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Law and Philosophy Library 8

On Law and Reason

Preface by Jaap C. Hage

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7.5.6 *Teleological Interpretation of Statutes According to Ekelöf. Multiple Goals*

Ekelöf's method is particularly difficult to apply to provisions having *many purposes*, often conflicting with each other.

In private law, interests of the parties compete with each other; in torts, e.g., the interest of the victim to receive compensation competes with legal certainty of the alleged tortfeasor. In public law, too, a number of considerations of purpose pull in different directions. When interpreting provisions of taxation law one must weigh and balance financial interests of the state, legal certainty of taxpayers, public interest to protect efficiency of trade and industry, the interest of the authorities to make the law easy to apply, etc. Where penal provisions are concerned, regard should be paid, *inter alia*, to general deterrence, to preventing recidivism, to re-education of the offenders and to the ideal of just punishment. One may even find competing purposes in Ekelöf's procedural example, quoted above. Ekelöf emphasises saving the time, money and trouble which would ensue from two trials. But this is not the sole purpose to be considered. If it were, *all* changes of indictment would be permissible. The competing purpose is, of course, legal certainty of the defendant, in particular protection from being harassed through unpredictable and prolonged changes of indictment.

One can also speak about direct and indirect purposes. A provision of the law of torts may thus directly intend to compensate a certain type of damage and indirectly aim at promoting economic efficiency. "Thus, we can usually attribute to any rule or other precept that directs behavior one or more 'immediate' (lowest-level) goals, one or more 'intermediate' goals, and one or more 'ultimate' (higher-level) goals" (Summers 1982, 64; cf. Weinberger and Weinberger 1979, 142).

Moreover, one must make a distinction between 1) purposes of the considered provision; 2) purposes of other provisions connected with it; 3) purposes characteristic of the part of the law to which the provision belongs, e.g., penal law; and 4) purpose considerations common to the whole legal system; an example of such a consideration is the purpose of protecting legal certainty. In fact, all legal substantive and authority reasons can be presented as such purposes. Can all of them be derived in Ekelöf's manner, that is, from results of literal interpretation of the statutory provision in ordinary cases? If one can thus derive only some of them, why should one ignore the other? To conclude, Ekelöf's method is too simple.

7.5.7 *Teleological Interpretation of Statutes According to Ekelöf. Restricted List of Interpretative Methods and Sources of Law*

For the sake of simplicity, Ekelöf cuts down the sources of law and the legal methods to a minimum. One should, in principle, pay attention to the statute, its results and own judgments telling one which of those are good.

> As stated above, Ekelöf also recommends paying attention to precedents which he regards as more important as the *travaux préparatoires*. But this thesis is quite independent from and incoherent with the main point of his theory.

Why should one not recognises that also the *travaux préparatoires*, the juristic literature and the traditionally established juristic norms of reasoning possess some (different) degrees of authority? Ekelöf hopes that such a simplification makes his method more objective, less dependent on value judgments made by the interpreter. This would make the law more fixed. But, as stated above, this hope is not realistic. Just the opposite, the method deprives the interpreter of valuable data which would restrict the necessity to follow own judgment. The hypothesis is thus plausible that the method does not increase fixity of the law. At the same time, it certainly decrease coherence of legal reasoning, since it makes its supportive structure much less sophisticated. In particular, it decreases the data basis of legal reasoning; this collides with a principle of coherence (cf. section 4.1.5 supra). It also cuts down the chains of justification; also this effect diminishes coherence (cf. section 4.1.3 supra).

One may perhaps interpret Ekelöf's idea to cut down the legal sources and methods as an expression of the radical optimism, typical for the reformist debate of the 1930th. He claims in fact that the judgment of the interpreter is sufficiently good to establish the reasonable purpose of the statute, without any auxiliary means but the statute itself and a radically restricted list of the sources of the law. In other words, the decrease of coherence due to the diminished list of authority reasons would be compensated with the increase of coherence due to the greater role of substantive reasons. My view is more conservative. It is difficult both for the law-givers and the interpreters to compute what is good for the parties and the society. As social engineering is concerned, our century is the time of failure. One needs reliance on tradition even to approximate the best solution of conflicts between people, as well in general as in particular cases. The established legal method is an extremely important part of this tradition. One should beware of rejecting it.

Ekelöf seems to recognise this conclusion in an indirect way when regarding precedents - though not the *travaux préparatoires* - as sources of the law side by side with the statute; he thus does not dare to deprive the interpreter of *all* the auxiliary means. If there is a precedent concerning a "special" case, then Ekelöf would always follow that precedent, although perhaps he would have solved the problem in another way if he had strictly followed his method. But why does he thus surrender only as regards precedents? While not to follow the *whole* established doctrine of legal sources and methods? One can perhaps explain Ekelöf's restrictive approach in this connection by pointing at his background, that is the Uppsala School scepticism as regards legal reasoning.

The same background explains perhaps why the purpose of a statutory provision according to Ekelöf is to be established by a detour through studying results of literal interpretation of the provision in ordinary cases. He seems to rely more on sociological hypotheses about these results, combined with "good judgment"

of the interpreter, than, e.g., on clear pronouncements in the *travaux préparatoires*. This may reflect the Uppsala school disposition to introduce some "scientific" sociology to the legal method, often regardless the price. But this detour is unnecessary, since the traditional legal method is not less rational than sociology.

7.5.8 Teleological Interpretation of Statutes According to Ekelöf. Conclusions

One can regard Ekelöf's method as a special case of reasoning by analogy, that is, a statutory analogy based upon relevant similarities of results.

Ekelöf claims, among other things, that his method should supersede both extensive interpretation of statutes and creation of more general new norms through statutory analogy. In consequence, he denies the relevance of the distinction between these interpretatory methods. But this kind of scepticism has some disadvantages, cf. section 7.3 supra.

Frändberg (1973, 143 ff.) has elaborated a theory of statutory analogy founded on the concept of "legal basis" of a legal norm, n, defined as "a desirable state of affairs, t, such that n is an instrument of achieving t." (id. 172). Frändberg's "legal basis" is clearly related to the purpose of the statute in Ekelöf's sense.

This emphasis upon the results represents an effort to recommend consequentialist reasons while maintaining loyalty to the authority of statute. By the way, one or another form of consequentialism is another typical property of Legal Realism, including the Uppsala School.

Because of their substantive character, consequentialist reasons are justifiable by recourse to various criteria of coherence. Authority of statute, on the other hand, is justifiable by recourse to fixity of the law. As all serious methods of statutory interpretation, Ekelöf's method must pay attention to both these values.

But is Ekelöf's method superior in these respects than the traditional practice of statutory interpretation? Despite Ekelöf's contrary opinion, one can suspect that the traditional legal method as a whole gives a higher degree of legal certainty than Ekelöf's radical simplification. I have thus argued above that exclusive application of Ekelöf's method, instead of the traditional one, certainly decreases coherence of legal reasoning. This means that it decreases the degree of support the reasoning receives from the *prima-facie* law and morality. I have also argued that exclusive application of this method probably decreases predictability of reasoning and thus fixity of the law.

These results are by no means surprising. During centuries of continual legal discourse the traditional method underwent repeated testing precisely from the point of view of both predictability and coherence of legal reasoning. Can all this evolution really be worthless?

One *should* use Ekelöf's method in some cases, provided that no reasons exist to rather use other interpretatory methods. But the method deserves no monopoly.

7.6 Solution of Collisions Between Legal Norms

7.6.1 Collisions of Rules and Principles

I have already discussed some examples of corrective construction of statutes, *inter alia* reduction, creation of a more general new norm through statutory analogy, and some types of teleological interpretation. The so-called solution of collision between legal norms is another type of corrective interpretation.

When discussing collisions between legal norms, one must consider the following distinctions.

A collision of *rules* occurs when the rules are logically, empirically or evaluatively incompatible. Logical incompatibility violates the demand of L-rationality. Empirical incompatibility violates the demand of efficiency, that is, it is incompatible with the principle of goal-rationality; cf. section 4.3.3 supra. Evaluative incompatibility means that the simultaneous obeying of two norms logically implies violation of a third one, corresponding to an assumed moral or legal value.

Two rules are thus *logically* incompatible (cf., e.g., Weinberger and Weinberger 1979, 132) if:

a. one of them commands an action while the other forbids it (a contrary logical incompatibility); or
b. one of them forbids an action while the other permits it (a contradictory logical incompatibility).

A special form of logical incompatibility occurs in connection with qualification rules (see section 5.6.5 supra). Two such rules are logically incompatible if one of them states that a certain circumstance is necessary and another that it is not necessary for the validity of a certain legal action. Consider the following examples. A rule stipulates that A has a power to make judicial decisions, another one stipulates that he has not. Or, one rule demands written form for validity of a certain contract, whereas another admits validity of both written and oral contracts of this kind; etc.

If two rules are logically incompatible, one cannot observe (or apply) them simultaneously. I disregard here some problems concerning permissive rules.

Two rules are *empirically* incompatible if they are not logically incompatible but nevertheless one cannot simultaneously observe (or apply) them for another reason. Suppose two rules, one of which obliges A to work daily from 4 a.m. to 4 p.m., the other of which obliges him to work daily from 4 p.m. to 3 a.m. These two rules are empirically incompatible; A cannot, as a practical matter, work for 23 hours a day.

Two rules are *evaluatively* incompatible even if one can - logically and empirically - observe (or apply) them simultaneously, when their simultaneous observance (or application) would lead to legally or morally objectionable effects, whereas each norm separately does not lead to such negative consequences. Suppose, e.g., two rules, one of which obliges A to work daily from 8 a.m. to 4 p.m., the other of which obliges him to work daily from 4 p.m. to 11 p.m. A can work for 15 hours a day but the labour law forbids it.

The Norwegian case Rt 1953 p. 1469 constitutes a good example. A fisherman who had shot a seal in the sea was prosecuted for not having paid the appropriate fee under the Game Act. He did, however pay another fee - in accordance with the Seal Fishing Act. It is clear that there is no logical incompatibility between these two statutes. Logically speaking, the fisherman could pay a fee twice. He could also probably do this from the physical and economic points of view. It would, however, be morally objectionable to demand a double fee of him. Cf. Eckhoff 1987, 276.

Collisions of *principles* (cf. Alexy 1985, 78 ff.) are connected with several difficult problems.

1. A *total* logical incompatibility of *rules* may be ascertained analytically and *in abstracto*, without considering particularities of the case; one rule prohibits exactly the same as another one permits or orders. (Concerning the distinction between total and partial incompatibility, cf. Ross 1958, 128 ff.). On the other hand, collision of principles occurs only in particular cases. For example, an increase of freedom leads in some *but not all* cases to a decrease of equality.

Yet, following *Aarnio*, one must play down this difference. A *partial* incompatibility of *rules* also depends on particular circumstances. Assume, e.g., that a rule stipulates that shops must be open on Saturdays and another rule demands that they must be closed on religious holidays. Incompatibility occurs when a holiday is on a Saturday. But the question whether any holiday is on a Saturday or not cannot be answered by an abstract analysis of the rules alone. One must know circumstances of a particular case, exactly as when the question concerns incompatibility of principles.

2. Following one principle only seldom totally excludes following another. One may rather speak about *weighing and balancing*: An increased degree of following of one principle results in a decreased degree of following of the other. Assume, e.g., that one principle demands justice and another economic efficiency. In some situations, increased justice results in decreased efficiency and *vice versa*.

Yet, one should not think that weighing and balancing occurs only when principles collide, not when rules collide. Whenever one discovers a collision of *prima-facie* rules one should set it aside, either by reinterpreting (and thus reconciling, harmonising) these rules, or by arranging a priority order between them, cf. section 7.6.2 infra. The natural way to assure a reconciliatory interpretation is to perform weighing and balancing of various considerations.

3. Still, when following one of the colliding *prima-facie* rules in the case under adjudication, one very often (though not always, see above) does *not* follow the other one. Paying attention to one principle has seldom such a result. In some situations, e.g., increased freedom results in decreased equality and *vice versa*, but one ought not to make decisions entirely disregarding either freedom or equality of the persons involved.

Yet, *Aarnio* has correctly pointed out that, in *some* cases, one of the colliding principles *is* to be entirely eliminated in the sense that, all things considered, it ought not to affect the decision of the case. The principle *pacta sunt servanda*, e.g.,

may be eliminated in this sense when one considers a case of an unreasonable contract and decides that it ought not to be followed at all (cf. the Swedish Contracts Acts, Sec. 36).

7.6.2 Collision Norms

When a non-jurist, e.g. a linguist, considers that two statutory rules are incompatible (logically, physically or evaluatively), he can describe this incompatibility and perhaps criticise it, but he cannot set it aside. *Legal* interpretation, on the other hand, has as one of its main purposes that of setting aside the incompatibilities and thus transforming the legal system into a perfectly consistent, more coherent and more D-rational one.

The following collision norms help the jurists to set aside collisions between legal norms.

C1) Whenever one discovers a collision of legal norms one should set it aside, either by reinterpreting (and thus reconciling, harmonising) these norms, or by arranging a priority order between them.

As regards principles, reinterpreting and harmonising is easier than arranging a priority order. One may thus try to understand, e.g., the principles of justice and economic efficiency in a way making it possible to simultaneously fulfil both these principles to a high degree. On the other hand, it would be difficult to justify a priority order demanding, for instance, that justice always goes before efficiency, *fiat iustitia pereat mundus*.

C2) Whenever one reinterprets or ranks norms which are colliding with each other, one should do so in a manner which one can repeatedly use when confronted with similar collisions between other norms. Strong reasons are required to justify a reinterpretation or a priority order applied *ad hoc*, i.e., only in the considered case.

This collision norm expresses an important criterion of coherence, that is, generality; cf. section 4.1.4 supra and Alexy's rule J.8, section 4.3.4 supra.

C3) One should interpret different sources of the law, if possible, so that they are compatible. Interpretation of statutes, precedents, legislative preparatory materials etc. should thus affect each other (Aarbakke 1966, 499 ff.).

A reconciliation is thus often more important than arranging of priority orders. This is a consequence of the *prima-facie* character of socially established legal norms (cf. section 5.4.1 supra). *Prima-facie* reasons must be weighed and balanced.

C4) If strong reasons militate against such a reconciliation, the must-sources of the law have *prima facie* priority before the should-sources and these before the may-sources. If one abandons this priority in an individual case, one

should justify one's departure with strong reasons (cf. Alexy's rule J.14; section 4.3.4 supra).

One must thus proffer strong reasons for, e.g., giving precedents priority before a clear statute. No reasons, on the other hand, are required to assign the latter a priority before the former.

C5) When a higher norm is incompatible with a norm of a lower standing, one must apply the higher.

Cf. sections 5.3.1 and 5.6.2 supra on the hierarchy of legal norms. Consider, e.g., the following hierarchy of Swedish legal norms: a) constitution; b) statutes; c) "other regulations" issued by the Government (on the basis of a parliamentary authorisation, as regards enforcement of a statute or as regards matters that, according to the Constitution, should not be regulated by the Parliament); d) "other regulations" issued by subordinate authorities on the basis of authorisation, given by the Government or by a statute; e) "other regulations" issued by the municipalities; cf. section 6.3.2 supra. This enumeration omits individual norms, such as judicial decisions.

A particular legal order must answer such questions as, What is the precise hierarchy of legal norms? What is the status of the lower norm which collides with a higher one? Is it invalid *ipsoiure*; or can it be declared invalid if a given procedure is followed; or is it inapplicable to the particular case under consideration? What is the status of a particular decision which follows the lower norm, not the higher one? Who has the power to decide about consequences of violation of the collision norm C5?

A special question concerns the courts' competence to declare that statutes incompatible with the constitution are invalid. This right to review the material constitutionality of legislation exists, for instance, in the United States [cf. the important case *Marbury v. Madison*, (1803), I Cranch, (US Supreme Court Reports) 137] and to some extent Federal Republic of Germany (Art. 100, Abs. 1 S. 1 Grundgesetz) but not in England or France.

In Sweden, Ch. 11 sec. 14 of the *Regeringsformen* provides that no court or authority may apply in a concrete case a regulation incompatible with the constitution. But if the parliament or the government had issued the regulation, the court or the authority may refuse to apply it only when the incompatibility is "obvious".

In Norway the right to review the material constitutionality of legislation has not only been recognised to a large extent but also been exercised in a number of cases from 1890 onwards and has been expressly confirmed by the Supreme Court, cf., e.g., the case Rt 1918 I p. 401. In Denmark the right of review is recognised in principle but exercised with such caution that, e.g., Alf Ross (1958, 132) put in question its practical importance.

C6) Where an earlier norm is incompatible with a later one, one must apply the later.

C7) One may apply a more general norm only in cases not covered by an incompatible less general norm.

A person making a false income tax return is thus responsible only for a tax offence, according to secs. 2–4 of the Tax Penal Act, but not for fraud despite the fact that his action also fits Ch. 9 sec. 1 of the Criminal Code (concerning fraud). Which norm is more general and which is less general? The statute can explicitly answer this question through the use of such words as "although", "unless", "apart from",

"in accordance with what is stated below", "to a wider extent than", and similar expressions.

Sometimes the answer is obvious, even though no express term in a statute indicates this, above all in the cases where the area of application of one statute falls entirely within that of another.

In this way the provision of Ch. 3 sec. 3 of the Criminal Code, concerning "a woman who kills her child at birth", is an exception from Ch. 3 sec. 1 dealing more severely with "anyone who deprives another person of his life".

But many cases are uncertain and then one must rely on weighing and balancing of various reasons.
Assume than an employer has deducted an amount from his employees' wages in order to pay tax. Assume that the employer's bankruptcy is impending. If he pays the amount to the tax-collection authorities, he can be punished for partiality against creditors, Ch. 11 sec. 4 of the Criminal Code. If he does not pay, he can be punished in accordance with sec. 81 of Tax Collection Ordinance. If the provision of the Ordinance is a "less general norm" in comparison with the provision of the Code, then he should pay but there are also reasons in favour of the opposite view (cf. the case reported in *Svensk Juristtidning* 1958, rf. 63).

C8) If a later general norm is incompatible with an earlier but less general norm, one must apply the earlier and less general norm.

The Bills of Exchange Act of 1932 is thus less general in relation to the Promisory Notes Act of 1936, since a bill is a kind of a promisory note. The former statute must thus be regarded as an exception from the latter.

The collision norm C7 is in this manner more important than the C6. But some reasons may support a reverse priority order.

C9) If it is not possible to reconcile different precedents, one should determine which are the most important. In so determining, the following circumstances are relevant:

a. The decisions of the Supreme Court have greater authority than those of lower courts.
b. Among the Supreme Court's decisions the most important are those reached in a plenary sitting.
c. Old precedents, not confirmed by new ones, have as a rule less authority than do new precedents.
d. The value of a precedent is diminished if the bench was divided or if the precedent has been criticised.
e. The authority of a precedent is increased if a strong need exists for a legal regulation in an area, e.g., not covered by sufficiently clear legislation.
f. Published cases have more authority than such which are not reported.
g. Cases fully reported in the NJA have more authority than cases summarily reported.

h. An established practice, based on several decisions, has greater importance than a single precedent.

C10) If it is not possible to reconcile different pronouncements in the *travaux préparatoires*, one should apply the following priority order: a) reports of relevant parliamentary commissions; b) pronouncements of the responsible minister; c) other materials.

However, incompatibility results in a decrease of the authority of all the incompatible parts of the *travaux préparatoires*. A pronouncement in the preparatory materials has thus the relatively greatest authority if not questioned by other pronouncements.

C11) If possible, one must harmonise the results of the use of different interpretatory methods. Whenever the use of different methods of statutory construction in a given situation results in incompatibility, one should set it aside by reinterpreting the provision in question.

The collision norms have the same character as other reasoning norms. They do not entirely solve "hard" cases. The practice of their application differs from one part of the legal order to another. They have a *prima-facie* character: one can disregard them if important reasons for doing so exist. Yet they increase coherence and thus rationality of statutory interpretation. They thus constitute additional reasonable premises, necessary to convert juristic jumps to logically correct inferences. They also constitute a kind of customary law or at least express established moral judgments. Moreover, they are connected with the very meaning of such words as "legal reasoning"; if one refutes a great number of them, one's reasoning is no longer "legal"; cf. sec. 7.1.2 supra. And, let me repeat, they help the interpreter to transform the legal system into a perfectly consistent, more coherent and more D-rational one.

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