Aleksander Peczenik

Law and Philosophy Library 8

On Law and Reason

Preface by Jaap C. Hage

Springer

to identify the legislator and his authority. The relation to this authority is a reason for a more precise interpretation of the content of the law.

In this connection, one must pay attention to two concepts, 1) democracy and 2) rationality.

1. The main idea of democracy, the power of the people, is not the same thing as an unrestricted power of the majority. The majority rule is a mere *approximation* of the democratic decision-making. The latter is a mere approximation of the moral decision-making. One can, e.g., say that the majority rule approximates the calculus of human preferences. To decide what actions are morally good, one must thus pay attention not only to the number of people having certain preferences but also to the strength of the preferences.

Consequently, the concept of democracy is not the same as "unrestricted majority rule". It is a much more complex and sophisticated notion, more or less intimately related, *inter alia*, to the following criteria of democracy: 1) political representation of the interests of the citizens, 2) majority rule, 3) participation of citizens in politics, 4) freedom of opinion, 5) some other human and political rights, 6) legal certainty, 7) division of power and 8) responsibility of those in power. One needs moral considerations in order to state the criteria more precisely and apply them to concrete states and social orders; cf. section 1.4.2 supra.
This idea of democracy thus does not imply the possibility of any temporal parliamentary majority whatsoever to immediately fulfil all its intentions.

2. A legal view, *inter alia*, concerning statutory construction is correct if it is as rational as possible. This idea of rationality is very complex. It implies that a correct legal view is supported by an as *coherent* as possible set of certain, presupposed or otherwise reasonable premises. Coherence demands, among other things, that the conclusion is supported by such a set of premises, and so on. In this way, a great number of statements hangs together. "Certain" premises are taken for granted by all people or at least all normal people belonging to the culture under consideration. "Presupposed" premises are taken for granted within a particular practice belonging to the culture under consideration, e.g. within the legal paradigm; cf. section 3.3.5 supra. The relation to "culture under consideration" and "legal paradigm", makes the law more fixed as a pure morality. This relation also elucidates the role of consensus in legal reasoning. Correctness depends on both coherence and consensus. Paying attention to the relationship between consensus and rational discourse (section 4.3 supra), one may conclude that a legal view is correct, if it is as rational as possible in view of an act of weighing and balancing, which pays attention to the postulate of fixity of the law and to various coherence criteria and discursive rationality. In brief, it is correct if it unanimously would be accepted by lawyers who think as coherently as possible and participate in a perfect discourse.

Democracy provides the best institutional framework for legal reasoning thus highly fulfilling the criteria of coherence and discursive rationality. But, of course, democracy is not a *sufficient* condition of correctness of such a reasoning.

6.6.5 Should One Pay Attention to Preparatory Materials?

The following reasons, *inter alia*, tell for the technique of legislation keeping the text of statutes short and leaving the details to the *travaux préparatoires*.

1. Provided that the preparatory materials fulfil high standards of quality, this technique brings more information into the legal system. Different persons whose pronouncements the preparatory materials contain, formulated different reasons. One can conceive the preparatory materials as a kind of dialogue (cf. section 3.2.1 supra). The person who performs the statutory construction thus gains access to a many-sided "store" of reasons to weigh and balance. On the other hand, if the legislator were forced to put all the authoritative information to the very text of the statute, he could not report both arguments and counter-arguments. He would be forced to make a choice. The information given to the interpreter would be less extensive. This would decrease coherence of legal reasoning. The greater the number of statements the interpreters may pay attention to, the greater the coherence of statutory interpretation; cf. section 4.1.3 supra.
2. By keeping the text of statutes short and leaving the details to the *travaux préparatoires*, the legislator also brings morally justifiable elasticity to the legal system. General rules can be too rigid to be just. It may be morally better to guide judges by means of a dialogue of the kind described above.

Provided that extensive preparatory materials exist, the following are some reasons for taking legislative preparatory materials into account within legal reasoning in general and statutory construction in particular.

1. A rational interpretation uses as many reasons as possible, cf. section 4.1.3 supra on coherence. *Ceteris paribus*, one thus should make use in the statutory construction of all the aids which are available, including preparatory materials.
2. When interpreting statutes, one should pay attention to their *ratio*, and this is connected with the *travaux préparatoires*.
3. The *travaux préparatoires* should be taken into account because they form a part of a democratic legislative procedure, (cf. above and, e.g., Eckhoff 1987, 64).
4. Regard for justice legal certainty and generality as a criterion of coherence requires that statutes shall be interpreted uniformly. Uniformity is promoted if all interpreters take into account the same preparatory materials, provided that these contain more information than the statute itself (cf., e.g., Eckhoff 1987, 64; Strömholm 1966, 214 and 1988, 328).
5. *If* the authors of the *travaux préparatoires* were outstanding experts and used much time to prepare the pronouncements, one may expect that their opinions are well-founded.
6. The persons participating in the legislative process expect *travaux préparatoires* to be taken into account. In this context, one may state the following.
   a. The statute is often formulated in a brief, abstract and vague manner, since the legislators expect that provisions which are found to be insufficiently clear will have been commented upon in the *travaux préparatoires* (cf. Eckhoff 1987, 64–5).

b. Were the courts to show indifference toward preparatory materials, they would run the risk that "those who have passed the statute would have some reason to feel disappointed" (Thornstedt 1960, 243) and might restrict the court's competence in the field of statutory construction.

On the other hand, the following arguments are among those adduced against taking legislative preparatory materials into account within statutory construction.

1. *Ceteris paribus*, a statute, containing a consistent system of rules, must be more fixed than a dialogue, that is, a set of pro- and counter-arguments, contained in the preparatory materials. For that reason, a restriction of the system of the sources of law to statutes, without preparatory materials, would increase fixity of law.
2. It is also an empirical fact that *travaux préparatoires* are sometimes less clear than the statute itself.

Cf., e.g., a minority report of Herlitz and J.W. Pettersson, *Kommunallagskommittéens betänkande* I, SOU 1947:53, 163; cf. Schmidt 1957, 172.
The purposes of the legislation are often stated only partially in the legislative materials. Many problems of interpretation are disregarded there. From this it follows that the help they give one to predict legal decisions might be very limited.

3. The statute itself is more concise and often easier to read than the *travaux préparatoires*. This is another reason for the conclusion that predictability of legal decisions might decrease if the courts base their practice on the preparatory materials, instead of the text of the statute.
4. The fact that the interpreter pays great attention to the *travaux préparatoires* may possibly have the effect that the legislator does not take much care with the drafting of the text, since he expects to clear up obscurities in the preparatory materials (cf., e.g., Eckhoff 1987, 65). But the materials are less accessible than the statute itself.

"It is quite strange to tell (the citizen) that instead of reading the statute books he should try to find his way through the labyrinth of the Parliamentary Report"; cf., e.g., a minority report of Herlitz and J.W. Pettersson, o.c. 163; cf. Schmidt 1957, 172.
Fixity of the law, predictability of legal decisions and hence legal certainty might decrease if the courts rely upon the parliamentary publications containing the legislative materials, instead of the statute book.

5. It is not clear which precedents, and how many, are to be considered sufficient to set aside contrary views in the legislative materials. This fact might also negatively affect predictability of judicial practice relying on the *travaux préparatoires*.
6. To bind the courts to the *travaux préparatoires* is to disturb the commonly accepted division of powers in the community.
   a. The preparatory materials restrict the number of possible choices the courts have when construing a statute. They may also gain priority before precedents. In this manner, the power of the courts is unduly restricted and the power of the legislator is dangerously increased (cf. Ekelöf 1951, 28).
   b. The *travaux préparatoires* are not subjected to the same parliamentary debate as the statutory draft itself. In the *travaux préparatoires* senior civil servants

and politicians might express ideas which would not be accepted by the Parliament. In this way the increased importance of the preparatory materials also upsets the balance of power between the *Riksdag* and, on the other hand, the Government and higher civil service.

7. The preparatory materials cannot be amended afterwards. If one desires to alter legal practice resulting from the preparatory materials, one must amend the text of the statute itself even though the only error is in the *travaux préparatoires* (cf. Ekelöf 1958, 94–5).

In abstracto, it is difficult to weigh and balance the discussed arguments for and against the conclusion that legislative preparatory materials should be used in legal reasoning, particularly in a judicial construction of statutes. But in the actual situation in Sweden, the materials *should* be taken into account. The following are some reasons therefor.

1. The high speed of legislation makes it impossible for the law-givers to create a consistent, precise and complete system of rules. They must make an insufficiently fixed law. The only way for them to make their intentions clear is to also elaborate extensive preparatory materials. This is possible, since the demands of consistency, preciseness and completeness are less applicable when one writes in a dialogue-form then when one enacts rules.
2. The high speed of legislation does not leave jurists sufficient time to elaborate commentaries, handbooks and other auxiliary means for statutory construction. At the same time, the confidence in legal dogmatics decreased, as a result of both its decreased possibility to do good work (see above) and the severe - albeit often mistaken - criticism it received from the Uppsala school. When legal dogmatics cannot make the law fixed enough, the interpreter needs all help the *travaux préparatoires* might give him.
3. The rapid changes of the society also diminish the confidence of lawyers in the customary law. This fact decreases the fixity of the law and thus increases the need of help from the preparatory materials.
4. The political stability, typical for Sweden, justifies a rather high degree of confidence in the civil servants and politicians who elaborate the legislative materials. They may be less competent as one would expect but, as a rule, they do not use the preparatory materials to promote particular interests or for other morally objectionable purposes.

6.6.6 The Role of Preparatory Materials in Swedish Law. General Remarks

Although not binding, preparatory materials are regularly followed by Swedish courts. Using the terminology developed in section 6.2 supra, it can be said that the Swedish courts have a *weak* duty to follow the *travaux préparatoires*. They *should* follow these materials, although one cannot say that they *must* do it.

In some states an explicit statutory rule requires that the lawgiver's intention shall be sought in construing the statute: cf. Ch. 1 Sec. 12 in the Italian Civil Code and Sec. 6 in the Austrian ABGB. In these countries, however, there is often an inclination to find the legislator's intention above all in the text of the statute and not in the *travaux préparatoires*. In French legal writing, too, it is considered that the legislator's will should be sought above all in the text of the statute, the *travaux préparatoires* being considered of less importance. According to a traditional view among English legal writers, *travaux préparatoires* should not be used at all in statutory interpretation. It may be that this view is not so strongly held as before, but nevertheless the importance of *travaux préparatoires* in England is still small. In the United Stated, the tradition resembles the English one, yet the importance of the preparatory materials is greater.

In the Nordic countries, the legislative preparatory materials have as a rule greater importance than in other states. The rather concise Norwegian *travaux préparatoires* succeed often to grasp the essential goals of the statute. In most (though not all) cases, they are also highly respected. Eckhoff (1987, 74 ff.) thus quoted some cases (Rt 1921 p. 406 and 1916 p. 648) giving evidence that the courts dare to judge in conflict with both the preparatory materials and the wording of the statutes, and other cases (Rt 1982 p. 745 and 1961 p. 98) showing that this only happens in exceptional situations. In Finland, the legislative preparatory materials are often less exhaustive, yet very important. The role of legislative materials in Denmark is probably lesser than in the other Nordic countries.

Even compared with the Nordic neighbours, Swedish courts estimate the importance of the legislative materials to an extraordinarily high degree (cf. Sundberg 1978, 232 ff. *re* the historical background). Until ca. 1980, Swedish legislative materials were also as a rule more exhaustive than in other Nordic states.

The idea that the Swedish preparatory materials occupy a position as important as precedent was formulated by *Folke Schmidt* (1955, 103 ff., = 1957, 172 ff.). Schmidt influenced the subsequent development of the Swedish doctrine of the sources of the law. In a later work (1976, 262), Schmidt expressed his opinion even more clearly: "The text of the statute received more and more a function of a headline to remember when one searches for what has been wished in detail. The pronouncement of the responsible minister states the main purposes, what alternative solutions have been refuted and what can be the more precise content of the draft…, all this to to govern the administration of justice."

Jan Hellner (1988, 66) summarised the situation, as follows: "The *travaux préparatoires* are often the most important aid, used in the statutory construction. One can find numerous examples of an interpretation explicitly supported by the preparatory material, but one can also find examples of judicial decisions contradicting the preparatory materials".

Hellner quoted the following case as an example. In NJA 1985 p. 659, the majority of the Supreme Court used preparatory materials as the reason for placing site leaseholdership on an equality with ownership, in spite of the fact that the interpreted statute had not explicitly supported this conclusion. The minority pointed out that other statutes always contain explicit provisions, if such a conclusion is intended.

In NJA 1981 p. 920, the Supreme Court unanimously affirmed the decision of the court of appeal which has followed clearly conflicting with the literal wording of the statute. The reason was that the final text of the statute was a result of the fact that the legislature had made a clumsy change in the text proposed to it. Though the change was not intended to affect the problem under consideration, the resulting wording contradicted this intention. It must be noted that one member of the court of appeal dissented and that a view had been expressed in the literature that, because of the clear wording, the statute must be interpreted in a way which contradicts the intention (cf. Hellner 1988, 69).

In RÅ 1974 Fi 850 the Supreme Administrative Court followed the *travaux préparatoires* instead of the wording of the statute. Justice Reuterswärd claimed that a literal interpretation would be both strange and irrational.

In some cases, however, the Supreme Court decided to disregard preparatory materials conflicting with the wording of the statute; cf., e.g., NJA 1978 p. 581. In the case NJA 1972 p. 296, the Supreme Court dissociated itself from a series of statements by the responsible minister in the *travaux préparatoires* of the Liability for Damages Act. Cf. NJA 1977 p. 273; 1976 p. 483 and 1952 p. 195.

In this context, let me mention NJA 1976 p. 483. The Real Property Code, Ch. 4 Sec. 7 stipulates what follows: "Purchase according to which a separate owner acquires some area within a real estate is valid only if a creation of a (new) real estate takes place according to this purchase through an official proceeding for which one applies latest six months after the purchase contract was drawn up and, if the proceeding is not finished within this time, it shall be executed in accordance with the purchase." In the case under consideration, the seller applied for a creation of the new real estate and later sold the corresponding area. The proceeding was not finished within six months after the purchase. The buyer applied for an entry in the land register. The court registrar refused, since the contract was to be considered invalid, on the basis of clear preparatory materials to the quoted statute. The Supreme Court, however, refuted the preparatory materials and remanded the case to the court registrar. The reasons were both the literal text of the statute and its purpose. The purpose was thus to avoid indefinitely prolonged uncertainty concerning validity of purchase. This purpose was not actual in the case under consideration, since no uncertainty would remain as soon as the proceeding is finished.

The importance of the *travaux préparatoires* varies from one part of the law to another. The greatest is it in the tax law. Their role in private law is also significant. Criminal jurisdiction is less affected by the preparatory materials. This is a consequence of the so-called legality principle, *"nulla poena sine lege"*, implying high respect for the literal wording of the statutory text. Yet, the *travaux préparatoires* may be important in criminal cases, too.

In, e.g., NJA 1980 p. 94, the decision of the Supreme Court supported itself on the preparatory materials to the statute (1976:56), amending the provision of Ch. 11 Sec. 4 of the Criminal Code.

6.6.7 The Role of Preparatory Materials in Swedish Law. Some Source-Norms

The most important source-norms in Sweden concerning legislative preparatory materials have the following content.

S5. The following texts constitute the *travaux préparatoires* that *should* be considered in legal reasoning: The legislation committee reports, memoranda prepared by a ministry or a central administrative agency; statements by persons and bodies invited to present comments; pronouncements of the responsible minister; pronouncements of the Council on Legislation (*lagrådet*); bills of the members of the Parliament and opinions of the relevant parliamentary commission (cf. Bernitz et al. 1985, 87 ff.).

Besides, one *may* consider the directives for the legislation committee and what is said during plenary debates in the Parliament.

The latter material is as a rule not respected very much, because it may contain things said for political advantage, and thus less coherent.

S6. Old preparatory materials *may* be taken into account.

The age thus weakens the position of the *travaux préparatoires* (cf., e.g., Schmidt 1957, 196 and Thornstedt 1960, 243). It is no longer so that one *should* pay attention to them.

Sometimes preparatory materials age rapidly. In Govt. Bill 1932:106 containing proposals for *inter alia* an act on mortgages on farming stock, the responsible minister made the following pronouncement: "Only such property as belongs to the debtor is covered by the preference right in mortgaging. This right can thus not be applied to effects which have been purchased on instalments." (NJA 1932 II p. 223). Twenty years later (NJA 1952 p. 195), however, the Supreme Court extended the preference right in mortgaging to effects which have been purchased on instalments.

S7. Consideration should be given, as a rule, only to materials which have been published in printed form.

S8. Pronouncements in the preparatory materials relating to questions outside the scope of the legislation under consideration should, as a rule, not be taken into account (cf. Schmidt 1957, 174).

However, the following exceptions must be noticed.

a. A body undertaking inquires concerning a number of statutes may in connection with one draft statute express its opinion about another draft dealt with earlier (cf. Schmidt 1957, 175). Such a pronouncement should be considered as of equal value with other *travaux préparatoires*.
b. In the interpretation of an earlier statute one should pay attention to preparatory materials of new statutes which regulate an adjacent area.

The antiquated but still valid provision in Ch. 1 Sec. 5 of the Commercial Code of 1734 ("If one sells goods to two persons one shall pay damages and the person

who bought first shall keep the goods") has for example been commented upon with the support of an inquiry of 1965 (SOU 1965:14, p. 37 ff.)

S9. Pronouncements in the preparatory materials should not be taken into account if they introduce entirely new norms, for which no support exists in the text of the statute.

In spite of this norm, a phenomenon occurs, sometimes called "*legislation through preparatory materials*". This takes place when 1) the *travaux préparatoires* claim priority before the wording of the statute; 2) they are relatively precise while the statute is very vague; or 3) they contain norms not supported at all by any statutory provision. Let me discuss some examples.

1. Sec. 3 of the MBL (the statute stipulating a comprehensive right of the employee representatives to be consulted in connection with the employer's policy) stipulates, what follows: If a statute or a norm enacted on the basis of statutory authorisation contains a special provision contrary to this statute, the provision is valid. The Stock Corporation Act, Ch. 8, Sec. 11, contains a clear provision of this kind. Yet, the minister wrote in the *travaux préparatoires* to the MBL (Government Bill 1975/76:105, appendix 1) that, as regards collective agreements, the MBL should have priority before this provision. To assure that this pronouncement does not overrule the statutory provision itself, the non-socialist majority of the Parliament, elected 1976, had to complete the MBL with a new Sec. 32, confirming that Sec. 3 still is in force, even in the case of collective agreements (cf. Ailinpieti 1980).
2. Sec. 36 of the Contracts Act gives the courts possibility to modify or set aside a contractual stipulation, "if it is undue (unreasonable) with regard to the content of the contract, circumstances of its origin, subsequent circumstances and other circumstances"; one must also pay particular attention to the need of protecting the person who, "as a consumer or otherwise occupies an inferior position in the contractual relation". The pronouncement of the responsible minister in the preparatory materials completed this general clause with more precise guidelines: One should set aside a contractual stipulation giving a party unilateral right to decide, especially if this stipulation is included in a standard contract elaborated by the clearly stronger party. One should also set aside a contractual stipulation incompatible with good business custom within a given branch. On the other hand, one need not accept a stipulation corresponding to what a given branch considers to be good business custom; etc. (Government Bill 1975/76:81, p. 118 ff.). Cf. section 1.2.2 supra, *re* NJA 1979 p. 666.
3. The statute of 1915 concerning installment purchase received 1953 an amendment stipulating invalidity of a reservation making the buyer's right to the goods dependent on his fulfilling another obligation. The statute was then replaced by Consumer Credit Act (1977:981) and Commercial Installment Purchase Act (1978:599). Neither contains a corresponding provision. Sec. 15 para. 2, concerning *another* question is, however, accompanied by the *travaux préparatoires* stating precisely that such a reservation is invalid (Hellner 1982, 231 ff.).

4. Ch. 4 sec. 19 of the Real Property Code deals with seller's liability for defects in the sold real property. Nothing in the statute indicates that the buyer cannot base his claim on a defect which he had noticed had he performed a careful inspection. Yet, this is the view the Supreme Court expressed in several cases, cf., e.g., NJA 1978 p. 301, no doubt under influence of the clear *travaux préparatoires* (cf. Hellner 1988, 70).

The legislation by preparatory materials may be explained as resulting from insuperable difficulties the legislator must face when attempting to create a fixed, consistent, precise and complete system or rules; cf. above.

S10. Pronouncements in the preparatory materials intending to change established practice based on an earlier statutory provision should be taken into account in exceptional cases only (cf. Schmidt 1957, 177).

But what is an exceptional case? Sec. 42 para. 1 of the MBL stipulates that neither the employer nor the: employer organisations may support an illegal labour conflict. The provision was received unchanged from Sec. 4 of the previously valid Collective Agreements Act. In this connection, rigorous rules evolved in practice; both the legislation committee and the responsible minister "derogated" these in the *travaux préparatoires* to the MBL (Govt. Bill 1975/76:105 p. 277).

S11. Wholly obscure preparatory materials should not be taken into account (cf. Strömholm 1966, 175 ff.).

Concerning the source-norms about collisions between various kinds of *travaux préparatoires* and between these and other sources of the law, cf. section 7.6.2 infra.

Ulf Bernitz (1984, 17) has pointed out that the recent development as regards the *travaux préparatoires* might jeopardise their position as a source of the law. About 1978, one thus began to abstain from elaborating a systematic presentation of statements by persons and bodies invited to present comments. Instead, one attached a chaotic appendix, in some cases only obtainable as a mimeograph. A couple of years later, one introduced a practice of merely attaching a very brief and rather uninteresting summary of such statements.

Cf., e.g. the Govt. Bill 1981/82:40 on home sale and the Govt. Bill 1983/84:16 on broker business.

At the same time, the quality standard of committee reports decreased, *inter alia* in consequence of growing practice to omit the customary presentation of foreign law, references to the professional literature and any deeper justification whatsoever.

One may explain this development by the fact that complexity and speed of change of the society has already become so high that not only the statutes themselves but also preparatory materials are too difficult to elaborate. Perhaps the lawgivers do as much they can, but cannot do much. Or have they already lost the hope of doing a good work?

This development causes the following risks.

1. An important reason to consider the *travaux préparatoires* consists in the fact that they constitute a kind of a dialogue, in which the legislation committee, the

persons and bodies invited to present comments, the responsible minister, the Council on Legislation and others pronounce reasons for and against a certain solution. These reasons constitute a basis of a rational weighing and balancing to be performed in various cases by the courts, authorities and legal scholars. The value of this basis depends on its extensiveness and completeness, now more and more questionable.
2. One may use fragmentary pronouncements, published in the *travaux préparatoires*, not knowing that they received a severe criticism of the persons and bodies invited to present comments.
3. The responsible minister has now gained an opportunity to conceal this criticism, e.g. for political reasons.

At the same time, the role of the *travaux préparatoires* has increased, as a result of the increased speed and decreased standard of legislation combined with the growing disposition of the courts to use all available means for justification of their decisions.

The situation is thus unstable. One cannot expect a peaceful coexistence of the growing rationality of judicial practice (cf. section 6.5 supra), the decreasing rationality of the *travaux préparatoires*, and the high degree of confidence of the courts in the legislative materials.

Perhaps some new ideas are needed, how to optimise the postulate of fixity of law and coherence of legal reasoning.

6.7 Professional Juristic Literature

The so-called doctrine is of significant importance for legal reasoning. The word "doctrine" refers first of all to the professional legal writing in *legal dogmatics*, whose task is to systematise and interpret valid law (cf. section 1.1 supra).
The word "doctrine" may also refer, in some contexts, to other types of legal writing, such as history of law, sociology of law, law and economics, philosophy of law etc.
In legal reasoning performed within legal research, importance of previous research is obvious. The author of a legal writing must, of course, pay attention to existing literature concerning the discussed matter. But the doctrine also influences legal reasoning in judicial and administrative practice. The mandatory literature affects all students of law, including future judges and officials. The outstanding legal researchers, appointed as high judges or members of a legislative committee, continue to pay attention to the professional literature which have been a necessary tool of their profession.

The doctrine plays an important role because it aims at *rationality*. The main point of systematising and interpreting valid law in the legal dogmatics is to present the law as a highly coherent system, supported by general reasons (cf. sections 3.2 and 4.1 supra). To deny the role of the doctrine as an auxiliary tool of legal reasoning would be the same as to refute rationality.

The doctrine constitutes also an important *source of the law*. In other words, one pays attention to theses developed in legal writing not only because of the quality of reasons there proffered but also due to the authoritative position legal writers occupy. It is a well-known phenomenon that a doctoral dissertation gains more authority as soon as the author becomes a professor or law. This is, of course, a result of the expectation of *fixity* of the law. When the law-givers and the courts fail to make the law sufficiently fixed, one looks for other fixed sources of the law. Books are fixed enough, especially when some parts of the law are monopolised by a single writer, as it must happen in a small country.

As a rule, the Swedish courts merely refer to the common scholarly opinion, without stating precisely the author or the title of his work. But explicit quotations occur in some cases, as well. An efficient method is to include an expert opinion as a part of justification of the decision, cf., e.g., NJA 1966 p. 210. In this manner, the court may quote even some controversial juristic views, as containing reasons to be weighed and balanced against other considerations.

Doctrine has been of varying importance in the history of law. In Rome Augustus gave to certain prominent jurists the right to answer questions of law by authority of the Emperor, *ius publicae respondendi ex auctoritate principis*. Other emperors, too, gave a similar right to certain jurists. The courts regarded the views of these jurists as valid law. Certain statutes of 4th and 5th centuries A.D. regulated the order in which these jurists should be cited, if their views were incompatible. The so-called citation-statute from A.D. 426 accorded binding force to books of Papinian, Paulus, Ulpian, Gaius and Modestinus, and regulated in detail the relative authority of these jurists.

In Medieval Europe the legal *communis opinio doctorum*, based on Roman sources and embraced by the majority of celebrated legal writers, mostly French or Italian, had a dominating influence. Opinions of the "doctors" were often used in the canonical process.

In Swedish law the position of doctrine was at its peak in the 17th and 18th centuries (cf. Sundberg 1978, 86 ff.). Not infrequently, the courts made explicit reference to the works of Loccenius, Rålamb, Kloot and others. References to the leading works of foreign legal writers were common. Some famous foreign scholars became also in various ways attached to the Swedish state. Pufendorf become thus a professor in Lund, Grotius received a Swedish diplomatic position.

The authority of doctrine underwent a decline in centralised monarchies, more and more emphasising the role of legislation; e.g. a draft of the Prussian *Landrecht* of 1794 thus prohibited writing any comments to this code. Also some ideas of the division of power preserved lawmaking as an exclusive domain of the lawmaker. Later, however, one noticed that all laws need interpretation. In Germany, one also needed the *gemeines Recht*, common to the plurality of small centralised states. Doctrine thus made a comeback in the 19th century. Great scholars, such as C. F. von Savigny, influenced the German legal development of this period. The German *Pandektenwissenschaft*, based on sophistication of Roman law, achieved a uniquely high level, influenced the final codification of civil law (BGB of 1896) and was highly influential even outside the boundaries of Germany.

At the end of 19th century, the standing of doctrine in Sweden was strong (cf. Sundberg 1978, 177–186.) A professor even stated that lawmaking in judicial practice is nothing but applied doctrine (id., 185). No doubt, this statement was highly exaggerated, yet it was significant that such a view could be seriously considered at all.

In the present-day Sweden, some jurists are afraid of the risk of a significant decrease of the role of doctrine (cf. Sundberg 1978, 262 ff.). However, one must pay attention to differences between various parts of the law. Legal writing has, e.g., a great influence in international private law. In public international law, it also has a clear position as a recognised source of the law, cf. Sec. 38 of the statute of the International Court of Justice.

The following factors increase probability of a high position of doctrine.

1. The greater respect the decision-makers have for rational reasoning, the greater is the role of doctrine.
2. The lower the speed of legislative change, the greater is the chance that jurists have sufficient time to elaborate commentaries, handbooks and other auxiliary means for statutory construction.
3. The more numerous statutory provisions, precedents, pronouncements in *travaux préparatoires* and other sources of the law are, the greater is the need of their systematisation and interpretation in legal writing.
4. The lower the degree of fixity and coherence of other sources of the law, the greater the need to look for help in the literature.

Taking some risk of exaggeration, one may state, what follows. There is a tension of two incompatible trends.

1. The respect the contemporary Swedish decision-makers have for rational reasoning is not particularly great. Some politicians often think that manipulating emotions is a more efficient means of influencing people than rational reasoning. There is also a tendency to rely less on scholarly views of an individual author than upon "teamwork", i.e. statutory construction proposed by legislation committees, various organisations and governmental bodies etc. This may be due to the fact that various teams have greater working resources at their command than has the individual scholar. But it may also be due to the fact that there is less confidence than there once was in the ability of legal researchers to find reasonable answers to hard legal questions. This would explain the tendency to rather rely on the economic and political power concentrated in the state and in the organisations.

Confidence in legal writing may have decreased as a result of - often mistaken - criticism it received from the Uppsala School, cf. section 5.5 supra. *Jacob W. F. Sundberg* called this phenomenon "the suicide of legal research" (cf. Sundberg 1978, 266.). Many Swedish scholars, *inter alia Knut Rodhe*, attempted at studying the law in a value-free manner (cf., e.g., his brief but influential remarks in 1944, 4 and 1971, 179), thus merely developing alternative solutions of legal problems; the final choice between these was left for "unscientifically" thinking legal politicians. (The distinction between value-free legal science and evaluative legal politics was,

by the way, quite popular in the first half of the present century. *Inter alia*, *Leon Petrazycki* (e.g., 1892 *passim*), *Hans Kelsen* (cf. section 5.3.1 supra) and *Alf Ross* (cf. section 5.5.4 supra) argued for this idea.) One can, nevertheless, doubt whether such a borderline can be precise. To be sure, both Rodhe's main works, *Obligationsrätt* (1956) and *Sakrätt* (1985) exert a significant influence; the same was true about works in judicial procedure by *Karl Olivecrona*, the greatest Swedish disciple of *Axel Hägerström*. It is, however, not certain whether these works really fulfil the demand of value-freedom. Moreover, another outstanding disciple of Hägerström, *Per Olof Ekelöf*, has openly advocated a certain teleological method of statutory construction; the method is normative, by no means value-free, cf. section 7.5 infra. Anyway, the high level of the Uppsala school together with its anti-juristic edge caused a certain shift of emphasis in works of some legal scholars who either preferred legal sociology to legal dogmatics or exercised the latter in a casuistic, overcautious manner. But of course, Swedish legal dogmatics also produced some great works by, *inter alia*, Ekelöf, Rodhe, *Jan Hellner* and *Folke Schmidt*.

At the same time, the speed of legislative change in Sweden is high indeed, and this makes the task of the doctrine excessively difficult.

2. Yet, the hypothesis is plausible that the role of doctrine will increase once again and thus satisfy the growing demand of ordinary people for rationality. Some hopeful signs are already here: Our system of the sources of the law is so extensive that the doctrine can always find interesting research topics, given time. Moreover, the fact that other institutions fail to make the law sufficiently fixed and rational makes the doctrine particularly important and encourages scholars to think creatively. The increasing size of justification of judicial decisions creates a need of judges to gain access to an extensive list of reasons they can employ. The recently increasing honesty of our political debate makes it probable that the politicians, too, will more frequently look for rational reasons and perhaps find some of them in the legal literature. The new interest of legal philosophy in problems of rational justification may help the doctrine to increase its professional level.

6.8 Foreign Law

Foreign law may, of course, give some inspiration for Swedish legal thinking. A conceptual *distinction* made in a foreign statute, a *question* asked in a foreign case etc. may be interesting for a Swedish lawyer who, e.g., can ask himself whether to pay attention to them when commenting upon the domestic law. In this manner, foreign law may be also valuable in legal education, thus providing examples of interesting cases etc.

Passing from the question of inspiration (in other words, the so-called context of discovery) to the question of justification, one may at first make the obvious remark

that the *substantive* reasons proffered in foreign decisions, doctrine etc. are applicable also in Sweden. This is obvious, as regards empirical reasons, e.g., concerning the nature of causation. Causality in Sweden cannot differ from causality in other countries. Although the matter of substantive *practical* reasons is more complex, one certainly may find moral reasoning performed by a foreign court right, just, highly plausible etc. Ultimately, this is, as always, a matter of weighing and balancing, guided by various criteria and principles of coherence and discursive rationality.

One may, however, regard foreign law also as a kind of *authority* reason. As all authority reasons, foreign law thus regarded is apt to increase *fixity* of the domestic law.

First of all, foreign law may gain authority in consequence of special circumstances, such as the following.

1. Some domestic norms of the so-called international private law, international criminal law etc. authorise an application of foreign norms in cases which in various manners have relationship to foreign countries.
2. Domestic norms may also be based on international law. As regards interpretation of rules based on international conventions, much importance is attached to foreign law which may have influenced the convention.

   NJA 1983 p. 3 concerns the application of a Swedish statute on oil pollution, based on an international convention of 1969. The Court found that the rule under consideration had been introduced at the proposal of the British delegation to the conference at which the convention was adopted. Consequently, the Court interpreted the convention in accordance with the English interpretation rules, especially the principle "ejusdem generis". The Court thus surveyed English cases starting with Sandiman v. Breach (1827)- cf. Hellner 1988, 54.

3. International legislative cooperation can lead to uniform legislation. The same statutory rules are then valid in several countries. Such uniform statutory rules may be construed uniformly in these countries. In Sweden this kind of situation arises in particular in connection with Nordic cooperation (cf. Korte 1984, 700 ff.).

   On a large scale, a similar development takes place in EEC countries (cf. Sec. 100–102 of the Treaty of Rome).

4. Harmonisation can take place even if legislation is not uniform. At the beginning of 1970th, particularly in Sweden, some influential politicians opposed the uniform legislation, since it slowed down their attempts to perform radical reforms. In 1974, Nordic Council issued a recommendation, according to which, even if uniform legislation is not possible in some branches of the law, efforts should be made to adapt statutes in the Nordic countries to one another. Ministers of justice of the Nordic countries established a net of relationships which promotes harmonisation of the law (cf. Korte 1984, 712 ff.). It is not my intention to comment upon the obvious political aspects of this development. From a philosophical point of view, the most important is the eternal tension between the value of uniformity and the value of flexible adjustment of the law to particular situations.

Harmonisation measures may lead to attempts to seek a mutual adjustment of the statutory interpretation in the countries concerned. The interpretation of uniform Scandinavian laws thus tends to be quite similar in particular countries (cf. Eckhoff 1987, 256). A common Scandinavian case law, however, did not evolve, except the maritime law (cf. Sundberg 1978, 188).

> *Reception* constitutes an extreme case of authority of foreign law. Foreign statutes can be adopted as valid law in another country. Thus late Roman statutes and other Roman sources of the law exerted great influence in many European states. It is sufficient to recall how the codification performed by the Emperor Justinianus in the 6th century affected the work of the glossators and postglossators in the 12th, 13th and 14th centuries as well as the work of the German pandectists as recently as in the 19th century. The Roman law have been thus adopted in Germany, Austria and the Netherlands, among other countries. Later, German and Swiss statutes have been adopted in, e.g., Japan, China and Turkey. English Common Law has been adopted on a large scale in the United States, Canada, Australia and even partly in India, East Africa etc.; French civil law has been adopted in a number of countries, *inter alia* in part of Poland, etc. It is clear that an interpretation of these statutes in the country of origin may influence their interpretation in the countries which have adopted the statutes.

I will, however, omit such special problems and concentrate attention upon the role of foreign law in interpretation of "average" domestic law. The existence of harmonisation of statutory rules etc. is not necessary for foreign statutes and their interpretation to gain some influence as authority reasons. For example, a foreign decision may deserve attention not only because it has been well justified but also because it has been made by a respected court. In particular, statutory construction chosen in a foreign context may be proffered as a kind of support for a similar construction of a corresponding domestic statute.

> Thus French and German civil codes and their interpretation affected a number of European countries which did not adopt these statutes as valid law. In Sweden, both the making and the interpreting of statutes have been influenced with varying intensity by foreign statutes and foreign legal writing, at least from the 17th century to our own days. It is sufficient to refer to great Swedish jurists from the 17th and 18th centuries (Loccenius, Rålamb, and others), as a result of whose writing foreign law come to influence lawmaking and judicial practice in Sweden. Richert's celebrated legislative proposals of 1826 and 1832 (cf. section 6.9 infra), as well as a large proportion of subsequent Swedish legislation, are also patterned in part on foreign - chiefly French and later German and Anglo-Saxon originals.

When considering foreign law as an authority reason in the domestic legal context, one must, however, pay attention to the difference between legal research and legal practice. For a legal researcher, it is quite natural to seek support in foreign law. A judge, on the other hand, must be more aware of the difference between the domestic law he has a duty to apply and foreign law. Moreover, a judge has much less time to perform a profound study of foreign law (cf. Hellner 1988, 89).

Differences between various parts of the legal order are also relevant. For example, the role of foreign law is continually growing as regards some branches of the law, particularly sensible to international cooperation, such as maritime law etc.

One must also pay attention to differences between various legal orders. In Sweden, it is most plausible to recognise authority of some Scandinavian statutes

and decisions. These are, of course, not binding in Sweden, but one may attach some weight to the fact that a respected Danish, Finish, Islandic or Norwegian court made a certain decision.

> The case NJA 1966 p. 210 concerned the right to damages of the owner of a factory when a cable bringing electric current to the factory was cut off. The majority of the Supreme Court pronounced a principle which was word by word identical with a decision by the Norwegian Supreme Court (cf. Hellner 1988, 90).

As regards, e.g., German cases, the problem is a little more difficult, due to some differences between legal systems in question. The Common Law of England, United States etc. is even less applicable in this context, since the conceptual apparatus of it is vastly different from the one known to the Swedish lawyers. Without advanced studies in comparative law, it is thus not easy to grant these legal systems any authority in legal reasoning performed on the basis of the Swedish law.

> Yet, there are some exceptions. Jan Hellner thus gave the following example. The case NJA 1987 p. 692 concerns the liability of an appraiser who had negligently valued real property at a much higher price than it was worth. The Supreme Court was probably influenced by the English decision in the Hedley Byrne case (1964) A. C. 465, discussed in a book which appeared shortly before the Swedish decision was made.

6.9 Draft Statutes and Formerly Valid Law

In legal reasoning one *may* pay attention to draft statutes. Even draft legislation which never became valid law is sometimes of considerable importance. In Sweden, Richert's proposals of 1826 for a general civil code and of 1832 for a general criminal code have for generations exerted influence on Swedish judicial practice and legislation (Hafström 1969, 207 ff.).

> The more technical points in the proposals influenced statutory interpretation almost from the beginning, whereas changes involving matters of principle naturally had to wait for new legislation, which in some cases did not come until more than a hundred years later. The idea expressed in the proposal for a civil code that even proceedings before the superior courts and the Supreme Court should be public and in part also oral was first put into effect in the Act of May 29, 1936, on the amendment of certain provisions in the Code of Judicial Procedure (Hafström 1969, 221.).

The following facts explain this role of draft statutes.

1. One may, of course, pay attention to the *substantive* reasons supporting draft statutes. As all such reasons, they are valuable if they make the reasoning more coherent.
2. A draft statute may also possess some *authority* based on such circumstances as high reputation of its authors etc.
3. Any draft statute expected to become valid law has an immediate *authority* derived from this expectation.

4. If clearer or more detailed, a draft statute may increase fixity of the law; one thus receives in advance clear rules to follow.
5. The like should be treated alike. It can be unjust to treat similar cases differently merely because one occurred immediately before and another immediately after a statutory change.

One faces here an objection that such a demand of like treatment would preclude *any* change of practice. However, the point is that a slow piecemeal change of practice is less unjust than a rapid legislative change, from one day to another. But of course, one must weigh and balance this point against others, supporting the different treatment of cases occurring before and after the legislative change.

Even a repealed statute can have an impact on legal reasoning, e.g., on the interpretation of its modern counterpart. In exceptional cases, even a foreign and repealed statute exerts such influence. The best example is to be found in the late Roman codification which was carried out by the Emperor Justinianus in the 6th century and which indirectly exercised immense influence in Europe long after the breakup of the Roman empire; cf. section 6.8 supra.

The following example elucidates the use of a repealed domestic statute. In Ch. 10 Sec. 26 of the old Code of Judicial Procedure a principle was expressed for distinguishing between a judicial and an administrative process: Administrative authorities thus had exclusive competence to decide cases concerning economics of the state, public offices etc. The principle implied that no appeal was possible in such cases to a general court, though, in some of them, one could appeal to an administrative court. The old Code of Judicial Procedure, including this provision, has been repealed, but in the *travaux préparatoires* of the promulgation act of the new Code, Sec. 5, it is stated that the principle must not be disturbed. The repealed provision of Ch. 10 Sec. 26 of the repealed Code of Judicial Procedure has therefore been regarded as a valid reason, supporting, e.g., conclusions concerning construction of statutes (cf. Westerberg 1973, 156 ff.).

> As an another example, one may mention the prolonged use of the repealed provision stipulating invalidity of a reservation making the buyer's right to the goods dependent on his fulfilling another obligation, cf. section 6.6.7 supra.
> This use of repealed statutes is often based on authority of *other* sources of the law, in the example quoted above the *travaux préparatoires*.

Justification of the use of repealed statutes is partly similar to that of the use of drafts. One may pay attention to the *substantive* reasons supporting them. If it was clearer or more detailed, a draft statute may increase fixity of the law; one thus follows the old rule if the new one is unclear. And again, it can be unjust to treat similar cases differently merely because one occurred immediately before and another immediately after a statutory change.

A repealed domestic statute can, however, also support a conclusion *e contrario*. The following example is theoretically interesting, albeit it lost its practical relevance, due to a further legislative change. "The Business Names Act contains… in contrast to the (previously valid) Trade Marks Act of 1884 no provision which

states what importance the registration may have for the creation of the right, and from this it may be concluded that the registration in this case lacks constitutive significance" (Ljungman 1971, 70).

The central problem in this connection concerns, of course, the choice between analogy and *argumentum e contrario*. I shall return to this problem.

A question may occur whether the use of repealed statutes creates a logical contradiction. To be sure, the act of derogation implies a norm stipulating that the repealed statute is invalid and thus *not* to be used. But a closer analysis shows that derogation merely means that the statute is no longer to be regarded as a *must*-source of the law. It says nothing about its position as a *may*-source.

Chapter 7
The Methods of Legal Reasoning

7.1 Reasoning Norms

7.1.1 Construction of Statutes in Hard Cases

In section 1.2.1 supra, I made the preliminary distinction between easy and hard cases. In easy cases, the decision follows from a set of premises solely consisting of a legal rule, a description of the facts of the case, and perhaps also some other premises that are *easy to prove*.

> These "other premises" are either certain, or presupposed within a practice belonging to the considered culture, or easy to prove in the sense developed in section 3.3.5 supra.

In hard cases, the decision does not follow from a legal rule and a description of the facts of the case (either alone or together with easily proved premises). However, the decision follows from an expanded set of premises, containing a value statement, a norm or another statement the decision-maker assumes but cannot easily prove.

> The decision-maker thus may endorse some value judgments, *inter alia* in order to perform a subsumption; to interpret a statute or another source of the law; to establish and fill up gaps in the law; to establish facts of the case; to perform legal qualification; to choose a legal consequence or to answer the question whether a statute is obsolete.
>
> The step from the legal rule and the description of the hard case to the decision is a jump, if and only if at least one of the premises which one must add to make the step logically correct is neither certain, nor presupposed, nor proved, cf. section 3.2 supra. If all these premises are certain, presupposed or proved, there is no jump, but the case still is hard, if a premise is *difficult* to prove.
>
> In the contextually sufficient legal justification, (cf. section 1.5.3 supra), in other words, within the legal paradigm (cf. section 3.3.3 supra), one may either explicitly spell out all these additional premises of the hard case or omit some of them. But since the case is hard, a lawyer would consider it natural, not strange, to mention them. On the other hand if, e. g., a philosopher of law alone would think it natural to mention such premises, then they are juristicaly trivial, perhaps presupposed within the legal paradigm, perhaps easily provable within it. The case is then easy, not hard.

A. Peczenik, *On Law and Reason*,

I shall now discuss *construction of statutes in hard cases*. If a case is hard as a result of a constructional problem, the construction of the statute is creative, not merely clarificatory.

Clarificatory construction (*interpretatio secundum legem*) establishes the meaning of the statutory provision in the light of its wording. It does not improve or change the wording. Where no other basis of clarification exists, it ends with pinpointing the obscurity of the statute.

Creative construction of statutes is either supplementary or corrective.

Supplementary construction (*interpretatio praeter legem*) involves a choice between possible interpretations of a vague or ambiguous statutory provision but it does not conflict with the wording of the statute.

When a construction of a statute so conflicts, it is not supplementary but corrective (*contra legem*).

> Section 4 of the old Swedish Constitution (*Regeringsformen*), derogated as late as 1969, thus stipulated that "the King has the right to govern the realm alone". The actually applied norm was, instead, "The *Government*, responsible to the Parliament, has the *executive* power"; cf. section 1.5.3 supra.

Corrective interpretation may result in a so-called *reduction*, if the statutory provision receives a new, more restricted sense, or even elimination, that is, a total withdrawal of the norm in question from the legal order. It may also result in *creation of a more general new norm*. A special case occurs when legal norms collide with each other, e.g., statutory provisions are logically incompatible. One needs then a *solution of the collision*, either by reinterpreting these norms, or by arranging a priority order between them.

> The Swedish Supreme Court normally construes statutes with caution and depends heavily on the legislative material. Some remarkable cases of creative interpretation, however, have occurred, as the following examples show (criticised by Hult, 1952, 579 ff.).
>
> NJA 1935 p. 157 and 1938 p. 35. The Court acknowledged an oral contract for the purchase of real estate to have a certain effect notwithstanding that the statute requires a written from if such a purchase is to be valid. Cf. the provision of Ch. 1 Sec. 2 of the Real Property Code then in force.
>
> NJA 1949 p. 82. In accordance with Ch. 3 Sec. 2 of the Act concerning international aspects of marriage, then in force, aliens might only obtain a divorce or separation in Sweden were a reason for this step to be found under both the national law of the spouses and Swedish law. In this case, however, the Court adjudicated a divorce case between two Baltic refugees exclusively in accordance with Swedish, not Soviet, law.
>
> NJA 1949 p. 195. A person was injured by an electric vehicle undergoing repair inadvertently set in motion by a mechanic. The court of appeal declared that this situation comes under the statute concerning injuries caused by "drivers" and which have "arisen in consequence of traffic" with a vehicle. (Cf. NJA 1962 p. 172).
>
> NJA 1951 p. 265. The Court applied the statutory rule concerning the father's contribution to the mother's maintenance in connection with the birth of an illegitimate child to a man who had impregnated the woman, even though the pregnancy had been terminated.
>
> In the case NJA 1966 p. 210, the Supreme Court deviated from general tort principles concerning damage to a third party because the development of the contents of law of torts "in

> a number of central respects - such as negligence, cause, remoteness of damage, unlawfulness, and what is meant by damage…, must to a large extent fall to the courts."

Construction of statutes in hard cases is supported by various types of premises. Some of these imply that one uses a certain interpretative *reason*, such as analogy, *argumentum e contrario* or suchlike. Others reveal an application of more comprehensive procedures, or *methods* of statutory construction. For instance, one usually distinguishes between linguistic (often called grammatical), logical, historical, systematic (cf. Savigny 1840 § 33), comparative, and teleological construction of statutes. Different methods imply that one pays attention to different *contexts*. When performing a systematic construction of a statutory provision, one thus takes into account its connections with such interpretatory data as other statutory norms, the structure of the statute, theories elaborated by legal dogmatics, etc. A historical construction supports itself on opinions and other facts that influenced the legislation. When performing a comparative construction of a domestic statute, one pays attention to foreign law. A teleological construction pays attention to data elucidating the purpose of the statute; etc.

7.1.2 Reasoning Norms

Some norms regulate legal reasoning, in particular they indicate how one should construe statutes. These *reasoning norms* have character, function, mode of existence and degree of justifiability resembling the source norms, cf. section 6.3.1 supra. *Character*. The reasoning norms have a *prima-facie* character: in a concrete situation, one may disregard each reasoning norm, if strong reasons justify it. *Existence*. The lawyers actually perform reasonings in the way suggesting that they - consciously or not - follow these norms. When reading, *inter alia*, writings in legal dogmatics, and perhaps participating in the legal practice, one may elaborate a relatively coherent hypothesis about their content. The hypothesis must be tested and may be accepted until studies of legal reasoning show that the authorities, judges and other lawyers do *not* follow these norms. The reasoning norms are also 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. Moreover, if one thus were unable to perform legal reasoning, our form of life would change, cf. section 4.4.6. *Justifiability*. One may use some reasoning norms as a basis for justification of other reasoning norms. Ultimately, one aims, and ought to aim, at *coherence* of the system of reasoning norms. Such coherence is always a result of an act of weighing, aimed at an optimal balance of numerous reasoning norms and numerous criteria of coherence. *Function*. One uses these norms often as presupposed premises of legal reasoning. They help to convert some argumentative jumps into logically correct inferences.

Consider again the following case, constituting a simplified version of the Swedish decision NJA 1950 p. 650; cf. section 1.2.2 supra. A person injured by a car lost his working capacity and, in consequence of it, a part of his income. A little

later, it was discovered that he had suffered from a gastric ulcer that would have made him incapable to work, even if he had not been injured. The Supreme Court did not hold the driver liable for the part of the loss for which the ulcer alone had been a sufficient cause. The reason for this decision was that the car accident had not been a *necessary* cause of the loss. The decision can be seen as a choice between the following two analogies (cf. Hellner 1972b, 166).

Analogy No. 1. Assume that we have two competing sufficient causes of a loss of working capacity, a traffic accident and a normal circumstance such as old age. Compensation would comprise only the difference between the victim's actual income and what he would have earned, if he had been a man of the same age etc. not injured in any accident. Consequently, in the case under consideration, only a similar difference should be compensated: between the actual income and a hypothetical income of an *ill* employee, not injured in any accident.

Analogy No. 2. Assume instead that we have to deal with a different pair of competing sufficient causes, a traffic accident and another person's intentional or negligent action, such as poisoning the victim. The person responsible for the accident would then have to pay full compensation, regardless responsibility of the other tortfeasor. Consequently, in the case under consideration, full compensation is justified, despite the illness of the victim.

The Supreme Court chose Analogy No. 1. Adding some premises, one can convert the reasoning of the Court to the following, logically correct, inference.

(1) A non-controversial legal norm, cf. now Ch. 2 Sec. 1 of the Tortious Liability Act, Sec. 18 of the Car Traffic Liability Act etc.	A person who caused damage in consequence of traffic with an engine-driven vehicle should compensate the damage if, and only if there exists a legal ground therefor.
(2) A non-controversial premise: the customary adequacy-rule	A legal ground for the conclusion that the tortfeasor should compensate the damage exists, if the causal connection between his action and the damage was adequate.
(3) A non-controversial premise: a description of facts	B, injured by a car driven by A, lost his working capacity and, in consequence of it lost a part of his income. A little later, it was discovered that he had suffered from a gastric ulcer that would have made him incapable to work, even if he had not been injured.
(4) An added and reasonable premise: a description of law in force	No other legal ground exists for the conclusion that A should compensate B's loss in consequence of working incapacity.
(5) An additional premise implied by the decision of the Court: a general and established norm of civil law	If someone suffers a loss as a consequence of another person's action but would have suffered the same loss as a result of such a normal circumstance as his reaching the retirement age, the causal connection between this action and the loss is not adequate.

(6) An additional premise: implied by the decision of the Court: an estimate of relevance of an analogy	A relevant resemblance exists between the actual case (in which B, injured by a car driven by A, lost a part of his income but would have suffered the same loss as a result of a gastric ulcer) and the situation in which one suffers a loss as a consequence of another person's action but would have suffered the same loss as a result of such a normal circumstance as his reaching the retirement age.
(7) An additional premise: a reasoning norm	An established norm of civil law should be applied by analogy to cases relevantly resembling those it explicitly covers.
Conclusion	A should not compensate B's loss in consequence of working incapacity.

This inference is correct because one has added, *inter alia*, premise 7, that is, a reasoning norm.

Reasoning norms thus support legal conclusions. A legal conclusion follows from a set consisting of a reasoning norm together with some other reasonable premises. This enables one to test a legal reasoning another person performs. More precisely, one can reconstruct the reasons supporting the conclusion he presents. Moreover, this makes it possible for one to weigh and balance these reasons against some other ones, deserving attention. In particular, one may in a clear manner adapt the construed statute to other sources of the law and to the requirements of morality. The reasoning norms thus increase rationality of legal conclusions. In brief, the reasoning norms make the practice of legal reasoning more stable and the interpreted legal norms more fixed.

But such norms are vague. More precisely, they are value-open; their sphere of application depends on value judgments endorsed by the interpreter. In consequence, one constantly changes emphasis given to different reasoning norms. For that reason, one often mixes together many methods of statutory construction. This is the only way to assure reasonableness of one's practice of statutory construction in hard cases. The interpretatory practice based on a single method leads often to unreasonable results.

Of course, reasoning norms are partly the same partly different in different legal orders, due to diversity of reasoning tradition, legislative technique, accessibility of statutes, precedents and legislative materials, etc. Moreover, reasoning norms vary from one part of the legal system to another. In the Swedish criminal law, the legality principle *nullum crimen, nulla poena sine lege* thus restraints an application of statutes by analogy. The taxation law is also interpreted fairly literally, although the relatively recently introduced general clause (Sec. 3 of the Tax Evasion Act) makes the picture somewhat complicated. The Swedish civil law, on the other hand, is quite open for extensive interpretation and the use of analogy. This reflects a more general problem, namely, that the statute does not play the central role in all cases in civil law; cf. the above-mentioned problem of remoteness of damage in torts. Some statutory provisions are also very vague; cf. the general clause of Sec. 36 of the Contract Acts, according to which a court may ignore or modify udue contractual provisions.

In public law, one meets, two phenomena, so to say acting in the opposite directions. The interpretation tends to be very loyal to the intentions of the authors of the statute. On the other hand, the statutes are often so vague, and the preparatory materials so fragmentary, that the interpreter must relatively freely guess these intentions. In the procedural law, the situation is much better from this point of view: difficulties to establish the purpose of the statute exist but are not *so* great.

In general, many reasoning norms are principles, not rules. When they collide with each other, one needs weighing and balancing. To be sure, the necessity to weigh may be postponed when one successfully formulates *second order reasoning norms*, indicating which of the colliding reasoning norms, methods and reasons one should apply in a given class of situations (cf. Wróblewski 1959, 143 ff. and 399 ff.). Yet, the second order norms may also collide. At the end, weighing is inevitable.

All those circumstances make it difficult for a sociologist of law to use the reasoning norms to predict the judicial decisions. But this fact does not matter for a jurist whose task is not to predict but to recommend a reasonable decision. The recommendation is always based on value judgments, but these are much more rational if supported by extensive sets of premises, *inter alia* containing the legal reasoning norms.

7.2 Logical, Literal and Systematic Interpretation

7.2.1 Logical and Quasi-Logical Interpretation

Let me now briefly discuss logical, literal and systematic interpretation of statutes.

> Some remarks on historical, teleological and comparative interpretation have already been made in section 6.6 (on legislative materials) and 6.8 (on the role of foreign law). Teleological interpretation will be discussed in detail in section 7.5 infra.

The term "*logical interpretation of statutes*" suggests that one draws logical conclusions from the considered statute. Among other things, one checks whether the statute is logically consistent. Consistency is the most fundamental demand or rationality (cf. sections 2.2.4, 3.2 and 4.4.1 - 2 supra) and a precondition of coherence.

Since the statute often is vague, it can be consistent in one interpretation, inconsistent in another. If it is inconsistent, one may remove inconsistency, *inter alia* using collision norms. I will discuss these in section 7.6.2 infra.

The term "logical interpretation of statutes" also covers questions of subsumption, cf. sections 1.2.1 supra. The following reasoning norm emphasises importance of subsumption:

11) Every judicial decision of an individual case, and every juristic recommendation of such a decision, must be logically derivable from a general norm, along with further reasonable premises.

Such a general norm may be stated in a statute, based on a precedent or supported by another source of the law.

This norm expresses the requirement of generality, that is, a criterion of coherence, cf. section 4.1.4 supra.

At the same time, it also promotes predictability of judicial decision, which is a typical result of the fact that decisions are made on the basis of general norms.

Cf. Alexy's rationality rules (J.2.2.), (J.6.), (J.8.), (J.10.) and (J.18.); section 4.3.4 supra.

One may also mention some *quasi-logical* maxims. Their vagueness makes it possible for one to interpret them as norms of customary law, moral norms or logical propositions. Let me mention three of them.

12) No one has a duty to do what is impossible.

This maxim has been cited in for example, the following connection. Sec. 21 para. 1 of the Sale of Goods Act reads: Where goods have not been delivered at the proper time, and this is not due to the buyer or an event for which he bears the risk, it is free to him to decide whether he will demand the delivery of the goods or cancel the purchase." Jan Hellner made the following comment: "The Sale of Goods Act does not make any exception to the buyer's right to demand fulfilment of the contract even for the case where the purchase related to certain specific goods and these were already destroyed at the time of the contract or were destroyed later. If this is established, however, the buyer cannot obtain a judicial decision for the fulfilment of the purchase; this is usually justified by reference to the maxim '*impossibilium nulla est obligatio*' (no one has a duty to do what is impossible)" - Hellner 1967, 82.

If one interprets the word "duty" as "a duty explicitly imposed by a statute", the maxim does not express any logical necessity. A statute can exist, demanding of one to do the impossible. But if the word "duty" means "morally justifiable duty", one can argue that a "duty" to do the impossible cannot be a (moral) duty at all; in the same manner as a "bachelor" cannot be "married".

13) Nobody can transfer more rights than he himself has Interpreted most naturally, this maxim is a norm, not a logical proposition.

> Let me consider the following situation: A person, A, is the owner of a real-estate property which is encumbered by the fact that the right of use has been given over to B. A sells the property to C and manages to do this in such a way that B loses the right of use without receiving any compensation. In this way C has got more than A had, namely a right of ownership not encumbered by a right of use. There is no logical impossibility in this situation. Only the clear *legal* norm seeks to prevent it (cf. Ch. 7 sec. 11–15 of the Real Property Code).

One may also regard the maxim 13 as a *moral* norm, justifiable by B's claim to legal certainty.

Yet, interpreted in a particular manner, perhaps lacking practical importance, the maxim expresses a kind of logical necessity. The word "to transfer" presupposes that nobody can transfer what he does not possesses. Analogously, nobody can pour a quart of water from a jug which only contains a pint.