view of other moral considerations. If legal reasoning had not fulfilled the demands of coherence and discursive rationality, its results would be unacceptable from the moral point of view; in particular, they would be unpredictable. Predictability is more important in legal reasoning than in a purely moral reasoning. To assure predictability, the law itself must be relatively stable, fixed.

In brief, one needs a theory of legal validity and the concept "valid law" which simultaneously fit two postulates: rationality of legal reasoning and fixity of the law.

5.1.2 The Purpose of Our Theory of Valid Law

A purely reportive (analytic, lexical) definition of valid law would faithfully describe the use of this term in the legal language. A stipulative definition would prescribe a new use of the term, without any attention to the established language. Our theory of valid law is neither fully descriptive nor arbitrarily prescriptive but reconciles description and prescription. It thus reconciles the following demands (cf. Peczenik 1966, 13 ff.)

1. It should be logically consistent.
2. It should establish a fixed sense of "valid law" and stick to it in various contexts.

The ordinary language of lawyers does not fulfil these demands. One utters apparently incompatible theses about valid law. For example, one sometimes regards statutory norms as legally valid if, and only if, they were enacted in the correct way, regardless whether the courts are actually applying them or not. Sometimes one regards the judicial application of the norms as the necessary and sufficient condition of their validity, regardless whether they were enacted correctly or not. At best, one must conclude that the lawyers use the term "valid law" in different, mutually inconsistent senses, each one internally consistent (cf. Wedberg 1951, 257 - no reasonably exact definition of legal system can be formulated; cf. Jörgensen 1970, 6 ff.

3. Provided that the demands 1 and 2 are fulfilled, our theory of valid law should identify as legally valid all and only the phenomena ordinarily enumerated as valid law.

"Ordinarily" refers either to ordinary language or to its specialised branch - legal terminology. Consequently, our theory of "valid law" will be better adapted to juristic discourse than, for instance, to empirical sociology.

4. Provided that the demands 1 and 2 are fulfilled, our theory of valid law should also regard as essential to the concept "valid law" all and only the properties

a) common for all or almost all legally valid norms; and
b) ordinarily regarded as essential.

Our theory is not merely concerned with the *words* "law", "valid law", "legal", etc. I will rather arrange the use of *many* words in a way showing what we in our culture regard as important properties of all or nearly all systems of valid law.

5. Provided that the demands 1 and 2 are fulfilled, our theory should, finally, contribute to the optimal weighing and balancing of two postulates, the first demanding that legal reasoning should be as coherent and discursively rational as possible, the second requiring that the law should be as fixed as possible.

The theory is not value-free, since it presupposes "an evaluative judgment about the relative importance of various features" of the law (cf. Raz 1982, 124). It thus goes beyond the "linguistic approach", as it must do, since the law theorists are no lexicographers and "should be concerned with explaining law within the wider context of social and political institutions"; cf. Raz 1982, 107 ff. and 122–3.

5.1.3 Normative Character of the Concept "Valid Law"

Although lawyers can easily give examples of valid law, they face problems when attempting to define the concept. The main cause of the difficulties is vagueness of the concept "valid law", particularly its value-openness. The concept of valid law has not only the theoretical meaning, expressed in various criteria for making a distinction between legal and non-legal norms, but also a practical meaning, that is, a normative aspect. *To say that a norm is valid means that it ought to be observed.*

Cf. Lang 1962, 112 ff. and 128 ff.; Olivecrona 1971, 112 and von Wright 1963b, 196. Ofstad 1980, 166–8, made several distinction: a norm is valid, if it (a) ideally viewed, ought to be accepted, or (b) is generally accepted, or (c) is acceptable, or (d) is supported by good reasons, etc.

An idea of valid norm that ought not to be observed is like a "married bachelor" or a "square circle", that is, inconsistent and self-destroying (cf. Marantz 1979). In consequence, one often attempts to answer two different questions simultaneously, What is valid law?, and Why ought one to obey the law?. The first concerns a definition of valid law, the second its deep justification. The first presupposes some ontology, that is a theory of what is real. I am thus going to use the term "the question of definition and existence".

The second question requires a clarification. The "valid" law is considered as "binding" but it is difficult state precisely what the latter concept means either. What does it mean that a norm, N, is binding, that is, ought to be observed? It cannot mean anything but the fact that another norm, a "super-norm", says that N ought to be observed. In this sense, legal validity is relative, in other words "derivative". Legal validity is thus no natural property but a normative one, necessarily related

to, and derived from, a "super-norm", stating that a certain norm ought to be obeyed. In order to meaningfully speak about a valid norm, one must assume at least two norms, one determining validity of another. This logically (analytically, necessarily) true thesis concerns all norms, *inter alia* legal and moral.

The relative character of validity causes a problem which *Georg Henrik von Wright* described in the following manner: "If validity of a norm is validity relative to the validity of another norm of higher order, the validity of this higher order norm will in its turn mean validity relative to a third norm of a still higher order, and so forth. If this chain is infinite the concept of validity would seem to lose all meaning, or be hanging in the air. If the chain is *not* infinite, then the validity of the norm in which the chain terminates cannot mean 'validity relative to some other valid norm', since there are no other norms to refer to." Von Wright's solution (1963b, 196–7) is the following: "The validity of a norm… is not validity relative to the *validity* of another norm. It is validity relative to the *existence* of another norm, hierarchically related to the first in a certain way". I will return to this problem in sections 5.3.1, 5.3.2 and 5.8.4.

The norm determining validity of a *legal* norm can itself belong to different systems. (1) It can be a legal norm. A constitutional norm thus determines validity of statutory norms. (2) It can be a moral norm. A moral norm decides, e.g., whether an old statute is to be regarded as obsolete, or even derogated by means of *desuetudo*.

On the other hand, it cannot be a norm of language. No doubt, a complex of such norms determines what kind of structure, content and efficacy of a normative system is sufficient to call it "valid law". But the meaning of the word "valid" is either legal or moral, not linguistic. The language merely refers to the law or morality.

One can classify different opinions of the concept "valid law" into three categories: Natural Law, Legal Positivism and Legal Realism, cf. sections 5.2, 5.3 and 5.5 infra. Natural Law tends to find the super-norm for the law in morality, Legal Positivism in the law itself, Legal Realism regards the whole problem as not rational.

5.2 Law and Morality – On Natural Law

5.2.1 Introductory Remarks

Many advocates of Natural Law have distinguished between the "positive" law, created by the authorities, and the truly valid or binding law, conforming to the natural law. In other words, they have made two assumptions.

1. The statement "n is a valid legal norm" implies the statement "n is binding" and "n belongs to a normative system roughly corresponding to the natural law".
2. One ought to obey valid legal norms precisely because they belong to a normative system roughly corresponding to the natural law.

But what is natural law? Though the concept is vague, one can assume that it refers to especially important moral norms.

But not all moral norms belong to the natural law. Some classical natural-law thinkers thus distinguished between the natural law, deciding what is *iustum*, and morality, deciding what is *honestum* (Mautner 1979, quoting Thomasius).

As regards the content and the sources of natural law, one can distinguish the following standpoints.

1. A natural-law theory is *religious*, if its important parts are supported by some religious assumptions, even if they also have an analytic or empirical support.

Thomas Aquinas's theory is thus religious, despite the fact that it also contains the following, profoundly reasonable, theses independent from the religion. Knowledge is supported both by observational data, provided by senses, and by a creative reworking of these, provided by reason. Reason creates concepts and enables one to grasp the essence of things. Reason also makes it possible to distinguish right and wrong. Human nature includes three kinds of dispositions, to self-preservation, to satisfying biological needs such as procreation, and to fulfilment of rational goals, such as knowledge and respect for the interests of others. Reason also tells us that these dispositions are good, provided that they are kept within limits. But why are they good? Here comes the religious component: They are good because God asks us to follow our nature.

Aquinas's theory of law corresponds to these views. The human law is binding only if corresponding to the natural law. The natural law, revealed in the Bible, reflects some parts of the eternal law, made by God to rule the universe. Since the eternal law is inaccessible to our reason, we need both the natural and the human law. On the other hand, the eternal law is imprinted in our nature. We can thus follow it to some extent, if we listen to reason.

It is not my intention to quote innumerable restatements of Aquinas's views about the law, not to speak about his original works. Brief and simple reports can be found, e.g., in 1980, 398 ff. and Stone 1965, 51 ff.

2. A natural-law theory is *rationalistic*, if it fulfils the following conditions.
   a) The most important parts of it are supported by statements which in one way or another are given by reason. Such statement can be analytic (reporting the sense of some concepts) or otherwise obvious, acceptable for anyone who possesses a coherent world picture etc.
   b) The theory can also have an empirical support (but this is perhaps not necessary).
   c) No important parts of the theory require a support of religious assumptions.

The classical Natural Law of 17th and 18th centuries provides many examples. One assumed that human beings had a natural right to the *suum*, that is, his own or his due, including one's life, body, thoughts, dignity, reputation, honour and freedom of actions (cf. Olivecrona 1969, 176 ff.; 1971, 275 ff.; 1973, 197 ff. and 1977, 81 ff.). The idea of the *suum* justified the binding force of promises, including the social contract. The content of the law was regarded as justifiable by recourse to such a contract. No wonder that, e.g., *Grotius*, regarded the principle that contracts should be respected (*pacta sunt servanda*) as the most important principle of natural law. People living in the original "state of nature" could enter a social contract, and thus

give the ruler a part of their *suum*, e.g., the right to regulate their actions. In this manner, a hypothetical contract which rational people would enter in the state of nature, could justify the duty to follow the law. The ruler's legal power to enact binding laws was thus based on the "obvious" idea of the *suum* and the "obvious" assumptions concerning the content of a hypothetical social contract.

Contractarian thoughts are unusually persistent. They appeared long before the classical Natural Law and persist until our days. Mention can be made of the Hebrew belief in the Covenant established between Jahve and the Israeli people and the ancient Germanic belief concerning the contract between the ruled and the ruler (cf., e.g., Strömberg 1981, 15). At the other end of the time scale, *John Rawls* claims that reason alone would be a sufficient condition for various individuals to unanimously accept certain principles of justice etc., if the following conditions were fulfilled: (1) they were placed in "the original position of equality", assuring impartiality; and (2) their views were satisfactorily balanced, that is, in the "reflective equilibrium"; cf. section 2.6.2 supra.

3. A natural-law theory is *empirical*, if it fulfils the following conditions.

   a) The most important parts of it are supported by empirical statements.
   b) The theory can also have some support of statement which in one way or another are "given by reason".
   c) No important parts of the theory require a support of religious assumptions.

5.2.2 An Example of Empirical Theory of Natural Law

Alfred Verdross (1971, 92 ff.) elaborated a moderate version of such an empirical theory of natural law. The theory contains four parts.

1. The first part is based on the thesis that all normal human beings feel certain basic needs and exhibit some primary wants.

   a) They all want to live. Though circumstances can force one to suicide, the disposition to self-preservation is natural.
   b) All normal people want to avoid being exposed to physical injury, defamation or economic loss.
   c) Though some people have a disposition to follow a leader, all normal human beings want to have some freedom to fulfil their intentions and not to be forced to act.
   d) They all want to be able to rely on the help of others, if needed.

   The following norms of the so-called social morality express these needs and wants.

   a) Each individual *ought to* abstain from attacking life of others.
   b) Each individual *ought to* abstain from attacking health, reputation and property of others.
   c) Each individual *ought to* abstain from attacking liberty of others.

d) Each individual *ought to* help others, if this is required. The following reasoning underpins this theory:

Premise 1	All normal human beings want that each individual acts in the way x
Conclusion	Each individual *ought to* act in the way x

The conclusion does not follow from premise 1. But one can add a premise 2, and obtain the following logically correct inference:

Premise 1	All normal human beings want that each individual acts in the way x
Premise 2	If all normal human beings want that each individual acts in the way x then each individual *ought to* act in the way x
Conclusion	Each individual *ought to* act in the way x

One can interpret premise 2 in many ways, *inter alia* as a more or less arbitrary norm, or as a value-naturalist definition of the concept of "ought". To be sure, the word "ought" has a more complex and unclear meaning. The following view is, however, plausible. If all normal human beings want that x happens, then each individual *prima facie* ought to act in the way bringing about x (in the weak sense of *prima-facie*, cf. section 2.3.3 and 2.3.4 *supra*). Moreover, it is then *reasonable to conclude* that one must take this *prima-facie* Ought into account when deliberating whether one ought all-things-considered to act in the way x or not. (This is the strong sense of *prima-facie*; cf. id.)

2. *Primary natural law*, discussed in the second part of Verdros's theory, is a special case of social morality. It thus consists of norms which (a) belong to social morality and (b) regulate legal problems. One identifies the legal character of problems according to two criteria. While social morality includes norms stipulating duties, the norms of primary natural law stipulate both duties of certain persons, other persons' rights corresponding to them, and competences of authorities to use means necessary to enforce the rights and duties.

Primary natural law is eternal, since it belongs to social morality, based on equally eternal primary needs and wants.

3. *Secondary natural law* indicates how the aims for the legal system which are derived from primary natural law can best be realised in the given social conditions. Secondary natural law changes continually, since it must fit changing social facts.

Before nuclear weapons were discovered, the primary natural-law goal of bringing good-neighbour relations between nations might sometimes be realised through war, either purely defensive or aiming at removing such a menace as Hitler. Consequently, just wars were permissible from the point of view of natural law. In the nuclear age a war can no longer lead to anything valuable. The doctrine of the just war must thus be abandoned.

4. *Positive law*, given in statutes, precedents etc. and enforced by sanctions is valid only when it is in accord with the secondary natural law.

5.2.3 Some Critical Remarks on Natural-Law Theories

Natural-law theories face, among other things, some empirical problems. We should all accept natural-law norms as both reasonable and deciding about validity of positive law, if social science could show us that if we observe these norms we could effectively satisfy needs and fulfil wants of everybody. But does science give us such evidence? Many critics claim that people living in different times and societies endorse different values and, first of all, different value hierarchies. The goals all recognise, e.g., to protect life, are vague. Moreover, one may choose several alternative means for realising the goals. One can protect life, e.g., through developing a more efficient health service or through more efficiently fighting crimes. To justify such a choice, one needs an act of weighing and balancing, ultimately connected with one's will and feelings.

No doubt, the law is indirectly connected with human nature. Human nature creates limits for human forms of life. The forms of life in their turn provide limits for what can constitute acceptable *prima-facie* moral reasons. *Inter alia*, it creates some rational limits for a hypothetical social contract. It is not plausible to assume that such a contract could have any arbitrary content possible to imagine. In effect, human nature creates some limits for a rationally justifiable content of valid law. But all those limits are flexible. They are not so precise as, e.g., Rawls assumes (cf. section 2.6.2 supra). Still smaller is the chance to deduce from these vague limits a content of a complex system of natural law. Fuzziness of such limits makes the requirement of correspondence between positive law and a contentually characterised system of "natural law" almost empty. In brief, natural-law theories tend to make too strong analytical and/or empirical assumptions.

One can also criticise many kinds of natural-law theories for making too strong assumptions concerning theoretical content of practical statements, e.g., for attempts to derive practical (normative or evaluative) conclusions from theoretical propositions about human nature etc. I have already discussed serious difficulties such a derivation must face, cf. sections 2.1 and 2.4.6 supra: The step from theoretical propositions to all-things-considered practical statements is not analytic but requires a judgment of reasonableness.

These problems create a paradoxical situation. Though intending to be precise, natural-law theories are peculiarly vague, that is, unable to elaborate a clear test of Natural Law. In consequence, if the concept "valid law" is defined as conforming to Natural Law, then the system of law becomes more vague, less fixed. This contradicts the postulate of fixity formulated in the section 5.1 supra.

5.3 Law and Morality – Legal Positivism

5.3.1 Hans Kelsen's "Pure" Theory of Law

Legal Positivism accepts the natural-law assumption that valid law is binding, that is, ought to be obeyed. At the same time, the positivists reject any analytic connection

between law and morality. They claim that the legal system can be thoroughly immoral and yet valid. From the legal point of view, one ought to observe even norms belonging to such a systematically immoral system. Consequently, they must explain the sense of this “legal ought”, different from a moral obligation. If the validity of legal norms is “derivative” (cf. section 5.1.3 supra), and if it cannot be derived from morality, from what, then, can it be derived?

The standard positivistic answer is: from the sovereign power which can enforce the law. One can mention the Sophists (cf., e.g., Dias 1976, 79) and Ulpianus: *quod principi placuit, legis habet vigorem* (Dig. I,4,1 pr.). Within the framework of Natural Law, this connection was emphasised also by Hobbes (cf. Olivecrona 1971, 19). Systematic Legal Positivism is, nevertheless, comparatively new; the term “philosophy of positive law” was first used by Gustav Hugo in 1798.

According to Bentham and Austin, the law consists of commands of the habitually obeyed sovereign, ensured by the threat of punishment. Its existence as law entails no moral justification at all (cf. Olivecrona 1971, 27 ff.) On the other hand, according to the traditional German Legal Positivism, the positive law has binding force by virtue of the will of the state. For instance, Bergbohm held that the material source of positive law consists of the legal consciousness (an influence of Savigny and Hegel) and its formal source of the will of the state (cf. Olivecrona 1971, 39 ff.) Such theories, however, encounter two further problems. First, one cannot define precisely “the will” of such an abstract entity as a state (cf. Olivecrona 1971, 71 ff. and 73 ff.). Second, entities such as the “sovereign” and the state are legal creatures; how, then, can existence of the state and the sovereign make the law binding if they are themselves made by the law? (cf. Olivecrona 1971, 65 ff.).

Hans Kelsen created the most perfect positivist theory of law. According to Kelsen, the actual legal research is an unjustifiable mixture of juristic, moral, sociological and other components. Consequently, one must liberate it from alien influence. Kelsen’s pure theory of law is so to say a general part of thus purified legal research.

The pure theory of law deals with what *ought to* be done from the point of view of the positive law, not what people actually do. Consequently, it studies legal norms, and only legal norms.

A norm is the sense of an act of will, directed at another person’s conduct. (Cf. section 2.2.2 supra.)

“Whoever gives an order, *means* something. He expects that the other understands *it*. Giving the order, he means *that* the other ought to act in a certain way. This is the *meaning* of his act of will” (Kelsen 1979, 25).

A legal norm functions as a scheme of interpretation. A juristic interpretation differs from interpretation in the natural science in the following manner: The former only, not the latter, regards a course of events from the point of view of a valid norm.

“The quality of an action to be an execution, not a murder, cannot be grasped by senses but follows first from a process of thinking, that is, from a confrontation with the criminal statute and the order of criminal process” (Kelsen 1960, 4).

Kelsen makes a distinction between a legal norm and a legal statement. This distinction corresponds closely to the difference between the so-called genuine and

spurious legal statements, cf. section 1.5.1. Legal science according to Kelsen utters legal statements, not legal norms.

"The difference shows itself in the fact that the ought-statements, formulated in legal science…, which neither oblige nor entitle anyone to anything, can be true or false, while the ought-norms, enacted by a legal authority - which oblige or entitle legal subjects - neither can be true nor false but only valid or invalid" (Kelsen 1960, 75 f.).

A legal scholar thus attempts at telling the truth about the content and validity of legal norms.

One expresses both legal norms and legal statements in the language of "ought", "may" etc. In both cases, one has to do with "the ought", not with natural facts. The difference is particularly clear in comparison with causal laws. While a causal law says "if there is A, B must necessarily occur", a legal statement says "if there is A, B ought to (should) occur".

"A legal statement connects two elements with each other in a similar manner as a (causal) law of nature. But the connection expressed in the legal statement has an entirely different content than the causal one described in the natural law… In the legal statement, one does not state that if A then B occurs, but that if A then B ought to occur" (Kelsen 1960, 80).

When evaluating Kelsen's views, one must make a distinction between two components. The first is a very plausible advice, given a legal scholar: Study valid legal norms, not anything else! The second is the controversial philosophical thesis that legal norms constitute a particular "world of the ought" etc. The second may imply the first, but the first has also an independent justification.

From a philosophical point of view, one can regard "the world of the ought" as a special case of Popper's "world 3", cf. section 5.5.6 infra.

"Purity" of Kelsen's theory means also that it has been liberated from *moral* elements. Morality differs according to Kelsen from the law, since only the latter is provided with an organised sanction. Moreover, several moral systems can coexist in the same society, e.g. a Christian and an Islamic one. One cannot scientifically prove which one is better. The law thus creates own criteria of the good and the ought, independent from any morality. A moral system may causally influence the content of the law, but has nothing to do with its legal validity.

"If one assumes that values are relative and thus claims that law and morality in general, and law and justice in particular, differ from each other, this claim does not mean that the concept of law has nothing to do with morality and justice, nor that the concept 'law' does not come under the concept 'good'. For the concept 'good' cannot be defined in any other way as 'that which ought to be', that is, that which corresponds to a norm; and if one defines the law as norm, it follows that what conforms to the law is good. The… claim to separate the law from morality and… justice means only that if one evaluates a legal order as moral or immoral, just or unjust, one expresses a relation of the legal order to one of many possible moral systems and not to 'the only one' morality… (V)alidity of a positive legal order is independent from its correspondence… with any moral system" (Kelsen 1960, 68–69).

"When discussing validity of a positive legal norm, one must disregard validity of a moral norm incompatible with it, and when discussing validity of a norm of

justice, one must disregard validity of a positive legal norm incompatible with it. One cannot simultaneously regard both as valid" (Kelsen 1960, 361).

Though contestable, the thesis that there are many moral systems is plausible. But it does not imply that the concept "valid law" is independent from morality. One can, e.g., interpret the concept "valid law" as implying that an extremely immoral "law" is no valid law. Each individual would then regard a normative system as valid law or not, depending on whether it does fulfil or not some minimal requirements of the moral system *he* endorses. I will return to this question later on; cf. section 5.8.3.

According to Kelsen, a legal order is an order of force, a sanctioned order. He concludes, what follows: "(A)ll norms which do not stipulate an act of force… are incomplete norms… valid only in connection with norms which do stipulate an act of force" (Kelsen 1960, 59).

The norms of private law are thus valid due to the fact that other norms enact sanctions for their violation, that is, sequestration, punishment etc.

One may wonder whether this theory fits the contemporary welfare state as well as the "minimal state" or 19th century night-watchman state. No doubt, the modern state still claims monopoly of using force, yet its activity has expanded to cover health service, education, redistribution and what not. It is by no means clear what the "essence" or, to put it more cautiously, the point, the most fruitful definition etc. of the law and state is. The safest course is to assume a plurality of criteria, none sufficient and none necessary, cf. section 5.8 infra.

One of the most important elements of Kelsen's theory is the idea that legal norms constitute a hierarchy of a peculiar kind. A norm is legally valid if it has been created in accordance with valid norms of higher standing which determine who is authorised to make the norm and how this should be done (cf. Kelsen 1960, 228 ff. and section 5.6.2 infra). The higher norm itself is valid if it has been made in a way prescribed by a still higher valid norm, and so on. But the highest legal norms, belonging to the constitution, cannot derive their validity from validity of still higher legal norms, since no such norms are valid in the legal system. The lawyers take for granted the validity of the highest legal norm. For a law theorist, however, it is a puzzle.

According to Kelsen, the highest legal norms must derive their validity from the *Grundnorm*, the basic or apex norm. One formulation of this norm is, as follows: the constitution ought to be observed. More precisely: "Acts of force ought to be performed under the conditions and in the manner which have been stipulated by the historically first constitution of the state and by the norms enacted in agreement with it. (In an abbreviated form: one ought to behave as the constitution prescribes.)" - Kelsen 1960, 203–204.

This is a regulative norm, imposing a duty. Raz 1974, 97, has written, however, that the nature of the *Grundnorm* is power conferring, that is, in our terminology, a kind of qualification norm). Cf. Paulson 1980, 177.

As an alternative, Kelsen admits a construction in which legal validity is based on international law whose Grundnorm is the following: The states ought to behave in the way which corresponds to the international custom; cf. Kelsen 1960, 222.

According to Kelsen, any apex norm whatever can be assumed provided it meets the requirement of efficacy (cf., e.g., Kelsen 1960, 215 ff.), namely that the majority of rules which are based on it are applied by a given power-exercising organisation.

In the Soviet Union, e.g., one may assume the *Grundnorm* "The Soviet constitution ought to be observed", but not "The constitution of the (czarist) Russian Empire ought to be observed".

Efficacy is thus the main criterion of legal validity. But why did Kelsen not say that it *entirely* determines the validity? Why had he also referred to the *Grundnorm*? One reason is that power systems exist (e.g. the Mafia organisation) which are not regarded as valid law. Secondly, legal validity is a normative quality, which cannot be identified with factual efficacy. Only "if the *Grundnorm*… is presupposed, can the constitution… be recognised as binding legal norms" (Kelsen 1928, 339; cf. Kelsen 1951, 1391; 1958, 1397 ff.; 1960b, 1422 ff.; 1960, 204 ff.; 1961, 827).

The apex norm is *not* legally valid because it has not come into existence in a legally prescribed way. It is only *conceptually presupposed* by anyone engaged in *legal* reasoning about valid law. Cf. Kelsen 1945, 116: The *Grundnorm* is "the necessary presupposition of *any* positivistic interpretation of the legal material"; my italics. Cf. Kelsen 1960, 209. Cf. Walter 1968, 339: Pure theory of law is a theory of legal dogmatics, not a theory of legal history or legal politics.

Kelsen has always regarded the *Grundnorm* as a presupposition. However, sometimes he also called it hypothetical, cf. Kelsen 1934, 66 ff. This interpretation inspired, e.g., Lachmayer 1977, 207 and Marcic 1963, 69 ff. But one can doubt whether this "hypothesis" is falsifiable. Cf. Verdross 1930, 1308 and Walter 1968, 339. Besides: "It is sometimes the case that two alternative scientific hypotheses may be equally apt to explain the phenomena in question. But there is no room for alternative *Grundnormen*", Dias 1976, 499–500.

After 1962, Kelsen regarded the *Grundnorm* as a fictitious norm presupposing a fictitious act of will creating this norm; cf. Kelsen 1964, 1977 and 1979, 206–7. Cf. Olivecrona 1971, 114. This was perhaps an influence of Vaihinger (cf. 1922, 24), or a compromise with Legal Realism, cf. Hägerström 1953, 277: The *Grundnorm* "merely hovers in the air".

Neither the idea of a hypothesis nor the idea of a fiction can be considered as improvements of Kelsen's main theory.

We all think that the constitution is valid law. If one seriously claims that the constitution is valid law, one thereby means that it ought to be observed. A law theorist thus concluded: "If the law become something that people were not obliged to obey then it would no longer be the law"(Marantz 1979). The expression "The constitution is valid law", can be defined as equivalent to "The constitution ought to be observed". The fact that we all call the constitution valid thus implies that we presuppose, take for granted, that it ought to be observed. The *Grundnorm* says precisely the same, that the constitution ought to be observed.

One can agree with Kelsen that the *Grundnorm* is thus conceptually presupposed by anyone engaged in legal reasoning about valid law. But according to Kelsen it also is a "ground" for legal validity. "If one asks for the ground of a legal