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On Law and Reason

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would simultaneously fulfil two necessary conditions of legal interpretation, that is, would have 1) strong support of socially established legal norms and 2) sufficient support of *prima-facie* moral norms. As soon one pays attention to the established law, one must disregard morality and *vice versa*. There is no all-things-considered law which such provisions strongly support.

Assume now, that the "legal" system in question contains very many extremely immoral provisions. It is extremely immoral on average, "*im grossen und ganzen*" (cf. Kriele 1979, especially 177; Dreier 1982, 41 ff.). A significant part of its provisions cannot strongly support any all-things-considered law. It is plausible to assume that this "legal" system is not even a *prima-facie* valid law. "*Lex iniustissima non est lex*".

> This thesis may be compared with the "central tradition of natural law" which "has affirmed that unjust laws are not law… *Lex iniusta non est lex*"… implies (i) that some normative meaning-content has for some community the status… of law, (ii) that that law is unjust…, and (iii) that compliance with that law is… *not* justified" (Finnis 1980, 364–5). But "(t)hat gives bad laws too short a shrift… We must therefore say… that *lex iniustissima non est lex*" (Lucas 1980, 123).

In brief, a normative system is a socially established (*prima-facie*) law, only if it does not contain or generate too many grossly immoral norms and practices. Moral reasoning decides what is grossly immoral and how much is "too many".

> Since the democratic legislation process is not perfect, unjust laws can be enacted not only in a totalitarian state but also in a democratic society. One may criticise them, even if approving of the legal system as such. Legal systems of such countries as South Africa or Cuba deserve a more comprehensive criticism, but one must recognise their character of valid law. Only *extreme* immorality of a normative system as a whole supports the conclusion that the system is no valid law.

The assumption that an extremely immoral "law" is not valid law is controversial because the expression "valid law" is ambiguous. One may interpret it either in accordance with this assumption, or in a strictly positivistic manner, excluding evaluative criteria of valid law. The latter interpretation is quite natural within a legal discourse of a civilised country. In such a discourse, there is no reason to doubt legal validity of the established system of norms which highly fulfils the descriptive criteria, discussed above. But within a general meta-theory of law, one must also discuss less civilised societies, such as Pol Pot's. In such a society, legal discourse loses its point. One must be engaged in a broader moral discourse, in which one may and ought to doubt legal validity of the system.

The following facts, *inter alia*, constitute reasons *against* considering a normative system as extremely immoral (cf. section 2.3 supra).

F_8) The normative system in question is not such that its implementation causes extreme suffering.

F_9) The normative system in question is not such that its implementation to an extreme degree contradicts important preferences of a significant number of people.

F_{10}) The normative system in question is not such that its implementation to an extreme degree prevents fulfilment of human talents.

F_{11}) The normative system in question is not such that its implementation clearly contradicts the goals characterising important social practices.
F_{12}) The normative system in question is not such that its implementation is extremely unjust, since it to an extreme degree contradicts the principle "like people should be treated alike".
F_{13}) The normative system in question is not such that its implementation is extremely unjust, since it to an extreme degree contradicts the principle that weak members of the society should be protected.
F_{14}) The normative system in question is not such that its implementation is extremely unjust, since it to an extreme degree contradicts the principle that individuals may decide about the products of their own work.

To be sure, admitting moral circumstances as criteria of valid law *may* make the legal system less fixed, because the test of extreme immorality is vague. However, fixity of the recognition procedure of the law decreases significantly only in rare borderline cases, when the normative system in question is such that one must consider whether it is *extremely* immoral. In civilised societies, the problem simply does not occur.

Moreover, the decrease of fixity of the procedure of recognition may also result in an *increase* of fixity of the law itself! Namely, the morally-laden, less fixed, recognition procedure excludes legal validity of very *unfixed* systems. Since the recognition procedure rules out *lex inuistissima*, one is not forced to accept as valid law some systems based on limitless arbitrariness of power-holders. Extreme immorality is often a result of contempt of the demand of universalisability. The power-holders treat the subjects differently without any universal principles justifying the discrimination. In such a system, a gang of terrorists can exercise power through entirely unpredictable terror. An extremely immoral law would *not* be fixed enough. Neither would it be very coherent. An important criterion of coherence consists in universalisability which, at the same time, constitutes the core requirement of morality.

5.8.3 Evaluative Openness of Valid Law

There can exist reasons to *expand* this list of the criteria of law. The following hypothesis is thus reasonable, that is, neither falsified not arbitrary: If one had more information about the attitudes of officials, jurists and laymen, more knowledge of their use of language and a better insight into interconnections of one's own moral judgments, one would be able to objectively (without influence of one's own feelings) elaborate a more extensive list of criteria that may serve as meaningful reasons for the conclusion that a normative system is valid law.

Can one objectively (freely from emotional bias) formulate the *sufficient* condition for the conclusion that a normative system is *all things considered*, (not only *prima facie*) valid law?

Such a sufficient condition would consist of (1) the complete list of *prima-facie* law-making facts, and (2) the complete list of statements determining the relative weight of these facts in the context of the normative system to be evaluated as "valid law". (1) and (2) would jointly imply a subset of law-making facts which are *sufficient* for the all-things-considered legal validity of a normative system.

> Such a subset can, e.g., include the above-mentioned facts F_1, F_3, F_5, F_7–F_{10} and another fact, F_{15}, so far not stated precisely, that turns out to be relevant for the concept of valid law. Another subset of this kind can include other facts, e.g. F_1, F_4–F_6, F_{11}, F_{12}–F_{14} and an additional fact, F_{16}, that turns out to be relevant, and so on.

However, one cannot precisely and objectively determine such sufficient combinations of all-things-considered criteria for legal validity. One can only give some *prima-facie* reasons, neither sufficient nor necessary, both for and against a given choice of a combination of criteria. Weighing and balancing of those reasons decides about the final selection of facts one considers as sufficient and/or necessary for legal validity. It decides, e.g., about the character and intensity of the properties a normative system must have to be valid law. This act of weighing thus decides how perfect the hierarchical structure (F_1) of a legal system worth the name must be; how far-reaching claims to supremacy, completeness and monopoly of force (F_3) it must make; how high a degree of efficacy the system must possess (F_5–F_6) etc. The same act of weighing and balancing decides how much suffering a normative system may cause, how unjust it may be etc. (F_8–F_{14}) before one denies its character of valid law. When performing such weighing and balancing, one can, e.g., "compensate" the system's moral deficiencies with its great efficacy. One can e.g. say that Hitler's fairly efficacious system of 1942 was valid law in spite of such atrocities as extermination of Jews. In 1945, however, the efficacy of the system decreased and its injustice increased so much that one could doubt its legal validity.

In brief, one must perform an act of weighing and balancing, and thus decide about the final selection of facts one considers as sufficient and/or necessary for legal validity. The following thesis is then a plausible explication of an analytic relation:

(2.3) If the most important law-making fact, F_WLAW(S), takes place, then the normative system S is, all things considered, valid law.

Of course, the most important law-making fact is not simple. It is rather an immense complex of facts. To identify it, one must perform an act of weighing and balancing of the competing criteria of law. Moreover, some particular criteria to be balanced are value-laden; to apply such a value-laden criterion one must rely upon weighing and balancing. To be sure, the "formalist" criteria F_1–F_3 may be formulated in a weighing-free manner: A legal system consists of several levels; it includes constitutive rules; and it includes some norms claiming its supremacy, monopoly of physical force and authority to regulate any type of behaviour. The same may be said about some "realist" criteria: Some legal norms are enacted by legislation (F_4), published, applied openly and interpreted by professional lawyers,

using established methods (F_7). But other "realist" criteria, F_5 and – F_6, assume weighing: The *most important* norms belonging to the legal system are always or nearly always observed in the practice of ordinary people or officials; other norms included in this system are *by and large* thus observed; *most of them* are at least not *systematically* violated. Finally, the moral criteria F_8–F_{14} are obviously value-laden, for example (F_8), the normative system in question is not such that its implementation causes *extreme* suffering.

Ultimately, each of these acts of weighing and balancing involves one's feelings. The concept of valid law is value-open. It has some theoretical meaning, that is, there exist some established criteria of law. At the same time, it has a practical meaning, related to feelings, will and reasons of action. When calling a normative system "valid law", one states that a kind of approval - let it be weak - of the system is justifiable. This hangs together with the normative character of the concept "valid law" (section 5.1.3 supra). Legal validity of a norm implies that it ought to be observed, either in the light of some established legal, moral or linguistic rules, or in the judgment of the person using the concept.

The concept of valid law is *vague*, yet one can proffer non-arbitrary, *inter alia moral, reasons* for and against the conclusion that a certain normative system is valid law and thus ought to be observed. When expressing this thesis, one denies strong natural-law doctrines, according to which one can state *precisely* the moral content of the concept "valid law". One also denies strong "realist" theories, showing scepticism as regards the reasonable character of the concept "valid law". Finally, one denies strong positivist theories, according to which knowledge of valid law is entirely independent of moral reasoning.

Vagueness should, however, not be misunderstood as uncertainty. To be sure, there exists a "big crowd" of criteria of law, neither sufficient nor necessary. Yet, the criteria are numerous. Moreover, most legal systems fulfil most of them. In effect, the certain core of the vague concept of "valid law" is quite extensive, while its "penumbra" is small. Only when dealing with Pol Pot's creations and suchlike, one is in doubt whether a system in question is or is not valid law. In spite of vagueness, the procedure of recognition of valid law is quite fixed.

Each criterion of the law, involved in the recognition procedure, is intended to apply to almost all legal systems. In consequence, the criteria are so chosen that they indicate the most fixed parts and aspects of the legal system. A legal system consists of several levels; a certain norm is valid if it was created in accordance with a norm of a higher level. The levels are usually very stable: a constitution level, a legislation level and an administrative-judicial level. It is not likely that the number of levels will significantly change. A legal system includes not only norms of conduct but also constitutive rules which enable us to speak about institutional facts, such as contracts, promises, marriage, citizenship etc. Again, the institutions thus created are relatively stable. To be sure, one may dramatically change some provisions of the law of contracts or marriage but it is not likely that one entirely gives up the principle *pacta sunt servanda* or monogamy. A legal system includes some norms claiming, what follows: the law is the supreme system of norms in the society; it has the sole right to authorise exercise of physical force in its territory; it has

authority to regulate any type of behaviour. This is a minimum of centralised power, very unlikely to be given up in the modern society. The most important norms of conduct belonging to the law are always or nearly always observed in the practice of ordinary people, performing everyday actions like buying, paying taxes, marrying, etc. To give up the totality of such norms is very unlikely. It would be the same as giving up our form of life. Some important norms of conduct belonging to the law are always or nearly always observed in the practice of officials, thus applying them to affect actions of others. Even this fact is unlikely to change, since this would create chaos nobody would accept. The law is frequently interpreted by professional lawyers, using established and noticeably advanced methods and doctrines. This fact is very stable, indeed. Generations of law theorists tried to change it, with no success at all. One may give more examples.

At the same time, the theory of law, presented here, assigns a great role to rationality and coherence in the law. This is, among other things, a result of the fact that it admits some moral principles as a part of the law. I have already stated that such principles, being universalisable, fulfil an important criterion of coherence. Moreover, the fact that the law, according to this theory, includes not only socially established but also interpreted norms makes the legal system very rich, thus composed of enacted statutes, established precedents, other authority-sources and moral principles. This fact makes the number of accessible premises of legal reasoning very great, and thus makes it possible to reason in a highly coherent manner.

In brief, the theory seems to fit both the postulate of fixity of the law and coherence of legal reasoning.

5.8.4 The Basic Norm For the Law

From the psychological point of view, there is no doubt that the lawyers spontaneously, without reasoning, recognise a normative system as a system of socially established law. One may thus enumerate legal statutes, precedents, etc. of a given country, without recourse to any general definition of law. This information is, however, more bibliographical than theoretical (cf. Wedberg 1951, 254). One gains the information through entering a certain socially established practice. The law students often begin their studies by acquiring a general view of this "bibliography". Among other things, they learn a list of the sources of the law, such as statutes, precedents etc., to which one must, should or may pay attention. The lawyers learn in their practice, too, how to perform legal reasoning. They thus master the use of the concept of valid law.

Once having done this, they enter the way of thinking which can be coherently understood only if one presupposes the *Grundnorm* in Kelsen's sense. They thus 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. The *Grundnorm* says precisely the same, that the constitution ought to be observed; cf. section 5.3.1 supra.

From a normative point of view (in the context of justification) one can, nevertheless, ask the lawyer, *Why* is this constitution valid law?, and, Why ought it to be observed? One can thus demand rational reconstruction of the spontaneous process of cognition of valid law.

The lawyer is not prepared for such questions. But had he the required analytical skill, he would answer, -Because such facts as F_1, F_3, F_5, F_6, F_8 and F_9 exist, and the normative system thus corresponds to the criteria of law. This answer presupposes the following reasoning.

Premise 1: the facts F_1, F_3, F_5, F_6, F_8 and F_9	This normative system consists of several levels; a certain norm is valid if it was created in accordance with a norm of a higher level. This system includes some norms claiming, what follows: the law is the supreme system of norms in the society; it has the sole right to authorise exercise of physical force in its territory; it has authority to regulate any type of behaviour. The most important norms of conduct belonging to this system are always or nearly always observed in the practice of ordinary people, performing everyday actions like buying, paying taxes, marrying, etc.; other norms of conduct included in this system are by and large thus observed; most of them are at least not systematically violated. Some important norms of conduct belonging to this system are always or nearly always observed in the practice of officials, thus applying them to affect actions of others. Some of the officials, e.g. judges, prosecutors, police, execution officers etc., participate in the exercise of a legally authorised force. The normative system in question is not such that its implementation causes extreme suffering. Neither is it that its implementation to an extreme degree contradicts important preferences of a significant number of people.
Conclusions:	One ought to observe the constitution of this normative system. Consequently, one ought to observe other norms, belonging to it. In other words, this normative system is valid law.

Depending on the context, one gives various emphasis to each one these three conclusions. I am disregarding this problem.

The conclusions do not follow logically from the proffered premise. The step from the premise to the conclusions is thus a jump.

As stated above, the lawyer performs this jump spontaneously, without considering the questions, Why is this system valid law?, and, Why ought it to be observed? He has a capacity to directly cognise the norms that are valid law and thus ought to be observed. He registers some simple facts but “sees” valid law. In a certain sense, he spontaneously derives the conclusions concerning valid law from a number of premises neither mentioning nor expressing valid law. One may call this spontaneous inference *the jump into the law*.

The problem of this jump is merely theoretical. Practically oriented lawyers have no need to consider criteria for legal validity of the legal system as a whole. They simply assume that it is legally valid.

In this manner, the legal mind *transforms* knowledge of some simpler facts into cognition of valid law. Metaphorically speaking, it transforms these facts into valid law. One can call this mental transformation *the transformation into the law* (cf., e.g., Aarnio, Alexy and Peczenik 1981, 142; Peczenik 1983, 12).

Borrowing the terminology of Uppsala school, one can therefore ask the question whether valid law is not a product of imagination. But the same kind of doubts can occur as regards physical facts. The fact that one sees a forest depends not only on the forest but also on the mind of the observer. A bird sees perhaps only particular trees, an insect particular branches, without interpreting them as a forest. In other words, human brain transforms the sense data about colours, sounds etc. into one's knowledge of branches, trees and forests. It would be, however, strange to call the forest a product of imagination. One could not live a normal life when regarding forests etc. as one's own dreams. But neither could one live a normal life when regarding valid law as a product of imagination; cf. section 5.5.3 supra.

The step from a description of non-legal facts to the conclusion that the normative system is valid law and thus ought to be observed etc. is a jump, but one can convert it to a logical deduction by adding a premise. The following inference is thus logically correct:

Premise 1: the facts F_1, F_3, F_5, F_6, F_8 and F_9	This normative system consists of several levels; a certain norm is valid if it was created in accordance with a norm of a higher level. This system includes some norms claiming, what follows: the law is the supreme system of norms in the society; it has the sole right to authorise exercise of physical force in its territory; it has authority to regulate any type of behaviour. The most important norms of conduct belonging to this system are always or nearly always observed in the practice of ordinary people, performing everyday actions like buying, paying taxes, marrying, etc.; other norms of conduct included in this system are by and large thus observed; most of them are at least not systematically violated. Some important norms of conduct belonging to this system are always or nearly always observed in the practice of officials, thus applying them to affect actions of others. Some of the officials, e.g. judges, prosecutors, police, execution officers etc., participate in the exercise of a legally authorised force. The normative system in question is not such that its implementation causes extreme suffering. Neither is it that its implementation to an extreme degree contradicts important preferences of a significant number of people.
The added premise 2	If the following facts occur: –This normative system consists of several levels; a certain norm is valid if it was created in accordance with a norm of a higher level. –This system includes some norms claiming, what follows: the law is the supreme system of norms in the society; it has the sole right to authorise exercise of physical force in its territory; it has authority to regulate any type of behaviour.

	–The most important norms of conduct belonging to this system are always or nearly always observed in the practice of ordinary people, performing everyday actions like buying, paying taxes, marrying, etc.; other norms of conduct included in this system are by and large thus observed; most of them are at least not systematically violated. –Some important norms of conduct belonging to this system are always or nearly always observed in the practice of officials, thus applying them to affect actions of others. Some of the officials, e.g. judges, prosecutors, police, execution officers etc., participate in the exercise of a legally authorised force. –The normative system in question is not such that its implementation causes extreme suffering. Neither is it that its implementation to an extreme degree contradicts important preferences of a significant number of people; –Then one ought to observe the constitution of this normative system. Consequently, one ought to observe other norms, belonging to it. In other words, this normative system is valid law.
Conclusions:	One ought to observe the constitution of this normative system. Consequently, one ought to observe other norms, belonging to it. In other words, this normative system is valid law.

The added premise 2 connects some facts with the conclusions concerning legal validity of the normative system and hence with the obligation to observe the norms belonging to the system. One can also say that the original premise *strongly supports* these conclusions in the sense developed in sections 2.7 and 3.2 supra.

Premise 2 is a concretisation of the following schematic statement:

If a sufficiently great number of facts exist, belonging to the set F_1–F_n, then the normative system N is valid law, i.e., one ought to observe the constitution of N and, consequently, other norms belonging to it.

Many such concretisations are possible. The facts F_1, F_3, F_5, F_6, F_8 and F_9 are not the only criteria of valid law. One may, e.g., also proffer such criteria as F_7 (The law is often published and applied openly; it is also frequently interpreted by professional lawyers, using established and noticeably advanced methods and doctrines) etc.

Within the legal paradigm (section 3.3.3 supra), one presupposes several premises of this kind. Transcending the legal paradigm, one can, nevertheless, argue for them. Premise 2 thus has support of various moral reasons, such as the following one: A morally objectionable *chaos* would occur in a modern society, if it no longer possessed a hierarchical, efficacious etc. normative system. Such a moral justification of the law can also receive a further support of certain, presupposed, proved and otherwise reasonable statements (cf. section 2.7, 3.2 and 3.3 supra).

The choice between various possible concretisations of the schematic statement, binding the facts F_1–F_n with the conclusion that the normative system N ought to be observed etc., depends both on the legal paradigm and on moral considerations. One may thus regard the concretisations as moral norms a law theorist creates when discussing the problem of legal validity.

As stated before, the addition of premise 2 eliminates a jump. The jump from the original premise (about some facts) to the conclusions concerning valid law is thus converted into a logically correct inference. Since premise 2 itself is justifiable by certain, presupposed, proved and otherwise reasonable statements, the jump is reasonable, cf. sections 2.7 and 3.2 supra.

One can regard both the schematic statement "If a sufficiently great number of facts exist, belonging to the set F_1–F_n, then the normative system N is valid law, i. e., one ought to observe the constitution of N…" etc. and its various concretisations, such as premise 2 supra, as versions of *the basic norm for the law*, the *Grundnorm* (cf. Peczenik 1981 and 1982 *passim*).

Let me point out some differences between this *Grundnorm* and *Kelsens Grundnorm* ("one ought to observe the constitution"; cf. section 5.3.1 supra). Our *Grundnorm* is conditional, thus including the clause "if a sufficiently great number of facts exists, belonging to the set F_1–F_n…". To be sure, Kelsen's *Grundnorm*, although formulated in an unconditional way, also presupposes some conditions, namely that the legal order, whose constitution ought to be observed, is fairly efficacious, related to the exercise of force and consisting of several levels, higher norms deciding how the lower are to be created. But our list of conditions is both more extensive and openly related to moral reasoning.

> I am disregarding the fact, here not important, that Kelsen emphasises the obligation to obey the constitution, while the schematic statement, developed above, also deals with the obligation to obey other norms etc.
> One can also regard both the schematic statement "If a sufficiently great number of facts exists, belonging to the set F_1–F_n, then the normative system N is valid law etc." and its various concretisations as material inference rules in Toulmin's sense. Although not logically true, they are presupposed in the everyday life.

Legal validity of the normative system N, or legal validity of its constitution, is validity relative to two things:

1) the *existence* of another socially established norm, namely the inference norm "If a sufficiently great number of facts exists, belonging to the set F_1–F_n, then the normative system N is valid law etc."; and
2) the *existence* of a sufficiently great number of facts, belonging to the set F_1–F_n.

One can regard this theory as a paraphrase of von Wright's theory of validity (cf. section 5.1.3 supra), according to which the validity of the constitution is not validity relative to the *validity* of another norm but it is validity relative to the *existence* of another norm. At the same time, one must remember that the condition "a sufficiently great number of facts exists, belonging to the set F_1–F_n" is not value-free. In order to ascertain whether the condition is fulfilled or not, one needs not only the factual data about F_1–F_n but also an act of weighing and balancing, determining whether a *sufficiently* great number of such facts exist. Moreover, some particular criteria of law to be balanced are value-laden; to apply such a value-laden criterion one must rely upon weighing and balancing. For example, the *most important* norms belonging to the legal system are always or nearly always observed in the practice of ordinary people or officials; other norms included in this system are *by and large*

thus observed; *most of them* are at least not *systematically* violated; the normative system in question is not such that its implementation causes *extreme* suffering; etc.

In brief, legal validity is relative to *existence* of a socially established norm but this norm requires weighing and balancing of many factual criteria.

5.8.5 A Classification of Jumps and Transformations in Legal Reasoning

All these problems result from the great role of *value judgments* in legal reasoning. Value judgments occur in three places:

1. In order to establish the content of some legal norms, one must perform an evaluative interpretation of such sources of the law as statutes, precedents, legislative history etc.
2. Value judgments are indispensable when one discusses such questions as, How great authority do various sources of the law have?, What is the *prima-facie* priority order between them?, and so on.
3. Value judgments are also necessary when one deals with the question whether the whole normative system under consideration is valid law.

Various justificatory jumps correspond to these kinds of value judgments. One may also say that jumps result in transforming our knowledge of the law, and perhaps also the law itself.

The term "transformation" is appropriate to emphasise the fact that some of the added premises, converting the jump into a deductive inference, may be adopted without any "certain" justification. For example, one must in some cases rely on an ultimate act of weighing and balancing, depending on one's will and feelings; cf. section 2.4.5 supra.

Let me comment upon the legal jumps in the reverse order, to start with the question of legal validity of the normative order as a whole.

A. The most difficult problems concern the *jump into the law*, from the criteria of law to legal validity. In the preceding section, I have already described how one through a jump derives the conclusions concerning valid law from a number of premises neither mentioning nor expressing valid law.

The jump results in the transformation into the law. The legal mind transforms knowledge of some simpler facts into cognition of valid law. Metaphorically speaking, it transforms these facts into valid law.

B. *A jump inside the law* occurs, on the other hand, when one through a jump derives conclusions concerning valid law from a set of premises containing at least one statement mentioning or expressing valid law. Such a jump results in a transformation inside the law (cf. Aarnio, Alexy and Peczenik 1981, 149–150 and Peczenik 1983, 33 ff.). In this context, let me make a distinction between legal source-establishing jumps and legal interpretative jumps.

B1. *A legal source-establishing jump* occurs, when one through a jump derives conclusions concerning some sources of the law, e.g., legislative preparatory materials, from a set of premises containing a statement about another source of the law, e.g., a statute.

One thus needs a jump when implementing some precedents as premises for a conclusion concerning the appropriate role of legislative preparatory materials in the statutory interpretation. First of all, one must then interpret the precedents themselves, for instance to establish a general norm, implicitly based on them. To perform such an interpretation of precedents one must, *inter alia*, supplement them with some established norms of legal reasoning.
These norms are related to the concept of legal reasoning. It would be strange to *simultaneously* refute a significant part of the set of such norms and still try to perform a *legal* reasoning; cf. section 3.3.3 supra and chapters 6 and 7 infra.
But the established reasoning norms do not unambiguously determine the interpretative conclusion. One also needs some moral premises, first of all moral principles. One must often weigh and balance various precedents, reasoning norms and moral principles, thus ultimately relying on one's will and feelings, cf. sections 2.4.5 supra.

Such jumps result in legal *source-establishing transformations*. The lawyer transforms knowledge of some sources of the law into knowledge of other such sources.

B2. *A legal interpretative jump* occurs, when one through a jump derives conclusions concerning interpretation of a norm from a set of premises containing a statement about the wording of a source of the law, e.g., a statute or a precedent.

One thus needs a jump, e.g., when implementing some provisions of the law of torts as premises for a conclusion concerning liability in cases of remoteness of damage. To perform such an interpretation of a statute, one also needs some additional premises, among other things both some established reasoning norms (see above) and moral principles. One must often weigh and balance various reasons, *inter alia* the wording of statutes, precedents, reasoning norms and moral principles, again ultimately relying on one's will and feelings.

Such jumps result in legal *interpretative transformations*. The lawyer transforms knowledge of the wording of the sources of the law into knowledge of interpreted law.

5.9 One Right Answer to all Legal Questions?

5.9.1 Introductory Remarks

In Chapters 2, 3 and 4, I have described three demands of rationality, *L*ogical, *S*upportive and *D*iscursive. Assume now that an example of legal reasoning is L-rational and fulfils the demands of S- and D-rationality to a maximal possible

degree. Must such a reasoning always lead to a single right conclusion? The question is highly controversial because it involves, among other things, basic problems of moral theory, analysis of the concept of valid law, and the *prima-facie* moral duty to obey valid law (cf. sections 5.4–5.8 supra). I will now critically discuss *Ronald Dworkin's* answer to it.

Dworkin's theory includes three parts, 1) law and morality, 2) the rights thesis, and 3) the right-answer thesis. Let me discuss them in this order.

Concerning the relation between law and morality, Dworkin points out that in addition to legal rules, there are legal principles. I have already discussed the contentual difference between rules and principles, cf. section 2.4 supra.

Dworkin own formulation is, what follows: "Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision… A principle… states a reason that argues in one direction, but does not necessitate a particular decision."

In addition to it, rules and principles have, according to Dworkin, different basis of validity. "(Legal rules) are valid because some competent institution enacted them". Legal principles, on the other hand, must to a high degree simultaneously fulfil *two* demands. They must conform to "a sense of appropriateness developed in the profession and the public over time". At the same time, they must fit statutes, judicial decisions and their "institutional history" (Dworkin 1977, 40 and 340).

As regards various views on the role of principles in the legal order, cf., e.g., Alexy 1985, 71 ff.; Esser 1964, 39 ff.; Jörgensen 1970, 96 ff.; Ekelöf 1956, 207 ff.

The relation between these two demands is this. "(N)o principle can count as a justification of institutional history unless it provides a certain threshold adequacy of fit, though amongst those principles that meet this test of adequacy the morally soundest must be preferred" (Dworkin 1977, 342). An American court was thus able to discover (*not* to create!) the validity of the principle that nobody should profit from his own wrong, though this principle had not been formulated in any previous statute or decision (the case *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188, 1889).

5.9.2 The Rights Thesis

This leads Dworkin to the "rights thesis". Morally justifiable principles, not "policies", typically justify judicial decisions in "hard" cases. These principles "are propositions that describe rights" (Dworkin 1977, 90). The task of the court is to discover pre-existing rights of the parties. To be sure, counter-examples demonstrating that judges often base decisions in "hard" cases on policy grounds instead on rights and principles abound.

The Swedish Supreme Administrative Court, e.g., often relies on policy considerations, cf., e.g., the cases concerning municipal competence, quoted in the semi-official Swedish Statute Book in connection with sec. 4 of the Local Government Act.

But Dworkin replies that "(t)he difference between an argument of principle and an argument of policy… is a difference between two kinds of questions that a political institution might put to itself, not a difference in the kinds of facts that can figure in an answer. If an argument is intended to answer the question whether or not some party has a right to a political act or decision, then the argument is an argument of principle, even though the argument is thoroughly consequentialist in its detail" (Dworkin 1977, 297).

Obviously, this "rights thesis" does *not* exclude the fact that a judge - when establishing the rights of the parties in hard cases - must rely upon weighing and balancing of various considerations.

On the other hand, the role of weighing and balancing within Dworkin's theory is restricted by his thesis that rights are "trumps" of an individual, in the sense of always having priority before policies. The latter, often concerning collective goods, are, in Dworkin's view, *not* to be weighed and balanced against rights.

The "rights thesis" is, however, open to criticism. In this context, let me briefly discuss three theses, (1) rights are "trumps", (2) rights occupy a special position in the law, as compared with morality and (3) rights are pre-existent.

1. Only all-things-considered rights are "trumps" which cannot be balanced against anything else. So is the case not because they are rights but simply because they are have the all-things-considered quality. On the other hand, *prima-facie* rights, like all *prima-facie* norms, are to be weighed against other reasons (cf. Alexy 1986).

Moreover, the reasons which one thus must weigh and balance against rights include *collective values*, e.g., environment, order, culture and progress. The latter are not reducible to the individual rights. To justify this thesis, let me merely report *Alexy's* argument: The best way to enforce collective goods is by collective processes, and this shows that collective goods are not a simple sum of individual rights. Cf. Alexy 1986. (To be sure, Alexy admits a *prima-facie* priority of individual rights in the cases of doubt.).

At the same time, I agree with Alexy that individual rights cannot be satisfactorily justified by collective values only. Such a purely collectivist justification would mean that in all cases in which an individual right collides with the collective value constituting its justification, the later must prevail. But this unrestricted priority of collective values is possible only in a system in which an individual is not treated seriously, and such a system is unjustifiable (cf. Alexy 1986).

Briefly speaking, in moral weighing and balancing in general, the position of rights and collective goods is the same: all of them must be considered, no general priority relation is justifiable.

2. On the other hand, one must admit that rights occupy a special position within the *law*.

First of all, a right (precisely speaking, a claim) occupies a special position as a reason supporting a legal duty of another person; this makes the following thesis plausible:

> If the *prima-facie* law explicitly contains, implies or at least strongly supports the conclusion that B ought to do H, then such a claim-making relation exists between B and another person, A, that the law also supports A's *prima-facie* claim that B do H.

Given a legal duty, one may thus always find the underlying claim, often constituting a part of a right to a holding.

Second, one can think that although a judge never may ignore the actual rights, he may in some cases ignore collective goods and deal *only* with rights.

But even if this is so, the role of weighing and balancing in the law remains great because, as pointed out above, the *prima-facie* rights must be weighed and balanced against each other.

3. Dworkin has also pointed out that the rights the judge states are "pre-existent", regardless of whether or not any statute or precedent already established them. But this theory also is open to criticism. As stated before, when the judge interprets valid law, he is confronted with many questions, *some* concerning rights. But not even when dealing with rights, is he always concerned with the question what rights the parties *already have*. No doubt, the judge must pay attention to the sources of law, to socially established moral norms, to customary legal reasoning-norms and to other pre-existing factors. But he also must reconcile (harmonise) these factors. He must thus perform an act of weighing and balancing.

Is this act of weighing an appropriate means to cognitively establish *pre-existing* rights, duties, etc.? Or can the right etc. in question, in some cases, come to existence in the moment of interpretation, not before? I will return to this question later on.

Another problem indicated by Dworkin's theory is this. The theory implies that one cannot meaningfully deny what the people participating in a legal process assume. They claim that certain rights, and the judicial obligation to enforce these, had existed already before the judicial decision recognising their existence was made. Therefore, they *did* exist already before the decision.

In my opinion, on the other hand, all participants of a judicial process, provided that they understand the sense of the words "the court", "litigation" etc., must take for granted that the task of the process is to answer the question who *is right*. But "to be right" is not the same as "to have a right". "To be right" means in this connection to rightly interpret the relevant legal norms. Some of the norms stipulate rights, some do not. Some are principles, other are rules. Some are norms of conduct, other are qualification norms, e.g. giving one a power or competence to perform a certain legal act. Some are pre-existent, some continually created.

Neither is it certain that a law theorist had to share the opinion of the participants of a judicial process, even if they had assumed that the point of litigation always is to establish pre-existent rights. To be sure, it is difficult to refute what everybody claims when participating in a definite practice, such as a legal process; cf. section 4.4.6 supra on the form of life. But such claims can contradict some other common assumptions, made within our *Weltaschauung* and concerning the question what the word "pre-exist" means. Since our *Weltaschauung* is dominated by scientific thinking, we do not tend to acknowledge existence of so elusive entities as rights which

nobody has so far formulated. Such assumptions can force one to revise the naive belief in pre-existing rights.

5.9.3 The Right Answer Thesis

Another important thesis in Dworkin's theory is that the question, what is the law on this issue, always or almost always has only one right answer.

Dworkin starts from the following thesis. In his opinion, a judge should apply the "constructive model"; that is, he must accept precedents "as specifications for a principle that he must construct, out of a sense of responsibility for consistency with what has gone before" (Dworkin 1977, 161).

Dworkin thus "condemns the practice of making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right" (p. 87). His theory of legal "integrity" (i.e., coherence) compares a lawyer with a writer, participating in writing a novel *seriatim*. Each lawyer intends to make his additions fit both the material he has been given and his substantive value judgments (cf. Dworkin 1986, 176 ff. and 225 ff.).

Let me call this view a coherence thesis, and emphatically declare my unconditional agreement with it.

However, Dworkin also believes that such a method would, in theory if not in practice, almost or almost always result in the one right answer. Only Hercules could accomplish so much but every judge can and should try to get as close to this result as he can.

Let me mention at once two factors explaining, *inter alia*, why I do *not* believe that this is the case. First, legal language is vague. Second, legal reasoning includes value judgments.

Dworkin, however, does not admit that these reasons justify the anti-Herculean conclusion. He must admit vagueness of the legal language but he would insist that a combination of enacted law with moral judgments always or almost always generates the one right answer to difficult legal questions. Dworkin admits that vagueness of the enacted law may force a judge to use his value judgment when applying the law. He also admits that a judge has the last word; nobody may change the results he thus reached. However, he rejects "strong" judicial discretion which would exist, if the judge had not been bound by standards set by the enacted law. At the same time, he says that Hercules J., thus bound by the enacted law, can interpret it in the light of legal principles together with his moral judgment, and thus find the one right answer to all legal questions. Now, the fact that this value-laden interpretation leads to the one right answer means that the enactment together with the principles give the judge a precise directive. The enactment must thus be precise in the context of the principles. In other words, Dworkin claims that almost all legal norms are contextually precise, though they may be lexically vague.

Before going further, let me reconstruct an important part of Dworkin's reasoning, as follows.

a. All participants of a judicial process, provided that they understand the sense of the words "the court", "litigation" etc., must take for granted that the task of the process is to answer the question who is right.
Therefore:
b. In any judicial process, one party is right.

Therefore:

c. In any judicial process, the disputed question has the one and only one right answer.

Therefore:

d. All or almost all legal questions have the one and only one right answer.
But one can replace this reasoning by a more cautious one:
a. All participants of a judicial process, provided that they understand the sense of the words "the court", "litigation" etc., must take for granted that the task of the process is to answer the question who is right.

Therefore:

b'. In any judicial process, one *asks the question* which party is right.

Therefore:

c'. In any judicial process, one can answer the disputed question in one of the following ways:
c1. Statutes, precedents and other sources of the law constitute a sufficient ground for concluding which party is right.

Or:

c2. Statutes, precedents and other sources of the law together with such reasonable premises as the traditional legal reasoning-norms, justifiable moral judgments etc. constitute a sufficient ground for concluding which party is right.

Or:

c3. Not even so expanded set of premises does constitute a sufficient ground for concluding which party is right.

Therefore:

d. Although some legal questions have the one right answer, other have many competing right answers. In the latter case (cf. item c3), the judge must make a discretionary choice.

Dworkin, however, refutes the idea of judicial discretion. He says that the probability of "a tie" - a situation in which the reasons are perfectly balanced, thereby making a single best answer theoretically impossible - is so low that it can be ignored (cf. Dworkin 1977, 286).

To this objection, one can provide the following reply. Dworkin counts only with three possibilities:

1. the reasons for a conclusions weigh more than the counter-arguments;
2. the counter-arguments weigh more;
3. the reasons and the counter-arguments weigh precisely equally.
   He overlooks the fourth possibility, that is,
4. the reasons and the counter-arguments are *incommensurable*.

5.9.4 The Incommensurability Thesis

A "single scale of measurable values" for legal reasoning is unavailable. One needs weighing and balancing which "involves *multiple* criteria", so that "neither of the opposing cases is stronger than the other, and yet they are not finely balanced" (cf. Mackie 1977b, 9).

Let me now proffer some reasons in favour of the incommensurability thesis. First of all, legal language is not absolutely precise. To be sure, Dworkin must know this, but he would insist that a combination of enacted law with moral judgments always or almost always generates the one right answer to difficult legal questions. In other words, Dworkin would claim that almost all legal norms are contextually precise, though they may be lexically vague.

However, and this is the point, legal reasoning includes value judgments and these have not only theoretical but also practical (volitional, emotive, conative) meaning. In my opinion, this practical meaning prevents even a Hercules from discovering the only right answer to difficult legal questions. The ultimate reasons, shaping weighing and balancing of other reasons, *must* be incommensurable and the act of weighing *cannot* establish anything pre-existent. To show this, let me argue that the act of weighing must be ultimately dependent not only on one's moral or legal knowledge but also on one's will and feelings. This view is intuitively convincing. Weighing and balancing can depend, e.g., on the assumed political ideology, the chosen method of statutory construction etc. In other words, the set of premises, from which a judicial decision of a hard case follows, contains reasonable but not proved premises. Can one *prove*, e.g., that the economic reasons for a tax reduction weigh more than equality reasons against it?

A more detailed argumentation consists of three steps.

1. First of all, all reasoning must have an end. As soon as one claims that a certain reason weighs more than another, one faces the question "Why?". The answer can be supported by further reasons. These, too, can be weighed and balanced against thinkable counter-arguments. One can thus assume that the objectively best weighing takes into consideration *all* relevant reasons for the conclusion in question and *all* relevant counter-arguments (that is, reasons for the opposite conclusion). However, if one does not wish to be engaged in a circular reasoning, one must take the "last", ultimate reason for granted, without further reasons; see section 2.4.5 supra.

2. The second step involves the following question, How can one know that a moral conclusion which thus rests on an unsupported assumption is right? In other words, how can one know that all important reasons for and against a given action have been taken into consideration? How can one know that no unknown counter-arguments weigh more? In theory, there exist the following possibilities.

   a. The ultimate assumption is *obvious*, that is, so convincing that one can by Reason alone, objectively, freely from emotions, gain knowledge that it is right.
   b. The reasoning is so *coherent* that one can objectively (freely from emotional bias) gain knowledge that it is right.
   c. The reasoning is accepted spontaneously, under influence of one's *will, feelings and emotions*.

Although I do not exclude that some practical statements may be obviously right, I insist that they are too few to bear the edifice of practical reasoning. One also needs a combination of the second and the third possibility. Moral reasoning involves both will, feelings and emotions but a reasonable person has a disposition to emotionally accept as coherent reasonings as possible.

3. The third step begins with the insight that, of course, one can still find some philosophical grounds for insisting that, at the final point of weighing, there always is an ultimate assumption, so obvious that one can by Reason alone, objectively, freely from emotional bias, gain knowledge that it is right. But this kind of foundationalism is incompatible with the following metaphysical assumptions.

   a. The list of all-things-considered reasons for action *cannot* be determined by objective criteria only. A human being is free in this sense: In the last resort, he can by his fiat decide which reasons of action are compelling and which are not.
   b. We all assume that there is only one world, common for everybody. In spite of difficulties concerning the correspondence theory of truth, one can assume that something in the world makes theoretical propositions true or false. In this respect, there is no space for a fiat. On the other hand, we do not expect the same objectivity in the practical sphere. An action can be good from the point of view of some persons and evil from the point of view of others. Not even a person who denies that one ought not to kill is so insane as an individual who thinks that he lives in another world than others.

See also Mackie 1977, 15–49.

However, I do not think that this implies "an error theory, admitting that a belief in objective values is built into ordinary moral thought and language, but holding that this ingrained belief is false" (id. 48–49). I would rather say the following: A belief in *justifiable* values is built into the moral thought. This belief is *true*, provided that "justifiable" means "included in a highly coherent theory". But since

incompatible moral statements can be simultaneously included in highly coherent theories, holding this belief does not imply that there is only one right answer to all moral questions.
If these assumptions are right, then unshakeable foundations, if any, are not enough to ultimately justify practical conclusions. In particular, they are not enough to establish all-things-considered rights.

Yet, let me finish with a caveat. The metaphysical assumptions, asserted above, constitute a component of *one* of many possible systems of metaphysics, cf. section 5.5.5 supra. As such, there are contestable. But can one think in a profound manner without a metaphysics?

5.9.5 Existence of All-Things-Considered Law

These assumptions made, all-things-considered rights cannot be pre-existent. On the contrary, they come to existence with the act of weighing. Yet, the latter is not entirely arbitrary. One needs the idea of ultimately free weighing in combination with the idea of coherence.

When the judge interprets valid law, he is confronted with many questions, *some* concerning rights. But not even when dealing with rights, he is always concerned with the question what rights the parties already have. In some cases, the right in question comes to existence in the moment of interpretation, not before. No doubt, the judge must pay attention to the sources of the law, the socially established moral norms, the customary legal reasoning-norms and other pre-existing factors. But he also must reconcile (harmonise) these factors. He must thus perform an act of weighing and balancing, ultimately dependent not only on his legal knowledge but also on his will and feelings.

The point of legal decision-making is thus either to establish and enforce the rights of the parties or at least to decide, by weighing and balancing various factors, to what degree their interests should be protected. The latter decision involves weighing and balancing of various considerations. Collective goods and policies may be taken into account in the process of weighing but never to such a degree that the rights are entirely ignored.

A consequence of this view is this. When the interpreter uses value judgments to establish valid law, he expects that others will endorse the interpretation. He thus assumes that the interpreted law is the same for everybody. The expectation is sometimes satisfied, sometimes not. We have thus to do with three different things:

1. the socially established law;
2. the interpreted law, the same for everybody; and
3. a cluster of various proposals, each recommending a different interpretation of law.

The interpreted law *can* be the same for everybody because the interpreters are fairly similar to each other. They share the same legal paradigm. In other words,

they use similar concepts and believe in similar rationality ideals; they assume that interpretation should aim at establishing valid law; they have a similar view on the sources of the law, legal method, legal certainty and justice; cf. section 3.3.3 supra.

In some cases, however, proposals of interpretation may differ, albeit all are aiming at rationality. Such a situation can occur because similarity of interpreters is limited. Their opinions of legal concepts, rationality, legal method, etc. are similar but not identical.

Consequently, the interpreted law comes to existence in the moment of interpretation, not before. The interpretatory statement thus cannot be true in the literal sense, since it creates, not describes the interpreted law.

All this may be said about *all* kinds of rights, moral and legal and, generally, about all kinds of moral and legal conclusions. However, there also exist situations in which there *is* a single right answer to a certain *moral* question, yet no right answer at all to the corresponding *legal* question. This conclusion follows from the fact that the all-things-considered law is a result of weighing and balancing of two different sets of *prima-facie* reasons, the socially established legal norms and moral considerations. These two sets may be incompatible. I have thus stated in section 5.4.6 supra that when the immoral law is very clear, weighing and balancing of it against moral considerations does not lead to any result at all. It is then impossible to formulate a norm-statement which simultaneously would have 1) a strong support of socially established legal norms and, 2) a sufficient support of *prima-facie* moral norms. In such a case, an all-things-considered legal norm simply does not exist. There is a gap in the interpreted, all-things-considered law.

5.9.6 Some Remarks on "External Scepticism"

Dworkin finds this kind of "external scepticism" (cf. Dworkin 1986, 78 ff. and 266 ff.) is untenable, for the following reason. No important difference exists between the statements (1) "slavery is wrong" and (2) "there is only one right answer to the question of slavery, namely that slavery is wrong". If one thus agrees that slavery is wrong, one must accept that there is only one right answer to such moral questions.

Yet, Dworkin overlooks an important difference between the moral statement 1 and the philosophical statement 2. To be sure, both statements have a certain theoretical meaning. But only the first, not the second also has a practical meaning, that is, expresses emotional rejection of slavery and constitutes a reason for fighting it. It follows, that a person who seriously claims that slavery is wrong can admit that another sane person can share the emotions of most ancient Greeks and Romans and deny that slavery is wrong. One admits that the opponents judgment is ultimately is based on different feelings. On the other hand, one cannot seriously utter the philosophical thesis 2 that there is only one right answer… etc., and simultaneously show this kind of tolerance against people who say that no such answer exists. For either a theoretical proposition is true, or it is false. *Tertium non datur*.

This difference is even clearer as regards negation statements. Dworkin's reasoning implies what follows. The statement (3) "there is no single right answer to any moral question" implies the statement (4) "there is no single right answer to the moral question of slavery", and this implies that (5) "slavery is not wrong". In other words, a person like myself must think that slavery is not wrong. But this devastating conclusion does not follow at all, due to the following important difference between the moral statement 5 "slavery is not wrong" and the philosophical statement 4. Only the moral statement 5 declares that the speaker has no bad feelings against slavery. The philosophical statements 4 does not imply anything at all as regards feelings. Consequently, it cannot imply the statement 5 either.

5.9.7 Alexy on the Right Answer

This discussion makes it easy to accept *Alexy's* answer to the problem of the single right answer to all legal questions. According to Alexy, the rationality rules applicable to *all* kinds of practical discourse "offer no guarantees that an agreement can be achieved in respect to every practical issue, nor that an agreement which has in fact been attained is final and unalterable. There are several reasons for this: first, some discourse rules can only be imperfectly fulfilled; second, not all the steps in the argumentation are tied to the rules; and third, any discourse must start from the existing normative convictions of its participants" (Aarnio, Alexy and Peczenik 1981, 272). This fact creates "the necessity of a legal order", that is, "the necessity of three… procedures: (i) the procedure of establishing positive legal norms…, (ii) the procedure of legal argumentation; and (iii) the procedure of legal court proceedings" (Aarnio, Alexy and Peczenik 1981, 274). The procedure of legal argumentation is thus a special case of practical discourse. The consequence is this. "Ordinary practical decisions simply claim to be rationally justifiable. Legal decisions, however, raise a more limited claim: that of being rationally justifiable within the framework of the valid legal order" (id., 275). The existence of positive legal norms and the procedure of legal argumentation reduce the space of discursive possibilities considerably but not to the point where the outcome is certain (id. 274).

Chapter 6
The Doctrine of the Sources of the Law

6.1 Substantive Reasons and Authority Reasons. The Sources of the Law

6.1.1 Introductory Remarks

It follows from the preceding chapters that legal practice should simultaneously fit two postulates: rationality of legal reasoning and fixity of the law. The remaining part of the book deals with the question, how these postulates affect the sources of law and legal method. An extensive study of this topic would require a comparison between many different legal orders. It would also require several distinctions, *inter alia* between constitutional law, statute law, case law etc. However, such a comprehensive study would exceed the limits of the present work. I must thus restrict the discussion to one country and one form of interpretation, that is, to Swedish customary norms, concerning the sources of the law and the method of statutory interpretation.

6.1.2 Substantive Reasons and Rationality

At the beginning, let me introduce the concepts "substantive reason", "goal reason", "rightness reason", "authority reason" and "source of the law". A great part of our discussion of the first four concepts follows *Robert Summers's* well-known theory (1978, 707 ff.).

Substantive reasons are statements whose *content* can support a legal conclusion. The support depends solely upon the content, not on other circumstances, such as who proffers the reasons. Substantive reasons are moral, economic, political, institutional etc. Some are theoretical propositions, e.g., about the facts of the case, other are practical statements. The latter are always supported by some *moral* statements, since economic, institutional and other practical reasons in the law must be morally acceptable.

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Such practical statements may but must not consider some goals. One proffers a goal reason when stating that a certain decision ought to be made because it can be predicted to have good effect; this effect constitutes the goal. Legislation introducing speed limits, e.g., serves the goal to reduce the number of car accidents.

One proffers a rightness reason when stating that a certain decision ought to be made because it is right or good, regardless any causal connection with a goal. It is thus a (*prima facie*) good thing to help people etc.; cf. sections 2.3.1 and 2.3.2 supra on moral criteria.

> In the case NJA 1973 p. 628, a contract between a Swedish charterer and a foreign shipping company contained a clause, according to which disputes between the parties should be decided by Greek courts. When a Greek court made such a decision, the question occurred whether it may be executed in Sweden, in spite of some objections of the *ordre-public* character. The Swedish Supreme Court decided the question in the affirmative. The main reason was the following. The opposite decision would make it possible for a party to demand that the dispute should be decided by a Greek court and, at the same time, that such a decision should not be executed in Sweden. Provided that all his assets were in Sweden, this would leave the other party without access to justice. The decision thus followed from a set of premises, including (a) the norm that one shall have access to justice; (b) the description of possible objections of a party; and (c) the description of his possible economic situations (all the assets in Sweden).

No doubt, one may say that the assumed *goal* was not to leave a party without access to justice. But this is a consequence of what the assumed *norm* demands. Such a demand can be always presented as a goal. On the other hand, the connection between the statement of this goal and the decision did not involve any *causal* statements.

One can support both rightness reasons and goal reasons by further reasons. Any reason can thus follow from a set of premises, containing further rightness and/or goal reasons. One may thus support, e.g., the value statement that a given effect constitutes a goal to be pursued.

> Such terms as “consequentialist reasoning”, “consequence-oriented decision-making” (cf., e.g., Rottleuthner 1980 *passim* and 1981, 211; Koch and Rüssman 1982, 227 ff.), “goal reasoning”, “teleological reasoning”, and so on, are ambiguous. In ordinary legal parlance, they refer to the situation where one judges a decision according to whether or not its *causal* results correspond to assumed goals. Sometimes, however, they also include evaluation of *logical* consequences. *Neil MacCormick* (1978 pp. 105–6, 108–119, 128, 129–151 etc.) thus maintains that the consequentialist character of legal reasoning consists of the fact that one evaluates both logical implications and causal outcomes of rival possible rulings.

The preceding chapters support the following theses about substantive reasons in the law. Most interpreters of law actually have a disposition to endorse coherent systems and to act as if they had intended to approximate a perfectly rational discourse. If one intends to correctly think about practical matters, one should have this disposition. One should also have it, if one intends to create stable consensus concerning practical matters. A stable consensus facilitates achievement of such goals as efficient organisation, minimisation of violence and, ultimately, survival of the species.

6.1.3 Authority Reasons and Fixity

One proffers an *authority reason* when stating that a certain legislative, judicial or other decision ought to be made because of other circumstances than its content. For example, the following sentence is an authority reason: "Future cases of this kind should be decided in a way resembling a certain case, *C*, because this case constitutes a precedent." One thus argues for a certain decision by reference to the authority of a precedent, not by recourse to the view that its content is right. The conclusion thus follows from a set of premises which contains a statement of authority, that is, a statement that a certain authority-creating fact exists. Authority may be ascribed to a certain individual person, A; one should do H because this person claims that one should do H. The statement which ascribes an individual person authority needs, however, a further justification; it must be supported by a general statement of authority. The latter may be either an authority reason (e.g., one should do what A claims because A has a certain position, such as being a judge), or a substantive reason (e.g., one should do it because A has some moral qualities). In the law, the former situation is more important.

> According to *Jacob Sundberg* (1978, 24 ff.), authority of the legislator justifies authority of statutes; similar relations exist between legislative committees etc. and legislative preparatory materials, between judges and precedents, between the people and customary law, and between legal scholars and legal "doctrine".

When authority is ascribed to an official position, it requires often that the person or persons, occupying this position, followed a certain procedure, such as the legislative or judicial process etc. For example, an authority reason may be based upon the fact that a court previously settled a dispute in the way one now argues for; one ascribes authority to the judge or judges, provided that they have followed the court procedure.

As stated in the preceding chapters, the great role of authority reasons in the law results from the following facts. 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. Predictability is more important in legal reasoning than in a purely moral reasoning. To assure predictability, the law itself must be relatively fixed. At the same time, 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.

The relation between substantive reasons and authority reasons is complex. *Robert Summers* (1978, 730 ff.) has claimed "the primacy of substantive reasons" and stated that they, "more than authority reasons, determine which decisions and justifications are the best". In my opinion, however, this theory is too simple. The following distinctions should be made.

1. Substantive reasons are logically indispensable in profound justification of legal reasoning. It is always logically possible to support authority reasons with substantive reasons. For example, a lawyer often bases his reasoning on a precedent. But why ought one to follow precedents? To answer this question, one may refer to

another authority, e.g. a statute, but this may also be questioned. At the end, perhaps first in the realm of profound (deep, not merely legal) justification of legal reasoning, one needs a substantive reason, such as this: When following precedents, the decision-maker increases morally valuable predictability of legal decisions.

2. However, such "underpinning" substantive reasons are often *tacitly* taken for granted in the contextually sufficient legal justification, i.e., in legal research and practice. Some substantive reasons thus support the *Grundnorm* that the constitution ought to be observed, but the lawyers assume this norm without reasoning.
3. To be sure, other substantive reasons enter also the contextually sufficient legal justification. Though they are omitted in easy cases, they are indispensable in "hard" cases, in which a person, performing legal reasoning, must rely upon value judgments; cf. section 5.8.5 supra. They thus are indispensable in three contexts: (a) One must use substantive reasons in order to perform an evaluative interpretation of the content of such sources of the law as statutes, precedents, etc.

As regards precedents, *Summers* claims the following: "A judge cannot apply a precedent wisely without determining which proposed application is most consistent with the substantive reasons behind the precedent" (Summers 1978, 730). And, "(a)lthough precedents may provide answers, these answers may be wrong" (p. 733). (b) Substantive reasons are also necessary when one discusses such questions as, How great authority do various sources of the law have?, What is the *prima-facie* priority order between them?, etc. (c) Finally, substantive reasons are necessary in those rare cases in which a lawyer deals with the question whether the whole normative system under consideration is valid law.

4. Yet, this leaves the question of "primacy" unsolved. *Both* authority reasons and substantive reasons are necessary for legal thinking. *Inter alia*, the following theses are plausible: Had a certain kind of reasoning practice solely relied upon substantive reasons, without referring to or at least presupposing authority, then, by definition, this reasoning would not have been legal (cf. section 3.3.5 supra). Had a certain kind of reasoning practice as a whole solely relied upon authority, without reference to substantive reasons, then it would not have been legal, either, but servile with regard to the power-holders (cf. sections 5.4.1–2 supra).

6.1.4 Sources of Law

All legal reasons are sources of the law in the broadest sense. All texts, practices etc. a lawyer must, should or may proffer as authority reasons are sources of the law in a narrower sense, adopted in this work.
I do not discuss other senses of the ambiguous term "a source of the law"; (cf., e.g., Ross 1929, 291 and Raz 1979, 45 ff.). *Inter alia*, the following senses are conceivable.