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On Law and Reason

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1. The term "a source of the law" can refer to causes of the fact that a legal norm has a certain content. For example, political views of a minister responsible for drafting a statute are a source of the law in this sense. This conception, however, leads to unacceptable conclusions. There are, of course, many things which causally influence some judges, e.g. prejudices concerning political enemies, good or bad health, the judge's family and personal situation etc. Are all of them sources of the law?
2. Moreover, the term "a source of the law" can refer to a source of knowledge concerning the content of legal norms. But there are many sources of knowledge, e.g. newspapers, private conversations etc. Again, are all of them sources of the law?
3. The term "a source of the law" can also refer to a "source of validity" of legal norms. Here it is a matter of the last factor which transforms a completed project into valid law. With regard to statutes, promulgation is a source of the law in this sense, since it converts a draft into a statute.

Stig Strömholm (1988, 297) regards the expression "texts which a lawyer must, should or may *proffer*" as less adequate than "texts which a lawyer must, should or may *pay attention to*". Certainly, the former has a formalistic flavour. Many sociologists would certainly find it more important that a certain factor affects the decision-making than that it is cited. Yet, the concept "source of the law" is not a sociological but a normative one, adapted to the context of *justification*. In this context, one can hardly imagine a justificatory norm which tells a judge: "You may allow this text to affect your decision-making but you may never cite it". Such a norm would promote dishonesty. Whatever may actually affect the decision-making, may also be cited.

6.2 Must-Sources, Should-Sources and May-Sources of the Law

6.2.1 Why Three Categories of Sources of Law?

The division of the sources of the law into three categories that one must, should or may proffer as authority reasons is applicable to many legal orders. It reflects the following distinctions.

1. Some texts, practices etc. are sources of the law, other are not. One cannot imagine a legal system without authority reasons, that is, without sources of the law.

   To be sure, one can imagine a *society* without authority. All reasoning would then solely rely on substantive reasons. But within this reasoning, one could not regard legal norms as binding or valid. Since the concept of valid law has a certain normative content (cf. section 4.7.2.), a valid legal norm, by definition, possesses an authority: One ought *prima facie* to obey it, not because of its content but because it is a legal norm.

It follows that one can make the distinction between some texts etc. that are and some that are not authority reasons. One *may* proffer the former, not the latter, as such reasons. Legal textbooks, e.g., though not binding, may be proffered in this manner, newspapers etc. may not.

2. Some sources of the law are *binding*. In Sweden, the binding law consists mainly of statutes; Cf. Ch. 1 Sec. 1 para. 3 of the Swedish Constitution (*Regeringsformen*): "Public power ought to be exercised under the law". It follows that one can make the distinction between some sources of the law (or authority reasons) that are and some that are not binding. Only the former *must* be proffered as authority reasons, while the latter *may* be thus proffered.

To be sure, one can imagine a legal system in which only one category of the sources of the law exists. For example, it may consist solely of binding statutes. But it would be unreasonable to forbid lawyers to quote precedents or legal literature. Consequently, the latter materials would sooner or later gain some authority, albeit they are not binding. But in a democratic society, it would not be acceptable to make legal literature as binding as the statutes. In other words, one needs two categories of legal sources, mandatory and permissive (cf., e.g., Hart 1961, 247 and Bodenheimer 1969, 393–4).

3. Some sources of the law, though not binding, have a particular authority, not much lesser than statutes. They are *guiding* the legal practice. Precedents, legislative preparatory materials and some other sources play precisely this role in Sweden. It follows that one can make the distinction between binding, guiding and permitted sources of the law. One must proffer the first category, *should* proffer the second and may proffer the third as authority reasons.

To be sure, one can imagine a legal system in which only two categories of the sources of law exist, e.g., binding statutes and permitted materials. The latter category would include, *inter alia*, both precedents and juristic literature. But many reasons tell for a further differentiation of the sources of law. It is, e.g., quite reasonable to assign precedents a higher authority than legal textbooks. Thus, one needs at least three classes of legal sources: binding, guiding and permitted.

6.2.2 Concepts of Must–, Should– and May–Source

The discussed distinction is an idealisation. One can elaborate more complex classifications of the sources of law. Moreover, only vague definitions of the "must-sources", "should-sources" and "may-sources" of the law are universally acceptable. Precise interpretation of these concepts varies from one legal order to another, from one part of a legal order to another and from one time to another. Different people can suggest different precise interpretations, serving different purposes etc.

> Consider, e.g., the differences between the Common Law systems and the continental European systems. In new legal systems, the doctrine of the sources of law is often unclear. In the European Community, controversies occur concerning, *inter alia*, the role of the Community directives, not "transformed" by the internal legislation. These have been considered as binding in England, cf. Yvonne von Duyn case, Eur. Court Rept. 1974 p. 13–37, but not in France, cf. Cohn-Bendit case, Conseil d'Etat 12 Dec. 1978, Rev. trim. dir. Eur. 1979 p. 157.

Consequently, a list of materials which must, should or may be taken into account also varies. In Sweden, for example, the list contained in the international private law differs from that found in the rest of the legal order; the list fitting private law may be questioned in the taxation law, etc.

The following comments elucidate the complex meaning of "must", "should" and "may".

1. The "must-sources" are more important than the "should-sources" which are more important than the "may-sources".
   One way to make this hierarchy of importance precise is, what follows.
   a. The more important sources are stronger reasons than the less important ones.
   b. Reasons strong enough to justify disregarding a less important source may be weaker than those required to justify disregarding a more important one.
   c. If a more important source is incompatible with a less important one, e.g. if a statute is incompatible with a view expressed in legislative preparatory materials, the former has a *prima facie* priority. One thus ought to apply the more important source, not the less important one, unless sufficiently strong reasons support the opposite conclusion.
   d. Many cumulated weak reasons often take priority over fewer strong ones.
   e. Whoever wishes to reverse the priority order, has a burden of reasoning.
2. If one only considers *judicial* reasoning, one may add, what follows. The courts have a strong duty to apply the "must-sources". They have a weak duty to apply the "should-sources".

This distinction is, however, difficult to state precisely. One way is to point out that the consequences of disregarding the "should-sources" are usually milder.
In Swedish law as of 1974, an official's failure to take into account must-sources was a ground of criminal prosecution; his failure to use should-sources, however, had no criminal consequences. In Swedish law as of 1987, the criminal charge applies only to the intentional and grossly negligent disregard of a must-source (cf. Ch. 20 Sec. 1 of the Criminal Code). Ordinary negligence is not criminal. The legal consequence of disregarding should-sources consists mainly of the risk of cancellation of the decision. In Sweden, the state may also be liable in torts, should its agent negligently disregard a should-source.

6.3 Norms Concerning the Sources of the Law

6.3.1 The Character of Source-Norms

I will now discuss some norms concerning the sources of the law, in brief source-norms. Let me describe their character, function, mode of existence, degree of justifiability and legal position.

A. The *Prima-facie* Character of the Source-Norms

The source-norms have only a *prima-facie* character. In a concrete situation, one may disregard each such norm, if sufficiently strong reasons justify it.

B. The Functions of the Source-Norms

1. The source-norms determine the position various sources of the law have in the legal system.
2. They help to convert some argumentative jumps into logically correct inferences.

One thus needs a jump, e.g., when implementing some precedents as premises for a conclusion concerning the appropriate role of legislative preparatory materials in the statutory interpretation. One must then interpret the precedents themselves. To do this, one must, *inter alia*, supplement them with some source-norms. The conclusion follows logically, that is, without a jump, from an expanded set of premises containing the precedents, the source-norms and some other reasonable statements.

3. The source-norms make the practice of legal reasoning more stable and the interpreted legal norms more fixed.

C. The Existence of the Source-Norms

The judges and other lawyers perform reasonings in the way suggesting that they - consciously or not - follow the source-norms. The norms constitute an important part of the legal paradigm, cf. section 3.3.3 supra.

Paraphrasing von Wright's theory of validity (cf. section 5.1.3 supra), one may say that the legal position of the sources of the law (as such which must, should or may be proffered) is relative to the *existence* of source-norms. Existence of these norms has an empirical and an analytic dimension.

1. Their empirical existence is the same as the existence of a complex of human actions or dispositions to act whose description *strongly* supports them; cf. section 5.6.1 supra. One may mention here a disposition to argue that it is correct to follow these norms, a disposition to criticise people violating them; etc.

In this context, one may discuss the empirical question whether a certain-source norm exists or not. When reading such domestic and foreign sources as, *inter alia*, writings in legal dogmatics, and perhaps participating in the legal practice, one discovers some information about these norms. Thus inspired, one may elaborate a relatively coherent hypothesis about their content. The hypothesis must be tested through studies of legal reasoning, *inter alia*, studies of arguments contained in justification of judicial decisions. One may accept the hypothesis until such studies show that the authorities, judges and other lawyers do *not* follow the source-norms.

Stig Strömholm claims, that source-norms are a second order source of law (cf. Strömholm 1988, 298). This is understandable, since he defines the sources of law as "factors" to which the lawyers actually pay attention. He thus claims that they actually pay attention to (a) statutes, precedents etc., and (b) norms, according to which they should pay attention to statutes, precedents etc.

2. But the source-norms have also an analytic dimension: They are related to the concept of legal reasoning. Though one may disregard each such norm, 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.

D. The Justifiability of the Source-Norms

1. One may inquire whether such a source-norm is *justifiable*. This question presupposes some normative standards, other than the discussed source-norm itself.
2. In the realm of profound justification, such standards are easy to think about; e.g., some source-norms are more just or more democratic than others.
3. In the contextually sufficient legal justification, the problem is more difficult. What *legal* standards determine the legal position of standards which determine the legal position of statutes, precedents etc.?

Yet, the question is meaningful. One may certainly use some source-norms as a basis for reasoning, justifying theses about other source-norms. The former convert the latter into a kind of second order customary law, or second order sources of law. The second order customary law is *valid*. Its validity is relative to the *existence* of the other source-norms, used to justify it.

4. Ultimately, one aims, and ought to aim, at *coherence* of the doctrine of the sources of law. Such coherence is always a result of an act of weighing, aimed at an optimal balance of numerous source norms and numerous criteria of coherence.
5. Since order is *prima-facie* better than chaos, a source norm which actually exists is, *ceteris paribus*, better than another, proposed but so far not followed. On the other hand, when considering several competing and not falsified hypotheses about the content of actually existing source-norms, one ought to prefer the content which has support of most coherent moral reasons.

E. The Position of the Source-Norms in the Hierarchy of Legal Norms

Assuming that the normative question of justifiability of the source-norms is meaningful, and that they can be regarded as second order customary law (cf. item D3 supra), one may discuss the position of the source-norms in the hierarchy of legal norms.

1. From the logical point of view, the source-norms are meta-norms, determining the legal status of other norms.
2. The source-norms can be altered as a result of the amendment of a statute. A statute can, e.g., prohibit the courts to quote precedents. They can also be altered in consequence of the change of other sources of the law, such as precedents, legislative preparatory materials etc. In this respect, the source-norms are thus ranked lower than many other sources of the law.
3. On the other hand, one uses the source-norms in order to justify validity and hierarchical position of other legal sources, such as precedents, legislative preparatory materials etc. One may also use them when arguing about validity and invalidity of the statutes.

No doubt, the conclusion that one should obey statutes follows from the Constitution (in Sweden, cf. Ch. 1 Sec. 1 para. 3). But one can use some source-norms to support the conclusion that a statute is obsolete or even invalid (as a result of *desuetudo*), even though it came to existence in a manner consonant with the Constitution. One may also proffer the source-norms to support the conclusion that some statutes (the "original laws") are valid, despite their having come into existence in a way conflicting with the Constitution.
From this point of view, the source-norms are ranked higher than statutes.

4. Validity of the Constitution itself is stipulated by the *Grundnorm*, presupposed within the legal paradigm (cf. sections 3.3.3, 5.3.1 and 5.8.4 supra). One may regard the *Grundnorm* as a source-norm, supported both by legal concepts and legal custom. Apparently, *this* source-norm is ranked even higher than the Constitution. Yet, it is doubtful whether it is possible not only to presuppose the *Grundnorm* within the legal paradigm but also justify it within this paradigm. It is more natural to claim that any justification of the *Grundnorm* transcends the limits of the legal paradigm. If this is the true, one can accept Kelsen's view that the *Grundnorm* is not a valid legal norm. Then, the question of its position within the hierarchy of legal norms does not occur at all.

6.3.2 Complexity of the Swedish Doctrine of the Sources of Law

The Swedish doctrine of the sources of the law is very flexible and complicated. It thus differs from the view, e.g. defended by the French exegetical school of 19th Century, that all legal questions are to be answered by recourse to statutes.

The most important source-norms in Sweden have the following content.

S1) When performing legal reasoning, one *must* use statutes and other regulations as authority reasons, if any are applicable.

All courts and authorities must thus use applicable statutes and other regulations in the justification of their decisions.
The expression "other regulations" refers to general norms issued by the Government, subordinate authorities and municipalities.
The Government can issue regulations

a. on the basis of authorisation, given by the Parliament (cf. Ch. 8 Sec. 6–12 of the Constitution);
b. as regards enforcement of a statute (cf. Ch. 8 Sec. 13 para. 1 item 1 of the Constitution);
c. as regards matters that, according to the Constitution, should not be regulated by the Parliament; this is the "rest-competence" of the Government (Ch. 8 Sec. 13 para. 1 item 2 of the Constitution).

Subordinate authorities can issue regulations on the basis of authorisation, given by a statute or the Government (Ch. 8 Sec. 13 para. 3 of the Constitution). The National Tax Board has thus a statutory authorisation to issue some norms that *must* be used as authority reasons; cf., e.g., Sec. 32 para. 3 item 2 of the Municipal Tax Act.
The power of the municipalities to issue regulations is based on Ch. 1 Sec. 7, and Ch. 8 Sec. 5, 9 and 11 of the Constitution).

Source-norm S1 does not exclude the fact that the courts and authorities may regard some statutes or regulations as obsolete or even invalid on the basis of *desuetuto derogatoria*, cf. section 1.2.7 supra.

The duty to use statutes and other regulations in the justification of judicial decisions does not necessarily imply that a court must explicitly quote them. But it must be at least implicitly clear what the statutory framework of the decision is. If a statute disregards some problems such as, e.g., the question of remoteness of damage (cf. section 3.1.2 supra), a court would often neglect to cite a specific provision of a statute. But if a statutory regulation is directly applicable, it would be a grave mistake not to follow it.

A statute or another regulation can decide that some other sources of law *must* be applied within legal reasoning.

a. Some forms of custom, e.g., commercial custom, must be thus applied.
   Cf. Sec. 1 and 10 para. 2 of the Contracts Act; Sec. 1 of the Sale of Goods Act; Sec. 1 of the Commission Business Act; Ch. 5 Sec. 12 of the Marriage Code; etc. A body organised within the Chamber of Commerce publishes the content of commercial custom.
   Cf. sections 6.4 and 6.5 infra, concerning the status of custom and precedent as the sources of the law.
b. Contracts must be also thus applied, cf. Sec. 1 of the Contracts Act. Standard contracts play a particularly great role, comparable to small legal orders *per se*.

Further, collective agreements are important, especially for the practice of the Labour Court; cf. Sec. 1 of the statute, regulating the procedure in labour disputes.

S2) When performing legal reasoning, one *should* use precedents and legislative preparatory materials as authority reasons, if any are applicable. One *should* also use international conventions, underlying the applicable national legislation, together with preparatory materials and other interpretatory data concerning these conventions (cf. Pålsson 1986, 19 ff.).

Cf. the "Tsesis-case" (NJA 1983 p. 3), concerning interpretation of a statute imposing liability for oil damage at the sea.
In the case NJA 1984 p. 903, the Supreme Court proffered the Europe- and UN-conventions concerning human rights to justify a refusal of extradition for a crime, although no Swedish statute supported the decision.

One also *should* use some customs, well established in the society, expressing general principles or accepted by previous decisions of the courts or authorities. Finally, one *should* use applicable "general recommendations" (cf. Sec. 1 of the regulation concerning the statute-book), issued by various authorities and public institutions.

Let me mention National Tax Board, Bookkeeping Board, Consumer Authority, Bank Inspection Authority, etc. (cf. Bernitz et al. 1985, 142 ff.).

This fact reflects a highly organised character of the Swedish society, where several public or semi-public organisations demand and often receive high respect.
S3.) When performing legal reasoning, one *may* use, *inter alia* the following material.

a. Some custom (so far it does not constitute a must- or should-source of the law, see S1 and S2).
b. Some quasi-legal norms, issued by various private or semi-private institutions.

One may mention the Press Ombudsman, the Press Opinion Council, the Radio Council, the Trade and Industry Stock Exchange Committee, Sweden's Bar Association, etc.

c. Professional legal literature (e.g., handbooks, monographs etc.).
d. Precedents and legislative preparatory materials which do not directly touch upon the interpreted legal text but which give information on evaluations in adjacent areas of law.
e. Judicial and administrative decisions which are not reported in the leading law reports, NJA (and therefore do not have the same standing as the precedents published in NJA).
f. Draft statutes.
g. Repealed statutes, provided that they give information about still actual evaluations.
h. Foreign law, unless it is incompatible with some overriding reasons, such as the so-called *ordre public*.
i. Other materials, constituting evidence of well-established evaluations, e.g. private pronouncements by members of various legislation draft committees, members of Parliament, ministers etc.

Established evaluations are (may-) sources of the law, because their justificatory relevance depends not only on their content but also on the fact that they are established. They thus are proffered as authority reasons, not as substantive reasons. Cf. section 6.3.5 infra on the character of the latter.

It is difficult to make a list of materials that one may *not* use in legal reasoning. Certainly, within justification of *judicial* decisions, one may not use political opinions expressed by the parties or interest groups, such as trade unions or employers organisations. This fact reflects a demand of objectivity the courts and authorities are expected to fulfil. This demand of objectivity is, however, difficult to state precisely (cf. Eckhoff 1987, 308 ff.). One certainly *may* use materials showing that a given group, say consumers, deserve special protection.

Within legal *dogmatics*, the demand of objectivity has a partly different character. For the sake of space, I must leave this problem aside.

As far I know, the growing complexity of the doctrine of the sources of law is an international phenomenon, by no means restricted to Sweden. A plausible explanation of this trend is this. Modern society is more and more complex and dynamic. This fact results in increasing complexity and rapid change of legislation. At the same time, citizens demand that the law is highly fixed and acceptable at the same time. Legislation alone cannot fulfil these postulates. A very free interpretation of statutes could perhaps fulfil the demand of acceptability but hardly the requirement of fixity. One needs an extensive set of authority reasons and, at the same time, a relative freedom to organise them into a coherent whole. The should- and may-sources of the law create such an extensive set, yet permit the interpreter to relatively freely insert morally required modification.

6.3.3 Are Substantive Reasons Sources of the Law?

The discussed list of may-sources is apparently strange because it does not contain *substantive reasons*. No doubt, one *may* proffer various substantive reasons, including moral judgments one endorses. Among various substantive reasons, one certainly may consider historical knowledge of conditions the statute was intended to remedy, history of the language and concepts, the so-called "nature of things" subject to the statute etc. For that reason, e.g., *Aulis Aarnio* (e.g., 1987, 87 and 92) regards substantive reasons as a kind may-source of the law. Indeed, *all* legal reasons, substantive or not, are sources of the law in the broadest sense.

Yet, substantive reasons are qualitatively different from authority reasons. They are by definition no sources of law in the narrower sense, adopted in this work. This definition covers only texts, practices etc. a lawyer must, should or may proffer as *authority* reasons.

One "underpinning" reason in favour of this definition is the fact that it reflects the fairly established language which makes often a distinction between the authoritative sources of the law and other, substantive, reasons (cf., e.g., Raz 1979, 53 ff.)

Moreover, substantive reasons are difficult to place in the classification of must-, should- and may-sources. Consider, e.g., the following view of *Hughes* (1968, 430): "Does (the argument from injustice - A.P.) stand on any different footing from the argument that a court should adopt a certain interpretation because there are earlier authoritative decisions which hold that way? It would not suffice to say that the latter is a legal argument because courts *must* be persuaded by it while the argument from injustice is only one that they *may* listen to, for courts have frequently brushed aside precedent and declared openly that for reasons of justice they will create a new rule." Neither can one say that precedents are *prima-facie* prior to substantive reasons. This would mean that precedents have priority over considerations of injustice, unless some additional reasons exist which justify the reverse order. But what are these additional reasons? If they are substantive reasons, as it is plausible to assume, then the whole combination of substantive reasons is generally prior to precedents! It is difficult to make sense of the reverse priority order, *prima-facie* or not. Finally, it would not suffice to regard the argument from justice and other substantive reasons as must-sources, since the latter are *binding* in a sense in which substantive reasons are not. The best solution is thus to regard substantive reasons as qualitatively different, located *outside* of the hierarchy of legal sources.

One must weigh and balance substantive reasons and authority reasons. The weight of the latter is *prima-facie* determined by the must-, should- and may-hierarchy. The weight of the former is independent from this hierarchy.

6.4 Custom

The postulate that custom must be followed is the most ancient means to increase fixity of practical conclusions. Substantive reasons may fail to give a single right answer to a practical question. This might cause social conflicts. To avoid problems, one can always do the same others do.

A complication results from the fact that no reason exists for an individual to do *everything* his neighbours do. Though all my neighbours prefer whisky, I am perfectly free to rather drink vodka. On the other hand, I am not so free to drink much more then they do. The following distinctions must thus be taken into account in connection with custom.

A1. Custom in the broader sense can be defined as any kind of factual regularities in human behaviour.
A2. Custom in the narrower sense covers only such regularities in human behaviour as are connected with endorsement of a norm stating that one should behave in this manner.

We are interested only in the second kind of custom.

The role of custom in the law is also affected by the fact that the law is intimately connected with practice of the courts and authorities. One must thus make the following distinction.

B1. Customary law in the primary sense is defined as custom of the people (connected with a norm-endorsement, cf. A2), which *must* or *should* be regarded as a legal authority reason. In this sense customary law arises among the people, and courts should adapt themselves to this customary law.
B2. Customary law in a secondary sense is defined as an established practice of the courts and authorities. It is created by this practice, not by the people.

To be sure, one may perhaps ignore what one's neighbours expect but it is not so easy for persons affected to ignore judicial decisions. This fact together with the influence of Legal Positivism and Legal Realism explains this strange identification of customary law with judicial practice. However, contrary to suggestions made by some Legal Realists (e.g., Strömberg 1980, 50 ff.), I do not adopt this terminology. It is better to call the judicial practice "judicial practice", not "customary law" (cf., e.g., Strömholm 1988, 216). It is also important not to adopt a terminology which encourages one to ignore the spontaneous norm-creating activity of people. Only weak moral reasons support the conclusion that the courts and authorities should have monopoly of creation of legally binding norms. One may thus argue that judicial and administrative practice create relatively fixed norms which have a democratic legitimacy. This is true but it does not imply that fixity of the spontaneous custom is lower and its legitimacy inferior. Much stronger reasons support the contrary conclusion. Firstly, the custom of people may be relatively fixed, perhaps more so than the practice of the authorities. Secondly, an indirect democratic legitimacy of judicial and administrative practice is hardly superior to the direct democratic legitimacy of popular consensus. Finally, the hypothesis is plausible that people tend to live together in a morally acceptable way. The hypothesis is also plausible that authorities can make mistakes. In consequence, such a spontaneous custom may easily have an even more coherent support of moral reasons than the norms created by legislation and judicial practice.

A more important complication results from the fact that one may regard the very source-norms, determining the legal status of *all* the sources of the law, as a kind of custom. Existence of the source-norms involves complex of human actions or dispositions to act whose description *strongly* supports them; cf. section 5.6.1 supra. Among dispositions of this kind, one may mention a disposition to argue that it is correct to follow these norms, a disposition to criticise people violating them; etc. These dispositions can certainly be called "custom". This custom determines legal validity of all legal norms, including, *inter alia*, norms of customary law.

In Swedish law, the legal status of customary law is not uniform. Some custom *must*, some *should*, some *may* and some may *not* be regarded as a legal authority reason.

The following kinds of custom, *inter alia*, *must* or *should* be regarded as authority reasons (cf., e.g., Eckhoff 1987, 229 ff.).

a. Custom which is both reasonable and well established, e.g., in some professions or some parts of the country (cf., e.g., Sundberg 1978, 172). This demand reflects the postulates of rationality and fixity.
b. Custom which expresses some general principles of law. This requirement corresponds to generality as a criterion of coherence, cf. section 4.1.4 supra.
c. Custom of the people which the courts and authorities recognise as a legal authority reason.

These three kinds of custom are, of course, not independent from each other. A well-established custom often both expresses some general principles and is recognised by the authorities.

An institutionally recognised custom (item c supra) receives an additional authority. A special case of an institutional recognition occurs when a body of experts writes down some kinds of customs. *Responsa* of the Swedish Chamber of Commerce provides a good example (cf. Bernitz et al. 1985, 144 ff.). A particularly strong "amplification" of the authority of custom may result from the fact that some statutes confirm the duty to obey customary law and stipulate some conditions of it. For example, the condition of reasonableness is formulated in the Finish Code of Procedure, Ch. 1 Sec. 11 (cf. Klami 1984, 16 ff. and 43 ff.; cf. Aarnio 1987, 80).

The normative questions, such as Why ought one to obey customary law in general?, Why ought one, in particular, to obey customary law possessing the above-mentioned properties?, etc. usually exceed the framework of the legal paradigm. When engaged in the deep justification of the legal reasoning one may, however, give a moral answer to them, e.g., emphasising the fact that people expect relatively fixed and reasonable custom to be respected.

6.5 Precedent

6.5.1 Introductory Remarks

A precedent is a decision of a concrete case which becomes an authoritative pattern for future decisions. The point of following precedents is, of course, to make the law fixed and judicial decisions predictable.

Swedish courts regularly follow precedents, perhaps in ever increasing dependence. The following source-norm is acceptable in legal reasoning concerning Swedish law (cf. Bernitz et al. 1985, 109 ff.):

S4.

a. Decisions rendered by the Supreme Court, the Supreme Administrative Court and the highest special courts such as, for instance, Labour Court, Housing Court, Market Court and High Insurance Court, *should* be taken into account in legal reasoning in relevantly similar cases, both in practice and in legal dogmatics.
b. Decisions rendered by such courts as courts of appeal, administrative courts of appeal, lower insurance courts etc. *may* be taken into account in legal reasoning in relevantly similar cases. They also *should* be taken into account in relevantly similar cases before the court that has made the precedent decision, in legal dogmatics, and perhaps also before lower and regionally parallel instances with similar competence. Finally, they *should* be taken into account in legal dogmatics,

This norm is open: one might use the term "precedent" in a broader sense, to include decisions of other higher courts and even authorities. It is, however, not easy to tell, how great the authority of some instances is. Cf. section 7.6.2 infra (collision-norm C9) about various factors, influencing authority of precedents.

6.5.2 Ratio Decidendi and Rationality

How is it possible for a legal system based on constant copying of old decisions to change?

> Of course, the law can change through legislation, but it also evolves without a change of statutes. A decision rendered *in pleno* can also change a precedent (the Code of Procedure, Ch. 3 Sec. 5), but a change may take place without involving *plenum*.

The answer is that only in similar cases do precedents become patterns for later decisions. One may always find differences between the precedent and the case to be decided.

> An example. In the case NJA 1937 p. 1, the Supreme Court pronounced that debts in dollars can be paid according to their nominal value despite the decline in the value of the dollar, but in the case NJA 1952 p. 382, the Court refused to recognise this principle as regards Polish zlotys. By the way of reason, the court stated that zloty notes cannot, according to Polish statutes, be imported into Poland. The deeper reason must have been that zloty notes, as a result of this prohibition, are difficult to sell abroad according to their nominal value. The situation of dollars is different.

Is it then possible to avoid following any precedent whatever? No. A precedent must be followed only in such cases as *essentially* resemble the precedent case.

The essential elements of the precedent case, used as guidelines for the subsequent case, are the *ratio decidendi*; other elements are *obiter dicta*. The *ratio* is a necessary condition of the decision which thus would have been different if the *ratio* had been different. Every use of a precedent as a pattern for future decisions is actually a generalisation of the precedent into a precedent-rule, stating that one must decide all cases with the same *ratio* in the same way.

What elements should one regard as essential, i.e., as the *ratio decidendi*? It depends on a complex reasoning in the concrete case, involving weighing and balancing of two kinds of reasons. First, one may consider reasons *adduced* by the court in the precedent decision with the aim of justifying the decision and with the belief that they were necessary to justify it. Second, one may consider the reasons estimated as necessary to justify the decision, even if not adduced in the decision (*constructed ratio decidendi*; cf. Eckhoff 1987, 143).

> A good method to establish the constructed *ratio decidendi* is to consider a set of precedents, at best extended in time.
> In interpretation of precedents use is made of a number of arguments which in part resemble conclusion by analogy in statutory interpretation. Practice as a source of the law resembles a markedly casuistic statute, the application of which calls for conclusion by analogy on a large scale. But here, I disregard such problems.

The "reflective equilibrium", resulting from weighing of such reasons, varies between different persons, places and times, depending on moral evaluations, procedural rules etc. The accepted technique in Sweden is to re-explain and re-justify the *ratio*. No simple criteria of *ratio* are thus established. Neither do they exist in other countries (cf., e.g., Simpson 1961, 148 ff. and 1973, 77 ff.). Following the *established* evaluations by determining what cases are essentially similar, only helps us to some extent to distinguish between *ratio* and *dicta*. Though a few guiding principles assist deciders, the step from the "given" premises (such as the description of the case together with the established criteria of *ratio*) to the conclusion concerning the *ratio* constitutes a jump. To establish the *ratio*, one must mix "reason and fiat" (Fuller 1946, 376 ff.). However, this jump is reasonable, if the conclusion follows from these "given" premises together with some additional reasonable statements; cf. sections 2.7 and 3.2 supra. As stated in chapter 4 supra, the additional premises are thus reasonable, if they highly fulfil criteria of coherence and discursive rationality. "(T)he rules applied to the decision of individual controversies cannot simply be isolated exercises of judicial wisdom. They must be brought into, and maintained in, some systematic interrelationships; they must display some coherent internal structure" (Fuller 1968, 134). In brief, whereas the point of following precedents is to make the law highly *fixed*, the method of so doing is connected to the ideas of *coherence* and *D-rationality*.

6.5.3 Why and To What Extent Ought One to Follow Precedents?

The following substantive reasons support the conclusion that precedents should be followed by subsequent judicial practice.

1. Precedents should be followed because this will promote the *uniformity* of practice, and thereby justice and legal certainty. This corresponds to generality as a criterion of coherence, cf. section 4.1.4 supra.
2. By following precedents the court can avoid the evaluation afresh of similar cases, which would be unjustifiable from the viewpoint of economy (c. NJA 1972, 253). Of course, various coherent considerations support the requirement of economy as such.
   Further arguments exist for the following precedents of *higher* courts.
3. The judges of superior courts are better qualified and more experienced, and their decisions should therefore be a model for lower courts.
4. Anyway, they are likely to reverse the lower court on appeal, if this court does not pay attention to precedents.

On the other hand, some substantive reasons tell against a very extensive use of precedents in order to create general norms.

1. The primary task of the courts is to decide *individual* cases, while the legislator is empowered to enact general norms. A high degree of faithfulness to precedents may disturb this division of powers.

2. Since the judges are appointed, not elected in a democratic manner, the increased power of the high courts is contestable from the point of view of democracy. (Yet, the democratically elected parliament can always change the statutory law and thus affect the judicial practice.)

One may, however, doubt whether these reasons, connected with the opinion that the courts should not be made too strong, are applicable to a country like Sweden, where the parliament and the administration are in many respects stronger than the courts.

3. A clear statutory norm provides a better support for predictions of future decisions, and thus for the fixity of law and legal certainty, than a precedent decision of an individual case.

This reason provokes some doubt, too, since such a clear and, at the same time, just statutory norm may be impossible to design.

It is thus plausible to conclude that on balance, the reasons for following precedents weigh, ceteris paribus, more than the reasons against.

6.5.4 Methods of Justifying Judicial Decisions

The value of precedents depends on weighing and balancing of those pro- and counter-arguments. One must, however, also consider the quality of the justification of the precedent decision. The following methods of justifying judicial decisions can be distinguished, depending on how general and extensive (and thus coherent) the reasoning is. (See also a similar but not identical classification elaborated by *Tore Strömberg*, 1980, 146 ff.).

1. A *pseudo-justification* is neither general nor extensive. In some older cases, the courts gave extremely *brief* reasons for the decisions, in other the reasons were quite *unclear*. In the decision it was written, e.g., that the plaintiff or the respondent had or had not a certain right, without stating any exact ground for this statement. Often it was not possible to know at all which general rule the court had followed.

The method dominated in Sweden in the first half of 20th Century. To some extent, it still is applied, e.g., in Finland and Denmark.

> As an example one may cite NJA 1947 p. 299. An association was held responsible for damage negligently caused by the supervisor of a shooting range owned by the association. The Supreme Court majority expressed itself so obscurely that it was not clear whether it considered the association liable because the supervisor's position was considered to be equivalent to one of management; or because his position was judged as connected with particular risk; or because a contract-like relation was considered to exist between the association or the injured person.
> A decision might also be justified with the use of unclear expressions of the type "must be assumed" etc. For example, in the case NJA 1954 p. 268 a person having a significant con-

nection with Bulgaria made an application to collect an amount which had been deposited in Sweden for his account. The Bulgarian state contested his right to collect the amount personally and stated that the payment should take place through a Swedish-Bulgarian clearing account and be made to him in Bulgaria. The Supreme Court majority recognised the Bulgarian state's right to plead in the case but without giving any reason other than that the members of the majority "found no hindrance to exist to the consideration of the Bulgarian state's plea", after which the case was decided in a way favourable to that state.

This method makes coherence of the decisions very low. For this reason, it is, at least *prima-facie* or *ceteris-paribus*, not acceptable.

2. The *simple subsumption method* is general but insufficiently extensive. The court presents the decision as a logical consequence of a general rule and some facts. It does this even in hard cases, in which the general rule is not contained in a statute but constitutes a result of an evaluative interpretation, based on additional premises which are not reported.

The method dominated in Sweden at the end of 19th Century. It still is applied, e.g., in France.

In many cases, the court forced the whole reasoning into one sentence with many subordinate clauses and the decision as a consequence ("since… and since… inasmuch as…, then" etc.). *Stig Strömholm* cites the following examples: NJA 1875 p. 489, 1876 p. 458, 1877 p. 487 and 1877 p. 334.

The method is *prima-facie*, or *ceteris-paribus*, not acceptable. To be sure, it fulfils one criterion of coherence, that is, the requirement of generality but it *totally* sets aside another criterion, demanding numerous and long chains of justification, cf. section 4.1.3 supra. Coherence and hence acceptability results from weighing and balancing of *all* criteria of coherence. The act of weighing may result in a *total* elimination of one of them only if its fulfilment would very significantly decrease the degree of fulfilment of the other.

3. The *fact-stating method* is extensive but insufficiently general. In the decision there are statements concerning facts, but neither value judgments nor norms. The interpreter must himself guess which statutory rules, norms for statutory construction, moral value judgments and other premises together with the proffered facts logically imply the conclusion.

In Sweden, the method is often used in lower courts and even in the courts of appeal, albeit there to a decreasing extent. Cf. also NJA 1952 p. 184 (the Supreme Court). The High Insurance Court uses this method frequently; cf., e.g., the cases 1086/75:1, 872/79:8, 1498/81:3 and 1516/82:4.

This method is *prima-facie*, or *ceteris-paribus*, not acceptable, either. To be sure, it fulfils the criterion of coherence demanding numerous and long chains of justification but it *totally* sets aside another criterion, generality.

The following two methods are *both extensive and general*.

4. The *dialogue method*. The court proffers clearly both the reasons for and against the decision, including facts, norms and - often general - value judgments; then it concludes that the former weigh more in the case at bar; cf. section 3.2.1 supra.

The method, influenced by the Common Law jurisdiction, is frequently used also in Norway (cf., e.g., the case RB 1978 38:78). It occurs also in Sweden; cf. NJA 1984 p. 693, where the Supreme Court performed weighing and balancing of reasons for and against the principle that security transfer according to foreign law should have an effect against the transferor's creditors in Sweden.

In Sweden, the method is frequently used, e.g., by the Housing Court, Cf., e.g., the case RB 1978 38:78 where the court completed an extensive reasoning with the following statement: "A reasonable weighing of the reasons proffered above leads, according to the Housing Court, to the result that the tenancy-relation ought to expire, unless particular reasons tell against this conclusion."

5. The *sophisticated subsumption method* (or "scientific" method). The court proffers clearly both the reasons for and against the decision, including facts, norms and value judgments; then it modifies these reasons in such a way that the decision becomes a logical conclusion of them (cf. section 3.2.2 supra). The proffered norms and value judgments are often general. *Inter alia*, one aims at formulating a clear precedent-norm.

The method, influenced by the German practice, occurs also in Sweden, especially in some courts of appeals; cf. also NJA 1983 p. 487.

The dialogue method and the sophisticated subsumption method often involve formulating general principles, even if these are controversial.

The majority of the Supreme Court in the case NJA 1977 p. 176 thus expressed the following, both important and highly controversial, general principle of evidence. "In torts, there is often a controversy about what caused the actual damage or injury… Many courses of events.., independently of one another, can constitute a possible cause… In such cases, full evidence .. can scarcely be given… If thus, in the light of all the circumstances of the case, it is clearly more probable that the actual course of events was that which the plaintiff has pointed out than that … pointed out by the defendant, the statement of the plaintiff should form the basis for the decision".

In the case NJA 1976 p. 458, a bicycle pump was changed so that it could be used for shooting a cork. The owner of the pump, A, a 9-year-old, permitted B, a 6-year-old, to play with it. The cork got stuck. B asked D, a 9-year-old, to withdraw the cork. D tried to do it, accidentally "shot" with the pump, and the cork hit B's eye. All instances ruled against B's claim for compensation from A. The majority of the Supreme Court denied A's negligence, since the risk of injury had been minimal. Justice Nordenson dissented and made several subtle conceptual distinctions, in a way unthinkable in the older Swedish practice, *inter alia* between the problems of negligence, remoteness of damage and the purpose of protection given by the law of torts. He also expressed a series of general principles.

Cf. NJA 1981 p. 622. Concerning the Supreme Administrative Court *(Regeringsrätten)*, cf., e. g., the case RÅ 1978 1:19.

In the case Rt 1975 p. 290, the Norwegian Supreme Court formulated a general norm that a patient has a right to read his case record.

In future, the Swedish high courts are perhaps going to more frequently formulate general principles.

Ceteris paribus, only a highly general and extensive justification of a decision is acceptable.

However, one must not overrate the results of the justification. In hard cases, it must contain a jump. Not even the most extensive and general justification can

show that the decision is the only right one; cf. section 5.9 supra. Not even such a justification can show that the decision follows from a highly coherent set of premises, solely consisting of certain statements and statements presupposed within a particular practice, belonging to in the culture under consideration.

No doubt, the decision may follow from a highly coherent but *contestable* set of premises. The decision may also follow from a set of certain and presupposed statements together with an additional premise, neither falsified nor arbitrary. Since the added premise is not arbitrary, the hypothesis is not highly corroborated that it does not logically follow from a highly coherent set of certain and presupposed statements (cf. section 3.3.7 supra). Yet, though one cannot exclude the possibility of this logical connection, one cannot demonstrate the connection either. Neither can one show that the decision follows from a *more* coherent set of premises than any other possible decision.

6.5.5 Coherence of Judicial Decisions

I have stated above that that a judicial decision fulfils criteria of coherence only if it is, *ceteris paribus*, both extensive and general. One may thus ask the question whether all judicial decisions should be accompanied by a both extensive and general justification. The answer must be, *ceteris paribus*, affirmative. That is, it must be affirmative in an ideal situation, in which all conditions of a perfect judicial decision-making are fulfilled. The judge has thus unlimited time, knowledge, intelligence, resources etc. In the real life, however, a less extensive and less general justification of a decision is not always wrong. Sometimes, it provides the best solution, because of the following circumstances.

1. A judicial decision is, *ceteris paribus*, morally right only if *someone*, not necessarily the judges themselves, can justify it on the basis of an extensive set of general premises. One is a good judge, if one can adjudicate correctly, that is, in the manner *someone* can justify in a highly coherent manner on the basis of both the law and morality. The judge himself may thus rightly *feel* that the decision is morally justifiable, but at the same time be unable to formulate a satisfactory justification. He may thus rely more on his decision than on highly general and otherwise coherent reasons he can put behind it. This situation is psychologically quite natural, since a great part of human decision making is dictated by unconscious mechanisms. To be a good judge, one need not be an equally good legal philosopher: One may, *inter alia*, be unable to make it clear, which general value judgment and reasoning norms would in combination with the statutory provision and the facts of the case logically imply the decision.
2. A judge deciding the precedent case can be *unable to predict* all the cases the precedent is going to cover. Not even the best justification entirely prevents undesired applicability of the precedent to cases that, for various reasons, often concerning their surprising consequences, ought to be decided differently.

3. The courts may regard as their primary task to decide *individual* cases; and consider only the legislator as empowered to enact general norms.
4. When a number of judges jointly decide the case, they often must find an acceptable *compromise*. In some cases, only a less extensive and less general justification can satisfy this demand. When *unanimously* accepted, it can be a stronger precedent than an extensive and general majority opinion, accompanied by a dissenting opinion. One may thus proffer highly coherent reasons for the conclusion that a less coherent justification accompanied by consensus of the judges is superior to a more coherent one without consensus.
5. In many cases, finally, the judge has no *time* to prepare general and extensive justification.

On the other hand, several reasons support the conclusion that the courts themselves ought to justify their decisions in a highly extensive and general manner. The following reasons of this kind have been listed by *Gunnar Bergholtz* (1987, 352 ff.).

1. The modern society is no longer oriented towards obeying judgments merely supported by an uncontroversial authority, perhaps felt as reflecting God's or the king's will. The parties rather wish to have immediate access to general and extensive reasons, answering the question *why* the court has decided in a certain way.
2. Democracy requires that the courts sufficiently respect the statutes, enacted by the representatives of the people. In hard cases, an extensive and general justification is a necessary condition for making it clear that the court has actually fulfilled this requirement; cf. section 1.4.2 supra.
3. An extensively and generally justified decision directly fulfils the demand of intersubjective testability and thus an important principle of rational practical discourse (cf. section 4.3.3 supra). In other words, one knows on which grounds one may criticise it. Testability promotes objectivity of the decision, and thus legal certainty.
4. A decision gains a strong position as a precedent, if it is justified in an extensive manner, facilitating its criticism and yet not proved wrong (cf. section 3.3.2 supra on Popper's falsificationist theory of science). At the same time, a highly general character of the justification makes the precedent widely applicable. This fact promotes uniformity and thus coherence of the system of law in action. It thus promotes predictability of judicial decisions and fixity of the law.
5. An extensive and general justification helps the parties to decide whether to appeal against the decision. It also increases their chance to obtain a change of the decision, if such is justifiable.

But general and extensive justification can, at the same time, be cautious. Assume, e.g., that the court has to make a choice between two ways to justify the decision, one implying an important but contestable material principle, the other merely stating a non-controversial rule of procedure. A cautious court may then prefer the latter.

> In some cases, one may have doubts. In the case NJA 1975 p. 92, the Supreme Court thus avoided the question whether the action of the accused person constituted a crime or not,

and merely stated that this "crime" had not been satisfactorily proved. (A critic asked the question, Can a non-crime be "not satisfactorily proved"?).

In torts, the courts often avoid difficult problems of choice between the demands of necessary and sufficient causation, and simply apportion the damages.

Cautiousness is sometimes forced by procedural rules, e.g., the prohibition to decide a case, amenable to out-of-court settlement, on grounds of reasons not proffered by the parties (cf. Ch. 17 sec. 3 of the Code of Judicial Procedure).

6.5.6 The Role of Precedents in Swedish Law

Although not binding, precedents are regularly followed by Swedish courts. A lower court decides contrary to a precedent, established of a higher one, in principle only when wishing to give the latter a possibility to reconsider its practice, e.g. because the contested precedent conflicts with a statute, legislative preparatory materials or another precedent.

Using the terminology developed in section 6.2 supra, one can say that the Swedish courts have a *weak* duty to follow precedents. They *should* follows precedents, though it is not so that they *must* do it.

The practice of following precedents has a long tradition. In Rome, the edicts of the praetor played a great role since 2nd Century B.C. (To be sure, the edicts contained general guidelines, not particular decisions, but the praetor was the highest judicial authority, without legislative power.) In canonical law, both the decisions of the Pope and established judiciary practice were binding. In the Swedish state in the 17th Century, precedents still played an important role.

Later, however, there set in a period of hostility to precedents. In Denmark, one stated that "precedent makes no law" (1672). The corresponding Swedish maxim was that judicial practice "should be based on written law, not on occasional judgments" (1803). In this connection, one can cite Prussian Landrecht of 1794, having forbidden the courts to take account of precedents.

In 20th Century, the role of precedents increased again. In the majority of European countries, the precedents are not binding. Yet, the courts *should* follow them in the sense developed in section 6.2 supra.

In the Common Law countries, precedents are formally binding, although it is difficult to say whether the courts in these legal systems really follow precedents more frequently and more thoroughly than, e.g., in the case of Sweden. Indeed it might be maintained that the influence of precedents in Sweden is even greater than in England. In England there are some rules which state when a court is *not* bound by precedents. In Sweden, in absence of such rules, the precedents have a very strong influence.

In Finland, the role of precedents resembles that in Sweden. It also varies between different parts of the law, e.g., the precedents are more important in taxation law than in civil law. In Denmark and Norway, the situation is similar; cf. the

Danish case U 1950 p. 413 Ö. The latest Norwegian case, in which a lower court intentionally disregarded a precedent of the Supreme Court is Rt 1910 p. 476.

The view that precedents are *not* binding has been officially expressed in Sweden, though perhaps in a somewhat exaggerated way.

The Parliamentary Commissioner for the Judiciary (*Justitieombudsman*), in his annual report (1947), criticised a lower-court judge who had dealt with a legal question in conflict with a decision by the Supreme Court *in pleno*. In consequence of this, the Parliament's First Standing Committee on Legislation declared that the lower instance is not bound by precedents and that "only the weight of the reasons referred to by the Supreme Court in justification of its judgments should be determinative for the influence of the Supreme Court on the application of law in the lower instances." This pronouncement provoked a lively discussion, in which *Folke Schmidt* (1955, 109) expressed the following opinion: "The Swedish judge follows precedents precisely because they derive from the Supreme Court. He does this even where he believes that a different decision would in itself have been more suitable. Only if there are strong reasons indicating that he ought to adjudicate in the matter in a way different from that indicated by the precedent does the question arise of examining the *weight* of the reasons invoked by the Supreme Court."

The actual role of precedents in the Swedish law is significant. One thus does not know at all many important segments of such parts of the law as torts, if one ignores the precedents.

In connection with the importance of precedents in Swedish legal practice it is necessary also to take into account the amendments of 1971 to the procedural law, and the corresponding rules of administrative law. According to Ch. 54 Sec. 10 of the Code of Judicial Procedure, and Sec. 36 of the Code of Administrative Procedure, in principle the Supreme Court and the Supreme Administrative Court are only to act in cases in which (a) it is important that a general ruling be given by way of precedent for judicial practice or (b) special reasons exist, such as a grave mistake made by the lower court. The legislative preparatory materials to these provisions support the conclusion that the law-givers intended to strengthen the role of these courts in creating precedents (cf. Govt. Bill 1971 no. 45 for amendment of the Code of Judicial Procedure etc., especially p. 88).

It is not certain whether the amendments caused the increase of the role of precedents (cf. Strömholm 1988, 338), or *vice versa*. The most reasonable hypothesis is that of a causal feedback: the increased role of precedents caused the amendments, and then the latter amplified the former (cf. Bergholtz 1987, 429 ff.).

In this connection, one may also take into account Ch. 3 Sec. 5 of the Code of Judicial Procedure, and Sec. 5 of the Administrative Courts' Act, according to which the Supreme Court and the Supreme Administrative Court *may* decide a case at a plenary sitting, if any of the divisions of the Court, when deliberating a decision, expresses an opinion diverging from a legal principle or statutory construction which has formerly been adopted by this Court.

It is not possible to read into these provisions a strong duty on the part of these courts to follow their earlier decisions. But those decisions that have been rendered *in pleno* have an exceptionally large influence.

6.6 Legislative Preparatory Materials

6.6.1 Introductory Remarks

A draft of a statute is often accompanied by legislative preparatory materials (*travaux préparatoires*), explaining its meaning, reasons and purposes.
In Sweden, one elaborates the *travaux préparatoires* at the following stages of the legislation process (cf. Bernitz et al. 1985, 87 ff.).

1. The Government or the Parliament takes the legislative initiative; the latter may demand that the Government appoints a legislation committee.
2. The Government appoints the legislation committee or, in some cases, an individual investigator. The responsible minister issues a pronouncement, containing directives for the committee or the investigator, prepared by the staff of the ministry. The directives are published in the series "Committee Directives" and in the Parliamentary Reports (*riksdagstrycket*).
3. The committee or the investigator prepares a report, published in the series "Official Investigations of the State" (*Statens offentliga utredningar, SOU*).

The Government can instead let a ministry or a central administrative agency perform the investigation; the ministry publishes the resulting memorandum in a special series. The Government can also appoint a *governmental* committee.

4. The ministry staff discusses the report.
5. Several persons and bodies are invited to present comments.
6. The report is again discussed within the ministry.
7. The Council on Legislation (*lagrådet*) may be asked to issue a pronouncement about the report, especially if it regards important matters.
8. The ministry prepares a Government Bill. It consists of a draft of the statute; a general justification; a special justification, section by section; and a summary of the previously elaborated material. The Bill is published and included into the Parliamentary Reports.
9. The relevant parliamentary commission discusses the Bill. The result is published in the Parliamentary Reports.
10. The Parliament *in pleno* discusses the Bill.
11. The Parliament enacts the statute; the statute is promulgated and published in the official statute-book, *Svensk författningssamling*.

Nytt juridiskt arkiv (NJA), part II, contains a survey of important preparatory materials.

6.6.2 Ratio Legis

Why are preparatory materials valuable? The answer to this question within the legal paradigm (that is, within the contextually sufficient legal justification) is "because they constitute a result of legislative work and we usually take them into

account". The answer within the *deep* justification is, on the other hand, "because they constitute the evidence of the purpose of the statute (*ratio legis*)". The idea of *ratio legis* is complex (cf., e.g., Klami 1980, 17 and Aarnio 1987, 99 and 125). One must pay attention to the following facts.

1. One may argue that what the legislator intended to say is more important than what he actually said in the statute. The literal text of the law may have been unfortunately phrased. For that reason, one recommends the so-called *subjective construction of statutes*, following the *ratio legis*.
2. The *travaux préparatoires* constitute the evidence of what the individuals who participated in the legislative process, such as members of the legislative committee, the persons invited to present comments, the minister, the members of the Parliament etc. thought and wished. This evidence is regarded as a data basis of the subjective construction of statutes.
3. Though often called "the will of the legislator", the *ratio legis* is, however, not the same thing as the personal views of the individuals who participated in the legislative process. It is rather the most coherent system of value-statements and norm-statement, consistent with everything they said, or at least with the most important opinions they expressed.

The idea that the main purpose of statutory construction is to discover the legislator's will was expressed in the year 1750 by *C.H. Eckhardus* (1750, 2): "To interpret is nothing else as to derive the author's opinion from his words and reason" (*interpretari nihil aliud esse, quam sensum auctoris ex eius verbis et ratione declarere*). In the first half of the 18th century this idea was expressed by Thibaut and Savigny, among other authors, in the second half, for example, by Windscheid, at the beginning of the present century, among others, by Bierling (cf. Wróblewski 1959, 160–1 n. 26). The subjective construction of statutes were, however, often based on other premises than the *travaux préparatoires*. Until the World War I, the role of the latter was rather insignificant.

6.6.3 Is Subjective Interpretation of Statutes Possible?

When commenting upon the role of the so-called subjective interpretation of statutes, one must, however, answer some well-known objections.

1. We cannot see into the mind of another human being. Consequently, some critics pointed out that we cannot *know*, but merely guess, what the persons participating in the legislation actually wanted.

However, this objection disregards the fact that one may have quite good reasons to justify one's guesses about other people's thoughts. The main argument is analogy. If I am pale, shout abuse and hit out at everybody who gets in my way, then I am angry. *A* resembles me in many ways. At present A is pale, is shouting abuse and hitting out at everybody who gets his way. Conclusion: *A* is angry at the present time.

R. Tuomela (1977, 39 ff.) has developed a more sophisticated idea (introduced by Sellars) that mental "acts" of thinking can be analysed by analogy to speech acts. Cf. Chisholm 1966, 62 ff.

2. The concept "legislator's will" can be criticised in another way as well, and this has in fact been done by, *inter alia*, Hägerström (1953, 17 ff. and 354 ff.), Lundstedt, Olivecrona (71 ff. and 73 ff.) and other representatives of the Uppsala School. They have pointed out that one could not consistently understand this concept to mean that the legislator is an individual person who with his will embraces at one and the same time the entire legal system; cf. section 5.5.2 supra.

However, subjective construction of statutes does not need to rely on such fictions. To be sure, one proposes as a correct constructional method one which derives the interpretation of the statute from a set of premises including the information of its *ratio*. It is also true that one supports the *ratio* with propositions about the will of the persons that participated in the process of legislation. But neither the *ratio* nor the proposed construction of statutes follow logically from the description of this will alone. Neither they follow from a set solely containing these propositions together with some certain premises and premises taken for granted within the legal paradigm.

The step from the *travaux préparatoires* to the conclusion concerning psychological will of the persons participating in the legislation is a *jump*. The step from the information about this will to the *ratio legis* is another jump. The step from the *ratio* to the proposed construction of the statute is a third jump. All three jumps can be reasonable, if derivable from a set of reasonable premises.

To put it more exactly, the "subjective" interpretatory conclusion can be derivable from a complex set of premises including some which are reasonable, although neither certain nor presupposed. The conclusion thus can follow from a set of reasonable premises containing

a. some pronouncements in the *travaux préparatoires*;
b. some source-norms telling one in what a way one *should* let the *travaux préparatoires* affect statutory construction; among other things, how one should establish a priority order between pronouncements of different persons and thus eliminate contradictions;
c. the hypothesis that these pronouncements often express various (neither permanent nor unitary) intentions held by various (not always the same) persons who participated in the legislative process; and, finally
d. some more profound reasons, *inter alia* general principles, supporting both these pronouncements and their use in a concrete piece of statutory construction.

3. Another objection to subjective statutory construction is based on the fact that in some exceptional cases evidence may show that a pronouncement in the preparatory materials is not in accord with the actual intention of the person who pronounced it.

However, the *travaux préparatoires* should be taken into account in the statutory construction because they *as a rule* correspond to such intentions. The practice of subjective construction of statutes reflects this normal situation. The demand of fixity of the law, and thus predictability of the statutory construction is a reason, perhaps sufficient, for the conclusion that one always should pay attention to the *travaux préparatoires*, even at the expense of sometimes making a mistake as regards the real intentions. But even if someone thinks that such mistakes are never to be accepted, the following norm is reasonable: Whoever holds that the pronouncements in the preparatory materials do not correspond to the actual intention, has the burden of argument.

4. The last objection that I intend to discuss here is the following one. The legislative power in Sweden belongs, first of all, to the Parliament. Thus the "legislator's will" ought to be sought above all in the *Riksdag*. Despite this, in judicial practice *ratio legis* is as a rule extracted from the statements of legislation committees, statements of the responsible minister, the opinion of the Council of Legislation etc. One pays much less regard to speeches made in the parliamentary debates on the matter. In other words, it seems that the "legislator's will" lies in statements by the legislator's assistants, not in statements by the "legislator" himself. How does this fit the idea that in subjective construction of statutes one discovers the legislator's will? (cf. Strömholm 1966, 216).

This objection can be answered by repeating that the subjective construction of statutes is based on the *ratio legis*, not on the personal views of the individuals who participated in the legislative process. As stated above, the *ratio legis* is the most coherent system of value-statements and norm-statement, consistent with everything they said, or at least with the most important opinions they expressed. Both the problem and the solution have been well-known since a long time. Cf. Thibaut 1802, 103: "*Die Raison des Gesetzes*" is "*durch eine Art juristische Fiktion als besonderer Wille des Gesetzgebers zu betrachten*."

6.6.4 Is Ratio Legis *Compatible with Democracy?*

One must, however, consider the following objection. Democracy requires that the Parliament has the legislative power. This power is exercised by real people who have real intentions. Is it compatible with democracy to replace this reality with the ideal construction of the *ratio*? One can answer this objection in the following way. The power of the Parliament is not the same as the possibility of any parliamentary majority to immediately fulfil all its intentions. The transformation of these to the statutes is regulated by legal norms whose justifiable *ratio* is to impose *rational limitations* upon the intentions.

This fact creates some analytical problems. Whereas the law is construed according to the "legislator's" will, the "legislator" is constructed according to the law. This is, however, *not* a vicious circle but rather a "spiral". A vague idea about the content of the law helps one