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Aulis Aarnio

Essays on the Doctrinal Study of Law

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To Ernesto Garzón Valdés, for inviting me on an intellectual adventure into science, man and society

Preface

This book deals with the doctrinal study of law, although the focus is on the legal reasoning in general. The topics have been chosen for a special reason. I first began to think about the value of philosophy for practical lawyers more than fifty years ago. The past five decades have shown that my curiosity has not been wasted. I am now more convinced than ever before that the old phrase "*bonus theoreticus, malus practicus*" does not hit the nail on the head. For this reason, the goal of my contribution is to increase the understanding of the value of philosophy for lawyers, especially for everyday research.

In this, I join the Scandinavian tradition, in which the interest in jurisprudence is most often intertwined with doctrinal studies of material law, such as that of civil, penal or procedural law. Good examples are *Karl Olivecrona* (procedural law), *Alf Ross* (mainly penal law), *Torstein Eckhoff* (public law), *Per-Olof Ekelöf* (procedural law) and *Aleksander Peczenik* (civil law). There are, of course, many philosophers who have approached law and legal reasoning, among other things. An excellent example was my close Austrian friend *Ota Weinberger.* In Finland, the list is quite long and representative: *Georg Henrik von Wright, Jaakko Hintikka, Ilkka Niiniluoto, Eerik Lagerspetz, Raimo Tuomela, Risto Hilpinen*, and many others.

In my case, my studies in civil law opened the door to a fascinating world quite early, where such notions as "right", "duty", "competence" and, a bit later, "norm", "prohibition", "obligation", etc., challenged the mind of the then young lawyer. Little by little, my curiosity grew and I found myself pondering the question: What am I actually doing when acting as a legal professional? I am still in this state, which is why the focus of this treatise is on the doctrinal study of law (DSL) and its theory.

There are four people who have been my "scientific fathers": *Georg Henrik von Wright*, who was my teacher, *Ludwig Wittgenstein, Stephen Toulmin* and *Chaim Perelman*. A fifth thinker should be on the list as well – but for reasons other than those mentioned above. In 1959, *Alf Ross'* book "Om ret og retfaerdighed" (On Law and Justice) invited me to see the core problems of legal thinking for the first time. Of course, Ross has also been important to me later on, but more as an opponent than a pattern to follow. Actually, almost all of my carrier since the early 1960s has been full of attempts to distance myself from Alf Ross. Now, after decades, we are

on the same side of the barricade, having different opinions, but opposing those who do not see the value of theoretical thinking for practical lawyers.

I feel sad that my thanks can no longer reach *Georg Henrik von Wright*. His significance was not limited to encouraging and supervising my work. He also created the foundation for the international rise of Finnish legal thought from the 1970s onwards. I could calmly follow his footsteps, first to Poland, the centre of European legal philosophy in the 1970s, then to Argentina, another important country in legal thought, and finally to the United States and different locations in Europe, such as Spain. My work as the president and vice-president of the International Association for Philosophy of Law and Social Philosophy (IVR) from 1983 to 1995 would never have been possible without the actual and indirect support of Georg Henrik von Wright. He was also a great help in 2001 when the Tampere Club was founded, a group of scholars representing different fields in the social sciences. Georg Henrik von Wright was the first honorary president of the club.

There have been many other people who have pushed me forward, each in their own way. First of all, I have in mind *Aleksander Peczenik*, a close friend and a great thinker who passed away in 2005. I would have not been the person I am as a legal philosopher without Aleksander Peczenik's wise thoughts and readiness to help me at a moment whenever a particular problem seemed completely unsolvable.

The other collaborator of great importance has been *Robert Alexy*. I still remember those golden days I spent in the hotel "Desiree" in Amsterdam with Robert Alexy and Aleksander Perczenik, trying to find our way in search of the foundations of legal thinking.

Jerzy Wróblewski, the central figure in Polish legal thought, and *Ilmar Tammelo*, who was working at the University of Salzburg when I started my international career in the late 1960s and early 1970s, encouraged me to publish my articles in international journals.

Ernesto Garzón Valdés earns my most heartfelt thanks. He opened my eyes to problems I would not have been able to identify without him. They concern, for instance, understanding the foundations and significance of morality, democracy and tolerance. He is not only a thinker of the highest degree but also a magnificent person. Ernesto Garzón Valdés has been a true friend for many years. The door of his home in Bad Godesberg has always been open to me and my family. As the president of the Tampere Club, he has also done extremely valuable work for both Finnish science and the Finnish culture in general.

Cordial thanks also go to *Werner Krawietz*, a collaborator and friend since the end of the 1970s. He was the first to open publishing channels for several Finnish legal philosophers, including me, and did other valuable work for the Finnish legal culture.

Jose Luis Martí and *Manuel Atienza* organised seminars for me in Barcelona and Alicante in the autumn of 2010, where I had an occasion to discuss the key issues of my work. At best, philosophical discussion is not only a great pleasure but also a privileged intellectual adventure. Cordial thanks for that, Jose Luis and Manuel.

Last but not least, Mr *Ev Charlton* earns my special thanks for the linguistic checking of the manuscript, which was done quickly, effectively, and with exceptional professional skill.

The title "Essays on the Doctrinal Study of Law" has been chosen consciously. All the chapters elucidate dimensions or points of view that are of importance for a legal scholar. Therefore, the collection includes some overlapping themes, which I have not eliminated because they emphasise, in a natural way, the weight of themes that have been, and still are, important to my work.

Tampere, Finland Aulis Aarnio
March 2011

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Introduction

Chapter 1
The Roman Heritage

Lawrence M. Friedman has analysed the problem of a modern legal culture in detail (Friedmann 1994, 117). The doctrinal study of law (later, DSL) is part of that culture, especially in the so-called Continental legal systems. One of the basic aims of this study is to identify the place for DSL in this modern legal culture, and, in this regard, to continue Friedman's analysis.

The Continental tradition of DSL does not come from nothing. DSL has been at the core of all legal sciences for centuries. Its history is at least as long as the European university tradition, which actually began in Bologna, Northern Italy, in about 1000 AD. As the 11th century was drawing to its end, the great spirits of grammar, rhetoric and logic started up a systematic study of law.

One of the leading figures was *Irnerius*, "the lantern of science", who was a master of exact reasoning and cleared the way for higher teaching and study of law, independent of the catholic church. However, Irnerius and his companions in Bologna were not those who actually developed legal thinking toward the modern DSL. The wise men of Bologna were too practical for that task. The real development was secured in the monasteries, where monks continued to translate the ancient texts into the Latin language.

Little by little, the Middle Ages left four significant institutions for the following generations (Van Caenegem 2006, 109). Two of them were born on the British Isles and two on the continent. England gave birth to the idea of parliament: the things that concern everyone need to be commonly accepted. The first traces of this line of thinking, which broke through on the continent much later, can be seen in the verdicts of local courts in 13th century England (e.g., the verdict *Lecestershire 1285 Prior of Launde vs. Ralph Basset*). Yet England was also the birthplace of the idea of common law; they created law that was *common*, *royal* and shared by *professional* judges.

These two ideas, parliament and common law, later gained a footing in the United States, and the idea of parliament also in Europe – after many diverse phases. Nonetheless, it is interesting that these medieval forms of law have also provided the seeds for the modern constitutional state. Obviously it is true that the modern forms of constitutional state only started to shape up after the French revolution, but when looking for the sources of the ideas, one should not underestimate the role of

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England and its medieval thought. The differences between the two traditions – that is, continental and common law – will not be dealt with in this study, which lays the focus only on the statutory law system and the role DSL has in it (Van Caenegem 2006, 110).

The two big ideas of continental Europe are of a different kind. The Middle Ages saw the development of general law (*ius commune*), which covered the whole of Western Europe (Mohnhaupt 2000, 657). One should, however, be cautious with this term. Apart from its apparent similarity, we are not talking about common, but literally general law. It was used broadly on the continent, especially in the areas where the Roman Empire had spread its influence, but it can't be called specifically common since there was local law in practice alongside it, sometimes even bypassing it. The basis for the later *ius commune* was found in the law created by the great jurists of the Roman Empire. After western Rome was destroyed in the whirlpool of migrating peoples, it was the fate of Roman law to fall into oblivion in the West.

Luckily, the saviour of the Roman line of thought was found in Byzantium. In 500 AD the emperor *Justinian* called together a skilled group of lawyers, who assembled, arranged and interpreted the central principles and concepts of Roman law for him. In some cases certain new additions were made, concerning the times. In any case, this event launched a lengthy era in which it was the appointed task of the legal professionals to keep law alive. There was no centralised legislation and the institution of courts was in disarray.

As was mentioned earlier, half a millennium after the creation of the laws of Byzantium, a group of talented legal thinkers emerged from the law schools of northern Italy (initially from Bologna), led by *Irnerius*. From their work, Continental Europe's dominating line of thinking began to take form. The scholars of Bologna separated law from the bonds of the church, once again creating secular law on the basis of Roman law. This is how Roman law saw its third coming in the early 11th century, once again shaped to fit the needs of the times (Strömholm 1986, 97).

As a matter of fact, all the tools of thought used by a modern Continental European lawyer have their roots in that age. The European conceptual heritage lies in Rome. We are full-scale heirs of Roman thought, which is the source of many self-explanatory and everyday concepts, such as contract, debt, commerce, trade, gift, real estate and personal property.

Gradually, Continental Europe began to acquire its "general" law, *ius* commune, which was a grammar shared by Continental lawyers that enabled them to interact regardless of their home or the language they spoke. The *ius commune* was also the foundation for other great legal codes, such as Napoleon's codification (in the early 1800s) and the German statute book on civil law (BGB).

The fourth part of the medieval legacy is natural law, although it is far from a medieval invention. The basic parts of natural law were already set up in Ancient Greece, especially by Aristotle. Nevertheless, the Middle Ages lifted it to a new level of prosperity, not least because of the work of St. Thomas Aquinas. Simplifying the point, the question is about a "natural" law, eternal, unchanging, binding all ages and peoples, and existing above secular laws. For St. Thomas, the natural law was passed

by God (Strömholm 1986, 109). The following generations have "rationalised" natural law and moved God away from the throne of law. As Stig Strömholm writes, the heyday of rationalistic natural law theory lies in the 17th and 18th centuries. It was the time of *Hugo Grotius, Samuel Pufendorff* and *Christian Thomasius*. At that time, the leading scholars saw that man, with his own mind, is capable of grasping and giving shape to the eternal principles of law that concern everyone (Strömholm 1986, 165).

Examples of this can be found in the UN's declaration of human rights and the European human rights agreement. Those documents contain many central principles of natural law. As it happens, the Middle Ages are once again among us. The brand new constitutions have resurrected a tradition of natural law that is centuries old.

The doctrinal study of law has had a central role in times of exceptionally strong centralised power (the centuries of Rome's flourishing, the age of Justinian and the Napoleonic era). Those times have witnessed the birth of the great legal codes, such as the *Corpus Iuris Civilis*, the *Code Civil* and the *Code Penal*. Paradoxically, legal scholarship, especially the analytic study of law (*Rechtsdogmatik* in German), has also found its place in times of weak centralised power. The status of the doctrinal study of law in those specific times has been exceptionally interesting. Its societal task was to carry justice, to take it over the crises of the era. This was the case, for instance, in the times preceding the German unification. Universities and academics had to fulfil the lack of legislative authority.

A good example of this is the historicist school in early 19th century Germany. *Carl Friedrich von Savigny* rose to a leading position when shaping general German law before the actual process of unification. von Savigny thought that law is created by people, springing forth like an organism or a plant. The spirit of people, *Volksgeist*, is the basis for all law, and the task of DSL is to shape that spirit into rule of law. Therefore, von Savigny advocated an idea that the meaning of the content of legal norms should be analysed through research into their historical origins as well as the modes of their transformation. Scholars as well as judges were, therefore, a kind of transmitting link between the spirit of people (the legal consciousness) and the norms of law, since only the professionals were equipped with the necessary technical tools for the forming of a legal consciousness. From the interpretative point of view, von Savigny accepted four methods; lexical, systematic, objective teleological and subjective teleological interpretation (Strömholm 1986, 264).

Despite all this, von Savigny's own thinking ran into a paradox. Since the era's German, the doctrinal study of law was not original and the necessary concepts and instruments of thought had to be pursued elsewhere. Assistance was found in Roman law, especially in the form of Justinian's legal code. Thus the paradox was complete: it was the task of legal scholars to form the legal consciousness of the German people, using the concepts of Roman law as their tools. This is how the school of von Savigny and their followers once again came to preserve and renew the main principles and core contents of Roman law. The result was the so-called Pandect law, which was used as the foundation for the subsequent statute book on

civil law (BGB), and, through this, as the building blocks of Finnish thought on civil law as well.

Considering the doctrinal study of law, von Savigny's work, despite its paradoxes, is important. When the centralised power was forceless and unable to produce general law for the numerous German kingdoms, the creation of law was left in the hands of the universities. The process was everything but democratic, but it also transformed the ancient inheritance of European thought into the modern age.

As much as scholars in the 18th century, modern European scholars are in need of the "ius gentium" of our time – i.e., elements that *bind together* the European thought on law, or legal thinking in general. This is one lesson of the past. It does, however, leave some core issues open. According to the traditional definition, the task of DSL is to produce knowledge about (valid) legal norms, as well as to systematise them. This definition is easy but problematic. It is more a point of departure than a well-founded conclusion or result from unambiguous premises.

This is the reason why this contribution begins with a topic to which I will return at the end of the book. The problem as such is simple to formulate: Does legal thinking, especially DSL (in German: Rechtswissenschaft), change or progress in some reasonable sense of the term, or, slightly in other words, what is actually changing and which is permanent in legal thinking and in DSL? Is DSL actually the same in our times as it was, let us say, in the 18th century? When it comes to its core and methods, some legal historians either deny the changes altogether, or say that DSL has not changed all that much – as is often believed – after it began to take its present form. What was the doctrinal study for centuries ago can still be discussed under the same heading. The legal order, the statutes, as well as the society, have changed, while DSL has not.

A glance through some of the early writings on law seems to provide support to this invariability. On the other hand, however, a 300-year-old textbook on civil law and an interpretative work on modern law do not seem to share any other common feature bar the fact that they belong to the same branch of study. Nevertheless, both impressions are deceptive.

To prove that doubt, I have singled out a few older studies for closer inspection, consciously choosing my examples from the Nordic countries. This decision carries weight, especially due to the fact that the significance of the Nordic tradition (as well as the Continental one, which provides its background) seems to be fading to the point of even being forgotten. This is partially so due to the process of "anglo-americanisation" legal theory *Ronald Dworkin* or *Joseph Ratz*, not to mention *H. L. A. Hart*, have gained, and, of course, with strong merits, a superior status when compared to the classics of the German-speaking world, such as *Georg Simmel, Max Weber* and *Joseph Esser*, or the Italian classic *Norberto Bobbio*.

However, all Nordic, and especially Finnish, legal thinking historically "comes" from Germany, or from the German-speaking world, the background to which is strongly based on Roman law (Aarnio 1983d, 9). One would not have to mention anything other than the receipt of Roman law in the 17th century, German pandect law and the movement of the conceptual doctrinal study of law (Begriffsjurisprudenz).

The significance of this influence in Nordic legal thought cannot be underestimated. Bypassing the classic Continental tradition is at least partly based on the absence of historical consciousness. The fact that the influence of Roman law in the British Isles ended in the 13th century has not been taken into account to a sufficient degree. The paths of the European legal thinking on the Continent and in England went in different ways. Therefore, speaking about DSL (Rechtswissenschaft) in the Continental sense, we have to give the Nordic classics a chance.

Chapter 2
Bonus Theoreticus, Malus Practicus?

Two Classics

The idea of a good theoretician being lacking in practical affairs is an old one, as the Latin used in the title of this chapter shows. Following this idea, the thesis could also be translated as follows: A practising lawyer can never be a theoretician. It seems to me that opinions of this type still exist on both sides of the borderline. Still, I am trying to prove this thesis inaccurate and, even better, to show through various examples that the thesis was refuted over 300 years ago in the finest Nordic legal thought of its time.

The first clear challenge to this thesis was formulated by the Swedish scholar *David Nehrman-Ehrenstråle* (1695–1769; later Nehrman) in 1729. The same line of thought, although with less clarity, was represented by the Finnish classic *Matthias Calonius* a few decades later. Nehrman's ideas are worthy of special attention because, in a way, he marks the beginning of an important turn – i.e., the turn towards the Nordic pragmatism in the doctrinal study of law. Nehrmann's text book was also used in Finland, at Turku University (founded 1640), due to the fact that Finland was a part of the Swedish Kingdom until 1809, when Finland became a Grand Duchy of Russia until Finland's independence in 1917. Even during the Russian period, Swedish was the official language, and the main parts of the Swedish Constitution were valid in Finland.

The development in the Swedish, as well as the Finnish, DSL did not happen through coincidence but through following a thoroughly considered research attitude. This is why the old classics might have something to say that seems to have been overlooked in the current focus on the present. Even though we might not learn anything from history, a glance into the past helps us to *identify ourselves*, to understand where we have come from and, thus, why we are like we are. In addition to this, analysis of the change in the doctrinal study of law through the early classics offers an instrument for recognising features of change as well as the relationship between theory and practice.

Let us begin with a few of Matthias Calonius' ideas. I am not striving for a doctrinal-historical analysis since my attention is focused on the title of this chapter. Describing someone as the "father of the Finnish doctrinal study of law" sounds formulaic, almost phrase-like. Still, this epithet comes in handy when discussing

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Matthias Calonius (1738–1817), for it expresses not just genuine appreciation but also respect toward the work he did to lift early Finnish legal thought to a European level (Calonius, 19). When working as a teacher at the university, Calonius was the sole member of the faculty of law (at the Academy of Turku) for a long time, which meant that his direct influence on the legal thought of his time was profound, probably greater than the influence of any other scholar working as a university professor after him.

The date of presentation for Calonius' published lectures has been given as 12.4.1810, but he had already lectured on the same issues in the Academy of Turku in the late 1700s. The lectures were first published in 1908 and not only dealt with civil law, but criminal, procedural, church and sea law as well.

By current standards, the lectures were not very original. Calonius took advantage of many Swedish sources without referring to them with any clarity. He especially used the texts of *Olof Rabenius,* a professor at the Uppsala University, using them to a much larger extent than the specific Rabenius references in the lectures show (Calonius, 41, 55, 134, 149, 204, 226, 234). Nonetheless, this was a common habit at the time, and we should not lay blame on Matthias Calonius for the lack of references (Björne 1980, 117). What was more significant was that Calonius lectured in Latin, and once Latin lost its place as the principal language of teaching in the 19th century, it started to become strange to new generations of lawyers.

The theoretical background represented by Calonius – i.e., the 18th century thinking on natural law – was also forced to give way to newer thoughts. In the early 1800s, the notes made at Calonius' lectures were still part of the unofficial study material for law students, but, little by little, Calonius started to be forgotten as a teacher and a researcher. There were some references to him in certain studies of DSL, but Calonius had practically been pushed to the side-rail in the doctrinal study of law before the Finnish publication of "The lectures on civil law". The reason was Latin language, which was slowly being pushed out by the Swedish language.

> After Calonius' time, teaching was mainly done in Swedish, because that was the lingua franca of the cultural elite in Finland at that time. It was not until 1866 that Associate Professor *Wilhelm Lavonius* gave the first lectures in the Finnish language at the University of Helsinki (Kangas and Timonen 1998, vii). The lectures were based on the imperial language statute of 1865, and on the decision made by the university's council on the grounds of this statute. It can be pointed out that *Elias Lönnroth,* the father of the Finnish national epos "Kalevala", had already given lectures on the peculiar features of legal language in the 1861–1862 term, but these lectures cannot really be said to have been jurisprudential.

From a doctrinal-historical viewpoint, Calonius' fate has been everything but oblivious. On the contrary, the publication of the second edition of "The lectures on civil law" in Finnish (1998) has shown that interest in Calonius and his work has gathered momentum in the recent past. For Finland, Calonius was a mediating link to both European thought and the tradition of Swedish doctrinal study of law. This is quite clearly shown once we place Calonius into the context of a longer cultural tradition in Sweden and Finland.

Rabenius himself is not the only significant name. Another important character in Calonius' background is Nehrman. In his lectures, Calonius has 17 direct

references to Nehrman, which is the same as his references to Rabenius. Due to this, it is not unreasonable to claim that Matthias Calonius was the successor to Nehrman's systematic thinking and also its developer in Finland, which is all the more important once we notice that Nehrman's largest merits were in the presentation of the brand new Swedish civil code of 1734, while it was Calonius' task to interpret and systematically present the code of 1734. It is this pursuit, the transfer of the "Nehrmanian" (and therefore European) legal systematics to future generations, that is one of Calonius' greatest merits in the Finnish doctrinal study of law. Systematic thinking and its concepts provide the toolbox with which a lawyer can manage the endless process fuelled by changing legal provisions.

Even though Matthias Calonius was forgotten in the circles of students as well as practising lawyers, his thoughts remain a part of the legal cultural tradition in Finland. An innumerable number of legal concepts, all the way to the very basic terms, are still in use in the doctrinal study of law, 200 years after Calonius' lectures. There lies the enduring value of Matthias Calonius' life's work. We must remember that Calonius was not only a scientist and a teacher. He also worked, among other tasks, as a member of the Supreme Court and as a procurator, having a significant influence in the development of Finnish judicial life.

To get a better idea of the intellectual life of Calonius, and of the early 1800s in general, we must take a closer look at the achievements of his mentor, David Nehrman-Ehrenstråle, in the Swedish doctrinal study of law. They expose a single important difference in Calonius' and Nehrman's attitude toward scientific research and the higher education based on it. Nehrman was 150 years ahead of his Finnish colleagues in many respects, which had a natural explanation.

Toward Modern DSL

Nehrman was the heir of German enlightenment, and a learned man who got his most important influences from the University of Halle, which was where the first university textbooks were published in the vernacular – that is, in German (Modeér 1979, XII; Björne 1984, 88). It follows from this that *Christian Tomasius* (1655–1728) held the first jurisprudential lectures in German, also being the first to publish scientific journals in his native language (e.g. *Geschicte der Weisheit und Torheit*). Tomasius was quickly followed by others. Nehrman studied at Halle in 1716, when Tomasius was the Director of the university (Rector) and his student *N. G. Grundlig* was Nehrman's teacher in natural law, among other subjects (Modeér 1979, XII and XIII).

What is most important is that, at Halle, Nehrman absorbed the idea of teaching the doctrinal study of law in the vernacular. Of course, there were many Swedes who thought highly of the idea of Swedish as the language of science (as a legacy of Sweden's golden time as a major European power).

This fact has not been seen as crucial in Nehrman's choice. He represented the new European culture that set a new task for universities: to make a connection

with the surrounding society. The teachings were no longer meant to stay inside the universities, making the vernacular the only possible tool for the spreading of knowledge. Nehrman has himself expressed this aim in the introduction to one of his works, where he clearly writes about the reasons for the book's publication in Swedish. According to him, the main reason was that the book should not prevent those without knowledge of Latin from reading it. Nehrman also hoped that the work would be read by other than law students – that is, people who needed to know what was regulated in the Swedish law.

In saying this, he was not only thinking about practising lawyers but also about commoners for whom it was important to know the content of their own law. Nehrman especially emphasised that someone who was pursuing the work of a judge should seek all the necessary knowledge, not by memorising the sections but by learning *independent thinking*. An adequate motivation for acquiring the knowledge, the diligence in the search for truth and the necessary intellect would not help a judge if he did not want to be an independent thinker. These ideas still work as advice to young lawyers of our time. Even in those days, Nehrman clearly saw the responsibility inherent in the work of a judge and in that of the scholar.

In a way, the selection of language also saved the central principles of domestic law for future generations. This is because Nehrman was strongly opposed to the receipt of foreign law, which had become common in the 17th century in the cases where the old Swedish law grew silent. For Nehrman, using foreign law as grounds for judgement was the same as using a foreign language in education.

Nerhman's opinion had both positive and negative consequences. The strengthening of the status of domestic law in Swedish jurisdiction was positive, but this process came at the price of severing the *direct* connections between Swedish legal thought and the main streams of the rest of Europe. Even Nehrman's writings could not be read by anyone except the Swedes (as well as their Scandinavian neighbours). This is the dilemma of all small legal cultures. There is a major difficulty in trying to be strong domestically while at the same time taking distance from the international legal community. Still, Nehrman's choice can be seen as the strength of Swedish (and Finnish) law in the long run. A domestic judicial culture, cultivated with care and precision, has a lot to offer to others. Actually, that has been seen in recent decades as law has become international and English has assumed the position of the legal *lingua franca*. On the other hand, the intellectual connection to continental Europe was important in Nehrman's case as well. He passed on what he had learned at Halle for use in domestic thinking.

Nehrman was one of the all-time most productive authors of study material in Sweden (Modeér 1979, XVI). He wrote textbooks, compendiums, lectures, and everything that could be of use to the students, which is why Nehrman held intelligibility and ease of reading as important values when working on texts. He even turned down administrative tasks (e.g. the appointment as Rector) to take the time to work on his writing for the good of the students. Nehrman has also been said to have been an exemplary teacher. He addressed his students personally and tried to direct their attention toward questions they would benefit from, all the while supporting them and warning of the dangers of excessive pedantry. What is most important is

that David Nehrman always stood for justice, doing this independently and without the influence of the establishment, even though he was otherwise loyal to the church and to the authorities. Nevertheless, he could also be sharply critical at the moments when justice and truth were in danger of being swept away by ornamental language and trivial theories.

On the other hand, Nehrman was a researcher and teacher at a time of change. The beginning of his career happened at the time when medieval land and city laws were still in effect in Sweden, even though he lived to see the birth of the big codification of 1734 – the most highly developed legal code in Europe at the time. Some might even talk about the two "phases" in Nehrman's teaching and output. For these reasons alone, Nehrman was obviously a pioneer and a central source of influence in Swedish judicial life. He represented both the old and the new.

When interpreting the old land and city laws, he clearly resisted the use of foreign law as the ground for judgement. At the same time, he rejected the use of Roman law as a direct source. On this point, Nehrman was peculiarly multifaceted, for his reasoning was leading him in two directions.

First of all, the rejection of Roman law had some purely practical reasons. According to Nehrman, university studies were to be occupationally oriented and close to practice. In this regard, Roman law was a cultural obstacle, a kind of covering layer that prevented the young law student from understanding the central questions of domestic law. While Roman law was strange, domestic law was familiar, "our" law, and for these reasons one was not supposed to study Roman law at the university but use one's time in learning the fundaments of the national judicial system.

Nonetheless, Nehrman himself did not abandon Roman law completely. On the contrary, even though Roman law was not supposed to be taught at the university, it was to be *researched* to the extent that it worked as a tool for comprehending Swedish law. It was of great concern to the doctrinal study of law, which is why Nehrman thought Roman law was an important subject for one who wished to become a researcher (*academicus*). It is this very comment that makes Nehrman's relationship with Roman law Janus-faced and troublesome. What was "natural" law for Nehrman was actually the Roman one, and because Swedish law was supposed to be in accordance with natural law, it became, for practical reasons, something like Roman law.

This paradox is not as inherently strange as it might seem on first reading. This was the way of thought in the school of Halle as well. As was already referred to, the same line of thinking was later represented by Friedrich Carl von Savigny. The historicist school he founded carried out ideas rather similar to the thoughts of Nehrman a hundred years before. So, not much is new under the sun.

On the other hand, Nehrman had a true respect for the old Swedish law, on the clarification of which he spent most of his life's work. Roman concepts and ways of thinking formed a natural and secure foundation for the interpretation (Modeér 1979, XIX). Roman law offered something like an intellectual framework, into which the old domestic law could be positioned. This had been the case all through the 17th century, when Swedish Courts of Appeal began the receipt of

Roman law. Thus the connection between Roman and domestic law was already known by Nehrman, making it possible to both maintain and strengthen the national judicial tradition and take advantage of the European intellectual currents, especially Tomasius' teachings on natural law. In this way, the old Swedish law, in its Carolingian-nationalist sense, Roman law and the teachings of the "Halle school" could be brought together in harmony.

After the Codification of 1734 had come into force, Nehrman's attention was directed towards *the interpretation* of the brand new legislation. It was no longer a matter of interpreting old sections or unclear legal principles that had lost their relevance in many places. Now there were new statutes available. Nehrman, faithful to the authorities, held them as the most important legal source. The method of legal studies was literal interpretation. For the clarification of the new legislation, he published a revised edition of his Introduction to the Swedish law. Nehrman explained his positivist stand by noting that every jurist has an obligation to improve their knowledge throughout their lives, to test their beliefs in every case as it comes before them, to confirm as right what truly is right and to defend what they, after careful deliberation, see as true.

So, the time had now come to interpret the statutes and to find the legislator's intention, but once again there was a reliable guarantee in case the law grew silent and the intention was not made clear: the concepts and principles of Roman law would serve the final firm ground.

Matthias Calonius, who lectured and wrote more than half a century later than Nehrman, stood in favour of the then prevalent thinking on natural law. He was not "orthodox" or overtly theoretical in this. He focused more attention on the statutes of the 1734 Codification than most of the natural law theoreticians of his time. Instead, in many sections of "The lectures on civil law", the influence of Roman law becomes clear, even to the extent to that the section on the law of property mainly leans on Roman law, and partially on old Swedish law as well. However, Calonius' thinking shows the same strain as Nehrman's and the pandectist's approach. In difficult (hard) cases, their interpretation was based not only on the provisions of the current law but also on legal tradition, as well as the concepts and principles of Roman law, and, as a final instance, on a certain kind of natural law. But herein lays the charm of both of the Nordic classics. They were messengers of European legal thought in their own time, which was of great importance because the modern doctrinal study of law was still finding its way in both Sweden and Finland.

Still, Nehrman's case highlights modern legal thought even better than Calonius', a fact that is worth mentioning as far as the general Nehrmanian view is concerned. He was strongly opposed to the thesis repeated by many: *Bonus theoreticus, malus practicus.* In his opinion, the matter was quite the opposite. Good theory is always *included* in good practice. For Nehrman, it was self-evident (*solkar*) that theory and practice could not be separated since they were both present in the lawyer's thoughts at the same time (*stezse wara tilhopa*).

In this way, David Nehrman left the future generations with a valuable, but difficult legacy: one cannot strive for an occupation or practice legal conventions without the foundation offered by theory. Statutes are forgotten as the years go by, as is the

message of the textbooks, but the equipment offered by legal principles, central concepts, rules of reasoning, and the general doctrines and theories will last.

This current in Nehrman's thinking invites us to evaluate it one more time. As was said before, Nehrman had a strong sense of duty towards law students. He published his lectures because the students spent a lot of time taking notes (*the Studerande anwänt mycken tid på afskrifvandet*). Man was supposed to be made to think, not to copy. To think about what? Here we come to two claims presented by Nehrman:

> (1) In studying the doctrinal study of law, practical goals were supposed to dominate. The students were not to be taught theories, but the kind of information they would later need in practical life. In common terms, it could probably be said that the teaching should be practically oriented. This was why the students were to use the university to gather information and skills they could later take advantage of in practice. A good judge does not need anything other than proper information; what is the valid law? This is the core and purpose of adjudication (Modeér 1979, XVI).

The claim seems overtly practical, hostile to theory and makes it seem like studying the doctrinal study of law should be "pipe-like" and profession-directed. One might even say that, according the above-cited passage, the teaching of the doctrinal study of law in universities should be more like studying in a present-day vocational high school, or, in a sense, as it is practised by the law schools of American universities. If Nehrman's words are interpreted like this, the title of this introductory chapter is truly correct: *Bonus theoreticus, malus practicus*. This way of thinking banishes theory from university teaching and makes the cultural aims of the university crumble. Still, this was *not* Nehrman's intention, nor do I think would it have been approved by Matthias Calonius. Nehrman's true stand is made evident in his other main thesis:

> (2) Roman law as well as the natural law of the time are highly important studies for those who wish to become researchers (*högnödigt studium för den som vill bliva academicus*). The doctrinal study of law, as a science, can never be practised without theory. Each claim about practice is filtered through theory; it is, in the words of the modern philosophers, theory-rich. Good theory serves good practice and vice versa (Modeér 1979, XVIII).

Hence the theoretical approach is not only a sufficient but also a necessary tool for scholars, not so much for the teachers. On the other hand, only a good scholar can be a good teacher. That is Nehrman's final conclusion. I have on some occasions talked about "smuggling" theory into practice, especially at times when there has been suspicion about the significance of theory. There is no reason to retreat from this idea, but it still only forms half of the truth. For Nehrman (and for me too) the theoretical approach should be an *integral* part of legal thought. In this regard, Nehrman can be interpreted in two ways.

First of all, he was an heir of the school of Halle, and adopted the *thinking on natural law* from there. Here, Matthias Calonius was a relative of Nehrman, even though Calonius' natural law was, to be exact, not as deep and well articulated as Nehrman's. However, for both of them, the doctrine of natural law was a strong and uncontested *philosophical hypothesis* in all of their scientific work.

It does not matter *which* natural law tradition they committed themselves to. What is essential is the *fact* that natural law had a central role in shaping their

thinking and that this philosophical hypothesis was actually *filtered* through to their practical statements. As regards the European doctrinal tradition, both of the masters were constantly working with the ancient tension between natural law and legal positivism. As the system of provincial law had its gaps, the principles of natural law were adopted as the foundation for gap filling and interpretation – especially in gap filling, where the natural law doctrine was directly applicable as the sole decisional basis.

At the time of the 1734 Codification, Nehrman's way of thinking went through a change. The primary legal source was the code itself, as well as the legislative history. Only in cases where those two grew silent or left room for different interpretations was support to be sought from natural law. This interpretative stance could be called the *acceptance* of the *indirect effect* of natural law. As legal positivism totally rejects the role of natural law, it is clear that here one finds a sharp difference between Nehrman's and Calonius' thoughts compared to the positivism – whatever one means by positivism. The difference is in the role of natural law as a *legal* argument, either directly or indirectly.

There is not only the general Hallean natural philosophical foundation to be found in the background of Nehrman's thoughts but also an idea of legal concepts as *necessary elements* of law. Concepts are established norms that define the proper meaning of the words used in legal language. In this respect, Nehrman even seems to be some kind of a "pre-Kantian" thinker. For him, legal concepts are not only a contingent collection of notions being instrumental in this respect.

The Dual Nature of DSL

Robert Alexy deals with this feature from the point of view of modern theory of argumentation and puts the problem as follows: "This claim to adequacy necessarily connects the concept of a thing with its nature. With concepts one strives to grasp the nature of the things to which they refer as perfectly, as correctly, as possible. This is the non-conventional or ideal dimension of concepts" (Alexy 2010, 167, 2003a, 6, 2008, 281, 2009b, 21, 2011, 15).

According to Nehrman, however, legal concepts have a dual nature. They are not only ideal but also socially established norms. As such, they are tightly connected to the European culture as the results of *Roman law.* This heritage, and only it, forms a firm conceptual basis for legal thinking because Roman lawyers, and precisely them, were the first to define what the necessary content of legal notions is.

The nature and role of Roman law concepts was not as clearly formed by Calonius, but he was obviously on the same path. The concepts and principles of Roman law were included in his lectures as an integral ingredient. From a contemporary point of view, Nehrman, and Calonius, stood in defence of the so-called *general doctrines* of legal thinking – in their case, mainly the doctrines of civil law. A lawyer can never manage without the conceptual structure of legal thinking, no matter how strongly he swears by the name of "theory-free" doctrinal study of law and practice.

A complex problem of contract law cannot be solved without knowledge of the general doctrines of contract, nor can one sentence anyone to compensation without an idea of the content of causality, adequacy or other central notions of tort law. The same goes for all other branches of law. Each has its own conceptual structure – i.e., general doctrines.

In Nordic legal thought, the general doctrines are still largely based on Roman ideas. They have found their way into contemporary thought through many phases, beginning with *Justinian's Corpus Iuris Civilis.* They were adopted by Swedish law in the 17th century, and were "brought up to date" in the lectures of Nehrman and Calonius. In this very sense, I find myself to be at least as Nehrmanian as Nehrman himself.

Since the early 1970s, my role in Finland has been to emphasise the importance of general doctrines, calling them the "toolbox" with which the practical duties of lawyers are carried out (Aarnio 1979, 74, 1989c, 288). After rereading Nehrman's texts with care and understanding, I do feel justified professional pride in being privileged to join a centuries-old tradition of Nordic (and European) legal thought. That tradition started well before my time, possibly articulated in a better way than I have done, but in any case, one that lies deep in the background to the cultural tradition of the Nordic lawyer. Matthias Calonius and David Nehrman-Ehrenstråle mediated the general doctrines (Roman law) of their time as well as the leading doctrines of 18th-century Europe for the shaping of future researchers.

Keeping this in mind, we again meet the problem: Has there been any kind of *change* in the doctrinal study of law since Nehrman's time? In this respect, two items emphasised by Nehrman and Calonius have to be recalled:

1. Their thinking was consciously based on a certain *philosophical conception of law*, and it was
2. based on well formulated Roman law *systematics*.

These two items both connect and separate their thought from contemporary ideas. The common element can be found in the fact that *all* legal thinking, both old and modern, presupposes basic philosophical assumptions as well as certain conceptual tools. The difference between Nehrman and Calonius on the one hand, and the modern legal thinking on the other, lies in the content of (1) and (2). The content and strength of these two items are different, depending on the cultural context. Hence philosophical assumptions vary from natural law to different degrees of positivism, and differences can be found in the significance of the general doctrines as well as the way in which they are used in actual research practice.

A typical example is the difference between the conceptual doctrinal study of law (Begriffsjurisprudenz) and the analytical civil law tradition. The difference in systematics can be seen in many everyday matters. In the early DSL, also the identification and formulation of problems, the structure of arguments, "truth-demands", the way of argumentation, and the form of presentation were different from that of today. Hence there is something unchanging in legal thinking, just as there is something that undeniably changes. This duality of change will be examined in more detail in the final chapter.

Chapter 3
What Is the Doctrinal Study of Law?

The Definition

According to the traditional view, in this treatise the doctrinal study of law is understood as a discipline, which has to (1) produce information about the law and (2) systematise the legal norms (Aarnio 1989a, 3). In doing this, DSL is one category of the legal sciences. There are, however, many other fields of legal research in which the notion of legal science is normally used. Historical study, the sociology of law, law and economics, and the comparative studies of law all belong to this category. They are legal sciences in the wide sense of the term.

DSL is the oldest of the legal studies as well as the widest spread internationally. The other fields of legal science mentioned above have their own value, but in relation to DSL they are only sources of information. For instance, the sociology of law produces information that is valuable for understanding society, but, for DSL, the best it can offer is to be a source of *practical arguments* that are used in legal reasoning to give support to the conclusion.

DSL and Adjudication

The authority applying the law has *judicial power* to give solutions and the *obligation* to reach a decision in every case that has been delivered up to the law. The official status of the authority obliges it to follow the legal norms or run the risk of sanctions. On the other hand, the adjudication always deals with *concrete cases*. The judge does not interpret the law just for the interpretation's sake (Aarnio 1987, 8, 1997, 188).

DSL is a practical field, or a study that is near praxis. In a sense, it *is* praxis in itself, the societal praxis from which our belief about what is in accordance with the legal order receives its content. If, however, DSL and legal praxis are equated with each other, and we say there is no difference between DSL and some other activity that investigates the contents of the legal order, problems arise. These can be briefly expressed as: Does DSL have a position independent of legal praxis? Pushed to the extreme, it is a question of whether or not there is any difference between a purely practical activity and DSL.

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DSL has neither the power nor the obligation to reach a decision, nor does it have the same responsibility of office as the judge. DSL is in the position of "a bystander". This means that, from the *organisational* point of view, the judge works within the official system and DSL deals with legal norms from outside. The judge, but not DSL, is a part of the power wielding machinery. Hence only the judge has the internal organisational point of view.

All these differences are, however, only differences between, on the one hand, the societal function of the judge and, on the other hand, of DSL. As far as the legal *interpretation* is concerned, the similarities are bigger than the differences. Let us begin with an introductory remark. *Stig Strömholm* observes that the scholar must argue in support of his stand *as if* he were bound to the same sources and the same principles of interpretation as the judge (Strömholm 1988, 26), otherwise the position of DSL would have no chance of success. In this way, Strömholm is able to bring up a really important point of view. However, he leaves his observation partly dangling in the air. What does it actually mean when we say "as if"? My answer is as follows.

There are always two sides to a judicial decision: the establishing of the facts of the case and the clarification of the contents of the legal norm – that is, interpretation. The decision lies in regarding the facts as belonging to the category of events covered by the norm. The traditional way of legal thinking in statutory law countries emphasises the *difference* between the fact-question and the norm-question. According to this view, the legal decision-making is a *step-like* phenomenon. By means of the proof of evidence, the decision-maker has first to establish the facts of the case. After this, the contents of the norm applicable to these facts will be identified. The last step is subsumption: the facts and the norm will be "combined". The final solution is the conclusion of the subsumptive procedure.

The theory of subsumption will be dealt with later. Instead, another dimension of reasoning has to be looked at more closely. In the judicial decision, the fact- and the norm-questions are *intertwined* with each other. It is impossible to establish the facts of the case without taking any account of the norm information. This information shapes the framework for everything we regard as a legal fact in the case. The relationship is the same as between the interpreted facts and the so-called brute facts. The norm information, as "pre-knowledge", is like a lens through which the decision-maker necessarily has to deliberate the proof of evidence (Aarnio 1993, 4).

Although DSL is only interested in *typical cases*, it and the application of the law are in a certain sense on the same side of the fence. The judge also has to interpret the statutes in order to reach the required norm information (Aarnio 1987, 8). In this respect, both the judge and the scholar have a similar internal perspective, which can be called the *epistemologically internal* point of view. This can be elucidated by comparing the position of a legal scholar with the position of the (other) social scientists. Before doing that, let us briefly look at judicial decision-making from a citizen's point of view.

In the rule-of-law state, citizens have a well founded right to expect the judicial machinery to produce maximal legal protection. In the following, this is called the *expectation of legal certainty* (Aarnio 1987, 3). The role, importance and structure of this expectation can be characterised with a so-called "triangle of legal protection".

Let us imagine that the tip of the triangle consists of the uncertainty concerning a difficult case, which may concern the two above-mentioned elements: factual question and legal question. In the scheme of things, it has been assumed that there is no certainty as to how the facts should be evaluated (proof) and how the statues and other legal material should be interpreted.

The distinction between the factual and legal questions is, of course, one of the traditional ones. In this context, the factual question has been left aside. In the proof of evidence, the matter concerns the credibility with which a certain fact has been established. This all contains the general theory of evidence, the principles of burden of proof as well as the theory of sufficiency of proof.

In the lower left-hand corner of the triangle are the judge's *power* and his or her *obligation* to give a decision. According to the Constitution in the rule-of-law countries, the task of the court is to give a decision in single cases, and through this task it becomes one of the societal implementers of legal coercion.

The citizen is situated in the right-hand corner of the triangle. As was mentioned above, he or she has the right to expect that the use of coercive power maximises the citizen's legal protection and legal certainty in general. This well-grounded expectation of legal certainty is one of the cornerstones of the Constitutional State. It does not concern arbitrary expectations of winning, but the fact that it is the *task* (social function) of the courts to produce legal certainty in general of as high a degree as is possible in the given circumstances.

This is only one side of the coin. Courts also have a unique social *responsibility* toward civic society. This responsibility is realised by *reasoning of decisions*. Parties external to the courts, such as citizens, researchers, attorneys and others who are subject to the decisions or otherwise interested in them, do not have any other means of evaluating the correctness of the decisions. The reasons of decisions are like a "handle", which one may grasp to weigh the decisions from the point of legal certainty. Through the reasons, the courts also connect with the *requirement of democracy*.

There is still one question with regard to judicial decisions: Why reason? There are several grounds for reasoning (Aarnio 1997, 188):

(1) The interest of a party presupposes that he or she knows on which arguments the case was solved. Exactly this is the key to the story. Only a well-informed citizen is able to evaluate whether the decision in his or her case is right or wrong. From the point of view of legal certainty, reasons weigh most, not the authority of the court.
(2) The appellate court cannot guarantee the legal certainty if the decision made by the lower court is not reasoned in a proper way. The procedure that produces legal certainty in a dialogue is also a dialogue between different instances.
(3) The self-control realised by the decision-maker only becomes possible by means of a well formulated and coherent set of arguments.
(4) The independence guaranteed to courts in the Constitution prevents others from interfering in individual decisions, but there is also another dimension involved in the role of the courts: it is intertwined with the control from a societal point of view. As *Gunnar Bergholtz* has stated, *democracy* requires *openness* from all instances it covers, including courts (Bergholtz 1987, 327). Only open and transparent decision-making makes the democratic *control of legal certainty* possible. Therefore, the control of the courts is not carried out through political directives or other such means but by constant evaluation of the courts' decisions.

All these requirements also concern DSL, although only where applicable. The relationship between reasoning and democracy is of great importance. DSL is one part of a legal community having the special task of developing the legal system. DSL is as important a factor in the societal dynamics as is the adjudication. Therefore, the expectation of legal certainty and the societal task of DSL are closely connected to each other.

DSL and Sociology

Prima facie, the function of DSL is essentially different from that of a typical social science. In the latter, the question is normally of the form "What happens?" or "What regularities can we find here?" The social scientists accept *legal norms as given*, and then take up for the analysis, for example, the problem of how a legal norm is followed. One of the primary goals of (empirical) sociology is the analysis of the *regularities* (invariances) of people's behaviour (Aarnio 1994, 3). On the basis of these regularities, in turn, some information may be deduced regarding the content of some norms: "People generally follow such-and-such a norm".

The social scientists thus normally represent a typically *external point of view,* but in a special sense. They are informed of the norms included in the legal order, of the legal institutions and of their functions, but they are not interested in the interpreted content of the legal order. The perspective of a social scientist can be compared to the study of chess purely by watching others play the game. A bystander may uncover many regularities, such as the fact that the piece called the pawn is generally moved one square at a time, except at the beginning of the game. It remains problematic, however, whether the external observer can *learn how to play chess* in this way if chess is the *first* game he has ever observed. In the same way, we can ask whether the bystander, through his interest in regularities alone, can understand the moves of the game, such as why in situation *X* the pawn is moved in manner *Y*.

These questions reveal that a true external perspective on society and legal norms is not without problems. *Peter Winch* has analysed the problem in a very illustrative way (Winch 1958, 83; Sandbacka 1987, 101). His point of departure is that the goal of all science is the identification of regularities in the subject. What is problematic is *how* we determine the criteria of similarity. Winch observes that, ultimately, everything depends on the rules and principles that have been agreed upon in the scientific community. These rules and principles say what is and what is not required in the investigation of phenomena. According to Winch, the difference between the (natural) sciences and the social (human and moral) sciences lies in the different origin of the rules. In the sciences, the subject is external to the researcher (in the proper sense of the word), so the basis for the evaluation of similarity can be found in the scientific community itself. There are no such rules in nature. The rules are rules for approaching the truth, and they have been crystallised on different grounds in the researcher community.

For the investigation of society, the situation is different (Tuori 1997, 127). In the social sciences, the rules defining similarity are to be found, at least in part, in

the subject itself – that is, in society. If, for example, we must determine whether two forms of activity, praying and greeting, are the same or not, the activity in itself (the movements, the gestures) does not reveal any differences or similarities. The basis for the deliberation must be sought in the society in which these forms of behaviour take place. They are social usages defined by certain rules, and what is even more important, these rules *constitute* the behaviour so that it is, for example, greeting. For this reason, we must know at least some (constitutive) rules before we can classify the forms of behaviour.

No matter what one's opinion is of the details of Winch's thought, he draws attention to an essential idea from the point of view of our theme. Not even a social scientist can be *purely* a bystander – that is, a representative of the extreme external point of view. To return to our example of the observer of the game of chess, and to borrow the words of *Ludwig Wittgenstein*, one can say that in order to learn the game the observer must already be able to play *another game*. If nothing else, the observer must understand what, in general, it means to play a game. The same is true of the understanding of social activities. One must, so to speak, somehow be "inside" them in order to participate in these activities in general, and it is not possible to even understand the activities unless one has participated in them at least once.

Thus the position of the social scientist in regard to legal norms *differs* in a radical way from the position of the judge or the administrative officials. Even if we were to require an understanding of the social scientist in the way Winch does, it remains true that the scientist is studying how *other* subjects are bound by legal norms. The subject group may be lawyers, judges, administrative officials, citizens or a group of citizens manifesting special characteristics. On the other hand, the social scientists do not have to formulate their questions in the way a judge does: "What legal norms bind *me* as an authoritative decision-maker in this very case?" Approaching the content of the legal order from this point of view is alien to the social scientist.

Here also lies the decisive difference between a typical social science, e.g. sociology, and DSL. The attitude of DSL is basically centred on the legal *norms* (rules), not on the *regularities* of the behaviour of the citizens, judges, etc. The research *interest* of DSL is *normative* in a quite different sense than the interest of sociology (Aarnio 1994, 15).

Evidently, the typical research interest of the social sciences does not extend to the understanding of systematic connections. The analysis of these connections belongs to the *epistemologically internal point of view* only represented by DSL. Furthermore, only this knowledge is a core of legal thought, the framework through which the decision can be sought at least on a rough level. Understanding the *systemic connections* sets those with a legal training apart from those who examine things from outside the system. In this very sense, the approach of the social scientist is *epistemologically external.* Even in the quite rare cases where sociology takes an interest in systemic connections, this interest is purely descriptive.

DSL has often been classified as a social science. How is this possible if the social sciences are defined in the above-mentioned way? It all depends on the notion of social science. What has been said about the differences concerns the relationship between DSL and *empirical* social science.

If the demand for scientific confirmation *is not set* in this way, the relationship between DSL and, especially, (theoretical) sociology turns out to be of a different nature. Assuming that social science is a study of society as an existing phenomenon, DSL clearly seems to be one of the social sciences. DSL expressly interprets the linkages (norms) through which people's personal relationships become legalised and, in this way, associated. From a certain point of view, law is society *in* those phenomena that DSL is studying; thus DSL is a study of these normative "reciprocating mechanisms". It is interpretative research that is a human (moral) science, but from this specific viewpoint it is inevitably a social science as well, the truth of which is measured by coherence.

Nevertheless, in this respect, DSL has often lost (or forgotten) its social-scientific character. If DSL is not clearly aware of the fact that its research object actually *is* society, it becomes a mere interpretation of symbols. In this case, DSL turns from actual social questions to a purely linguistic level, and becomes an uncontaminated interpretation (Aarnio 1994, 16). This being the case, DSL only interprets for the sake of interpretation, it only concerns the level of mere language, it corrects and specifies language as language. To quote *Peter Winch*, DSL only "clears trash from language" (Winch 1958, 24).

If this is the case, the independence of DSL with regard to its object becomes distorted, it would "abolish" itself from society – and from itself. And vice versa: DSL can only be an as*sociating agent* if it recognises the social character of its object and thus the fact that in interpreting legal data it is *inevitably* a social science.

However, if DSL only concentrates on analysing "societally important objects" as its subject matter or *participates* (politically) in society by interpretations, it is only superficially societal and loses its primary task. DSL is not a field of legal *policy*. And what is most important, DSL is not interested in phenomena *as such* but in society as existing *in those phenomena*.

In this respect, *theoretical* DSL is in a key position. In it, the object of DSL becomes obvious: legal relationships as a theoretical object. Theoretical DSL analyses on a conceptual level those linkages that constitute personal relationships becoming legal relationships, and further, legal statutes (and institutions). Thus, legal relationships form the framework of the pre-understanding (Vorverständnis) that guides interpretation and this framework, inevitably (or at least, implicitly), always includes a picture of society. Therefore, the family resemblance between theoretical DSL and (theoretical) social science is obvious.

The difference lies more or less in the fact that the concepts of DSL offer a *normative* framework with which to perceive society. It is a conceptual body of the world of "Ought". However, normativity is not essential when the social-scientific nature of DSL is evaluated. The normative concepts of DSL have the same *function* of formulating theory as theory in any other field of research, and on *this* point, one cannot prove any difference of principle between theoretical social science and the theoretical part of DSL.

Part II
The Foundations of Legal Thinking

Chapter 4
Lawyer's Dilemma

Robert Alexy emphasises that the single most essential feature of law is its dual nature (Alexy 2008, 288). The law belongs to the realm of facts as well as that of ideals. The core of its *real nature* is coercion or force. The judge has both the power and obligation to decide the case. However, the power machinery has to follow the principles of legal certainty and efficiency, because they are the central elements in people's well justified expectation of legal certainty (Alexy 2008, 291). As Robert Alexy puts it, the essential element of law's *ideal dimension* is the claim to correctness, which, in my terms, refers to legal certainty and efficiency.

The claim to correctness is not reduced to just that. It reveals another essential feature of law – that is, the non-positivist thesis: there is not only a contingent but a necessary connection between *law and morals*. Legal validity or legal correctness on the one hand, and moral merits and demerits or moral correctness and incorrectness on the other, are necessarily intertwined with each other (Alexy 2001, 374). As we will see later on, this connection can be summarised by *Gustaf Radbruch's* famous formula: extreme justice is not law (Radbruch, 7; Alexy 2001, 374, 2002b, 3, 2004a, 22, 175, 2011, 18).

As far as the nature of law is concerned, a third dimension, *metaphysics,* has still to be added. Notwithstanding the lost reputation of metaphysics among the (extreme) positivists, it has an essential role in the characterisation of law. Robert Alexy summarises that role as follows: "It is impossible to justify human rights without using concepts like that of autonomy and that of person" (Alexy 2004a, 24). Without an autonomous person, there is no law, and no morals either. These two entities do not belong to the physical world as "brute facts". The notion of "dignity" was used by Immanuel Kant in a close connection with the problem of human being (Garzón Valdés 2006, 231; Hoerster, 1983, 1).

Even though the metaphysical point of view is essential for understanding law, it is not dealt with in more detail in this study. In what follows, the primary focus will only be on the ideal dimension, in which the nature of the (legal) *truth* as well as the *relationship between law and morality* take centre stage.

According to the traditional definition, DSL produces knowledge of legal norms and systematises them. In the social division of labour between different sciences, the task has mainly belonged to DSL in the systems of codified law. This is not a coincidence. The task follows from the societal *interest of knowledge* (Habermas

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1989, passim.; Pietarinen 2002, 63). In every society there is a need to know the content of the legal order. This kind of knowledge is required of judges, civil servants and attorneys, as well as laymen. Were DSL to no longer satisfy this interest, some other institution or actor would in all likelihood quickly appear to claim the task. This interest of knowledge does not disappear from society by, for instance, redefining the task of DSL, even though such attempts have been made. An example of this is legal realism, dealt in more detail below. The American as well as the Scandinavian version of realism did accept the interest of legal knowledge but both held that "genuine" knowledge could not be reached by the "unscientific" methods of DSL.

On this basis, the functions of a theoretical study include the analysis of *what is required on justification from DSL for it to fulfil the criteria of controllability* (Aarnio 1987, 24). Taking this problem seriously, a set of other questions wait for an answer. Exactly those answers reveal, at least roughly, the internal structure as well as the goals of this study. The list is as follows:

(1a) Can the property of *true/false* be attributed to an interpretation in DSL? If this is possible, what are the criteria of truth/falsehood?

(1b) What *methods* does legal dogmatics use in establishing truth/falsehood?

(2a) If it is problematic or (even) impossible to use the notion of truth, is there some *analogous* notion to truth in DSL?

(2b) What *methods* are available in establishing such a "truth"?

(3a) Is it possible (in hard cases) to *know* something about the content of the legal order?

(3b) What *method* is to be used in obtaining knowledge?

(4a) If it is problematic or (even) impossible to speak of knowledge in connection with DSL, is it possible to use an *analogous* concept?

(4b) Is there some *method* for finding such "analogous" knowledge?

All these questions leave a great deal unsaid. The main problem concerns the notion of truth. As we will see later on, legal norms do not *exist* in any sense of the Tarskian concept of truth. The *correspondence* required by Tarski is of no use as regards legal norms. A statement presented by DSL cannot be compared with reality in any manner familiar from the empirical sciences (cfr. Sintonen 1981, 77). Thus, the truth produced by DSL is "softer" by nature. It could rather be called (well-reasoned) *certainty*. DSL presents norm recommendations, the strength of which depends on the credibility of the recommendations. The certainty, in its turn, is closely connected with *coherence*. From this, it follows that the central *methodology* of DSL is not inductive or deductive but rational *discursive*. The method is legal argumentation, which produces a coherent network of reasons to support recommendations.

On this basis, the cornerstones of the theory of DSL can be found in three pairs of notions. They also describe the *carrying themes* of this study:

a. The *existence vs. validity* of norms (ontological question);
b. The *knowledge vs. other type of certainty* (epistemological question), which is closely connected with the notion of truth;
c. The *deductive or inductive vs. discursive method* (methodological question).

All these themes are connected with the well-known problem of one right answer, which has played an important role in the history of legal thought. The present study is, to a large extent, a criticism of such doctrines.

Still a couple of comments are important. First, the rational discourse is only possible within a certain framework, which can be called the *preconditions of communicative rationality*. The most central of those preconditions is freedom (liberty). This not only concerns positive and negative freedom but also the so-called third form of liberty introduced by *Quentin Skinner.* This notion reminds us of those criteria used in *J.R. Searle's* theory of speech acts as well as the *Habermasian* principles of discourse ethics. One cannot avoid dealing with these problems if the focus is on the rationality of legal reasoning.

Second, legal scholars, as well as the judge, are necessarily "prisoners of the language". This is so because their task is to work (mainly) with linguistic expressions. The subject matter of reasoning, as well as the arguments, are language, such as the norm formulations given by the legislator, sentences formulated by the Supreme Court or the scholar's recommendations. The interpretations based on this material are, in their turn, articulated in language. Thus the scholar and the judge have to work within a "circle of language".

This is the reason why the theoretical tool used to analyse DSL in this study is the Wittgensteinian philosophy of language. From the Wittgensteinian perspective, the doctrinal interpretation – more correctly, the justification of interpretative statements – can be understood as a particular *language-game*. The interpretation standpoint finds its proper place, or, using Wittgenstein's words, "its home", as part of a language-game, and inversely, if the standpoint is detached from this game, the proposition will lose its meaningfulness.

Wittgenstein levels extremely sharp criticism at attempts to create a so-called improved language – that is, a language where the defects of natural language have been remedied and which, for instance, is representable in a formally exhaustive manner. Wittgenstein thinks that the language of everyday practice is complete in itself. The task for us is only to find out how this language *functions*.

An old phrase says: Legal thought is not mathematics. That is the reason why the language-games of DSL must be taken as complete. They have to be analysed in their natural contexts – that is, in the context of the living language. This does not mean that it is not possible to *reconstruct* interpretation games that elucidate the structure and function of the natural DSL games. The reason for that is a simple one. Language is such a complicated whole that we cannot get hold of it if we try to find the *common features of all language-games* in a single analysis. As Wittgenstein says: Language is veiled by a fog that prevents us from seeing the details.

To unveil the way everyday DSL language functions, we must restrict our study to dealing with language forms that are a great deal simpler than normal language. The most fruitful way of doing this is to construct language models that are deliberately simplified. These language-games are like examples that, by virtue of their own representativeness, show us the things that are characteristic of DSL language. That is our task later in this contribution.

As we will see later on, DSL argumentation can be characterised as the combined interplay of pro- and contra-arguments. To phrase this in hermeneutic terms: Interpretation involves the problem of the relationships that prevail between sentences, a problem that is capable of being treated with help from the basic notions of *whole, part and hermeneutic circle*. This is not to say that "The law is as it is read". This sort of scholarly arbitrariness does not correspond with the actual state of affairs. DSL is not a chaos of individual opinions. In order to avoid the chaos we have to accept something as certain in order to know something else must already be certain. For this reason, Wittgenstein's view of knowledge and certainty will be taken up.

Chapter 5
On Language-Games

Learning Language

In the philosophy of language, a separation has traditionally been made between the *semantics, syntax* and *pragmatics* of language. In this respect, Wittgenstein's thinking went through a quite radical transformation as he moved from the *Tractatus* into *Philosophical Investigations*. The "later" Wittgenstein was strongly polemic about the conventional way to understand language as a combination of names. One of his best-known examples was *St. Augustine*'s story about learning language as a child. St. Augustine seems to state that he learned the meaning of words from the way adults used words by pointing at objects (*ostensio*) and making sounds in different ways. He learned to understand how individual words were the *names of certain objects.* Learning a language was thus based on naming.

According to Wittgenstein, the learning of language does not normally follow St. Augustine's thought. Instead, the learner is like a person who enters a foreign land and tries to discover the rules of the language used in this land that is strange to him. The visitor already knows *some language,* and on the basis of *this knowledge* he or she has a facility for understanding the foreign one. A small child learning a language is in a different position. What is taught to him is more about *thinking* than individual words. One who does not want to be master of any language can at most repeat the words after the teacher. This becomes clear once we think about the way in which some animals can "learn a language". Here the matter is purely about imitation. We cannot say that an animal has control over that language. Wittgenstein puts his idea in the words "One must already know something before one can ask its name".

Nothing prevents anyone using a language where words truly represent certain objects. After all, this method is used in language labs, for example. Nonetheless, this is not a representative example of the way language works and the way one learns a language. What is integral is the meaning of expressions, and this is only revealed in the practical use of language. Thus, the meaning of expressions is the *use of them in language*. This turns the attention to a new direction (Hertzberg 1976, 126). The important thing is no longer the semantic (or syntactic) function of language, as it was in *Tractatus*, but the pragmatics of language.

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In this direction, new problems are obvious. It seems to be impossible to say anything conclusive about language *in itself*. As mentioned above, language seems to conceal itself in a mist. Nor is it possible to figure out the parts language is comprised of and then reconstruct them "back together". Faithful to his style, Wittgenstein poses a question: What are the simple parts that constitute a chair? The pieces of wood, of which it is made, or molecules and atoms? "Simple" means that it is not constructed out of anything, and therein lies the problem. "Constructed" in which way? There is absolutely no sense in talking about the simple parts of a chair.

Language-Games

We are like a fly trapped beneath a glass. Therefore, the dilemma is as follows: I do not know my way out. Wittgenstein's solution was the concept of a *language-game*. In order to bring about the functioning of language, we must settle for forms of language that are drastically simpler than those in normal use. The construction of language-games shows how the language works.

Every isolated part of language can be understood as its own language-game. Therefore, prayers, requests, recommendations and the language used in a butcher's shop, as well as the highly technical language of professionals, are all language-games. The same holds true as regards DSL and the different games that are played *inside* it. On the other hand, the exact number of existing language-games can never be known. This is due to the fact that at every moment, some language-games disappear and are replaced by new ones. Language is a *dynamic totality* of language-games.

Some of the main features of the Wittgenstein philosophy of language will be dealt with in this study. There is a huge amount of literature on this topic. My idea is not to debate with different authors, and least of all to say what Wittgenstein really thought. In recent philosophy there have been a lot of attempts to do that. The following presentation concentrates on such characteristics as seem to be useful for the theory of DSL. In this regard, the analysis introduced by *Jaakko (and Merrill) Hintikka* has been of great importance in the development of my thinking for many years.

Jaakko and Merrill Hintikka have characterised the change in Wittgenstein's thoughts as a move away from ostension-based naming, first to the idea of following rules and then as a comprehensive solution, to the concept of a language-game. In all phases, the question is about the relationship between language and reality – that is, language and the world. But this relationship is radically different in language-game theory than it is in the theory of ostension or in that of following the rules (Hintikka 1976, 191).

According to the Hintikkas, Wittgenstein did not fully give up on the Augustinean theory of ostension. He supplemented it with the idea of following rules (Hintikka 1976, 202; Marmor 1993, 147; Winch 1958, 24; Schauer, 225; Malcom 1995, 145; Aarnio 1997, 109). The meaning of words is in their *way of use*, or, to put it more precisely, in the grammar that defines their use. Therefore,

language can be taught to someone else by teaching the rules of the grammar that regulates the use of the language. 'The rules constitute the meaning', Wittgenstein writes (Wittgenstein 1967, 3). For its part, the rule can be recognised by pointing it out, by ostension. For example, if I say "red" and point at a red piece of paper, I have articulated a rule by which the term red is used.

Following this idea, rules are *everything* that has to be or can be learned. *One cannot get behind the rules because there is nothing behind them.* When one studies language he or she envisages it as a game with fixed rules, and compares it with, and measures it against, a game of that kind.

Still, it became clear to Wittgenstein that the very *status* of the rules was problematic. What does it mean to *follow* a rule? The simplest answer is obviously that following a rule is the same as acting in accordance with it. Nevertheless, it is not nearly that simple. We are immediately faced with the question: How can we know that the rules really have been *followed*, and that they have been followed *correctly*?

It could very well be that when teaching a language, the student coincidentally happens to catch the correct use of the term, for reasons other than following the rules. This means a difference has to be made between the concept of following a rule and the fact that someone *behaves* in the way presumed by the rule. The problem has not been exhausted, even with this distinction. There must be some *reason* for following a rule, and this reason cannot be another rule. Otherwise, the problem has merely been moved to an upper level – i.e., to the meta rules defining the use of first-degree rules, which, in its turn, leads to an endless chain of rules, since the following of a meta-level rule also needs to have a basis in another meta-level rule.

A solution like this did not satisfy Wittgenstein, and he took distance from the notion of following rules. However, what does it mean that in the end one already has to know something before asking its name? What is that "something" that must be known? For Wittgenstein, the final solution is the concept of a language-game. They are in themselves *complete*. Wittgenstein notes that the thing we call a relationship between a name and an object is defined solely by the proper language-game. However, no single and simple name-object-relationship prevails. On the contrary, there are as many relationships as there are elements we generally call "names". The terms we use really do gain their meaning only in the *context* they belong to at any given time, or, as Wittgenstein himself says, *Words have their logical home within the sphere of language* (Wittgenstein 1967, 7; Hintikka 1976, 194). What is important is that, at this stage of Wittgenstein's thinking, language-games are prior to the rules (Hintikka 1976, 201; Malcom 1995, 145).

Language-games are no replacement for the act of naming, for the naming takes place in the game and the game constitutes the name relationship. From this it follows that the games *precede* rules in a conceptual sense. The Hintikkas summarise the issue as follows: "In later Wittgenstein, language-games are truly the measure of all things" (HIntikka 1976, 196).

The fact that the language-game *precedes* the rules makes one understand why Wittgenstein emphasised that playing a language-game does not mean the same as following rules *blindly*. The player does not simply follow a rule as if the rule were a "recipe" or a formula articulated in advance. Wittgenstein's core idea is that we

cannot find out what it means to play a language-game if we refer to following a rule, because one understands the rule while playing the language-game. Following a rule is playing and, to quote the Hintikkas: "You learn new rules by mastering the language-games of which they are a part" (Hintikka 1976, 196). In other words, we can imagine someone having learned the game without ever learning or formulating the rules.

All this is also true as far as DSL is concerned. DSL consists of numerous different language-games, every one specific to a certain field of law, such as civil or penal law. The scholars do not know *in advance* which are the rules defining the meaning of a statute at issue. The meaning will be revealed *during the game*. In DSL, learning a language, as well as the interactive understanding of another person, also means *taking part* in language-games, because a language-game is an activity; it is action.

The structure of the game shows what can be formulated in it, because the language-game locks down the meaning. Nothing has so far been done when something has been named. It has not even got a name, except in the language-game. Taking part in a language-game means participation in shared beliefs, or, as Wittgenstein puts the idea: "People's shared way of acting is the frame of reference, by means of which we interpret unknown language" (Wittgenstein 1967, 206; Sandbacka 1987, 31). Playing a game is above all about gaining experience, not about propositionally explaining the game to another person.

On Family Resemblance

Another radical change in Wittgenstein's thinking dealt with the relationship *between* different language-games. There are an innumerable number of them. Old ones are constantly being taken out of use, with new ones taking their place. As was noticed above, there are eternal dynamics going on in the language. What is significant is that the language-games are not simply mutually contradicting, separate and sealed; in a way, they are interlocked with each other.

Wittgenstein talks about the *family resemblance* between language-games. Game A brings to mind B, B is like C, and so forth, with A and X seeming quite unlike each other. Wittgenstein himself clarifies the idea as follows: "We see a complicated network of similarities overlapping and crisscrossing; sometimes overall similarities, sometimes similarities in detail" (Wittgenstein 1967, 66; Hintikka 1976, 208, 1996b, 335).

This idea forced Wittgenstein to use the metaphor of language concealing itself in mist. It is impossible to show something that *all language-games have in common*, apart from the fact that they are language-games. What, for example, do the language-games used by a modern physicist and a Hindu priest have in common? On the other hand, there are a lot of similarities between the DSL language-games in civil and penal law. Still, even their language-games are far too complex and multi-layered for anyone to make statements about them as a whole.

Hence the philosophical problems are not within the search for this (unattainable) unity. The philosopher must leave the games as they are. His task is not to change language, and through it, the world, but to submit language to a closer look at it. The games, for their part, *show* the way language works. Nonetheless, this is not the whole story.

Social Dimension of Language

As a matter of fact, what has been said is only an introduction to a more profound problem of what connects language to reality. Part of that problem concerns the *impossibility of a private language*. Every individual expression gains its meaning when used in a language-game while the language-game is connected to our actions. Wittgenstein emphasised that we should also call the *whole*, consisting of language and the actions into which it is woven, the language-games. Hence, language as a semantic phenomenon is only a part of the totality. The other essential part is the social dimension, which Wittgenstein himself calls the *form of life.* In this regard, a language-game is always an *expression* of a certain form of life, or, as Wittgenstein says: "And to imagine a language means to imagine a form of life" (Wittgenstein 1967, 19; Hintikka 1976, 275; Winch 1958, 33; Kenny 1975, 163; Pole 1958, 52; Aarnio 1997, 115).

Henri Le Roy Finch refers to the close relationship between "form of life" and "language-game" as follows: "It is significant that all Wittgenstein's five references in the Investigations to forms of life mention language, which shows how forms of life are interwoven with language" (Finch 1977, 91). *Charles Taylor*, for his part, emphasises the significance of inter-subjective (common, shared) meanings that presuppose that a certain shared value is part of the shared world, and that all of this is common (Taylor 1976, 250).

Therefore, Wittgenstein does not in any way see the characterisation of language-games as just an analysis of simple communication – that is, about spoken and written language. The question is not about "getting rid of the trash in language", as *Peter Winch* has stated (Winch 1958, 33). The identification of a language-game in the Wittgensteinean sense is always identification of a certain form of life. Language is a social (shared) matter. Wittgenstein here goes to the point: If a lion could speak, we would not understand it. In this very sense, a language-game is a public phenomenon. A fully private language, belonging only to an individual subject, is not possible. It is not a language-game at all because no one else can play it with the person in question. There is no social dimension to a private language (Hintikka 1976, 275).

In order to illustrate this side of the case, let us conduct a thought experiment. There is only one being in the world capable of thinking and conveying sounds. In what sense has this being a meaningful language? Every single expression has a meaning for him alone. He is constantly engaged in a monologue with himself. His "language", as language, would be odd, since, from the being's own point of

view, he is acting blindly. He does not have a meta-language with which he could analyse and evaluate his "primary" language. Thus it would be absurd to talk about his sounds constituting a language-game, and about these sounds having a meaning.

Direct Experiences and Feelings

Nonetheless, there still remains one other issue that Wittgenstein actually thought about in more detail than many other problems of language. This was the language of (direct) *experiences and feelings*, such as feeling pain. Here, as on many other occasions, Wittgenstein makes a radical opening by asking: Why can't a dog simulate pain. Is he too honest? (Wittgenstein 1967, 250). What is the meaning of that opaque statement? Let us take an example. I prick myself in the arm with a needle, as a result of which I feel pain. This pain is expressed by yelling or by swiftly moving my hand. The Hintikkas call this the *primary language* of expressing pain (Hintikka 1976, 274).

If someone doubts my expression of pain, he might presume I am merely faking it. It might just as well be that I am only playing with a needle and making gestures that simulate feelings of pain. Here we approach the core of Wittgenstein's sentence "Why can't a dog simulate pain". The reason cannot be that the dog is too honest or timid to do so, because a dog lacks the ability to *simulate language*. This is not the case with humans. We can also hide our feelings through simulation, and if someone doubts my expression of pain, this *doubt* is no longer part of the primary language. The doubter has moved on to a language-game of the second degree (*secondary* language). What happens is that another (secondary) language-game is superimposed on the primary one (Hintikka 1976, 278; Hintikka 1996b, 191). This game includes doubts, but also questions, lies, reasonings, etc. Its structure is of a completely different type than the primary language of expressing pain. The notions of error, correctness and verification do not apply in primary games. The language-games of DSL are in this very respect always of the secondary type. In their connection, one can ask the meaning.

In a certain way, the primary language is a vertical link to a person's (e.g. my) own experiences. The primary language works as a mediator between secondary language-games of the higher degree and an individual's subjective experiential reality. In this language, one cannot state reasons for the expressions of pain. Hence the rules of the primary language are always followed blindly. When feeling pain, I do not play this game all the time thinking or explaining something. I must move to a language of the secondary level in order to ask myself: Did I really feel pain or merely simulate it? Or, in another case, I might say to my grandchild: Do not worry, I was only playing with the needle.

Let us take one more example, presuming that person A is startled and shouts in pain. The shout tells us something about A's inner state. In this setting, sentence

P1: "A shouted in pain" is an *argument* for the sentence
P2: "A was experiencing pain".

As outsiders, we have no way of "directly" controlling A's state of pain, for it is his personal, private matter. The only way to approach it is to argue on grounds similar to sentence P1, which tells us something about A's "behaviour in pain", but both P1 and P2 are parts of a secondary language and can thus be remedied, whereas A's actual *feeling* of pain is beyond error, repair and verification.

If we move the focus and look at *Axel Hägerström*'s value-nihilism, its core content is clear. For Hägerström, value-judgements are expressions of feelings, similar to an experience of an apple being sour. These feelings belong to the primary language that does not submit to argumentation. One cannot conceptually disagree with one's own *expression* of a feeling. The primary language is unique to every individual. As *Carlos Santiago Nino*, among others, has shown, value-judgements are fundamentally *social* matters, not "matters of taste" (Nino 1994, 14). They can also be contested, for which reason they must be counted as belonging to the secondary language.

Form of Life

Thus the problem of meaning is always brought up in social practice, in a "speaking situation". There cannot be language without its use, so it is not possible to talk about meanings without a language community in which the language is used. Hence, it is perfectly impossible to think that every member of the *legal community* could have a personal and private secondary language. For these reasons, language cannot be separated from the form of life. On the contrary, language as an activity is only meaningful when connected to the form of life that supports it. Speaking language is the same as participating in a form of life.

All this helps us to understand the learning of a language in general, as well as legal language as a specific part of it. Linguistic interaction is possible if, and only if, the speakers share a common cultural background, a form of life in the meaning meant by Wittgenstein and *Charles Taylor*, who separates two notions, "common" and "general". What is our common (life) world stands in sharp contrast to that what exists in all individual worlds (Taylor 1976, 220; von Wright 1974, 55).

The example of understanding a foreign tribal community can be interpreted in this way. If an outsider approaches a community and hears its members saying "Grh", this can be interpreted as a welcoming gesture, an expression of hostility or a sign of complete lack of interest. The answer to these questions is revealed to the outsider once he grasps the background connection, the form of life that supports the expression. If the form of life is *completely* foreign, a near-unsolvable problem appears: How can we understand a completely foreign culture? (Sandbacka 1987, 21).

The foreign culture can only be opened if we manage to get acquainted with its language-games, and this becomes possible if we have a *general idea* of the way language-games are played. One cannot be fully detached from the unknown culture but must at least know something before "asking a name". Further, once one

knows something about the alien culture, one can adopt the "internal point of view" and gain an "entrance" to the language of that culture. Metaphorically speaking, the internal point of view presupposes that the language-games must be overlapping, at least to some degree. Things being so, one gradually grows to be involved in the new form of life, which makes it possible, first, to *understand* the foreign language-games, and second, maybe, to *accept* them. Understanding always prevails over acceptance. If one is a *member* of a certain culture, he or she not only understands and accepts the carrying rules and principles intertwined with that culture, he or she is also *committed* to them.

Language-games are layered in countless ways. A primitive language-game is joined by a first-degree secondary language-game, while this one is joined by a language-game needing further explanations, and so forth (Hintikka 1996a, 339). This "upward" process forms a vast and complex network of language-games that is both horizontal and vertical and family-resembling in both relationships. We gain more and more skills in a language as we learn new language-games that have a family resemblance to the ones we know in advance. We "grow into language" – even though we also "create" language in a limited sense.

As individuals, we cannot create and shape language in a significant way, but the community we are a part of does renew it by creating new language-games and removing old ones. Forms of life change, and we change along with them.

Yet, when referring to the form of life, what does it mean to say that I *know* things are so – in our case, law having this and that content. This question invites us to the next challenge, which, following Wittgenstein, I call the problem of certainty.

Chapter 6
The Foundations of Knowledge

On Certainty

In the years 1949–1951, Wittgenstein mainly focused on the problem of *knowledge and certainty* (Wittgenstein 1969, 2, 18, 24, 54, 82, 88; von Wright 1972, 11; Aarnio 1997, 119). Accordingly, he strove to point out the *difference* between these concepts. An important starting point for this is the conceptual distinction between *knowledge and belief* (Hertzberg 1981, 60). According to Wittgenstein, the sentence "I believe. . ." has a subjective truth. It is an *expression* of a certain belief. It does not need to be argued at all. In its way, the notion of *argument* does not belong to the "logic" of the belief-game. If, on the other hand, one claims to *know* something, he has to be able to provide an argument for that statement. This is the distinction from a simple belief.

In order to know something, one must be well-informed about the language-game played with the notion of knowledge. Once one is familiar with that special game, it becomes clear what *kind* of arguments one should present to support the knowledge-claim. This does not mean that concrete arguments could not be doubted in an individual case. On the contrary, doubting is a natural part of the knowledge-game. This leads us to the problem of *justification.*

The arguments supporting the knowledge-claim form a kind of chain that must be extended in case someone doubts an argument presented at a certain point. The arguments are like the strands in a rope. The rope must be strengthened every time the twine turns out to be too weak due to additional questions. Still, this process cannot be continued for ever. One who doubts everything does not belong to the game of knowledge. If, for example, I would doubt every mathematical calculation that is made, I am crazy, and no one would say that I have been mistaken. The game of doubt in itself requires certainty. Therefore, arguments and proof of them must have a final point. At some point it must be possible to say "This rope will last" or, as Wittgenstein thinks, we must be able to *trust in something*.

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The Final Foundations of Knowledge

The "final foundations" and supporting columns of our judgements do not belong to our *experiences* in the sense that we would get to the final points by learning from experience. The last arguments have a unique role in the system of our sentences of experience. The final point *precedes experience* and the knowledge based on it. Little by little, we manage to develop a system of beliefs. Some things are then inherently stable, while some are more or less mobile. What is stable is not stable because it is obvious or convincing, but because the things surrounding it all have "their place".

As Wittgenstein thought, all argumentation takes place in a language-game. On the other hand, all games are locked by certain foundations, which are no longer held in doubt. These foundations are not given to us by our everyday experience, nor do we become aware of them intuitively (by "inner vision"). They are given to us. "The proofs that are certain are those that we unconditionally accept as certain" (Wittgenstein 1969, 163, 232). Therefore, the hypothesis that earth has existed long before my birth is not an experiential sentence or an intuitive invention. It is part of the complete picture that forms the starting point for my belief.

The proving of every proposition requires that a part of the sentences has been locked into something. But that which one holds on to is not a single sentence but a whole colony of sentences. To use the rope metaphor again, the binding matter is not a single fibre but a whole lot of fibres, in the midst of which, every new fibre, for example a statement on judicial interpretation, is added. Wittgenstein states that the "colony" of sentences is, in a way, forged into the foundation of our language-games. It forms the framework for everything we hold as true or false, right or wrong (Wittgenstein 1969, 105, 140–142, 225). It is a foundation that simultaneously makes the shared beliefs and attitudes, and, of course, all linguistic communication, possible. Without a foundation that precedes the giving of meanings, communication would come apart.

This implicates Wittgenstein's stand on the relationship between knowledge and certainty. Knowledge requires the possibility of doubt and this, in turn, requires argumentation. What we hold *as certain* is held as such without argument, because we no longer have any doubts about it. Therefore, *certainty is the precondition for all knowledge*. The "colony of sentences" that forms our shared foundation of knowledge has gained the name *world-view* from Wittgenstein (von Wright 1972, 27).

This should not be taken to mean a unified and stable set of sentences. On the contrary, its borders are unsteady and the set itself is composed of a huge number of sub-systems. Each of these systems is, in its way, a fragment of the world-view, a single part in an interlocked whole. For their part, the fragments of the world-view are the foundations for the language-games. They are the pieces that lock down the final links in the language-games. Bearing in mind what has been said about the family resemblance between language-games, it is easy to grasp the meaning of the sub-systems of the world-view being "interlocked".

If we were to call the group of sentences that forms the world-view pre-knowledge (*Vorwissen*), as *von Wright* does, we might, following his thoughts, say that every language-game has a foundation that forms a fragment of the player's pre-knowledge (von Wright 1972, 25). For Wittgenstein, the world-view is not a thing of assurance. It is an *inherited background* with which one makes the distinction between true and false. The sentences that belong to the world-view have a similar role to rules in a game, even though the world-view is not definitively locked. It is not a petrification, but something that is in constant change. The world-view is a dynamic foundation that Wittgenstein compares to a river bed. Little by little, the bed changes its shape, even though it is somewhere at every moment, constantly determining the direction the water takes.

At its core, the world-view is *not a propositional matter*. If anything, we should say that the *foundation* of the world-view is a non-propositional phenomenon, for which Wittgenstein has reserved the title *form of life*. He maintains that the end point of the chain of arguments is not a certain point of reference ("seeing") but *action* (Wittgenstein 1969, 369, 487; Taylor 1976, 221). The form of life is a matter of actions. We use actions to shape our form of life, and by our actions we can see what we finally trust. Once one *knows* how to act in a certain way in a certain situation, one is proven to belong to a certain form of life.

It is possible to understand the form of life (and its propositional manifestation, the world-view) as a "layered" phenomenon. At its core ("at the bottom") there are certain elementary actions – the building blocks of human culture. In the case of law, let us, according to *Aleksander Peczenik*, call it the deep justification of law.

These elements of the deep structure, for their part, make possible a form of life that includes language, in our case the primary norms of everyday life like commands, prohibitions and permissions. At some point – admittedly at quite a high level of abstraction – the form of life is connected with statutes. This is how the texture of a world-view is formed, giving rise to a vast network of sub-systems.

As regards this background, what the standing on language as a *manifestation* of the form of life means becomes understandable. When Wittgenstein says that an expression gains its meaning in the use of language, he means that meaning is revealed exactly in the special way the language-game is played. Nevertheless, the question is not about language in itself as an autonomous phenomenon. On the contrary, an individual expression is part of the language-game, while this, for its part, is connected to the form of life. It is not possible to understand activity (playing) without having a certain shared basis. This shared basis is nothing other than the form of life. Language-games are wholes in which the use of language, the form of life and the way of observing the world are combined. Therefore, the analysis of language is, for Wittgenstein, always and in every setting, an analysis of the form of life. Language, thought and the form of life are necessary elements of man's intellectual existence.

If we try to abstract the language-game and separate it from its connections, we can no longer understand language. Language as an activity can only be comprehended when it is seen as connected to the form of life. Words have their "home" in the form of life; thus belonging to a certain form of life is a precondition for taking

part in a language-game, or, vice versa, playing a language-game is taking part in a form of life. Someone not involved in this interplay cannot understand language, neither can he be understood in the first place.

The Role of the Form of Life

Moving from one form of life to another is not a matter of rational argumentation. The rational reasoning is only possible *within the framework of a certain form of life*. Wittgenstein says that such movement from a form of life, A, to another one, B, can only happen through some kind of persuasion (von Wright 1972, 14; Wittgenstein 1969, 156, 519). If we argue about something with someone who belongs to a different form of life, we cannot have an effect on him with rational arguments. We must try to persuade him to adopt our stance, to change his form of life – and the other's world-view along with it.

This connects my conception of language and the notion of form of life to the conventionalist ontology. A shared form of life is the final foundation that makes it possible to have shared beliefs. It also proves the idea that the question is not about any kinds of "contracts" made by people. The basis of "conventions" is located deep in the lives of men. One who joins it is not a contracting party but a participant. For example, one might think of a person withdrawing from society and deciding to live his life "alone". This is obviously possible, but it does not isolate that person from the shared form of life. Every individual must take part in at least some part of it in order to stay alive.

Conventionalism adapts extremely well to the role *Aleksander Peczenik* has given to coherence in legal thought (Peczenik 1990a, 275). Coherence deals with forming the largest possible compatible group of propositions. In order for that group to have relevance in a given community it has to be a part of shared beliefs, for it is only these that function as the bearers of the community's ontological commitments. Shared beliefs can focus on the foundation of existence (primary states of affairs) or on the way life is evaluated. Thus communal ethics and morality are, as we will see, also dependant on shared beliefs. If a certain ethical choice is individual in the full sense of the word, the choice has nothing to do with communal dimension and the person representing it drifts outside the community with his choices (forms of life), or at least it appears so.

Let us assume that persons A and B belong to the same form of life, L. They have the same shared meanings. Thus a shared language makes it possible for A and B to understand each other. Still, the form of life L allows many different variations, fragments of the form of life. Let there be two of these – that is, F1 and F2. A fragment like this corresponds exactly to the world-view – in this case there being two, W1 and W2. There are two different language-games played within the framework of the world-views.

The choices between W1 and W2 can be called *basic choices*. For their part, they constitute a fragment of the form of life (F_1/ F_2) and the world-view that corresponds

to it. In this way, as noticed by *Henry Le Roy Finch*, it seems to be possible to say that *choices are immanent to the concept of the form of life* (Finch 1977, 93; Taylor 1976, 228). If we are participants in a language-game, we have to make certain basic choices. This, in turn, means that we cannot accept a world-view based on different basic choices, even though we can *understand* the other choices due to a shared form of life (L). We understand them because we have a *sufficient amount of shared notions*. As distinct from this, moving from one world-view to another is always an irrational matter. This, too, is a choice that cannot be explained.

Still, belonging to a certain fragment of a form of life (F1/F2) is not a matter of *simple choice*. We participate in it just as we take part in an *inherited* background, to put it in Wittgenstein's terms. Complex social mechanisms connect man to a certain form of life. In many ways, these processes are subconscious and thus outside our choice. There is no single foundation for explaining why different individuals have a shared fragment of a form of life, a shared world-view. For example, the explanation is not in that they represent a shared economic interest, for instance. Further, we could always ask: what is the special interest of the people who defend life in all its forms, thus opposing abortion or euthanasia.

From the philosophical point of view, a shared form of life provides an explanation for the *inter-subjectivity of judgements*, and makes comprehensible why values are not individual in an arbitrary way. It also makes the foundations of a *legal community* understandable. The normative commitments gain their inter-subjectivity *in* a form of life and only in that. Further, the form of life is always a shared matter, at least to some degree. This is also the key as far as the legal community is concerned. In the end, it is based on a form of *life*. In this regard, *Neil MacCormick* has used the term "satisfactory form of life". That term helps a great deal in understanding the reasons *why* a certain form of life connects lawyers and the legal scholars among them to a common language and a common culture. Let me elucidate by using a story about what happened in the hotel Forum in Warsaw in the late 1970s. I was there waiting for *Jerzy Wróblewski* before continuing my trip to Lodz. The story goes as follows:

> I sat at a table and looked for a waiter to take my order. In the same room, a few tables away, sat a dark-skinned man wearing a beautifully ornamented African ceremonial outfit, with a fur hat on his head. He obviously could not speak a word of Polish, and likely not even English, which the waiter could understand with some difficulty. As time passed, I got my stroganoff while my neighbour got a fish soup. I do not know if he had ordered it. Once he had eaten the soup, he took a pipe and some matches from his pocket and lit a match. At that moment, as the flame flared, I realised that we belonged to the same form of life and shared the same beliefs.

Through these primitive actions, the form of life gathers layers, becoming more abstract until we arrive at the question of the "existence" of a legal norm. But *in the end*, the form of life is built on nothing but primitive *actions*, not even linguistic conventions. This can be expressed in a rhetorical way by saying: In the beginning there was act. The "deep structure" of the form of life is non-propositional.

Primitive actions, like a smile as an expression of friendliness, form a complex network of social relationships and the shared beliefs that belong to them. Therefore,

these primitive actions are finally the foundation for our shared beliefs, as well as for the basic social conventions from the viewpoint of law. For these reasons, the *final* foundations cannot be *expressed* in the ontology, they are only shown. This also stands for law, which is one and, as such, a very important layer of the vast network of silent societal commitments.

Summing up, the task of DSL is, in the end, interlocked with the deep structure of law. What can be kept as certain is based on many-layered beliefs in the norms, concepts and systems of both of them.

Chapter 7
On the Ontology of Law

The Standard View

The problem of language-games is involved in another key issue: the ontology of law. What else in the world of life is but a basis for an ontology, which is why a further question has to be answered: How does the law exist? A classic example of an ontological problem has the form: Is my overcoat in the hall even if I cannot see it? Bishop *Berkeley* could have asked this question. In his famous thesis he wrote that "the world is my idea". What exists is nothing but a subjective (mental) image created by the perceiving subject with his reasoning.

However, let us take Bishop Berkeley and those who share his opinion seriously. Is my overcoat really in the hall, even if I cannot see it? What about the world surrounding me? From where I sit in the home of *Ernesto Garzón Valdés* I can see a chair and a table, the trees in the garden, rose bushes and other things. I can hear the sound of birds, as well as the thumping of riverboats on the Rhine. Is everything still "there" if I close my eyes, or if I don't hear anything? One resorting to everyday experience thinks questions like these are silly, as does a large group of esteemed lawyers. My own place is safely on their side. After all, who would believe that the world disappears completely when the perceiver dies, not to mention that objective reality makes an exit and returns depending on whether the perceiver has his eyes open or closed? All things considered, my overcoat stays on the coat hanger, even if I close my eyes and can't immediately see it.

Hence the hypothesis about the world remaining after the death of the perceiver is a sensible foundation for an ontology. The difficulties arise after hypotheses like this. What, in the end, has to be assumed to "exist"? Creatures, characteristics, mental images, memory traces or what? As far as law and legal institutions are concerned, this is a crucial question. However, the answer is difficult to shape; far more difficult than it is to sneer at Bishop Berkeley's ideas. What actually is the ontological relation between the perceiving subject and objective reality? In addition to this, Bishop Berkeley was a wise man, not a "village idiot", and the problems he dealt with prove to be skilful enough when analysed in detail.

As already mentioned, the problems of ontology are not important for the everyday world of the lawyer, nor does anyone devote much attention to them. Still, it is

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certain that as soon as the problem of ontology is thrown out through the back door, it makes its way back through the front door before we have even noticed. As far as DSL is concerned, the scholar has necessarily to accept an ontological assumption of *some* kind, at least implicitly. No one would like to admit to be examining something that is non-existent or basing a decision on a non-existent entity.

This is why ontology is not the sophistry of philosophers. At its core, it is about the DSL being DSL. Otherwise, the scholar has not fully internalised his or her own profession. That scholar works mechanically, guided by external forces (like economic goals), going about his business blindly, whom no amount of theory can save. He takes his everyday routines to his grave. However, as soon as someone takes the deep structure of law, as well as the foundations of DSL, seriously, the ontological table is set for him or her.

Axel Hägerström formed the basic ontological question characteristic of the Scandinavian realism. For Hägerström, all knowledge is knowledge about reality. Knowledge is like a mirror picture received from reality. According to him, only one reality exists, and it includes objects located in time and space, which, in their turn, are objective. What cannot be placed in time and space does not exist. The expression "the world outside time and space" is self-contradictory (Hägerström 1953, 17; Marc-Wogau, 113; Bjarup 1980, 153). Those entities which really do exist define which statements are meaningful as an object of scientific research. Only statements that describe the existing entities belong to the language of science. That is why all kinds of metaphysics are impossible. "Preterca censeo metaphysicam esse delendam", Hägeström wrote, modifying Cato's famous sentence concerning Karthago. The same basic idea was accepted, for instance, by *Alf Ross* and *Karl Olivecrona* (Ross 1953, 340, 456; Olivecrona, 80, 212).

According to Hägerström, reality comprehensively covers the states of affairs that can be the subject matter of meaningful sentences. From the ontological point of view, this idea is called nominalism: Only real entities do exist, while general concepts (redness) or mathematical entities do not. Ontological realism is a counterpoint to nominalism. For a realist, the mathematical entities, as well as the general concepts, are real and they may be parts of consistent arguments (Peczenik 1989, 258).

This is not Hägerstöm's idea. For him, *three* kinds of entities belong to the reality. First, *physical objects*, human beings and events. They belong to reality not only as the contents of thoughts but also directly. The second group consists of recollections, emotional sensations and other *mental states* and processes. They are only parts of reality in an indirect way – that is, as qualities of entities that belong to reality directly. The third group consists of, among others, the contents of dreams and *imaginations*. They only belong to reality as the contents of thoughts and thus, in an indirect way, like the entities of the second group.

Entities that cannot be classified in any of these three groups are not real in the Hägerströmian sense. He called these entities metaphysical and excluded them from the realm of science because one cannot *know* anything of metaphysical reality. Religious entities, as well as creatures of fairy tales, belong to that "reality". There can be poetry about these things, but no verifiable propositions.

The Hägerströmian ontology is an example of a well-formulated and rigid, but also a problematic and vulnerable approach. The difficulties are especially significant as far as law and especially where the existence of *legal institutions* is concerned. Let us look at the proposition.

P1: *"That building is over two hundred years old"*.

P1 expresses a fact, the elements of which are "building" and "200 years old". There are no special problems with which to get a touch on the meaning of P1. The language of law does not refer to the qualities of reality (the real world) in the same way as is the case in P1. This can be elucidated by proposition P2.

P2: "*A is the CEO of company B"*.

The fact A is the CEO of company B is different from the facts involved in P1. Terms like "company" and "CEO" cannot be reduced to "reality" in the same way as a building and its age.

On the Conventionalist Theory

There is, however, one theoretical view that helps us grasp the ontological status of P2: the conventionalist ontological theory. According to *Eerik Lagerspetz,* such social institutions as state, law and money are social conventions based on *shared beliefs* (Lagerspetz 1995, 20, 2009, 188). Let us take as an example a one euro coin. In order for it to be understood as money, and being of one euro in value, one has to believe it really is that kind of entity. In addition, one also has to presuppose that the others (other members of the community) believe the coin to be money. Further, those others have to believe that I believe the same. When separated from these shared beliefs, the piece of metal is not money, nor is it of any particular currency. The same goes for legal institutions. Lagerspetz himself states that the existence of social objects, relationships and features depends on the shared beliefs prevailing in the community. The communities, for their part, also exist for the very same reason.

Every one of us belongs to one of these communities. This is also the key to understanding identity. We do exist as biological beings, regardless of shared attitudes, but our identity is formed by our relationships to others, which, in turn, are based on shared attitudes. From the viewpoint of other community members, we are social objects. In this sense, my social existence is a social fact. The things we hold as essential in ourselves are to a large degree social facts concerning ourselves. Therefore, our social existence is based on the community and is realised through its shared beliefs. On the other hand, we are also social subjects and take part in shared attitudes, partly by shaping the attitudes of others.

The situation could be described with the example of language. Language exists regardless of us, for we only progressively take part in language by learning it. Language is a social and communicative practice, which we cannot wholly change,

either arbitrarily or through mutual agreement. In a certain sense, and in a way that is inessential for the sake of language as a whole, we may creatively take part in the forming of language, but we cannot change it in any way. Language is a net of shared attitudes preceding our interpretations and beyond our control.

According to Lagerspetz, for example, the word "state" does not refer to anything that can be directly perceived. We might say that the state has certain qualities or even that it *does* something. But all that we can actually perceive are people, as well as certain physical objects. A term such as "state" is called *institutional*. All that concerns "state" can be said about other legal institutions, like "legal person" and "CEO". All these terms have common characteristics. They are bound to certain norms in one way or another (Lagerspetz 2009, 189).

Institutional Legal Theory

This opens a new way to understand the so-called *institutional legal theory*. Those who were the first to ask "institutional questions" were *G. E. M. Anscombe* and, especially, *J. R. Searle*, who later developed his famous construction of social reality. Later on, *Neil McCormick* and *Ota Weinberger* applied the same thoughts to law and formed their own institutional legal theory, which was fulfilled by *Neil Mac Cormick*. I do not introduce that theory in detail. Instead, it is necessary to discuss some critical points.

For MacCormick and Weinberger, institutions and institutional facts are products of constitutive rules (MacCormick and Weinberger 1986, 21; MacCormick 2007, 102). In their theory, MacCormick and Weinberger partly follow John Searle's ideas (MacCormick and Weinberger 1986, 21, 181; Searle 1996, 31, 113). A wooden piece on a chequered board is a simple "brute" fact. It becomes a chess piece due to a constitutive rule. A certain piece is the king, thus bringing into being the institution "king". Social institutions and, through them, the whole social constitution is built on constitutive norms, but an institutional fact is not completely similar to a social fact. As John Searle emphasises, there are social facts that are not institutional, such as a tree falling on top of a car during a storm.

A legal "institution" is defined in a similar way as a chess piece turns out to be a king, another a queen, etc. According to MacCormick and Weinberger (1986, 21), the constitutive norms structure the lifespan of a legal institution, but not only them. According to these authors, there are five kinds of institutive norms: *constitutive norms, rules of recognition, rules and standards of argumentation, rules of articulation and legal injunctive rules of the first degree* (MacCormick and Weinberger 1986, 52). The first group of norms is constitutive *sensu stricto*, the latter four mostly focus on the functioning of the institution.

Marriage is an often-cited example of a legal institution, whereas the marriage between A and B is an *institutional fact* (Searle 1996, 79, 113). It *articulates* the institution. John and Jane might well live in a social micro-community, but they are not treated as spouses without a certain normative foundation. Norms constitute the institution as a marriage, defines its functions and marks its extinction. In this

respect, marriage is an institution like football, in which certain brute facts are interpreted with the help of the rules of the game. A physical person, N, moves his foot forward and makes the white leather-covered object move toward a frame protected by a net on three sides, in such a way that the moving object passes the person, M, standing in front of that frame. We say: Goal! In order to say this, we must be familiar with such concepts as player, kick, ball, penalty and goal.

To be exact, the examples were not entirely about the brute facts. Someone would say, I suppose, that we only have sensations interpreted as a foot, another as a leather-covered object, etc. However, it does not matter which way the notion of "brute fact" is defined. The institutionalism only emphasises the *special ontological status* of institutional facts, although the "bridge" from brute facts into institutional facts is inherently more complex than might be anticipated by the above-mentioned examples (Anscombe 1958, 69; Searle 1996, 34, 55; MacCormick and Weinberger 1986, 77).

In this respect, the ontological proposals presented by Sir *Karl Popper* do not give any final solution (Popper 1972, chapter 4). According to Popper, the physical world (world1) is comprised of physical objects and events, and the mental world (world2) is formed by consciousness and thoughts, whereas world3 is the home of human artefacts such as numbers, conceptual systems, qualities and certain cultural objects as symphonies. If we were to say, for example, that "Sibelius thought about his symphonies", Sibelius would belong to world1, thinking to world2 and the symphonies to world3. Taking this seriously, it seems to me that Popper builds world3 from entities that are held in Platonic ontology as timelessly existing. The quality "red" is an abstract qualitative modifier formed by man, the status of which is ontologically similar to a symphony. It is not difficult to see that (legal) norms and the legislation as such are, in the Popperian interpretation, inhabitants of world3 as well.

MacCormick and Weinberger seem to accept not only the existence of worlds 1 and 2, but also that of world3 (cfr Searle 1996, 127). For them, the legislation is an example of an *institution* belonging to world3, just like the marriage. On the other hand, because institutions always precede the institutional facts, *individual statutes* must be institutional facts constituted by the institution of legislation. However, what is the ontological status of the individual norms (statutes) that, in their turn, regulate the legislation as an institution? That question, formulated by *Kaarlo Tuori*, leads us into a vicious circle or infinite regress (Tuori 1997, 127). Therefore, the institutional theory, at least in the form represented by MacCormick and Weinberger, is incapable of providing an answer to basic questions on the ontology of law. What is still left open is the "true" *ontological status of an institution*.

H. L. A. Hart has a famous answer to this question: The rule of recognition. In more general terms, the rule articulates an *institutional support* for a legal norm (or legal order). The rule of recognition gives an institutional guarantee for a certain norm as regards its validity. Having an institutional support, the norm at issue does belong to the legal order. One who deals with law from an *external point of view* focuses his attention on whether people have accepted the institutional support as a basis for the legal order or not. This kind of statement concerning the acceptance of the rule is an empirical argument and can thus be true or false.

Hart's view is problematic in at least one respect. Quoting Wittgenstein, one already has to know something before asking the name. So it is in the case of an external observer. In order to know which norms are accepted *as valid* in a certain community, one has to know something about the internal point of view of the community members. This presupposes information about the commitments of those having the internal perspective. Only those norms that are voluntarily accepted as binding are valid in that community. However, the external observer, who does not *commit* him/herself to the norms of the community, can only receive information on the *rule-following* in the community concerned. The external proposition concerning the existence of the rule of recognition is an empirical and, as such, a value-free statement. The external observer can never know for sure whether the norms followed in a certain community are *accepted as binding* or not. This problem will be recalled later on in connection with legal realism.

In this study, the solution to the ontological problem with regards to law follows the lines formulated by *John R. Searle* (Searle 1996, 79, 149, 177). However, I have tried to continue a bit further and ask: What does it mean, *in the end*, that law exists as an institution? In this regard, *Eerik Larspetz's* conventionalist ontology seems to provide us with a more acceptable solution than those described above (Lagerspetz 1995, 3, 2009, 188). Lagerspetz's focus is on three kinds of rule-based systems: language, money and law. The last of those systems is, of course, most important for this study (Lagerspetz 1995, 5). Let us start, however, with some general problems.

On Shared Mutual Beliefs

What is essential concerns the intersubjective meaning, or to be exact, what makes shared intersubjective meanings *possible* (Simmonds 1984, 104). It is what all the individuals belonging to a certain community believe about the world. This is the view emphasised by *Bertrand Williams*, for whom the "shared life" is something more than an atomistic individualism (Williams 1985, 104; Sandel 1982, 174). The institutions and institutional facts exist for those individuals because the institutions are based on *shared mutual beliefs* (Lagerspetz 1995, 9), and further, because those people believing in the institutions also act in accordance with the beliefs. Thus the matter is about a *shared consciousness*. For this consciousness, it is not enough that individual people happen to believe in a certain thing as "state", "money" or "legal person". They also need to know that other community members share this belief. Let us look at the belief and/or attitude X concerning a societal fact Y (p is q).

The belief X is shared and *mutual* in a given community, C, if, and only if

1. every member of community C believes X;
2. every member of community C believes that every other member of C believes X.

The belief X is connected to the actions of the community members (of C) as follows (Lagerspetz 1995, 134). An entity, E, is a *conventional fact* if, and only if, there is a mutual belief X, and this belief *provides a reason* for the relevant agents

to realise E. The other reason for action is a *general rule* (or practice), which is an object of mutual beliefs. In this case, a conventional (individual) fact can be subsumed under such a rule or practice. All this is applicable to *law* too. Law is, as Lagerspetz points out, an institution comparable to language and money (Lagerspetz 1995, 134).

This does not mean that "normal" reality does not exist. On the contrary, the tree in front of me does exist perfectly independently of me and of the way in which I interpret what I am looking at. If I call the tree "birch" it moves to be a social fact because, on the basis of our shared mutual beliefs, only a certain type of tree qualifies as a birch. The "brute" fact and the "social" fact thus have an existence of their own.

The shared mutual beliefs are always *reflexive*, and in some sense circular. This does not, however, cause any harm in our communication. We have to accept that the analysis of social reality is *necessarily* reflexive due to the fact that the social reality is built up on a reflexive network of beliefs and attitudes. No ontological theory whatsoever can change this nature of human and social existence. As social beings, we simply have that kind of ontological structure within us.

One question is still open. As we noticed, the shared mutual beliefs are (at least partial) grounds for the social activity. Why is it so? What forces people to behave in accordance with shared beliefs? According to Eerik Lagerspetz, the reason is the need for co-ordination. In a certain situation it may, in principle, be possible to follow several alternative practices, but all things considered, only one practice is reasonable. In traffic, of course, it would be unthinkable to drive either on the right or the left side of the road. Actually both practices are known in the world. The shared belief that one should drive on the right side is a necessary and sufficient reason to follow that practice in a particular country. Otherwise, people could not co-ordinate their behaviour and the result would be traffic chaos. As Eerik Lagerspetz puts it, our lives with the shared beliefs and conventions is easier than without them (Lagerspetz 2009, 189).

The conventionalist ontology does not mean that people in a certain community have actually made a *"contract"* with which they should behave in the future. Such agreements are certainly *not historical facts* and, for other reasons, they are not necessary either. Shared mutual beliefs and social conventions result from continuous processes, as the spoken language is a result of development that is as old as the human language in general. Language is not a matter of agreement. Lagerspetz points out, that we can agree with the meaning of a single word but *not all meanings* are based on agreements because the agreement already presupposes that we have at least some meanings available. Once again: One has to know something in order to ask the name.

All this means that people grow up to know the shared beliefs without being necessarily aware of this learning procedure. Sometimes an individual person has an incorrect image of the content of a shared belief and he must learn things through these errors. However, the *whole society* can never have an incorrect image concerning its own conventional basis. In this very sense, a *community* as a whole cannot make mistakes as regards the shared beliefs.

As far as DSL is concerned, all this means that the research objects are the mutual beliefs about valid law. There is no simple entity as a legal norm, yet it is still the task of DSL to produce information about it. A valid norm is a social (and conventional) fact *based on mutual beliefs* in it, or on general norms, which, in their turn, result from mutual beliefs. All in all, DSL is dealing with a set of beliefs, and making them into a coherent whole called justification of an interpretative standpoint.

In this way, the task of DSL, the ontology and epistemology of law, the theory of language and the methodological theory of legal reasoning are nothing but dimensions of the nature, function and societal role of legal research.

Chapter 8
A Moral Point of View

Starting Point

Ethics and morals have been, and are by now, the subject of a wide and deep philosophical discussion. It would be waste of time even to attempt to deal with the main contributions on this topic. In what follows, the focus is only on a limited number of issues where there seems to be at least some possibility to introduce a fresh understanding of the old question of values and morals. This chapter should therefore be read not as a comprehensive study of values and evaluations but as a limited analysis of their basic features and their role in the theory of DSL.

I will defend two special theses: first, an *extreme injust thesis* (the moral foundation of law), and second, the thesis of *moderate value relativism* (Jörgensen 1982; Aarnio and Peczenik 1996, 321). The former deals with the ultimate justification of law, and further, what is, in the end, the object of the doctrinal study of law. The latter concerns the nature of value statements and their role in DSL.

At least the following positions can be taken as far as the nature of value statements is concerned:

1. Values are entities of their own, existing independently, and belong to the world in one sense or another,
2. values are properties of objects, like "black" is a property of a table, and
3. values are, or can be, derived from facts (they are reducible in a certain way).

From an epistemological point of view, both (1) and (2) have some problematic consequences. The "knowledge" about this kind of objectivity is not *publicly* controllable. The "knowledge" is personal, based on intuition or the like. As is well known, *G.E. Moore* defended the so-called "ethical intuitionism". Moore agreed with an idea that the business of ethics is to discover the qualities that make things good. For him, the categorisation "good" is, however, an indefinable and non-natural property. Something is good because it *is* good. One cannot prove if something is good, but one can *know it*. The question of intrinsic goodness can only be settled by appealing to what Moore calls "moral intuitions", self-evident propositions that recommend themselves to moral reflection (Moore 2002, 1). For reasons referred to later on, this kind of intuitive knowledge is not a sound basis for a value theory,

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perfectly independent of whether values are defined as "existing" independently or are understood as properties of existing entities.

Alternative (3) is related to *Hume's guillotine*: A normative or evaluative sentence cannot be deduced from a factual one. Water and food are certainly necessary for the life of a human being, but it does not *logically* follow from this fact that every human being ought to get enough food and water. On the other hand, a value statement cannot be justified using facts as the only reasons, although we are all ready to say that getting food and water is a moral right for everyone.

Values are not mere *feelings* or otherwise subjective matters either. For the representatives of the so-called Uppsala school, *as well as for C.L. Stevenson,* value statements were only expressions of personal feelings. According to this view, it is impossible to use rational argumentation to support values. Value-nihilists like *Hägerström, Olivecrona* and other representatives of the Uppsala school concluded that one can only persuade others, not convince them rationally.

The thesis of moderate value relativism is also in deep contrast to *R.M. Hare's* "universal prescriptivism" (Hare 1952, 1981). Hare argues that moral terms like "good" and "right" have two semantic (or logical) properties, universability and prescriptivity. The term "universability" means that moral judgements must identify the situation they describe according to a finite set of universal terms. "Prescriptivity", in turn, means that moral agents must perform acts they consider an obligation to perform, whenever they are able to do that. According to moderate value relativism, neither universability nor presciptivity in the Harean sense does hold's good.

Moral Foundation of Law

As regards the relationship between *law and morality,* or law and (ethical) values, two dimensions are essential. Moral principles are immanent to the *foundation* of law, and morals, as well as values, are bound to legal *argumentation*, being a part of the procedure of justification. This is exactly the idea defended by *Aleksander Peczenik*, who, for this purpose, introduced the notion of *deep justification* of law (Peczenik 1989, 158). Peczenik emphasises, as does *H.L.A.Hart*, that law has to be in harmony with certain minimum moral requirements.

This idea is close to what *Aristotle* presented. In the Nicomachean Ethics, Aristotle emphasises that the just is lawful and fair, unjust is unlawful and thus unfair too. However, Aristotle later adds that the unfair and the unlawful are not the same thing. Everything that is unfair is unlawful, but everything unlawful is not unfair. Obviously, Aristotle's thought relates to his specific conception of the relationship between law and justice.

Peczenik defends a *non-positivistic theory of law,* according to which there is a necessary connection between the legality and moral correctness. As we have seen before, the same thesis has also been defended by *Robert Alexy*. He keeps the observer's and participant's points of view separate – that is, the external and internal perspective. As far as an observer is concerned, the positivistic separation thesis is

perfectly correct. From the participant's perspective, only the connection thesis is the right one, and this is decisive as regards the existence of the legal system. As Alexy points out, a legal system without participants is not conceivable. Taking this seriously, the extreme *injust thesis* enters the centre. Robert Alexy formulates it, following *Gustaf Radbruch's* famous formula, as follows: Extreme injustice is not law (Alexy 2002, 3). The extreme injustice thesis is intertwined with the dual nature of law. Law is both real and ideal, and, what is important, both are necessary elements of law. The ideal component concerns, as was mentioned earlier, the claim of correctness, which, in turn, presupposes the theory of rational discourse. The real side concerns the legally regulated procedures, which guarantee the achievement of decisions and provide for their enforcement (Alexy 2010, 168).

Does this mean a softened version of natural law? Yes and no. The extreme injustice thesis is related to natural law in the sense that the *immoral law, by its foundations,* cannot be law at all. In this regard, Radbruch's formula is close to that introduced by St.Thomas: *dictum lex iniusta non lex est*. As far as I see, the difference lies in the term "extreme". According to St. Thomas, law and morals are connected to each other not only in extreme but *in all cases*. Hence, St. Thomas' theory presents natural law in a much broader sense than the extreme injust thesis (O'Connor 1969, 14; Tranoy 1964, 98; Lagerspetz 1995, 106).

The extreme injustice thesis as such does not deal with the material content of injustice. It is a conceptual precondition of law being law, and it is, therefore, on a meta-level compared to the so-called *minimum content of natural law* introduced by *H.L.A.Hart* (Hart 1961). This Hartian criterion for law consists of a list of *prima facie principles* (or reasons) that are not only widely accepted by people at different times and in different parts of the world but are also necessary preconditions of (valid) law. Hart's notion of minimum content is very much discussed in jurisprudence (Lucas 1966; Rawls, 1973; Mc Pherson 1970; Lagerspetz 1995, 135; Sartorius 1971, 131). In this context, there is no need to take part in this special discussion but just lay the focus on some main features of Hart's view. Hart has mapped out some necessary criteria as regards law and morals. The most important are the following (Hart 1961, 190):

(1) *Human vulnerability*: Humans are vulnerable and exposed to damage and harm caused by others,
(2) *Approximate equality*: Humans are approximately equivalent in their mental abilities, even though there may be some differences between individuals and groups,
(3) *Limited altruism*: Humans feel some degree of worry and interest toward the needs of others, for which reason, extreme selfishness is not one of the human qualities,
(4) *Limited resources*: Humans have only limited resources and everyone must still be able to satisfy their basic needs in accordance with their biological requirements, and
(5) *Limited human understanding and strength of wil*l.

Sir *David Ross*, in his turn, gave a list of seven *prima facie* obligations, which he did not see as all-inclusive: fidelity, reparation, gratitude, non-maleficence, justice, beneficence and self-improvement. They can either be reinterpreted in Hartian terms or they can be reduced to them (Ross 1930, 38).

The system of valid legal norms is not a (deductive) consequence of those facts. Hart respects the Humean guillotine. Instead, the facts *provide the grounds* for a set of rules that maintain life and keep the community together. As Neil MacCormick thought, the criteria listed above are *underpinning reasons* that combine law and morals together. In this respect, Hart's model is one application of the form of life argument. "The minimum content of natural law" is an expression referring to basic elements of our form of life without which the community would not stay together. For this purpose, Hart provides a *technical norm*: If men have to live together and accept a reasonable degree of community, they must consider their own weaknesses and those of others.

> As *D. J. O'Connor* points out, Hart's moral theory is uncontested, but in terms of the discussion on morals, it has been bought at a certain price. The main motivation of morality has been removed. Even with the use of Hart's minimum requirements, there is no way of drawing any *normative instruction* on how man should act in an *individual case* requiring a certain moral decision. Thus, we are close to the problem of *prima facie* and "all things considered" arguments. Minimum natural law is inevitably a collection of general principles, which have to be given a context-bound interpretation. The fact that people feel some sense of worry for others, or that they have altruistic qualities in the first place (even though not everyone does), supports a general norm obligating loyalty and solidarity, or related norms. Still, a norm like this is only a *prima facie* argument, and by its nature too general in order to provide unequivocal support for an *individual moral judgements* (O'Connor 1969, 16).

Following the same lines as H.L.A. Hart, *Neil MacCormick* listed three values (ethical norms) connected to law since the Antiquity:

> Live honestly
> Harm nobody
> Treat all persons with the respect due to them (MacCormick 2008, 60).

This list is, in a nutshell, *the core of just law*. The principle often referred to by *Ronald Dworkin* can be added to the list with good grounds: *No one shall be permitted to benefit from his own wrong*. The demand for honesty forbids people betraying each other and breaking their promises, and advises them toward justness and acts performed in good faith. The prohibition of harming others naturally covers the physical integrity of other people, but also goes much further in securing human dignity. The third demand realises the Roman epithet *suum cuique tribuere* – i.e., to give each his own.

As examples of lacking the moral foundations of law, Peczenik refers to the "legal orders" by *Adolf Hitler*, *Josef Stalin* and *Pol Pot,* and maintains they were not law in the full sense of the term since they were incoherent with the basic moral principles woven into the structure of law (Peczenik 1989, 58). Law requires a deep moral justification. Let us look at Pol Pot's system. Even if the people of Cambodia had (de facto) held the command of Pol Pot as a genuine dispensation of justice, it could not legitimate the normative system as the system of law. The Cambodian system would have still been extremely injust. Therefore, the extreme injustice thesis is not only contingent but a *necessary element* of the genuine valid law. It separates the (valid) law from the non-law. The extreme injustice is never law because injustice cannot be coherent, all things considered, with the minimum content of morality.

Moral Foundations of Legal Reasoning

The extreme injustice thesis as a meta-level principle does not concern the problem of *legal reasoning* at all, although it is intertwined with the dual nature of law – i.e. with the real and ideal dimensions. As Robert Alexy says, the ideal component concerns the *claim for correctness*. In DSL, the claim for correctness is at the core of reasoning, as it is in the adjudication as well. However, what makes the claim for correctness complicated is the role of value statements in legal reasoning.

There are, of course, many legal problems, even whole areas of law, where moral standpoints and value statements are perfectly irrelevant. This is the case, for instance, in purely technical applications of law. It would seem peculiar to maintain that an interpretation concerning the notification of a will takes a moral stand. On the other hand, it is as easy to identify a set of problems that are exposed to ethical valuations. A good example is offered by the family law, in which ethical and moral arguments cross paths on the levels of legislation, jurisdiction and research.

In this regard, moderate value relativism is closely connected to DSL (Aarnio and Peczenik 1996, 321). As far as interpretation is concerned, the general moral principles and value statements have a similar status in the moral and ethical discourse as the legal principles and other general norm formulations have in the legal reasoning. They are like "law in books", which is in need of interpretation before becoming "law as a fact". As we will see, for these reasons, the legal reasoning is only a special case of moral discourse. That is why moderate value relativism reveals some basic features of all use of general terms, independent of their "home" in moral or legal language-games.

Following *Ota Weinberger,* value judgments and moral principles *become law* when they are *used as legal arguments* (Weinberger 1994, 8, 1992, 252). In other words, a moral argument only receives the status of a legal source when it has the *institutional support* of the legislature or the judiciary. In this very respect, the non-positivistic thesis also concerns the legal reasoning. Let us look at DSL from this point of view. Ronald Dworkin denies that the Hartian notion of rule of recognition can be applied to *principles* at all. Such a rule does not allow even a single lawyer to distinguish a set of legal principles from his broader moral or political principles (Dworkin 1986, 40; Siltala 2000, 44). Dworkin is wrong. The fact that the institutional support in the case of principles is a complicated one does not mean that there is no such support. In the case of principles, the institutional support is a *result* of complex legal reasoning, not a matter that *precedes* the reasoning.

On Moderate Value Relativism

Charles Taylor makes a distinction between *weak and strong evaluations* and defines them through the concept of desire (Taylor 1985, 18, 34). If a person holds it as better to swim in warm rather than cold water, we are dealing with a weak evaluation. The grounds for the choice are purely a desire for personal comfort. A

strong evaluation, on the other hand, is based on values. The choice is made depending on how "good" or "bad" the valued object is. In other words, strong evaluations are beliefs and attitudes concerning the value of the state of affairs. Based on these beliefs, we make value distinctions concerning our world.

Taylor holds strong evaluation as an integral criterion for human identity, since identity is not formed in a neutral environment. The selections that form identity demand value-based criteria, and because of this, strong evaluations are also more or less fixed attitudes and beliefs formed in the process that aims for the said valuation. Therefore, strong evaluation can either signify a process or its result.

Independent of the problem of identity, there is still one question to be answered: Are there any *ethical constants* among strong evaluations – in other words, constants that are independent of culture and/or historical circumstances. Taylor himself suggests that one of those constants would be the respect for other people. He admits that there have been, and will be, *historical situations* where this principle is not followed at all, but notwithstanding these contingent situations, people *in all cultures are obliged* to respect others. In this sense, the principle is normative and universal.

However, Taylor does not specify the notion "universal". The principle of respect for others turns to be either a conceptual necessity or a weakly normative recommendation. In the first case, the principle of respect for others is a *conceptual criterion for human life*, whereas the second interpretation only expresses a *recommendation for how things should be* in order for everything to be well. Still one question is left open: What is the validity of such recommendations? In which sense and to what extent are these recommendations binding?

Let us begin with an example parallel to Taylor's principle of respect for others. The example concerns the principle "An innocent man shall not be killed", which has often been dealt with in moral philosophy. One afternoon, Justus Caritas, an explorer, arrives at a small village somewhere in Latin America. In the market place he sees 20 Indians who have been captured. Pedro, the commander of a small revolutionary group, is making a decision about the fate of the prisoners. Seeing Justus Caritas, Pedro wants to celebrate the event and makes a suggestion: If Justus Caritas kills one Indian, the others will go free. If the explorer refuses to do so, all the prisoners will be shot.

There is a genuine moral problem here. Justus Caritas has to make a choice on the basis of extremely *scanty alternatives*: To kill or not to kill. Let us assume that Justus is faithfully committed to "An innocent man shall not be killed" as a *primary* principle. By following this primary principle, he would let twenty innocent men be killed. In order to escape from such a cruel duty, Justus has only one option: by killing one, he would save the other 19. However, then he has to violate his basic maxim. This alternative is, of course, also based on a moral principle, but on a radically different one: "Save as many innocent men as possible". In this case, "An innocent man shall not be killed" is no longer the primary principle. Instead, there are colliding *normative principles* and the explorer has to weigh between them. This kind of collision will be discussed later in connection with legal principles.

This story has one important point for the present study: Is the maxim "An innocent man shall not be killed" to be followed regardless of its *actual consequences*?

Furthermore, is this maxim *universally valid* as a *normative* statement? Finally, is it *empirically* universal or only valid relative to a certain culture, group or individual? Would a moral and rational Chinese person assess the problem in the same way as the European Justus Caritas? In general, the fundamental question is: What is the nature of values?

As far as moderate value relativism is concerned, one way of solving the moral dilemma is of special interest: the way of *interpretation*. Let Justus still accept his primary maxim "An innocent man shall not be killed". How can he *save this maxim* and, at the same time, save as many Indians as possible? The dilemma can be solved by the interpretation of who is "innocent", what constitutes "killing" or what in this context is "man".

In Justus' case, the problem concerns the notion of "killing". He can tell himself that he did not kill any Indians. The killer was Pedro, and in this very situation he could not prevent the killing. In other words, Justus makes a *normative exception* from the maxim.

It is a social and historical – that is, contingent – truth that a general moral principle like "An innocent man shall not be killed" easily meets acceptance among different cultures, no matter how far apart from each other these cultures are. It even seems to me that men in *all societies*, at *all times* and in *all situations* would be ready to accept the prohibition of killing an innocent man. Still, this is not the core of the matter.

Prima Facie vs. all Things Considered

We can by all means say that the general principle "An innocent man shall not be killed" contains certain "*objective elements*". In this regard, the "objective" dimension of the principle refers either to the wide acceptance of the principle (*empirical dimension*) or to the validity of it (*normative dimension*). Let us leave the empirical dimension for a while.

As was referred to above, general principles like "An innocent man shall not be killed", independent of their formulation, are in need of *interpretation* when being applied to practice. This results from the *nature of language*. All linguistic expressions belong to a certain language-game, why they all are contextual as to their nature. There are no single expressions for which the meaning is unambiguous and *given in advance*.

In this regard, *Aleksander Peczenik* spoke about *prima facie* reasons or obligations (Peczenik 1989, 238). The same term had already been used by Sir *David Ross* who argued, against *G.E.Moore*, that maximising the good is only one of the several *prima facie* obligations that play a role in determining what a person ought to do in a certain situation (Ross 1930, 41; Williams 1985, 176). The *prima facie* obligations other than maximising good have already been dealt with above.

However, *Shelly Kagan* has argued that Ross does not actually speak about *prima facie* but rather *pro tanto* reasons or obligations:

> . . . in distinguishing between pro tanto and prima facie reasons I depart from the unfortunate terminology proposed by Ross, which has invited confusion and misunderstanding (Kagan 1989, 17).

Kagan herself argues that a *pro tanto reason* has genuine weight, but, nonetheless, may be outweighed by other considerations, whereas a *prima facie* reason involves *epistemological qualifications*. Referring to that, Kagan continues: "a prima facie reason appears to be a reason, but may actually not be a reason at all" (Kagan 1989, 17).

Shelly Kagan is right. *Prima facie* is an epistemological qualification, or at least something like it, and it is in this very sense that the term is used by Peczenik. According to him, *prima facie* reasons are starting points for further *interpretation procedures*. It challenges one to provide justificatory reasons for *prima facie* obligations. As it happens, they are not "binding" fundamentals, to say nothing about their being "final" arguments, even though they have swept people along throughout the ages.

What is essential for general principles of the *prima facie* type, such as the aforementioned prohibition, are the *(normative) exceptions*. *Gottfried Wilhelm Leibniz* spoke about an "internal" measure (Leibnitz, passim,). Every matter either has a locked or open internal measure. A circle is internally closed. A line, on the other hand, is open. The concepts "happiness" and "kindness" are similarly open by their internal measure. We can never say that we are "completely" happy since there is always something that could make our happiness even greater.

The same goes for *prima facie* principles. According to their meaning in the considered culture, such a statement decides that an action of the kind it indicates ought to be performed *ceteris paribus* (Searle 1978, 88; Aarnio and Peczenik 1996, 18). They are normatively open and, as such, are a challenge for interpretation. In this regard, the crucial points are the reasons provided in *applying the general principle to practice*. General principles retain their force with the help of *exceptions*: "An innocent man shall not be killed, *unless* he is . . .". All exceptions are *stipulative* and, as such, normative as to their nature. The exception can also refer to the notions "killing" and "man". For example, an innocent man shall not be killed, unless he is a member of another tribe, race, etc. In this way, each application of a general principle is bound to its context. The *prima facie* statement has to be adapted to the case at hand "all things considered".

When applied to practice, general moral principles become conditional. They can be used "more or less" depending on the situation, as is the case with legal principles too. The optimal content, all things considered, defines the contextual application of a general *prima facie* obligation. Thus the optimal point is a result of weighing and balancing.

In this view, "An innocent man shall not be killed" is a *true moral principle*. This is why the distinction between *prima facie* (PF) and *all things considered* (ATC) proves to be crucial in the areas of values, morality and law as well (Aarnio and Peczenik 1996, 324). It reveals not only the difference between the applications but also the reason for the importance of *providing reasons* for statements on value and

morals. An individual application of the principle "An innocent man shall not be killed" can only be tested through its reasons. Only the reasons make it possible to take a critical stand toward value statements, morality and law. If there are no reasons, or if they are insufficient, the gates are opened for arbitrariness, since the reasons are being replaced – fully or partially – by the arch-enemies of rational thought: Persuasion and manipulation, even by the use of force (Toulmin 1968, 185, 203, 1976, 234; Gregg, 289; Veitch, 105).

> The empirical dimension *exemplifies* – but does not justify – the normative one. The Aztecs killed thousands of people from opposing tribes in the span of a single day, as the anthropologist *Marvin Harris* describes, and they could do it using interpretation – i.e., the *exceptions* made to general principles. The people killed were not "innocent". A general principle can be fitted into a whole formed by time, place and circumstances, and the application is grounded by stating that the general principle allows the exception in question, like killing in self-defence.

In this regard, there is nothing like "*objective morality*". One should not even try to *aim* at determining the exact content of the *general* moral concepts. The interpretations are always subordinate to an open question: Then what? Hence the content-related value theory has to be replaced with a discussion-related *procedural theory of morality and values* (Alexy 1989, 177). A judgment on general moral principles, as well as that of general value statements, is *produced* as a result of this process. What is essential, therefore, is *deliberation* (discourse), not an attempt to define values and morals substantially.

If people are ready to take part in rational discourse, the extreme opinions can be eliminated and the final result can be based on the shared opinions based only on adequate reasons with all things considered. In this case, people have gone as far as a human being can. Only gods or *Ronald Dworkin's* supreme judge Hercules can surpass the abilities and possibilities of men who accept these views.

The crucial point of the procedural theory is that the discussion cannot continue "endlessly". There must be a "certain" foundation so that no additional reasons are needed. The firm final basis is as important for values as it is in the case of truth. As far as I can see, that basis can be found in our *form of life*. There is nothing in human life that is as certain as the primitive holdings of our form of life. With their support, we determine what we hold as right or wrong.

These final foundations cannot be contested or even expressed by language since they merely have to be accepted *as given*. We cannot go outside our thoughts and thus outside the form of life. It brings together social groups and makes an internal discussion on values possible inside a certain group and, with certain reservations, the dialogue between groups as well.

However, we can never *know* when we have reached the certain basis of our interpretations. This basis exists but it is outside rational argumentation. As we will see later on, this does not destroy the rationality of legal reasoning or frustrate the purpose of producing certainty in DSL. There is enough family-resemblance in our world views to guarantee the understanding of opposite opinions, and, what is important, to reach consensus, even in the hard cases.

The value objectivists do not accept this kind of relativism. According to them, values are necessarily *objective* as to their nature. This kind of objectivity may mean a number of things. First, the notion of objectivity is identical to the concept of *independence of the subject*. This characterisation of objectivity is again prone to the so-called argument of the open question: You think the values are objective, but for what reasons? Sometimes, the objectivity means that values *exist* in a special "value reality". This ontological assumption presumes that the "value entities" can only be recognised by *intuition*, not by public means. However, intuition is not a means to reach knowledge in the true sense of the term.

Sir *David Ross* was an example of a moral theorist, who was a moral realist, a non-naturalist and an intuitionist. He argued that there are moral truths: "The moral order . . . is just as much part of the fundamental nature of the universe . . . as is the spatial or numerical structure expressed in the axioms of geometry or arithmetic" (Ross 1930, 41).

> St. Thomas Aquinas is another famous example of those who proceed from the assumption that practical deliberation is guided by *natural ability* (*habitus*). St. Thomas calls it *synderesis*. It is a property of the human mind, with the help of which man apprehends the most general moral principles. Some might speak of the "acquiring of moral knowledge. Still, synderesis is not just the ability to acquire moral knowledge. For St. Thomas, it is a natural, innate and infallible capacity for understanding moral principles and accepting them. For this reason, the basic premises of practical reason *cannot* be mistaken since synderesis has been given to man once and for all and cannot be weakened or diminished in even the direst of circumstances. It is and remains the *basic* ability that provides practical deliberation (practical syllogism) with its undisputed premises (O'Connor 1969, 22).

I do not see these kinds of theories as well-founded. One here meets Wittgenstein's famous beetle example. Five people each have a different beetle in their matchboxes. No one opens their own box, but the five have a spirited discussion on the qualities of the beetles. Each has his own "private language", and no kind of sensible discussion on the beetles is possible unless the parties concerned open the lids of their boxes. If a private and solely intuition-based value language would be possible, we would be facing a social dead-end.

Summary

Values, as well as evaluations, are *social and subjective matters*. They are subjective in *this* special sense. If a state of affairs X is valuable, it is so due to the fact that a certain individual, let us say A, has associated that quality with X. Because the values are *social matters*, there is a net of inter-subjective links between subjective evaluations. The evaluations of a specific sect, religious order or political group are to a large degree similar. This can even be empirically tested, but an empirical test is not essential here.

The *inter-subjectivity* of values and evaluations is one dimension of the form of life. A certain form of life is not *ours* without an interaction between those who are

committed to that form of life. Hence the form of life necessarily *presupposes* a certain degree of similarity, or family resemblance, as regards the values. This family resemblance of evaluations is the very link that makes it possible, ”all things considered”, to present interpretations of *prima facie* values. Inside a specific community, a value statement may even reach a wide generality, whereas it may not succeed outside that community.

On the other hand, values can be *drawn* from objective (empirical) reality in no relevant way. *Hume's* guillotine has been sharpened for my aims as well. As was emphasised above, evaluations are always related to a certain community, an audience. *In this specific sense*, the values and evaluations are *relative*. However, they are not relative in an arbitrary way. To a certain degree, reasons can, and must, be provided for every evaluation. In this sense, a crucial difference exists between an *attitude* and a valuation. An attitude is related to matters of taste (this apple tastes sour), and they cannot be argued. Therefore, no one can be convinced of an attitude by means of rational argumentation. Attitudes can only be influenced through persuasion.

The same holds true as far as legal reasoning in general and DSL as its specific case are concerned. The norm statement is not the key issue but the *discursive procedure* that justifies the recommendations presented by scholars. This is the real reason why moderate value relativism is deeply connected to the methodology of DSL.

Chapter 9
The Three Notions of Liberty

The Traditional View

For the purposes of this contribution, *Philip Pettit* has made an important distinction between *singular* and *plural* notions of liberty or freedom. He writes:

> We concern ourselves in the singular mode with how far someone is free to do or not to do certain things, or with how far someone is a free person or not a free person. But, equally, we concerns ourselves with the plural question as to how far the person enjoys the liberties that we take to be important or basic (Pettit 2008, 201).

Pettit continues the analysis of plural liberties dealing with the life of a free person, In this, he spells out that requirement in three constraints, which he describes as feasible extension, personal significance and equal co-enjoyment. For the theory of DSL, however, this analysis is not as important as the singular mode. The same holds true as far as the relationship between law and liberty is concerned. In this respect, it is essential to formulate the problem as Pettit does: Does the coercion involved in threatening to impose penalties mean that the subjects of the law thereby suffer a loss of freedom? (Pettit 2009, 39).

However, the focus of the following discussion is not on the freedom of citizens but on the *fundamental preconditions* of the rational legal reasoning. A rational discourse on morals, ethics and law is impossible without a certain degree of freedom. The preconditions have been the key issue in, for instance, *Jürgen Habermas'* and *John Searle's* theories. However, instead of these theories, the general notion of liberty as such will be dealt with.

The traditional concept of liberty is three-fold. It is focused, as Philip Pettit emphasises, on a singular mode, i.e. on a certain *agent*, its *goals* and the *restrictions* on the realisation of the intended goals. Very often, liberty is understood simply as the absence of restrictions. This traditional concept does not permit any other way of thinking about liberty, and it is this one-sidedness that *Isaiah Berlin* grasped, separating *positive* liberty from the absence of constraints that are *negative* liberty (Berlin 2002, passim; Carter 2007, 3; von Wright 1971, 99; Veitch, 67, 123; Nelson, 58). The idea of negative liberty is intertwined – in a complicated way – with three other notions: intimate, private and public. The absence of constraints is different

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in each of these cases and it would be more precise to speak about three notions of negative liberty (Garzón Valdés 2006, 61).

> *Stephen Toulmin* writes on lacking liberty as follows: "On the extreme view, indeed, all human choices and decisions whatever, are – strictly speaking – settled by outside forces, regardless of other appearances; so that any discussion of thought, action and belief as "rational", with its implications that our "choices" and "reasons" are something more than surface phenomena, is delusive (Toulmin 1976, 329).

The Third Notion of Liberty

Quentin Skinner has developed Berlin's idea in a remarkable way. In the following, the focus is on mainly on the Skinnerian version of liberty. According to Skinner, Berlin originally thought of positive liberty as the freedom to follow a specific form of life. However, positive liberty, when defined in these terms, does not conceptually differ from negative liberty, since all the situations covered by negative liberty are ones in which one is free to act - that is, to realise the form of life one has chosen.

Berlin's next attempt was to identify positive liberty as being one's own master, but the fate of this attempt proved similar to the concept of liberty built on the realisation of the form of life. If one is his or her own master, he or she is free in the negative sense of the concept, being free from constraints, for which reason a distinction cannot be made between positive and negative liberty.

Berlin found a solution in a form of (positive) liberty where the agent tries to *determine himself.* The proposal in some ways (although not by its philosophical foundations) reminds one of *Soeren Kierkegaard* when he said: "What is hardest is becoming what one is, to become oneself". Skinner describes Berlin's proposal by saying that liberty is therefore not equated with self-mastery but more specifically with self-realisation (becoming to oneself), especially the perfection of the self, the idea of myself as the best one can possibly be when he or she is in harmony with the true nature of his or her being.

When defined like this, the concept of (positive) liberty is detached from a mere *absence of constraints*. The concepts of positive and negative liberty have thus been separated. Positive liberty is not analysed through constraints that prevent action but as a specific *model for action*. However, the solution is anything but free from difficulties. The problems are involved in the notion of *being*, which is essential for the positive liberty characterised above. The definition of "being" leads to all the problems usually met by analyses of "essence" or "the nature of things" or (ideal) forms of being. Skinner is right to point out that there are as many interpretations of "being" as there are views on the moral nature of man. For some, the being of man is defined in religious terms, whereas some define it in a moral or humanistic sense.

The suggestion that the goal of being could be the *best possible form of life* gives some relief to the difficulties, but it needs specification as well. Without approving this standpoint in detail, Quentin Skinner formulates his own suggestion as follows:

Liberty consists of a way of life where, free of all our passions and sufferings, we finally reach harmony with nature (Skinner 1984, 193, 2003, 12).

These noble suggestions have some attractive features, but even the best ones prove to be vulnerable upon closer inspection. In order to understand Berlin's thoughts on positive liberty we must, as Skinner acutely reminds us, connect them with the early years of the Cold War. Isaiah Berlin wrote on positive liberty at a time when his British generation took distance from any form of totalitarianism. Berlin and likeminded individuals connected with idealistic concepts of what is best for all humans. Every attempt at defining the features of the "socialist man" led to the exclusion of the opinions of others, and then in worst cases to their violent repression. For these reasons, Berlin grew away from his earlier ideas of positive liberty. This was especially so in relation to the ideal of the "Soviet man", but it might also fit with the more recent attempts at forming the "new European man".

I don't feel the same as Berlin did. This text is written at a time when the European totalitarian states have become a thing of the past. Thus positive liberty has a different political dimension in the 21st century than some decades ago. It is knowing oneself in the sense of the Socratic advice "Know thyself". It is with this byword and its applications that the analysis will continue here.

The viewpoint in what follows is limited, but still relevant for the positive liberty part. The fundamental question from the legal theoretical perspective concerns the notion "being a legal scholar". This "being" is of an ideal type. We are now dealing with the necessary conditions of a "good legal scholar". In this regard, "becoming something" means the same as fulfilling the criteria of an ideal scholar or decision-maker (a judge). In the real world, there are no such beings, but as an ideal or standard, "becoming an ideal scholar" is of great importance. It is this dimension where Berlin's concept of positive liberty has strengthened the theoretical foundation of this treatise.

In the sense of negative liberty, one is not free if others prevent one from doing what he or she could otherwise do. On the other hand, the use of one's liberty cannot prevent or disturb the use of someone else's. This solution to the collision of liberties is essential in terms of *maximising social liberties*. This is largely the point in the much-discussed collision between fundamental rights. The notion of negative freedom is, therefore, at the core of law, the legal system and legal reasoning as well.

Berlin and Skinner make a crucial distinction between the lack of negative liberty and the lack of *capabilities*. According to Skinner, we only lack freedom when it becomes impossible to perform an action that is within our capabilities. The distinction was made earlier by *Thomas Hobbes*, and Skinner does refer to Hobbes as the father of the idea (Pettit 2009, 44; von Wright 1971, 72; Lagerspetz 1995, 105). If an external sanction prevents someone from leaving the room, he is not free to leave in a Hobbesian sense. In more precise terms, he is free formally but not effectively. The same cannot be said of the person who has taken to his bed due to sickness and cannot get up. He or she is not free or lacking freedom. He or she is *incapable* of leaving the room. The same goes for a blind person who has to read a certain notice. The blind person is not lacking in freedom, he is incapable of reading the message meant for him.

In my opinion, Skinner's (and Berlin's) proposal needs a certain, although minor, adjustment. In the case of a blind person it is acceptable to speak about lacking the freedom to read, at least in some sense of *negative* liberty. However, if a person lacks the physical ability to read, he or she is not prevented by any *external factor*. Neither is the obstacle "internal" to him in the form of fear or weakness of will. It would be closer to the truth to say that there is a *contradiction* between the person's ability and his goals.

This also goes for a lawyer who sets himself the goal of mental growth (and growth of know-how). Not everyone makes their own fortune. This is an everyday realism of life, and should not be changed with a specific theory. The theory of rational discourse, for example, is not a magic word making every interested party a lawyer of the "best degree". If the theory seeks something like this, it is doomed to fail even before its final formulation.

Quentin Skinner's individual contribution is not within the specification of the concepts of positive and negative liberty but in the formation of a *new* dimension of negative liberty, or, to be precise, in the presentation of a concept of negative liberty. For this reason, the title of his treatise "The third concept of liberty" hits the target. I shall not devote time here in going through the analyses of the Roman period or the birth of English parliamentarianism, with which Skinner shows the roots of the third concept of liberty, thus proving that the concept is older than the formulation given by Berlin.

The core of the story is that one may lack freedom even when nothing in the traditional sense of negative liberty prevents one from acting. This is the case when one has to be *dependent on the power of some other person*. In this regard, the liberty is the absence of *dependence*, which may be social or political in its nature. Skinner summarises the matter by saying that the way in which man finds him or herself to be constrained is in lacking the freedom to abstain from saying or doing certain things.

The person who is not free follows the will on which he sees himself to be dependent. The thinkers of the Roman classical period, such as *Livius,* took this as a sign of slavery. What is most important is that dependence is not forced, since it is internal to man. The mere consciousness of dependence makes man do things he thinks others expect of him. In this context, I have sometimes discussed political corruption without being able to conceptualise my thoughts in an adequate manner. The core of the idea is that a person who becomes "corrupted" in this very sense is ready to follow a superior (political) will, but only because it is important for him to belong to the "circles" without trying to gain a benefit from it, such as a higher status or authority.

In the area of legal research, the same phenomenon may be articulated as a researcher's unwillingness to criticise the higher courts for fear of losing his authority. A researcher like this has "enslaved" himself in the Skinnerian sense, and lost his genuine freedom of expression. This person sees it as more heroic to keep the voiced criticism to a minimum. By doing so, one may achieve something that one holds as beneficial, but, whether he or she realises it or not, he or she has lost the independence and the autonomy. In Skinner's terms, now liberty may be constricted

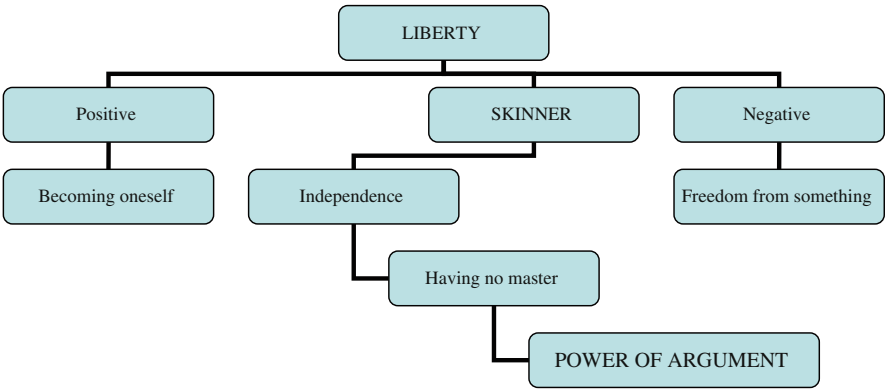
and held captive without the presence of any kind of prevention or power. A will cannot be *independent* if it is not also independent from the *wills* of all others.

> The media is a powerful actor in modern society. Freedom of speech is a cornerstone of modern journalism. Still, being conscious about the fact that one may face a crossfire from the media as a consequence of one's opinions easily leads to restricting one's freedom of honest discussion. It is better to be on good terms with the media if one wishes to preserve one's status and prestige as a presenter of social opinions. This is an extremely important point for DSL as well as the judiciary. The media is a figure of authority in modern society in exactly the same way as the constitutional figures of the legislature, executive power and the judiciary. There are strong grounds to speak of a four-fold division of power.

In a Skinnerian sense, the media by no means sets limits on negative liberty. Freedom of speech is secured in the constitution. However, the constitutional protection of liberty does not concern the third form of liberty, man's internally constructed consciousness of the limits to his own freedom. This is why the independence of DSL and that of the judiciary is in an important sense independence from the "will" of the media. The scholar and the judge who do not dare to present their own opinions to the public are slaves of the public in a similar sense as discussed by the classics of Rome, with Livius at the forefront, when blaming the public for not conforming to figures of authority. The independence of the judiciary is not only constitutional, it is also the avoidance of "slavery" in all actions taken to realise judicial relief.

Summary

The different forms of liberty and their relationship to the theme discussed in this book may be clarified with the following diagram:



Independence in the diagram is exactly independence from the power of others, which is the key to social activity without masters. On the negative liberty side, freedom from something may signify the absence of a physical, mental, social or legal constraint. Using force is one example of a factor limiting or prohibiting physical

freedom. A mental constraint has often been characterised as being unable to do certain things: for what may be mental reasons, a person does not dare to act in a certain way. The social factor may be a social pressure formed by the environment and guiding human behaviour. The legal constraint is formed by orders and prohibitions, sometimes also by constitutive norms like planning regulations in the field of construction.

In an Aristotelian way, *Georg Henrik von Wright* has connected one important type of constraint to human abilities (and skills). These are not mental in an endogenous manner, but learned, whereas the lack of skills or abilities forms a constituent factor of negative liberty.

In what follows, negative liberty is not essential. As was referred to before, positive liberty and, especially, the Skinnerian third form of liberty is the most significant factor woven into the themes of this book. As a matter of fact, it provides one of the philosophical grounds – from the viewpoint of the classical concept of liberty – to my legal philosophical approach. In this very sense, Skinner's third form of liberty provides a passage to the core of legal thought and DSL.

Part III
Between Realism and Idealism

Chapter 10
What Is Science?

A Positivistic View

In the philosophy of science, a great deal of the criteria for "genuine" scientific research has been defined. According to the positivistic theories, the demarcation line between *science and non-science* is clear (Popper 1959). This means that DSL is not science at all. However, the scientific status of DSL is not that hopeless. In order to have a closer look at this problem, let us listen to some more moderate voices.

The practice of science is seen as a professional institution for which it is characteristic that the rules of science are learned by following models. The silent know-how passes through actual practice from one generation to the next. One can write a good dissertation by reading good dissertations. For a person whose curiosity is directed at understanding the foundations of his own actions, the response concerning professional institutions is, however, inadequate. For this person, the demarcation problem becomes important (Niiniluoto 1984, 19).

Still, the criteria for science are not interested in solely distinguishing magic or pseudoscience from science. The criteria are also needed to express what is *good or bad* science. Both problems are especially important for legal research as well.

On the Criteria of Science

Robert K. Merton has listed several criteria that are central to science (Merton, passim). Merton feels that one of the most important concerns the *universality* of science. The results of science are valid regardless of the subjects presenting them, and they are valid everywhere, given that the object, method and interpretation of results are similar. There is no "local" science, which does not mean that science is not in a constant state of change. Science is bound to time but not to place. On the other hand, a single scientific idea or statement is not in itself a scientific result. In order to gain that status, the statement has to pass through the screen of the scientific community. The statement becomes a scientific result ("truth") only after it has been approved by the scientific community in discussion conducted according to the

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rules of science. In this specific sense, science is a *communal matter,* even though the status of scientific result does not presuppose general approval by the research community or even that it has become part of the prevailing conception.

Science is also communal in another sense. Merton reminds us of the results of science being shared property, since science is free from special interests. The results are, however, shared property only as far as researchers are concerned. For other people, access to the results depends on the background, social status and wealth of the individuals. In this sense, the discussion on a- and b-level citizens also touches upon – perhaps most of all – science and its results.

Merton considers, as do many others, that *method* is an important criterion of science, and one of the core features of method is organised scepticism, which often puts science in opposition to the interests of the society's elite. Still, without scepticism there is no knowledge, and without being organised, scepticism would only be a relative to incidental curiosity. As shall be seen later on, organised scepticism is only possible under conditions in which science has an *autonomic status*. Science that depends on the establishment cannot fulfil its role as a sceptic. Merton also supplements organised scepticism with other characteristic criteria of the objects of science: genuine *interest in knowledge*, *selfless curiosity* and interest in *furthering the human good*.

Jürgen Habermas has brought an important addition to the discussion on organised scepticism and criticism (Habermas 1989, 146). It especially concerns the humanities, or the "historical-hermeneutical" sciences. They are governed by the hermeneutic interest, which is practical by its nature and concerns the understanding of the significance of cultural phenomena. The hermeneutic approach thus also helps the self-knowledge of humans by strengthening communication and by creating preconditions for the transfer of traditions in society. According to Habermas, the hermeneutic interest is also *emancipatory* since its basic character is critical of ideology. In its emancipation, the hermeneutic interest helps reveal social relationships that are based on false consciousness and the objectification of relationships it allows.

Scepticism, whether it is emancipatory by nature or not, is still not enough to constitute a criterion of science unless the scientific method also guarantees the *control* of the scientific research process as well as that of the propositions achieved as results of the research procedure. In this, science has a unique status in society. Statements of politics or religion, for example, are not subject to a similar control as the statements of science. This is more or less the same as the idea of the scientific community as a measure of the scientific results.

The task of science is to produce true and well-grounded beliefs. If the belief is not true, it does not produce knowledge, and if the reasons cannot be provided for a belief that turns out to be true, it remains as a mere guess. Later on, we shall see that the same requirements cannot be set in all fields of science. A given field does not fall completely outside the area of science, even though it does not produce knowledge in the *strict sense* of the word – that is, true and well-grounded beliefs.

The "knowledge" produced by DSL is "softer" than the truth but simultaneously certain to such a degree that makes communal acceptability possible. In this respect, *controllability* proves to be an essential criterion for DSL since an uncontrolled production of "certainty" opens the gates for arbitrariness.

Whatever we think about the criteria Merton has set for science, they have an important task in characterising the *ethics of science*. Truth (or certainty) is the fundamental ethos of the human search for deeper understanding. Along with beauty and goodness, truth is one of the central values of human life, and science that respects truth (or certainty) has to take its ethos seriously. Breaking the Mertonian rules is the same as acting against the ethics of science.

Further Analysis

Raimo Siltala has analysed the demarcation problem using the scientific method as the measure (Siltala 2003, 475). Siltala makes a distinction between the context of *discovery* and that of *justification*. The former contains, among others, the following minimum criteria of the scientific method:

1. *Prohibition of triviality*, meaning the requirement of significance set for the results of research, and
2. *Prohibition of identity,* or the requirement for the research to be uncompelled, which means that one could describe the study as having its own individual identity.

The most important requirements for the scientific method, however, concern the scientific justification, which is always a communal matter. In this regard, Siltala lists the following minimum requirements:

3. The results have to receive *communal approval*, which fully concerns the results of legal research as well, since law is a thoroughly social phenomenon.
4. The requirement of *rational justification* rules out arbitrariness and contingency.
5. The research has to be *temporally continuous*, which is guaranteed by the long duration of the methodical tradition, which, in turn, has a significance that enhances predictability.
6. The *degree of exactness* of scientific statements has to make scientific communication possible and exclude the anarchism that ruins research.
7. In general, research has to have *some kind of method,* since methodical nihilism of all kinds makes science and scientific discourse impossible.
8. *The concepts used in science have to be identifiable*, in addition to which the method has to be cleared of any such complexity that may ruin its generality (methodical application of Occam's razor).

Summary

Ilkka Niiniluoto has formulated some complementary requirements to the Mertonian analysis and those presented by Raimo Siltala (Niiniluoto 1984, 21). Niiniluoto builds his analysis on a list of six criteria, which also have great value for legal research.

One of the main features of science is its *systematised structure*. An arbitrary and unforeseeably changing research strategy does not enable one to grasp the object of the research. The matter may be elucidated with the "mist-creature" described by the Finnish philosopher *Eino Kaila*. The world-view of a mist-creature consists of a series of individual and arbitrary sensations. At one moment it may realise one sensation, such as the colour green, while at another moment a loud rustle. The sensations are not connected within the framework of any whole (system). The mist-creature does not perceive the rustle the leaves of a tree make in the wind. Due to the detachment of the experiences, the creature never finds out what "really" happens. The same would go for a creature from space having no preliminary knowledge of the conditions on earth. If matters would only be elucidated to the creature as glimpses, without any system and at random intervals, nothing would be repeated. The creature would have no conception of the reality of earth based on systematic management of knowledge.

Another criterion Niiniluoto sets to science is *consistency*, which refers to the consistency of both thinking and expression. Scientific thought has to stand up to the test of logic, which identifies the possible contradictions in the system of propositions as well as whether the research follows the law of excluded middle. Linguistic consistency, for its part, refers to the syntactic norms defining the correct use of language.

Objectivity is a requirement characteristic of science in general. For Merton, this requirement refers to the elimination of the interests set by both the researcher and the external world. The crucial fact in Niiniluoto's discussion of objectivity is the *power of arguments*. One must let the facts (arguments) do the talking.

What is difficult here is that all scientific facts are *interpreted*. This goes for sciences (*Naturwissenschaften*) as well as for the humanities and social sciences *(Geisteswissenschaften*). In the latter, the special difficulty lies in the fact that the subject matter of the research, such as human behaviour, exists within the same community as the researcher. Therefore, a fully external point of view is impossible in the social sciences.

As Ilkka Niiniluoto points out, the formulation of scientific theory always takes place in a specific intellectual environment, which presupposes the fulfilment of at least the following criteria:

(1). *Conceptual presumptions* (a given system of concepts is adopted and/or concepts are interpreted in a given way)
(2). *Factual presumptions* (specific facts are taken for granted)
(3). *Ontological presumptions* (a given category of entities is presumed existent)
(4). *Methodological presumptions* (a specific method is seen as "genuinely" scientific)
(5). *Epistemological presumptions* (knowledge may only be acquired on specific things)

(6). *Value-related presumptions* (presumptions relating to the world-view and ideology), and
(7). *Metaphysical presumptions.*

The last-mentioned may take several forms. For example, the presumptions of classical metaphysics concern the origins and essence of all beings. The extreme injustice thesis is one from of that kind of metaphysics (Alexy 2004, 160). A vulgar form of metaphysics is represented by the pseudo-sciences; it is not possible to verify or falsify their propositions. Sometimes a theory includes elements that have not been adhered to from the beginning to the end. Niiniluoto calls these presumptions temporarily metaphysical. They can be changed during the research or replaced by testable presumptions.

All presumptions can distort the results of science. This is why a researcher has to be conscious of his presumptions in order to maintain the scientific research approach and to stay objective. In this case, the presumptions can either be publicly stated as reservations in the theory or at least interpreted as such. If the presumptions are not recognised, the research becomes "blind", which means that it cannot be exposed to criticism and the testing of its results.

For this reason alone, the research has to be constantly prepared for criticism. The *openness to criticism* of the starting points, the research procedure, the results and the publication of them are the essential criteria of true science. A closed system is immune to facts external to it. In the field of theoretical social sciences, Marxist theory has been held as a typical example of a conceptual-logical model. It cannot be shaken by any empirical observations external to the theory or statements based on such.

Similar to Merton, Niiniluoto also sets the *autonomy of science* as a criterion when drawing the demarcation line between science and non-science. No external instance can define the problem setting, the method used or the results or publication of the research. Attempts in this direction have not been lacking, especially in dictatorships of many forms. In a dictatorship, science has occasionally even been made an instrument of politics and power. This was the case in the real socialism, especially in the Soviet Union and the GDR.

A more difficult problem is bound up in the *science policies* of modern societies, in which there are attempts to set the "social" goals from outside the instances practising science, like universities. However, an interesting social problem and the problem that can be studied by scientific methods have to be separated from each other. In applied technical and medical research, expectations of results may, with good grounds, emanate from outside science, but in the social sciences the autonomy of science is different from the hard sciences. Social sciences, which become sensitive to the expectations of the authorities, immediately jeopardise their own autonomy since it is only autonomy that protects the criticality of science.

The list of criteria is completed by the requirement for *self-adjustment*. This requirement is intertwined with the notion of autonomy. One dimension of autonomy emphasises that science and only science has the right to identify its defects and errors, as well as the ways through which these defects and errors can be repaired.

All that can be summarised in what I call the *scientific attitude* introduced by *Georg Henrik von Wright*. It is not included in the list of criteria compiled by Merton or Niiniluoto, but it has special significance as the background presumption of all science. At its core, the scientific attitude concerns an unforced and spontaneous humility when faced with a given task. Humility is required by consciousness of the fact that nothing in science is final.

As Sir *Karl Popper* emphasised, science can never achieve the "final truth". All of its truths are only temporary. In this regard, Popper defended the so-called thesis of verisimilitude. With a substantial degree of simplification, the basic idea is that no scientific proposition can be verified, whereas it can be and often is falsified at some point. By falsifying its own hypotheses, science comes closer to the truth but never quite reaches it. A slightly modified falsification concept does not require that statements could be proven false. It is enough that the propositions are not "testable". This is one of the dilemmas of science. It is a guarantee of its dynamics but also a measure of its limitedness.

The amount of information in a scientific hypothesis is greater the bolder or more unlikely it originally is, since what the hypothesis tells us about reality is connected to the number of alternatives it gives. Niiniluoto refers to *Isaac Levi*, who summarises the thought in the statement: "A scientist has to gamble at the cost of reality" (Niiniluoto).

The same scientific attitude concerns DSL. However, one special feature of DSL should be brought forth at this point. It has been connected to its practice for as long as there has been the doctrinal study of law in its present form. I call this feature the "commitment to authority". Its theoretical grounds are in the (weakly) normative nature of DSL, in the name of which authoritative opinions or opinions experienced as such have been presented. As the belief in authority has crumbled in society, first through the secularisation of religion and later on in the field of law, legal research has met with increased criticism. The opening of society has amounted to growth in the demands for control and – in many cases – also to the increase of controllability.

Summing up, the criteria of science also include legal research understood as the doctrinal study of law. If one considers it reasonable to question the scientific nature of DSL, the answer has to take a stand on its systematisation, consistency, objectivity, openness and autonomy or, in summary, the scientific attitude represented by DSL. No field of science can be detached from these requirements when its scientific criteria are put into question. Detachment from the criteria of science amounts to severing the field in question from the long tradition of science.

On the other hand, it does not seem altogether useful to try to *define* the notion of science once and for all, and then to attempt to fit a given field into the definition arrived at. However, this error has been made time after time. One example is the attempt made by *Alf Ross*. He had a certain positivistic model of science in mind, and the main task was to formulate a concept of legal research that fits the pre-established scientific criteria. Taking the Rossian criteria of science seriously, legal research is either an empirical or a logico-deductive science.

Attempts like this are expressions of a scientific imperialism, which is foreign to the way in which Ilkka Niiniluoto, for instance, identifies the criteria of science.

There are no general criteria of science that dictate what DSL *should be*, given that it is objective, critical, autonomous and self-adjusting.

Instead, the thought experiment should be reversed. One should not begin by asking *what science is*. In the case of DSL, it would mean that DSL is fitted into the Procrustean bed, where either arms or legs are severed. The bed is, of course, of the correct size if, and only if, the patient is measured to fit the bed. The only problem is that when DSL is measured according to this kind of bed, it is no longer DSL.

The times of extreme positivism have now passed, but the lesson provided by them is still vital. One who is interested in the scientific nature of the doctrinal study of law cannot shut himself away in an ivory tower and try to define DSL as anything other than what it is. The status of DSL in the social division of labour is not a question of definition. DSL is a *form of social practice* and has to be accepted as such, since the conditions for the existence of DSL are bound to nothing other than the societal interests. For as long as people are asking questions about the content of valid law, there will be a need for an activity that provides an answer to this question. At the moment, this activity is as it has been for the last few hundred years.

If this societal fact is accepted as a starting point, the problem of controllability of interpretative statements is important. DSL cannot escape this question and base its existence on the flimsy ground of intuition. What *Descartes* said about common sense could also be said about intuition: It is an effective force, but the downside is that everyone has it. In order to avoid this trap, the statements of DSL have to be *publicly* (inter-subjectively) controllable.

Chapter 11
Legal Realism Reinterpreted

Alf Ross and the Scandinavian Realism

The positivistic model defends the separation thesis, according to which there is no necessary connection between law and morals. Let us now have a closer look at the problems that follow from this thesis represented by, for instance, *Alf Ross*. For this reason, an attempt will be made to reread Ross in a new light, which will make it possible to identify the real differences and similarities between the Scandinavian legal realism, represented by Ross, and the modern argumentation theory.

Alf Ross (1899–1979) was, without a doubt, one of the greatest Scandinavian, and even European, legal thinkers of the 20th century. He was like a tall oak, in the shadow of which only a few smaller plants could persist. In the Nordic countries he is on an equal standing with *Axel Hägerström*, whose philosophy also provided Ross with his first intellectual home. In this spirit, Ross took a strong stand on the normative nature of morality (and valuations) in his writings of the early 1930s. According to him, things such as moral obligations are only expressions of a sense of duty. Due to this background, we already have good reason to connect Alf Ross with the intellectual legacy of the Scandinavian realism.

Still, to understand Ross and his contemporaries, we must remember that Ross also wrote in the pragmatic tradition beginning in Denmark from *Vilhelm Oerstedt* and was carried on in the works of, for instance, *Henry Ussing* and *Fredrik Vinding Kruse*. As we will see later on, Alf Ross was a deeply Nordic thinker. Connecting him, for example, to the "robust predictionism" represented in the extreme forms of American realism (pragmatic instrumentalism) is a complete distortion of the background to his learning and his basic jurisprudential commitments (Hart 1983, 161; Lagerspetz 1995, 107, 128). On the other hand, the Scandinavian version of realism found daylight at a time when the optimist view as regards the social engineering conquered the Western mind. No one raised a doubt on the power of science, or on the human ability to change the society either (Illum, 1968, 49; Jörgensen 1969, 389; Zahle, 227; Bjarup 1980, 152; Peczenik 1989, 262).

As regards Alf Ross and his thoughts on the doctrinal study of law, we must be careful to separate his two "roles". First, the *analytic* Alf Ross, whose findings were elaborated on in the Nordic countries by the so-called analytic school of the doctrinal study of law (Ross 1958, chapters V–IX; Ross 1957, 812), and the second

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Ross under closer scrutiny here – i.e., the *(legal) realist* Alf Ross (1946, 1953/1958). This side of Ross' thinking has never really found its place in the Nordic countries.

What Alf Ross was interested in as a realist was the nature of the *scientific* doctrinal study of law. In order to be a part of science, the propositions should (at least in principle) be true or false in the same way as those of science in general. Ross himself formulates his scientific programme as follows:

> The leading idea of this work is to carry, in the field of law, the empirical principles to their ultimate conclusions. From this idea springs the methodological demand that the study of law must follow the traditional patterns of observation and verification which animate all modern empirical science; and the analytical demand that the fundamental legal notions must be interpreted as conceptions of social reality, the behavior of man in society, and as nothing else (Ross 1958, xi).

Alf Ross was not a realist only due to the influence of Axel Hägerström, even though Hägerström's shadow was cast on the young Ross. Actually, Alf Ross' path to Hägerström went through Hans Kelsen. Ross' book "*Theorie der Rechtsquellen*" (The Theory of the Sources of Law) is strongly marked by *Hans Kelsens'* thoughts, even to the point that Ross's countryman, Vinding Kruse, among others, criticised him for being too Kelsenian. It is apparently this very criticism that led to Ross finishing his dissertation in Uppsala under the guidance of Hägerström.

This is also how Ross was drawn to the camp of Scandinavian realism, even though he did this in a characteristic way. It is also interesting to note that in the introduction to the work *Theorie der Rechtsquellen,* Ross actually disassociates himself from the central arguments of his own book and, at the same time, from the Kelsenian thinking to a great deal. The introduction is thus something of a pathway from the young Ross to a more mature character. The most significant and influential work Ross published on the theory of the doctrinal study of law was "*On Law and Justice"* (1958; in Danish, Om ret og retfaerdighed 1953). The English version is a partially rewritten and shortened version of the original text of 1953. That is the reason why Danish references are also used in the following, in a context where there is a danger of misunderstanding the original idea.

> Alf Ross himself did not fully agree with the English translation quite contrary to the Spanish version (translated by Genaro R. Carrio). *Aleksander Peczenik* as my collaborator, I have tried to make some corrections to the inaccuracies of the English version in Ross' favor, so this theme will not be discussed at any greater length in this context (Aarnio and Peczenik 1985, 127). However, the original Danish text has to as large extent as possible been used as the basis of the following analysis.

"On Law and Justice" is no longer a pure example of the Uppsala school. Its author also shares the main ideas of logical empiricism and the so-called Vienna circle, which is why the work must be evaluated against the scientific background of its time. Before we get better acquainted with the realist-Ross of this phase, there is reason to make a brief excursion into legal theory in general.

According to Ross, the terms "legal theory" and "jurisprudence" literally refer to theory *about* law. When interpreted like this, legal theory can be (1) theory about the legal system – that is, the structures norms, and concepts, (2) theory about the

application of law (adjudication), (3) theory on legislation, or (4) theory about legal research (the doctrinal study of law).

Ross as a Logical Empiricist

Ross often talked about legal *philosophy* rather than legal *theory*. This concept should not be taken verbatim. In this regard, Ross' idea is similar to the later *Ludwig Wittgenstein,* who emphasised that, for him, it was not important to practise philosophy, but to analyse philosophically interesting problems. Philosophy is not a science; it is a therapy that frees man from unnecessary problems. In the same spirit, Alf Ross writes: Not legal philosophy, but legal-philosophical problems (ikke "retsfilosofi", men "retsfilosofiske problemer"). Yet, what is a legal-philosophical (jurisprudential) problem for Ross?

To encapsulate, it is the *language of the doctrinal study of law*. In this as well he was a child of his age. As Ross himself mentions, logical empiricism, still very much dominant at the time of "On Law and Justice", set as its programmatic statement the thesis: The task of philosophy is the logical analysis of the language of science. Therefore, "On Law and Justice" strives for an analysis of the scientific nature (status) of the legal propositions presented in the doctrinal study of law.

Alf Ross' realism is literally *legal* realism. Everything he writes about law is written through the doctrinal study of law. As we are about to see, this attitude is a source of both Alf Ross' strengths and weaknesses. Let us first take a look at a few starting points. Ross' main target since his early works was natural law. In his Kelsenian phase he might be best characterised as a legal positivist, whereas the thoughts of the later Ross are more related to philosophical positivism. Both of these attitudes meant a *polemical attitude against natural law*. Therefore, one possible way to read "On Law and Justice" is by choosing the author's negative orientation toward natural law as an interpretative horizon.

Ross' philosophical positivism can be identified in his conscious purpose to formulate an empiricist theory for a *scientific* doctrinal study of law. What follows from this is, first, an attempt to define *what is science,* and, second to define such criteria for the doctrinal study of law according to which this research fulfils the definition of science. Metaphorically, the definition of science is like Prokrustes' bed. The doctrinal study of law fits the bed well when the head is cut off and the legs are shortened enough. If the doctrinal study of law does not fulfil the general scientific criteria, it is something other than science, such as legal policy or pure manipulation or persuasion. In this, Alf Ross was a true representative of logical empiricism, which is no surprise when taking the strong position of the movement in the years following World War II into account. In this setting, we can count *Theodor Geiger* and *Hans Reichenbach* among Ross' kindred spirits.

According to logical empiricism, relevant scientific arguments are either (1) based on perceptions or can at least (2) be reduced to them. Ross continues with this statement:

> It is a principle of modern empirical science that a proposition about reality . . . must imply that by following a certain mode of procedure, under certain conditions certain direct experiences will result . . . This mode of procedure is called the principle of verification (Ross 1958, chapter 9, at 39).

This means that the real content of an empirical proposition is composed of those *actual consequences* that the proposition either expresses directly or which can be logically derived from propositions expressing direct experiences. Only in this way does science fulfil the requirements for truth (sandhetskvalitet). If a proposition does not fulfil this requirement, it does not belong to science, even though it might be interesting, aesthetically pleasing or well suited to invoking feelings. Thus, only empirical propositions could belong to Ross' scientific world-view (Ross 1958, x and chapter 8).

This can be called the *empiricism hypothesis*. On the other hand, statements (logically) derived from empirical propositions (verifiable implications) also belong to science. Let us call this the *logicality hypothesis*. Scientific theories are complex combinations of these two elements. To encapsulate: They are empirical and logical, or, to put it in one word, logico-empirical.

Realist Ross

As a legal realist, Alf Ross saw the law produced by the legislative act as being not valid (gültig in German) in any other way but *formally*. This formally valid law only becomes *legally* valid (geltend in German) once it is effective – i.e., realised in society. Ross writes: "I reject the idea of a specific *a priori* validity which raises the law above the world of facts, and reinterpret validity in terms of social facts" (Ross 1958, xi). According to this view, a formally valid norm is a norm, but it does not exist as a *legal* norm if its validity is only of a formal kind. From this viewpoint, the crucial problem is what the "social nature" of law actually means.

Like American realism (pragmatic instrumentalism) he took off from the point that only the law applied by officials is "living", or valid. Thus, the legal phenomena as the counterpart of the norms must be the decisions of the courts, and the validity of legal norms – as well as their existence – can therefore be sought solely in the judicial application of the law, and not in the law in action among private individuals.

One dimension of this idea is based on law always being the use of *coercive force*. Law is a power system. The courts realise the use of coercion by defining which actions fulfil the threat of sanction. In Rossian terms, law, coercion and adjudicative activity form the core of valid law. Nevertheless, Ross rejected the idea that coercion is a criterion of the validity. Of course, the judge *uses* power in the adjudication but this does not mean that the *validity* of law depends on power and coercion. Power is not something "behind" the validity, although law is, in simple terms, an instrument of power. The validity only results from the activity of the judges (efficacy).

A key to Ross' concept of the doctrinal study of law can thus be found in his theory on the validity of norms. I shall illustrate this idea with certain ideas introduced by *G. H. von Wright* on the same subject, since they are even better suited to

analysing the basic concepts about validity than the analyses made originally by Ross (von Wright 1968, 3, 1985, 267). von Wright writes that it is not often natural to talk about the existence of a (legal) *norm*. Instead, we can state that there is a *duty* to do something. What, in this case, does it mean that individual *i* has the duty to do, let us say, *O*?

According to von Wright, this means the same as: *i* belongs to group *C,* of which it is (very) probable that if a member of group *C* does not do *O*, then some A regularly does *R*. Here it is presumed that *A* is an authority and R something that is unpleasant from the viewpoint of a member of group *C*, such as some "bad" or "unwanted" consequence.

von Wright goes on to say that the unpleasantness caused by R is, from C's viewpoint, greater than the benefit or advantage gained from not doing O. If, in these circumstances, individual *i* has the duty to do O, the norm N – "*Every C has to do O*" – is valid. A norm like this can be called a *primary norm.* Its "target" is precisely the behaviour of the citizen (C) and its validity depends on the reaction of the officials, in the aforementioned way.

The legal order also includes norms that oblige officials (A) to put consequence R into effect if an individual *i* of group C neglects to do O – that is, does not obey the norm N. It is this *secondary norm* that guarantees the realisation of the sanctions set in the primary norm. The validity of the secondary norm thus implicates the validity of the primary norm, but not the other way around, which is why the validity of the secondary norm presumes the existence of a "Hartian" rule of recognition or something like that.

> Let me add that following von Wright's ideas, a norm that is not valid is a norm as well. There is no contradiction to the Rossian vocabulary. According to Ross, an ineffective (formally valid) norm is also a norm, although it is not a legal one. If a norm is not formally valid either, it may still be a norm but without any kind of legal significance.

What Is Law?

Ross, like many other legal theoreticians, used the game of chess as his example. He asked: What does it mean that, during the game, a certain rule of chess is a valid chess norm? The answer to that question opens up the nature of a game of chess as a normative phenomenon. Once this example is moved into law, we can outline an answer to the classic problem: What is law? In Ross' opinion, the validity of a chess norm can only be analysed by separating the *external* and *internal* viewpoint. Ross himself did not use exactly these terms, which were presented by Wittgenstein on several occasions, but, by all accounts, Ross had adopted a similar view. Actually, it may be that Alf Ross was one of the first to use this distinction in jurisprudence because he dealt with it as early as the beginning of the 1950s. Ross himself writes as follows:

> In the concept of validity two points are involved: partially the outward observable and regular compliance with a pattern of action, and partly the experience of this pattern of action being a socially binding norm (Ross 1958, 37).

Ross continues (in Danish) that not every externally (outward) identifiable custom of the chess game is an expression of a valid chess norm. The chess norm, as well as a legal norm, has a double function, first, an external pattern of action and, second, an internal motivational basis for the player, or in the case of law, for the judge (Ross 1953, 37, 50).

The distinction is crucial in Ross' case. If someone who observes a game of chess from the outside tries to understand the players' moves, he must connect this activity to certain rules. The player acts in the way he does because he has to, since if he does not, he will be excluded from the game. The game is conceptually defined by the rules. The same goes for any other game. External understanding, however, presumes a previous "internal" understanding of the subject.

As we saw in Chapter 5, Ludwig Wittgenstein defended the same idea that without an internal point of view, it would never be possible to understand an entirely foreign culture, since we cannot know anything about rules that are completely strange to us. The same holds true as far as the chess game is concerned. The rules of the game make the player's actions intelligible to someone looking at the game from outside. The rules express an abstract normative idea content, which can be used as an *interpretative or explanatory scheme.*

> It is important to make a difference between (at least) three different steps or layers of internal aspect. An internal point of view may mean *understanding* the object, such as the other part, or *acceptance* of the other part, or finally a *commitment* to the other part's view or perspective. The more internal information one has available, the deeper one understands the object. However, even a perfect understanding does not mean perfect or even partial acceptance. Further, a full understanding does not necessarily result in a commitment to the fully understood object. The intention to understand something X is not identical to the intention to commit to X.

In the case of law, that interpretative scheme makes it possible to understand legal phenomena (legal life in Rossian terms) as a meaningful totality, and, at least to some extent, predict the future legal phenomena – that is, legal life (Ross 1958, 42).

From the internal point of view, the rule is no longer an interpretative scheme. As distinct from the outsiders, the player does not try to understand his own or the other player's actions. He simply *plays* and tries to do so in accordance with the rules in order to guarantee his participation in the game. Here, the chess game example provides a model with which to understand the validity of a legal norm as well.

As we have already seen, legal rules have a *dual function*, the external and the internal ones, depending on the point of view one takes. In this regard, the legal norms are a part of the *normative ideology* ("judicial ideology") internalised by the judge. In this way, as has been referred to, Ross independently represented a conception of understanding activity (actions) similar to *H.L.A. Hart*. According to Hart, officials have to accept certain judicial rules of recognition (as well as rules of amendment and execution) as common norms concerning themselves. Ross did not, of course, use the notion "rule of recognition". As regards the validity of law, the judicial ideology, however, has exactly the same role.

Dealing with the doctrinal study of law, Ross establishes as his point of reference the proposition A as follows (Ross 1958, 38):

A = D is valid (Danish) law
In which, for example
D = § 28 of the Law on Bills of Exchange.

A similar argument could naturally be made about any other possible statute in any other national law. The proposition A is, according to Ross, a typical *legal* proposition. On exactly which conditions is this proposition true in the Rossian sense?

Ross first reminds us that a legal norm, just like a chess rule, forms an *inter-subjective meaning and motivation context* regulating the behaviour as a shared ideology adopted by the majority of judges. Rules are followed because they are *experienced as binding.* In the judge's case, the internal aspect means a commitment to a relevant normative ideology that forms the basis and framework for the adjudication.

In this respect, Ross was a typical Scandinavian realist. He thought that a rule that is experienced as legally binding provides the judge with a *model for behaviour*. The model *motivates* the judge, as does the rule in the chess game as far as the player is concerned. For the judge, the rule that serves as an *interpretation or explanation scheme for an outsider* is the *basis of motivation*. However, the task of the doctrinal study of law is *not* to make empirical psychological investigations into the process of motivation. In this regard, Ross does not share such "psychological" legal theory as is represented by the eminent Polish legal philosopher *Leon Petracycki*, a mentor of the Cracow school. The doctrinal study of law deals with the *content* of the judicial ideology, and, as we will see, it does this by means of certain specific methods.

The motivation to follow the rule is not based on need calculations or other such matters as interests. Instead, the normative ideology of judges gives impulses to a person who experiences that ideology as a kind of social pressure. This makes him internalise the ideology spontaneously, so that he commits to the norm at issue independently of, or even against, external expectations.

The judicial ideology is not well articulated but assumed as a kind of "silent and shared commitment". However, it does give institutional support for the recognition of the validity, similar to the Hartian rule of recognition. That rule of recognition very seldom makes explicit *which* norm is valid at a given time. The same holds true as regards the judicial ideology. It is a complex totality, with the result that *different judges* may have, and actually do have, different conceptions of the validity of norms. Nonetheless, this non-coherence does not make the judicial ideology as a rule of recognition dispensable or lessen its significance as the foundation of law.

Ross is careful not to confuse what *is* with what *ought to be*, and in no way belittles the strength of Hume's guillotine. One cannot draw something that ought to be from something that is. Hence the judges are not supposed to draw normative (ideological) consequences from the fact of what they are actually doing. Ross only emphasises that what is truly felt as binding must be internalised. The same problem was pondered by *G. H. von Wright* in his theory of action. For him, one of the forms of activity is "internalised" action, such as our socially internalised habit of stopping at a red light. In those cases, it is unnecessary to ask what an individual intended (wanted) to do; the reference to internalised behaviour is enough.

However, in this phase of his career Ross was more interested in the method of the doctrinal study of law than the deep structure of law. Therefore, the core of his theory concerns the question: What is the assertion *A = (D) is valid (Danish) law* about? This question is crucial with regard to the scientific status of the doctrinal study of law. In the simplest possible terms, Ross' answer is: The assertion A is a *prediction*. The real meaning of the content of the assertions on valid law is a prediction concerning future social events.

According to Ross, the doctrinal study of law never looks at the past, to history, but at the future, and so the legal research should never be interested in the court's past behaviour *de facto*. This is the case despite the fact that, to a large degree, it has to base its predictions on the past or previous behaviour of the officials.

On the Ideological Element of the Rossian Theory

The focus of the doctrinal study of law is always on the *judge's commitment to follow a certain norm*. This is a different matter to "the activity of the courts" since, according to Ross, the court is an institution and it is inaccurate to say that the institution "commits to a shared ideology". In the Rossian theory, the judge, and only the judge, is the key actor, and what the scholar is doing is to predict the judge's further commitments.

Ross does not make a rigid difference between the predictions of the doctrinal study of law and legal-political estimations (sententia ferenda). This is due to the fact that future social events are never strictly determined. Each prediction might also affect the future, shaping it. To a certain degree, the prediction might thus also be self-fulfilling.

Notwithstanding the above difficulties, an assertion A presented in the doctrinal of law is as follows:

> A: *The norm N (for example, §28 of the law on bills of exchange) is currently valid law.*

Independent of the linguistic formulation of A, its meaning content can be reformulated in the form of a prediction:

> A1: *If proceedings are instituted in a court so that the facts and circumstances fulfil the essential requirements of 28§ of the law on bills of exchange, it follows that the norm expressed by 28§ of the law on bills of exchange will form the decisive foundation of the court's decision in the case (integrerende bestanddel af dombegrundelsen), and all this on the precondition that there are no factors between the prediction and the decision that change the foundations of the prediction A* (Ross 1958, 55).

The prediction A1 can be taken as *accurate* (anses for sand) if, and only if, there are good reasons to estimate that the prediction will be realised in the activity of the judge. Still, it must be emphasised that the "truth value" of sentence A1 does not depend on whether the evidence of the fact can be estimated well enough in a certain case. The predictive nature of sentence A1 does not depend on procedural evidence but on the prognosis of whether a certain norm will be included in

the judge's reasoning or not – that is, whether a norm will be applied in the given circumstances.

The prediction always concerns the normative ideology internalised by the judge. The norm is valid in a certain legal order if, and only if, it is a part of that judicial ideology. Further, the assertion A1 about the validity of a norm is true if, and only if, the norm is part of a binding judicial ideology.

In one sense, Ross' thoughts prove to be quite problematic. First, he thinks that the probability by which the assertion A1 proves to be accurate also defines the validity of norm N. From this, necessarily it follows that norm N can never be either valid or invalid. It is only valid with a certain probability that changes on a scale of (nearly) 1 – 0. Ross himself points out that the validity depends on the varying degree of probability concerning the predictions of the future behaviour of the judges (Ross 1958, 47).

For its part, the degree of probability depends on the experience material (erfaringsmateriale; in Danish) on which the prediction is based. Ross calls this material legal-source-material (retsskilderne; in Danish). Therefore, a prediction deals with the probability of a certain norm belonging to the judicial ideology shaped by the sources of law. As this is the case, there appear to be problems in two different dimensions. First, it seems to be impossible to apply a probabilistic model to the treatment of this kind of material. Legal-source-material (or judicial ideology) does not normally give one the chance to estimate probability quantitatively (for example, as a numerical prediction: a probability of 75%). There are no quantitative measures for the predictor to use. Thus the prediction must be based on a *qualitative analysis.*

Therefore, it seems to me that the "probability" is more about a kind of "credibility" or "arguability" – that is, about how well founded justification of the future activity of courts one is able to form. "Arguability" is something other than a mathematical-theoretical "probability" based on statistics, other quantitative data or on the use of empirical observations. This is connected to the fact that "predictions" of the doctrinal study of law – unlike the predictions of science, for example – are based on data, the ontological status of which is problematic. This can be seen as one ponders the way a norm, a court decision or a custom "exists". These data are ontologically difficult in the same way as the "existence" of language. They are partly dependent on the subject and on his or her interests.

It is obvious that the perceptions concerning the scientific predictions (meter readings, pictures on an electron microscope, etc.) also need interpretation, but the difference to the "perceptions" that support legal predictions is clear. As the interpreter of his "perceptions", one engaged in the doctrinal study of law also belongs to the community that has produced the interpreted data in the first instance. This person evaluates the data from an internal viewpoint, and is not an objective observer in the same sense as a physicist observing the readings on a meter or other technical equipment. A lawyer has already learned the language where and in relation to which the interpretation is produced.

This can be called the *epistemic internal* viewpoint. In a sense, it is key to both the criticism of Ross and the theory of argumentation represented in this contribution.

The "epistemic internal" viewpoint combines the intellectual approaches of the scholar and the judge toward law – for example, toward sources of law and their way of use. The scholar not only understands but also accepts the same source material as is used by the judge. The difference between these two lies in the fact that the scholar does not commit to the judicial ideology in exactly the same way as the judge. For the judge, the source material is the motivational basis on which to *solve* the case. The scholar does not solve anything, but he does recommend certain solutions to certain typical cases, and this presupposes a commitment to the judicial ideology at his disposal.

Without an adequately shared (common) epistemic viewpoint, the scholar and the judge will not reach an agreement on the content of law, and in extreme situations might not even understand the language the other uses. This adequate and shared (common) viewpoint also separates the legal scholar and the judge from an *epistemic external* viewpoint represented by, for instance, a sociologist following an empirical method. For his investigation, the sociologist needs certain internal information in order to understand the judicial game. Depending on the purpose of his research, he may also accept certain legal material as his basis as well as a set of rules and principles guiding legal reasoning. However, the empirical sociologist never commits himself to the judicial ideology. His method is descriptive and explanatory, not interpretative – as is the method of a legal scholar.

On the other hand, the scholars, the legal scholar as well as the sociologist, and the judge have an *organisationally* different position in relation to law. Only the judge is "inside" the organisation of jurisdiction. He uses the *power*, which is why his position can be called *organisationally internal* in order to make a distinction from the organisationally external viewpoint of the scholars.

A Critical View

As was referred to earlier, a genuine prediction always aims at the future, even though it is based on past facts. This raises a problem: What, in the end, is the target of the prediction? There are multiple answers to this question.

1. The prediction is targeted toward the *end result* of the case at hand (e.g., the Supreme Court will affirm the consequence X)
2. The prediction strives to make a future decision *understandable*, to give it an interpretative background (e.g., the Supreme Court's decision X in situation Y is understandable because Z)
3. The scholar tries to *anticipate the (public) arguments* used by the judge
4. The scholar predicts the *norm the decision (probably, credibly, etc.) is based on*, even though the norm is not written out.

Taking Ross' view of the doctrinal study of law into account, the alternatives (1)–(3) can be ruled out. If the prediction solely concerned the end result of a certain

case, it would not fulfil the basic requirements of the doctrinal study of law. Contrary to the task of an attorney or other advisors involved with certain cases, the task of legal research is not to anticipate the results of *singular* decisions.

As regards the alternative (2), it is difficult even to talk about a prediction. Making future cases understandable is not a prediction at all. It is an explanation, and this, in the case of alternative (2), can be at most a reference to an "explanatory conformity" or the motivational foundation of the judge.

The alternative (3) is no more promising. The fact that we have some way of anticipating the arguments used *de facto* by the court does not necessarily tell us what the content of valid law is. As Ross – like a true realist – remarks on many occasions, arguments can also be nothing more but a *façade* (Ross 1958, 55). The decision may be justified with entirely different arguments to those used de facto by the judge, or they may mean something completely different. In some cases, the decision may be made without even one single rational argument.

> As *Jerome Frank* pointed out, in extreme cases the judge's ulcer, his early-morning quarrel with his wife or losing his calm in the morning traffic may have a decisive influence on the content of the verdict. The arguments must not be taken verbatim. Still, it is in some ways true. We can never find out what the judge really thinks, for we only receive the arguments, having thus to manage with just the façade.

Ross did not take all this seriously. Even the realist doctrinal study of law does not predict mere "façades". It tries to reach something deeper, more genuine, and in doing so predicts normative information. What is this?

The answer is bound to the alternative (4), combined with alternative (1). For Ross, the genuine prediction concerns the premises used by the judge – that is, the *judicial ideology.* He points out that if we are able to predict the legal premises of the case, we will also succeed in predicting the conclusions. In this way, Ross places the judicial ideology in the centre of his prediction theory. The prediction attempts to reach the (de facto) *effective* normative ideology, or the one that can be *thought to be effective.*

The prediction does not concern the individual arguments used by the court but whether or not a certain norm – in our case D – belongs to the normative ideology accepted by the judge. He follows that very norm due to the fact that he has *internalised the normative ideology in an uncompelled way*. For this reason, the norm forms a genuine motivational foundation for the judge's decision. The motivational foundation of the judge and his knowledge of the facts are what finally define the decision he makes. This is why it is important for the predictive doctrinal study of law to know which (normative) motivational foundation the judge commits to.

> This is the point where Alf Ross has to be clearly separated from such American realists as *Robert S. Summers* calls "predictionists" – such as Oliver Wendell Holmes - and even more so from the so-called "robust" predictionists (Herman Oliphant). On the other hand, there are similarities between the Rossian view and those forms of the American view that also accept the role of norms. It is also important to note what the American predictionists said about the separation of law and morals, and to compare this view to that accepted by Ross (Ross 1958, 59; in Danish, 43).

According to Ross, the content of the normative ideology is defined by the sources of law, which are the essential constituent of valid law. The normative ideology, in its turn, consists of directives that do not unambiguously regulate the final decision but give a guideline or a standard according to which the judge is able to orientate further in order to finally find the decisive directive. Into this normative ideology belong not only the norms of law but also those of customs and morality.

Ross calls his conception of *ideological behaviourism*. This aims at anticipating the behaviour, but selects the ideology that guides the behaviour as its target. Here Ross is drawn far away from rough stimulus-response-behaviourism, and he also takes distance from vulgar court realism. Still, the theory of prediction faces other challenges as well.

First, the *usefulness* of the prediction theory can be questioned. A judge is not at all interested in knowing the *prediction about his own actions*. His interest concerns the *way he ought to ac*t – that is, the content of the *binding* normative basis in his case. There is, however, an even more serious deficiency in the prediction theory: it does not make a *critique of the court's activity* possible.

> *Robert S. Summers* touches the point: "The conception of the lawyer implicit in . . . predictionism does not specifically provide the work that lawyers do in deciding how state power *ought to* be exercised, what the law *ought to* be, and whether existing law is *good or bad* . . . Propositions of law are normative in nature" (Summers 1982, 21).

> This critical function of the doctrinal study of law (critical positivism) has also been emphasised by *Stig Jørgensen* and *Henrik Zahle,* among others (Zahle, 335).

The doctrinal study of law is expected to evaluate the interpretations of the adjudication, and to give constructive feedback to the courts. The social task of the doctrinal study of law is partly normative, and in accepting this normative task it necessarily becomes critical toward the judicial practice. The doctrinal study of law gives reasoned recommendations on what it is to act in a right way in certain typical situations. The doctrinal study of law that is solely predictive is only a lackey of the courts, not their supervisor.

Ross rejected this critique. For him, the prediction theory does not make the doctrinal study of law a slave to practice (slave af praksis). His answer is firmly attached to his original theoretical hypotheses. Ross says that predictions constantly "live". When there is new information about the judge's actions, the prediction is adjusted. The prediction A1 in case Y is not probable if, all things considered and including the former decision X, it is probable that case Y will not be decided like X. The predictive doctrinal study of law is thus constantly dynamic. It takes account of all the new information concerning the changes in the normative ideology. Still, there is still an open question: What knowledge is the prediction based on?

According to an orthodox interpretation of the Rossian theory, the doctrinal study of law is based on empirical research dealing with the behaviour of judges. This is why the doctrine of the sources of law is not, according to Ross, normative in its nature. Instead, the doctrine is descriptive and presents the content of judicial ideology in actual use, and this material can be observed empirically.

However, one must know something before asking the name. This holds true as regards the predictions as well. In order to predict the future behaviour of the judges, one must already have some idea of the judicial ideology prevailing in the court, as well as of its role in the judge's decision-making procedure in general. Yet, this is not enough. For a prediction, one also needs information about the effective normative ideology. This is where Ross gets into trouble: On which grounds can a conception of judicial ideology be formed in practice?

Interviewing the judges is out of the question. It produces something like the legitimation of what the judges feel (see) to be the right way to act rather than information about the effective normative ideology. When asked essential questions, man tries to give the best possible image of himself, and judges are only human beings.

There remains only one possibility. The prediction must be based on what one knows about the judges' thinking *in general*. The scholar has to presume that the judges' thoughts about the content of law are similar to the thoughts of other lawyers, including the scholar himself. As we saw, the "predictor" must have at his disposal *the same epistemic internal viewpoint as the judges.* Without this, the scholar has no way of understanding the judge's actions.

This means that the scholar has to be "inside" the same normative world as the judge – that is, he has to internalise the same sources of information, and vice versa. The question is not only about the scholar somehow "finding" the descriptive sources of law. He also interprets, understands and puts them into the order of preference. The scholar gives the sources of law a content he assumes to correspond to *the legal community's general way of thinking* about the sources of law. According to this principle, the scholar and the judge have to use (nearly) the same

1. sources of law,
2. legal standards of reasoning, and
3. somewhat similar principles of rational discourse.

To put it in a nutshell, the scholar necessarily has to assume that the judge has adopted a similar, not necessarily identical, but family-resembling way of thinking as he himself. From this it follows that legal "prediction" is essentially similar to any kind of *argumentation based on sources of law*. There is no other way of "anticipating" the future activity of the courts than to use the source material accepted in the legal community in general.

The Rossian prediction theory does not take this dilemma seriously, which is why his theory leads to mere *pseudo-predictions*. The scholar might, of course, have a predictive *intention*, but as a matter of fact, he must base the predictions on exactly the same source material as the non-predictive doctrinal study of law. This conclusion is not made different merely by naming the statements "predictions". As far as their content is concerned, they are nothing but a doctrinal interpretation, or weighing, filling normative gaps, using *contra legem* deliberation, or eliminating contradictions.

It seems to me that Ross was aware of the problems inherent in pseudo-predictions even though he did not draw the necessary conclusions from these difficulties. He even noted that the predictions of the doctrinal study of law are linked with the same *self-fulfilling* characteristic as "predictions" about society in general. When a prediction is made public, it quite often tends to bring about exactly the consequences that are anticipated in the prediction. This is so because both the "predictor" and his "target" are intertwined with the same societal system, and bound to the same normative basis.

What has been said above does not mean that Ross gave up his empiricist starting points. On the contrary, his *intention* – from the beginning to the end – was to formulate a true realist (predictive) theory for legal research. However, Alf Ross could not consistently hold to his empiricist thesis. His barely noticeable separation from logical positivism is a necessary consequence of rejecting purely behaviourist legal theory. The essential element of his prediction theory is the notion of judicial ideology, which, in its turn, is a normative phenomenon.

As Ross was quick to deny that the task of the doctrinal study of law is to examine the judge's motivational process using the tools of psychology, there was actually nothing left beyond the acceptance of a non-positivist viewpoint to a certain degree. Ross' theory is both behaviourist as well as *idealistic*.

Ross and Hermeneutics

This very element in the Rossian prediction theory *necessarily leads* to a non-positivist final conclusion: The doctrinal study of law is *interpretative*, or if preferred, hermeneutic, and not empirical as to its nature. Slightly from another point of view, the doctrinal study of law is the rational reconstruction of how the judge, as well as the citizens, *should act*.

This normativity contains the stumbling block of every realist legal theory, including Alf Ross' model, even though he openly accepted legal policy – *sententia ferenda* – as a *part* of the doctrinal study of law (Ross 1958, 46). Still, he also wanted the doctrinal study of law to be something "more"- i.e., cleaned, especially from the moral standpoints. Following this intention, Ross happened to give the doctrinal study of law a mask that concealed the actual research practices. As has been repeatedly emphasised, the judicial ideology is (partially) comprised of non-empirical source-material as well as the standards by which to use it. The scholar dealing with the source-material cannot thus avoid *choices*. These choices are based on certain priorities, which, in their turn, presuppose, among other things, the use of *moral standards*. The common internal point of view shared by the scholar as well as the judge thus necessarily leads to the conclusion that the Rossian predictions are actually nothing more than pseudo-predictions.

After the manuscript of my book was finished, *Svein Eng* published an excellent analysis concerning the comparison between Ross' "On Law and Justice" and Hart's concept of law. Unfortunately, Eng's analysis could not be used for my purposes (Eng 2011).

Chapter 12
Outlines of the New Rhetoric

On the Background

Friedrich Scheiermacher (1768–1834), one of the influential figures of the German Romanticism, paid particular consideration to the problem that emerges when attempts are made to endow a given text with an understandable content. Schleiermacher saw this problem as follows: Every act that leads one to the *correct* understanding of a text is (and must be) ultimately based on a dialogue between the author and the interpreter – that is, on some sort of an imagined conversation. Every author addresses his text to some interpreter. When this basic pattern is inverted and the matter is looked at from the interpreter's viewpoint, the task then is to reply to the author's oral or written expression in the context in which it was originally presented. In this way it becomes possible to have an authentic interpretation, an understanding of the text that is based on a dialogue between I (Ich) and you (Du).

It has been correctly pointed out that Schleiermacher's basic intuition seems to be plausible up to a certain limit but also contains several difficulties that are hard to solve. Indeed, his ideas as such have not been particularly applied in the later theory of interpretation. However, Schleiermacher's influence on the theory of understanding has been extremely significant. It was transmitted by the author of an influential Schleiermacher biography, *Wilhelm Dilthey*, to *Martin Heidegger,* who passed it on *Hans-Georg Gadamer*. Through him, it has been channelled to the whole Continental discussion about hermeneutics (Aarnio 1983, 47; Villa 1984, 509).

Scheiermacher's conception of interpretation gives rise to a difficult problem: Under what kinds of *criteria* has the text-author's message been caught in its "genuine" meaning? It is well known that this question has occasioned reflection on the significance of the *temporal* – that is, historical – difference between text writing and interpretation. Although this aspect is not dealt with in detail in my study, the following remark is worth mentioning.

As we will see, it is correct to understand the interpretation as a dialogue, and thus a form of communication. However, if hermeneutics opts for the line suggested by Scheiermacher, it will neglect another aspect of the problem far too much – namely, the interpretation is always an interpretation of something *for someone*. Therefore, it is not enough to consider just the relationship between the text author and the

A. Aarnio, *Essays on the Doctrinal Study of Law*, Law and Philosophy Library 96,
DOI 10.1007/978-94-007-1655-1_12,

text interpreter. The analysis should also, and perhaps above all, deal with the third pole – that is, the person or party to whom the interpretation is being addressed. The reason for this is that it is exactly *this* pole that most essentially seems to involve the *epistemological* dimension characteristic of interpretative studies. This observation echoes *Karl-Otto Apels'* conception of the so-called interpretation community in hermeneutics. Now, let us look a little more closely at what this means from the specific viewpoint of legal reasoning.

The interpretation proposition is not an empirical statement in the sense that it is confirmable by reference to the so-called brute facts. It is also true that references to empirical facts – for instance, to the assumed consequences of interpretation – can be used as a warrant for the interpretation proposition. However, that proposition does not follow from the factual statements in any unambiguous way.

On the other hand, it does not seem possible to think that there were such a set of inference rules valid in the legal community that the interpretation proposition were derivable from legal sources by mere application of these rules. The inference rules of legal reasoning do not form such a closed system, and the content of these rules is not so univocal that a logical – i.e., necessary relationship between the premises and the conclusion – prevails. Legal reasoning is by its nature an open performance.

From the viewpoint of hermeneutics, the interpretation in DSL is a linguistic matter. On the other hand, it is not possible to justify the interpretation proposition *as such* – that is, by comparing it with the "normative reality" in some way or another. We find here some sort of a network of sentences, within which the premises and the conclusion are interconnected non-logically but still plausibly. Following Wittgenstein, an interpretation proposition could be compared to a strand of a rope. In becoming associated with other strands it makes up twine, which is the more durable the more strands there are in the rope and the more elaborated the structure of the twine is.

Despite the importance of the hermeneutic approach, it does not give enough detailed tools for further analysis of legal reasoning. The next step can be found in the so-called new hermeneutics or *new rhetoric*. Let us start with some ideas from *Stephen Toulmin,* a distinguished contributor to the theory of argumentation:

> If we accept the formal pattern of mathematical and scientific theory as the only acceptable varieties of "rational demonstration", therefore, we shall be driven to the paradoxical conclusion that the best of us do not really "know" what other people's states of mind really are, even in the most favorable situations (Toulmin 1976, 113).

Toulmin proceeds to note that "scientific" methods – that is, the mathematical-positivist model of science – are of no help to us as we try to "read" a person's gestures, expressions or other kinds of behaviour to provide us with some clues about what he means. What is it that makes this process impossible? Toulmin has an answer ready at hand. It is closely related to the proposition made at nearly the same time in the 1970s by *Georg Henrik von Wright* concerning the understanding of human behaviour (von Wright 1971, 83). Toulmin himself formulates the fundamental question of the understanding as follows: "What kinds of justificatory

activities must we engage in, if we are to convince our fellows that these beliefs are based on good reasons" (Toulmin 1976, 138).

Toulmin pinpoints the difficulty of "*the ambiguity of all individual signs and features when taken separately*". But what, in the end, is "understanding"? What kind of research does it demand? What kind of truth does it produce? All these questions are unleashed at the moment one adopts the thoughts of Toulmin or von Wright, or – especially when it comes to law – *Chaim Perelman*. Since my theory rests largely on the influence of Perelman, his ideas demand closer attention, especially as they point out the ways in which the legal positivism represented by *Alf Ross* leaks.

The Greek Rhetoric

Thinking back to their school history books, many are likely to remember the story about an Athenian called Demosthenes who suffered from weak rhetorical skills. He decided to overcome his faults and went to the seashore. As the waves rumbled in, he put stones in his mouth and began practicing. Demosthenes' perseverance was rewarded and he became one of the great orators of his time. The story skilfully describes not only tenacity and sense of direction but also one specific cultural feature characteristic of ancient Greece. This feature is the important role of speech and oratorical skills. It follows from this that speech was more important than writing in managing public affairs. Therefore, it is no wonder that rhetoric was one of the great virtues for the Greeks.

The skill of speaking, rhetoric (*rhetoriké* in Greek), has been defined as eloquence or influential speech. To be more specific, rhetoric in this sense is a group of rules and principles through which a speech can be made aesthetically pleasing and influential, efficient. For the people in ancient times, rhetoric was more than anything a practical affair. The Greeks thought of it as "technique" (*tekhne*), while the Romans described it as an "art" (*ars*).The most significant developer of rhetoric was, without a doubt, *Aristotle* (384–322 BCE). He set apart three types of rhetoric: the political speech (*deliberative*), the judicial speech (*forensic*) and a type of speech concerned with ceremonial events, in which the orator's objective is to prove his skills and abilities as a speaker (*epideictic*).

In the first two cases, the core is in developing a solution to a problem and making the public believe it by directing their opinion through rhetorical means. In ceremonial affairs, rhetoric is used to make people admire the skills of the speaker. For example, when discussing a judicial speech, Aristotle advised the use of certain specific means in order to guarantee the outcome. The point of departure is in taking account of every essential aspect of the topic. In modern times we might say that the speaker has to know how to recognise the problem and to concentrate on the essential. Aristotle developed specific techniques for these occasions. He thought that the speaker has to master certain manners of treatment in order to have something to say about different matters. Those manners are processes of thought that always take off from some place, figuratively speaking. These places, or points of reference, were called *topoi* (plural of *topos*).

What follows can be taken as examples of topoi. Sometimes it is useful to set off from juxtaposition, such as large/small or expensive/cheap. One application could be the reasoning often used by lawyers: if a greater wrong is allowed, the lesser wrong must be allowed as well. The relationship between cause and effect can also be a topos, as can the conceptual pair of common/specific. They are places from which the speaker can begin his argumentation. For example, he can take a specific case as his point of reference and then proceed to the general one. In addition to topoi, perhaps the most crucial aspects of Aristotle's rhetoric are the proofs, since they are the means by which one can give rise to acceptance among the public. Examples of proofs are generalisation (induction) and logical verification (deduction).

Nevertheless, Aristotle also thought that a speech and a good orator always have to make the audience emotionally convinced as well. A good speech has to be outlined clearly (*dispositio*), in addition to which its language has to be put into a beautiful form – that is, easy on the ears. This is the *elocutio* part of the speech, the finishing touch. Since speeches were not written down in ancient times, one also needed various techniques of memorisation. Only with their help could the orator concentrate all his skills on speaking and winning over the public.

Rhetoric did not have such a good reputation in antiquity. In his dialogue *Gorgias*, Plato paints a devastating picture of the titular person, the greatest sophist speaker, even though it has been said that it was Gorgias who realised that speech can even be used to produce fraud and make people believe a lie. This was why *Socrates* thought that the sophists' rhetoric was only flattery and impersonation, being nowhere close to influencing and persuasion.

These masters of rhetoric lacked what is most important: the knowledge of the good, the truthful and the right. At their worst, the sophists taught that an opinion could be defended at any cost necessary. To emphasise: a good speaker had to know how to turn black into white. As the significance of the speech as an influence on public opinion waned more generally in the Roman age – speech was partly replaced by written text – rhetoric began to acquire more and more negative connotations. Later on, it disappeared from the public scene and moved into (monastery) schools, where, as in universities, it was for a long time regarded as one of the seven liberal arts. The radical change brought on in the 13th century through the development of cities transferred the church into the centre of the village, so to speak. The cathedral replaced the monasteries, giving birth to the sermon tradition as a counterbalance to seclusion and keeping rhetoric alive through the early Middle Ages.

Still, rhetoric would have to step aside little by little and give room to more important issues. It has been said that rhetoric became art for art's sake and its final destiny was complete disappearance from the group of important subjects taught in schools. Thus rhetoric was covered by the merciful pastel dust of history.

The Return of Rhetoric

The return of rhetoric into the legal context actually occurred after the Second World War. Perhaps it is appropriate to associate this turn with the name of the German *Theodor Viehweg* (1993, 16). It is not the task of my contribution to develop Viehweg's central idea any further, so I will content myself with the following remark. Legal thinking is not deductive from top to bottom. When solving a legal problem, a lawyer does not act according to the classic syllogistic model. Even though being logical is obviously a lawyer's virtue as well, law is "something more", something other than deductive inference. Legal discretion is problem-directed and "topical", developing its arguments from a certain point. This is the very thing that provides the connection with rhetoric. Nevertheless, even as Viehweg connected his thoughts to the ancient tradition of rhetoric while providing a detailed description of its development and characteristics, he still makes a decisive break with Antiquity.

Viehweg emphasised a new dimension of rhetoric. It was for him no longer the art of speaking or persuasion but argumentation, a form of thinking, not a form of speaking. In this specific way, Viehweg can be held as a significant thinker in the development, the influence of which reaches all the way to present-day theory of argumentation (Weinberger 1973, 17). On the other hand, Viehweg did not add anything new to the analysis introduced already by Aristotle in his book on topics. Aristotle emphasised that the key issue is to identify a method on the basis of which one can reason consequentially and defend successfully his/her standpoint. This is the core of new Perelmanian rhetoric as well (Aristotle,Topic I.1 100a 18–21).

Perelman was a full-blooded philosopher and a philosophy professor, but he was a lawyer by education. This becomes clear in his unceasing interest in legal thinking. Therefore, there are good reasons to call his thinking not just moral-philosophical but legal-theoretical as well. In this regard, the basic question is as follows: Can a value statement be justified, and if this is possible, what is this justification about? For Perelman, this very problem was of the utmost importance after his dissertation on *Gottlob Frege*'s logic.

Any kind of logic cannot answer the problem of the goodness/inferiority of value-goals in any better way than empirical research. As a tautological operation, logical reasoning is always valid, but empty as far as the content of reasoning is concerned. Two plus two equals four, no more, no less. Pure deductive logic does not provide an answer for what is good or bad, beautiful or ugly, right or wrong, just as one cannot by means of logic find out what ought to be done or what is allowed or forbidden in a certain situation at a certain time.

On the other hand, legal reasoning is not inductive. The assertions on law cannot be tested by empirical observations. What is essential is *rhetorical argumentation* (new rhetoric), where the only criterion for a "good" reasoning is the weight of the arguments. In this regard, Perelman stands apart from some of the other classics of rhetoric, like *Kenneth Burke*, who was not interested in the "goodness" of argumentation at all, but in the hidden "rhetoricity" of our verbal acts, especially the force and cunning inherent in rhetorical expressions (Burke 1945, 59, 91, 1969, 19).

Once Perelman had set his sights on the preconditions of "good" reasoning, an important step was taken toward the question of how *mutual understanding* between people can be reached in such difficult matters as values, morality or law. Here, the decisive notion is not truth but acceptance of claims that might be controversial through the presented arguments – and legal argumentation is reasoning for and against something, *pro & contra*.

The Idea of New Rhetoric

This is Perelman's greatest achievement as a philosopher. He disproved the idea of rhetoric as nothing but an eloquent tool for persuasion, and returned it to its roots, to a question of how to *convince* the other part of the dialogue. The goal of reasoning is not persuasion, manipulation or mental intimidation but *credibility and acceptability*. The reasoning has reached its goal when the counterpart of the dialogue becomes convinced about the final result through the power of the arguments, not, for instance, due to the authority of the person giving the arguments. In "good" reasoning, both the discursive procedure as such and the conclusion have to be acceptable.

Perelman is correct to point out that it was Aristotle who originally chose to separate rhetoric and dialectics, even though he thought that the two were related, more or less adjacent pairs. In Perelman's own words: Dialectics deals with arguments used in disputes and bilateral conversations, while rhetoric focuses on the techniques of the public speaker as he speaks to a crowd of laymen gathered together in a public space, not equipped to follow more complicated reasoning.

In dialetics, the arguments are presented to experts, not to laymen. For instance, the core of legal discourse lies in the communication between those who are well informed as regards the problem at issue. That is why the new rhetoric is significant, especially for lawyers. In real life, there are, of course, a great number of cases where lawyers do the same as others – that is, wield, or at least want to wield, (mental) power over the others. The model of rational legal reasoning cannot, however, be based on these kinds of contingent examples. The theory of legal reasoning, in the Perelmanian sense, focuses on the *ideal cases*, where all contingencies are excluded. In these cases, the solving of a legal problem cannot be based on persuasion, or on manipulation either. Instead, the decision-maker or scholar tries to *convince* the other part – at least, this should be his goal. The recipient of a dialogue becomes convinced if, and only if, certain principles of rational discourse are followed and the statement is based on substantially valid arguments.

To simplify the point, legal discourse is like a game of chess. The principles of rational discourse are like the rules of chess and sources of law the pieces of the game. In the "game of reasoning" the lawyer moves the pieces according to certain discursive standards. Each move is either for or against the statement being controversial. The totality of the moves produces the whole, called legal justification.

Perelman saw this kind of reasoning as being a *dialogue* by its nature, not a monologue. No one speaks or writes to himself. This point provides a reference to the question of private language discussed in Chapter 5. Legal reasoning is always a social matter, and as such a part of human communication. It is no wonder that, after Perelman, rhetoric has largely turned into a theory of rational discourse and communicative rationality.

Conceptually, the Perelmanian dialogue includes two participants, A and B. Let us assume that A presents an argument, X, in favour of a certain interpretation, T1, of the statute S. The other part, B, the receiver of the argument X, presents a counter argument, Y, which happens to be contradictory to X. In the position of B can be an individual, as in our example, or a group, or a community, and, according to Perelman, even a universal community covering all individuals (Perelman 1968, 15; Toulmin 1968, 149, 1968, 144, 195, 1976, 90). Perelman called the recipient – in our case, B – an *audience.* The idea of legal discourse can now be elucidated as a dialogue between the interpreter (A), and the audience (B). In this case, the core of legal discourse is squeezed into the question: What are the necessary – or sufficient – means to convince the audience of the validity of a certain interpretation as regards a certain statute?

The question splices the old rhetoric away from the new one, and makes a conceptual difference between speech skills and argumentation. As speech skills, rhetoric persuades and coaxes; it might flatter, manipulate or even invade the most sensitive areas of human privacy by shaping emotions. The new rhetoric deals with convincing the audience through the strength of the arguments. When the arguments are weighty enough, the recipient either accepts the presented interpretation as it is, bringing forth a (genuine) consensus on the matter, or is at least ready to make a fair compromise. The result is accepted due to the argumentative force of reasons, not because of the person presenting them.

This provides a new viewpoint on the way Perelman separates demonstration (logical reasoning) and argumentation from each other. In demonstration, one follows certain rules of deductive inference to arrive at formally *logically true* statements. Rhetorical argumentation, in its turn, consists of *substantial truths,* thus giving rise to the problem of whether statements about values, morality or law can be "true" or only more or less well justified (Toulmin 1968, 195, 202). This question is important because legal interpretations cannot be justified with reference to the empirical reality. As the analysis of Alf Ross' theory revealed, a statement on the content of law has no Tarskian "correspondence" with external reality. That is why the notion of truth has no use in the doctrinal study of law understood as an interpretative science if the notion of truth is defined with the Tarskian criteria.

At its best, rhetorical argumentation can produce a kind of "certainty", not truth, or in the Perelmanian terminology, *probability.* However, the notion of probability is in this context as inaccurate as it is in the Rossian prediction theory. At its core, probability is a *quantitative* concept. In the doctrinal study of law, probability has more to do with *legitimacy* than mathematical-statistical probability. From beginning to end, argumentation is about what is *qualitatively* acceptable on a specific

occasion. Argumentation strives to "bring together" the interpreter and the recipient in a way that results in an adequate mutual understanding (Aarnio 1987, 221).

What proved to be troublesome for Perelman was that each opinion given to an actual audience easily turns into persuasion in practice. The interpreter cannot separate rational and non-rational arguments, and this also stands for the recipient. Then the dialogue tends to include prejudices, unfounded beliefs, impressions, emotions and will. Argumentation is distorted into rhetoric in its eloquent sense. Even though all speech and writing is directed at someone (an audience), it cannot, as a theoretical concept, be an actual community, such as a school class. The teachers and students can all too easily fall into the traps of persuasion and manipulation. The community that is the focus of the reasoning has to be general and unlimited in order to function as a party in a dialogue aimed at convincing the other.

For this purpose, Perelman adopted the concept of a *universal audience*. In the development of his theory, this concept is important but also easily misleading (Ray 1978, 361). The universal audience does draw attention away from persuasion and manipulation toward convincement and credibility, but the concept "universal" is problematic in itself. If the universal audience includes all the individuals of the world at a given moment, it is not specifically universal. It is a composite of members of a given place at a given time, even if the number of members reaches into the billions. A universal audience like this does not differ from a school class in any important way. On the contrary, it is an empirical truth that it includes the collision of many interests deeply linked to a culture. It is impossible to think that one could "let arguments speak" in this huge and empirically locked audience. Thus, in order to salvage Perelman's central ideas, the only alternative is a new definition of the universal audience.

If the concept "universal" is used similarly to the "universals" of logic, it is an abstraction that covers all possible worlds, including all the recipients one can think of. A rational, mutual understanding in this universal audience necessarily means an objective truth, valid in all surroundings. If a dialogue focuses on morality, this definition of the universal audience results in the conclusion that an objective truth is reached even in moral questions. Actually, Perelman refers to this principled possibility in his presentation of moral argumentation.

Still, this very definition of the universal audience is problematic. In order to reach truth, all the members of the universal audience must be wholly rational beings. It is only by this assumption that it becomes possible to think of the universal audience reaching truth in moral or legal questions. As we will see in more detail, the universal audience is then nothing but another version of the "ideal speech situation" introduced by *John Searle* and J*ürgen Habermas*, or Hercules J in the *Dworkinian* theory. It is an ideal not reachable by humans, and therefore only a theoretical standard like the model of meter in Paris. The "truth" of a universal audience is only of a *prima facie* nature. It is always in need of contextual interpretation, and it is this contextual interpretation that is the focus of the theory of rational legal argumentation.

The needs of that theory can be fulfilled by utilising the concept of *partial universal audience* (Aarnio 1987, 222). The monstrosity of this term surely needs some

further clarification. An audience that is partial as well as universal covers all the individuals who accept the principles of rational argumentation and commit to them. Therefore, it does not include every person in the world, and it is not even essential to ponder who belongs or could belong to it in the actual world. The members of the partial universal audience are, of course, ideal beings, which is why the *audience in itself is ideal*. It is assumed that the members have internalised the ideal of rational discourse and committed themselves to it. This assumption is weaker than that behind Perelman's universal audience. A partial audience has room for different opinions based on different interests. It is possible that two members of the audience, sharing the same terms of rationality, commit to different moral presumptions, perhaps because of different (basic) interests. Rationality would not guarantee unanimity, or even a consensus, on moral presumption with any certainty. Due to different interests, not all rationally deliberative people would necessarily end up at the same result in hard (moral) cases.

This idea comes close to that introduced by *Robert Alexy*. In his analysis of human and constitutional rights, Alexy points out that human rights as such possess only moral validity. According to Alexy, a right is morally valid if it is justified by everyone who is able and willing to engage in rational argument. The validity of human rights is their existence. "The existence of human rights, therefore, consists in their justifiability and in nothing else" (Alexy 2004a, 15).

The reasoning does not lose its character as justification when the premise concerning the interest is introduced. The interest is always connected with decisions, and these concern the fundamental question of whether or not we accept our discursive possibilities. This problem is connected to the notion of human identity – i.e., what is a human being (Garzón Valdés 2006, 231; Hoerster 1983, 93).

Rhetoric and the Argumentation Theory

Rhetoric as the general theory of argumentation is not left powerless. On the other hand, it does not reach for more than man is capable of. The point is in the attempt to overcome randomness and create a *model* for the way in which rational argumentation can function in the world of values, morality and law without bringing forth results that can be deemed objectively "true".

Defending the rational model of discourse might be called poor and meaningless idealism but, in the end, it is the kind of idealism necessary for human intercourse. It does not give any substantial standards to legal or other social praxis but it is still powerful due to its principles that identify the criteria of a "good reasoning". There is no other way but rational reasoning to surpass the occasional conflicts in everyday life. The ideal model – and only it – helps to draw up directions, or landmarks, for those who are ready to stand against the irrationality of everyday life.

Perelman's new rhetoric cannot change the world any more than the theory of argumentation. People are as cruel from generation to generation and their ears remain deaf to the call of rationality. But Chaim Perelman has lit a beacon for those

who still have a conscience to listen to the sound of reason in a world of irrationality, to let arguments speak at the expense of emotions and prejudices.

The new rhetoric was a significant turning point in legal theory. With its help, a break away from the positivistic separation thesis could be achieved. In this sense, the new rhetoric prepared the ground for the hermeneutic approach. On the other hand, it should not be maintained that either the new rhetoric or hermeneutics offer precise guidance for legal argumentation. They are not *methods* in the actual sense of the word, even though hermeneutics implicitly contains notions of how texts have to be (should be) interpreted. *Tomasz Gizbert-Studnici* has made an important contribution to this matter when stating that even though hermeneutics is normative in a hidden way, it is primarily a *background philosophy* for argumentation (or interpretation), giving answers to what interpretation is (Gizbert-Studnicki 1988, 158).

It has become the task of the modern theory of argumentation to repair the "methodological deficits" of the new rhetoric. This is because Perelman himself does not give an answer to *how* legal texts, such as statutes, should be interpreted. His theory remains vague on the types of discursive rules and principles, as well as on the ways in which these rules and principles should be used.

The most common criticism of the new rhetoric has been that the doctrinal study of law is not a science at all if the truth-quality is removed from its statements and only replaced with talk of certainty and degrees of certainty. This was exactly the opinion of Alf Ross. The doctrinal study of law has to be scientific to at least some degree. Notwithstanding what Ross suggested, one counter-argument to the positivistic view is worth mentioning.

Instead of asking what can generally be considered science, we must look at actual legal research and its essential qualities. The starting point for theory formation is in legal-dogmatic research as it is practised, especially in continental Europe. When the essential qualities of the existing doctrinal study of law as an interpretative study have been uncovered, it becomes possible to see which legal statements, if any, belong to the field of "science". In that, it is essential to identify the statements that fulfil the demands of *controllability* (Toulmin 1968, 50, 1976, 227; Aarnio 1983b, 47, 1987, 67, 1997, 189). If the statements of DSL cannot be controlled in a credible way, they fall outside science. The situation is not that fatal. The history of the doctrinal study of law in Europe pays witness to the fact that this type of study fulfils the criteria of controllability in a way that is exactly typical of that branch of science.

The theoretical challenge for the new rhetoric, as well as the theory of argumentation, is to identify the criteria of controllability suitable for the doctrinal study of law. The essence of those criteria concerns the rationality of legal reasoning, and here the Perelmanian ideas form a firm basis for further analysis. If one lets the arguments speak, the doctrinal study of law joins the family of sciences as a sovereign member. In this sense, it was Theodor Viehweg and Chaim Perelman who, more than anyone else, turned over a new leaf for European legal thought. This is a good place from which to proceed. Still, one excursion into the notion of science will be instructive.

Chapter 13
Scientific Inference – An Example

Out of the Cave

In her book "Out of the Cave", *Edna Ullman-Margalit* deals with archaeological reasoning. In general terms, the analysis is reasoning about reasoning, and, from the theoretical point of view, takes place on the meta level. In the following, I will use Ullman-Margalit's analysis as a *model of theoretical reasoning* without taking any stand on the archaeological studies, or on the substantial theories about the findings of the Dead Sea Scrolls (Ullman-Margalit 2006, 6). My thesis is as follows: Edna Ullman-Margalit's reconstruction of the hypothesis formation and the theoretical disputes related to the findings is relevant for the methodology of human sciences in general, including DSL. For this reason, I will first briefly describe the findings of Qumran and the competing theories explaining those findings (Ullman-Margalit, 23). After that, a summary of Ullman-Margalit's theoretical analysis will be introduced. Finally, an attempt will be made to apply Ullman-Margalit's model to DSL.

In the spring of 1947 a group of Bedouin shepherds were looking for a few stray sheep in the desert of Judea near the Qumran ruins, northwest of the Dead Sea. In one of the caves they came upon seven scrolls of scripture. Later it was realised that these scrolls contained ancient texts, the origin of which could be dated back to the time before the current era. The find was followed by a veritable wave of archaeological digs. By 1956, ten other sites had been examined, and the result was a large group of writings measuring six to seven metres in length, as well as thousands of fragments. The material is contained in approximately 900 manuscripts that consist of over 300 different compositions of text, some of them biblical.

The biblical writings include readings of holy texts, such as interpretations of the prophet Habakuk. Also included is "The War Scroll", which describes an eschatological war between Light and Darkness that lasted more than 40 years. "The War Scroll" also presents a description of the equipment needed for warfare and the forming of armies, as well as their strategies. Another side of the scrolls includes administrative orders, such as norms on religious rituals, cleanliness, asceticism, celibacy and so forth.

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The finding of the scrolls has been held as the most significant archaeological discovery of the past millennium. It has been suspected that they form a picture of the birth of early Christianity and its relationship to Judaism, as well as the (real) life of John the Baptist and Jesus, since the texts can be said to be descriptions of "current events", at least on the basis of the time of their writing. To put it differently: for the archaeologist, the finding of the scrolls is like a huge telescope, bringing a way of life over 2,000 years old within the reach of the researcher.

It has been thought that the people who lived in Qumran came to build their community approximately 150 years before the current era, staying in place until 68 AD, when the Roman legions destroyed the city, as they had recently done to the temple in Jerusalem. According to this view, the writings seem to have been born within a time frame of more than 200 years, but with most likelihood they were made in the few decades preceding the current era.

On the basis of the scrolls, it has been deduced that the people responsible for them were part of a group (sect) that opposed the prevailing concept of the similarity of priests and kings. To them, kings came from the family of David and priests from that of Abraham. As an alternative to the lunar calendar followed in Jerusalem, the group adopted a solar calendar of 364 days. The Qumran people were also strict in their use of the Law of Moses, and at least some of them lived in celibacy. In addition to this, they were expected to practice asceticism and the purity of soul and body, which has been taken to mean that the large pools found in the excavations were used for ritual baths. The folk of Qumran rejected the urban way of life, shunned the collection of property, had common dinners led by priests, strictly defined rites of initiation and were patiently waiting for the beginning of the last battle between Light and Darkness.

This much, and much more in detail, is known. But this is also the part where questions begin to arise. The standard theory, the basic points of which were formed in the time after the first findings, sees that the people of Qumran were an *Essenean religious sect*, and that it was the Essenean scribes who wrote up both biblical and administrative texts. It is precisely this prevailing theory that Edna Ullman-Margalit, calling it the *DSS theory*, takes into critical examination, looking especially at the traps of scientific reasoning it includes.

Both the representatives of the DSS theory and its critics have to put together a puzzle of many pieces that do not seem to take any acceptable form. It is therefore no wonder that in addition to the DSS theory, there are nearly twenty competing explanations for the contents and origin of the Qumran scrolls. All of them refer *to the same facts*, but many of them give these facts an interpretation different to that of the DSS theory

The DSS theory and the competing theories all presuppose two things. First, the *textual interpretation* of the scrolls' content, including philology, readings of the bible in the original language, the research into the history of early Christianity and Judaism, knowledge of the texts of historians from the examined era, etc. Second, one must have knowledge of *empirical research* – in this case, archaeology in particular – as well as the ability to read papyrus texts and put texts together from small

fragments. We are dealing with a real multi-disciplinary and multi-layered project, which is therefore also very complicated.

The DSS theory is vulnerable to many counter-arguments, and questions can be posed in at least three directions. The first is about the *origin* of the texts, the second (textual criticism) about the *content* of the scrolls and the third about archaeological finds and their *interpretation*.

Origin

1. Were the texts really written in *Qumran* and why? Surely it is possible that they were made in, for example, Jerusalem, and only hidden in the Qumran caves as the Roman legions were approaching.
2. If the texts were written in Qumran, it still leaves a question open: were they made by the Essenes and why? At the time of the writing of the scrolls there were numerous religious groups in Judea, many of which had similar separatist intentions.
3. Even if the texts were made by the Essenes, we might ask: was the group responsible for the scrolls really a *sect* and what does it mean to belong to a sect? The Jews were divided into Sadducees and Pharisees, and the scrolls include material that connects them to parts of both groups. In order to talk about a sect, we either need to *define* the concept of a sect or to *classify* the Essenes under some other known sect.

Content

The interpretation of the texts has been done with the aid of writings from the era's historians. Important sources are, for example, *Flavius Josephus* and *Pliny the Elder*. This still leaves open the reliability of contemporary descriptions. The more interesting question is whether we are forced to interpret incomplete descriptions in a way that gives support to the meaning projected onto the texts beforehand. Is there a deductive circle from texts to contemporary writings and back?

The Interpretation of Archaeological Findings

1. The excavations have brought up a defensive tower and signs of battle. Was Qumran more of a military fortress than home to a religious sect?
2. A counter-question can also be posed about the large pools that have been taken to be ritual bath sites. What if they were the storage for the fortress' water? In the harsh conditions of the desert, water had to be stored for the people to survive.
3. The digs have also brought up dining sets, glass objects and other such objects. Why couldn't we think that Qumran was just a luxury resort for a nobleman from Jerusalem, not a holy place or a fortress?

4. Industrial objects have also been found. What if Qumran was some kind of a production site?
5. Skeletons of men, women and children have been found in different caves. According to the DSS theory, at least the majority of the Qumran people lived in celibacy. How can we explain the skeletons of women and children? Or was the Qumran destroyed by the Romans later used as a burial site?

Ullman-Margalit begins by noting a fascinating factor in the background. When the first findings were made in 1947, the scrolls were put in the hands of non-Israelis. In addition to this, the researchers who were the first to shape a scientific theory for the scrolls (the DSS theory) were English, French, German and partly American (Ullman-Margalit, 26). Therefore, it is *possible*, even somewhat believable, that the *ideology* of the researchers, either Christian or with shades of Christianity, had something to do with their interpretations. It was only natural that they were expecting clues about the birth of early Christianity, perhaps even the life of Jesus. It was not as natural for them to think about the findings from a Jewish angle, not even on the basis of early Christianity possibly growing from the Judaism of the era. From these remarks, we can point out that the DSS theory is possibly *not ideologically neutral*. The same hesitation is also possible as regards the legal interpretations, depending, of course, on the area of law and contextual surroundings. Still, this dimension of the subject will not be discussed any further in this context, no matter how fascinating and important it is.

An attempt to answer to the questions Why the Essenes? Why Qumran? and Why a sect? presupposes a distinction between two lines (or chains) of reasoning. One is the *textual examination* (interpretation) of the scrolls, the other the *interpretation of the archaeological findings*. In short, we can talk about the textual line and the archaeological line. Both have been used to verify the *basic hypothesis* of the DSS theory, according to which the scrolls were written by an Essenean sect living in Qumran on both sides of the year 0.

To quote an example given by Ullman-Margalit, the reasoning concerning the Essenes in the DSS theory proceeds in the following way:

1. The concept of a sect is defined by listing the characteristics of a sect and by giving the community the modifier “Qumran – sect”
2. The text of the scrolls is used to deduce that these are the same sectarians who are mentioned in other writings from the same time (e.g. Flavius Josephus and Pliny)
3. The content of the Qumran scrolls is similar to how the Ancient historians described the Essenes
4. There is an adequate similarity between the scrolls, the place where they were found and the description provided by the Ancient historians
5. Therefore: The Essenes wrote the scrolls.

The Structure of Reasoning

Let us now take a closer look at the functions of the structure of reasoning. This is also how we can get to the leaking points in the reasoning. Edna Ullman-Margalit examines two different deductive structures that she calls *The Weak and the Strong Linkage Argument* (Ullman-Margalit, 28). The core of the problem concerns the possibilities to *combine* the textual line with the archaeological one so that they *strengthen* the original hypothesis and, therefore, the DSS theory. As a tool in finding the solution, Ullman-Margalit uses the concept of "linkage". I will first discuss the weak linkage, follow it with the strong one, and finish by examining both in a conclusive way.

Let us start from the hypothesis, H, (Qumran Essenes authored the scrolls), and accept two different deductive structures as two lines of reasoning (Ullman-Margalit, 41):

A (contents of the scrolls) ->B (scrolls are Essene), and
C (site of Qumran) ->D (Qumran occupants were Essene).

These two are linked together with a factual linkage – i.e., with some archaeological findings – as follows (Fig. 13.1):

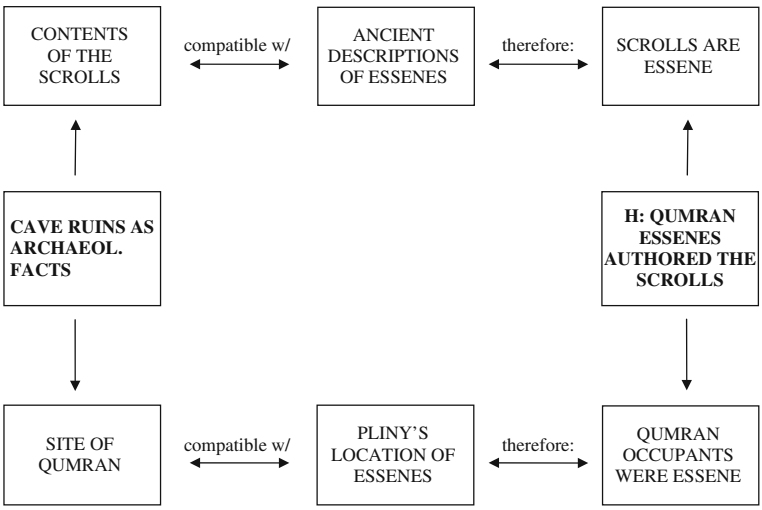

Fig. 13.1 The weak linkage

The strong linkage is otherwise similar, but the archaeological argument has been replaced by an interpretation of the archaeological fact. Then, the following diagram results from that assumption (Fig. 13.2):

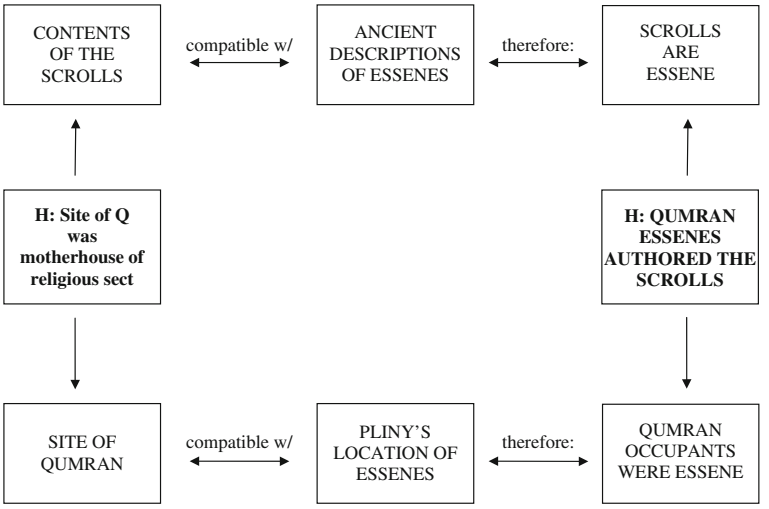

Fig. 13.2 The strong linkage

Both lines (the textual and the archaeological) are supported by *contemporary descriptions*. In the previous, the Ancient historians describe what the Essenes were like, and in the latter, where they lived. In both cases the strength or weakness of the chain is mostly in

1. how reliable the contemporary descriptions are *as a whole* when describing current events
2. to what extent is the information they provide combined with *subsequent* interpretation (from our age).

The first question has to do with the terms the historians used to write their own descriptions. Even though the texts provide interesting information as seen "back then", the demands for source criticism were not the same as ours. Another question in the suspicion of the descriptions is in the lack of definition in the points of view. The choice of the point of view from which different things were presented might not open up to the modern reader. For example, the historians do not describe the other religious groups of Judea in the same detail as they do with the Essenes. Therefore, we cannot use their descriptions to deduce that there weren't any other groups, nor that they might have adopted similar norms as the Essenes. Another difficulty with texts from Ancient historians is that it is easy to slip in some information modern archaeology might have gathered about the circumstances of the described events. We are interpreting old descriptions with the sole support of our own knowledge (Ullman-Margalit, 74).

Another way of taking a critical view of the chain is by putting the interpretations of archaeological findings against one another. For example, Qumran may have been

a military fortress, not a sacred place. A similarly difficult counter-argument deals with the water pools or the skeletons of women and children. The DSS theory manages to stay intact throughout these tests, but not without damage and not without any need to do some more research. Still, it is not essential to ask *which theory* of the origin and content of the Qumran scrolls is the right one since the real question lies in the *reasoning procedure* and its possible weaknesses. For this reason, we should consider some points before drawing conclusions about the applicability of Ullman-Margalit's concept of "linkages" on legal reasoning.

First, in DSS, as in any empirical research, it is necessary to identify logically independent chains of justification. If, and only if, they all support the same conclusion, it becomes more plausible (acceptable). As far as the DSS theory is concerned, both lines (textual and archaeological) are *logically self-contained*. In this regard, the basic presupposition for a sound scientific argumentation is fulfilled and the DSS theory seems to give a good example of the theory of DSL.

On the other hand, the textual and the archaeological line are based on *different kinds of truth theories*. In the textual line, it is all about how well the different (logically independent) interpretative elements fit together. To put it briefly, the "truth" of the textual line is *coherence*. In this line, interpretation cannot be "compared" to any extra-textual reality (unless we're dealing with contemporary descriptions). The text is a *hermeneutic* whole, in which interlocking parts strengthen each other and the result. The relationship between contemporary descriptions and the text of the scrolls is also coherent. The text (scrolls) is interpreted with the help of a text (contemporary descriptions) in a way that is circular in its nature.

The truth of the archaeological line is basically in *correspondence*, but this fact is not at all simple. Let's examine the following proposition.

P: The water basins found in Qumran were pools meant for ritual baths.

The correspondence between the claim and reality is not obvious, although the pools might well have been dug up with archaeological methods. A set of other archaeological arguments are needed to support the interpretation that the structures are pools. Therefore, what is true in P is that there were pools of water in Qumran. P does not, however, claim only this. The other core element of P is that the pools were used in rituals.

In testing the validity of *this* claim, one has to interpret the findings through the textual information in the scrolls – i.e., to proceed from the scrolls to the findings. In addition to archaeology, there are many different pieces of a puzzle that need to be fitted together in order to achieve a coherent relationship between them. The *confirmation* of the "truth" of P is, in the end, a highly complex search for a coherence that is partly non-archaeological. This does not mean that we cannot hold on to a Tarskian *definition* of truth when discussing P, but the definition of truth would not justify P as a true proposition.

What about the *combination* of the two lines? Ullman-Margalit refers to the concept *consilience of inductions* used by *W.Whewell.* If two independent chains of reasoning support the same overarching hypothesis, they produce *together* a more reliable result than both of them alone. Sharing the same ground hypothesis, they get additional support, which they wouldn't have got without it. Therefore, the two

chains that were originally only *compatible* now lend support to each other as a result of the ground hypothesis. The result is more probable than it would have been if based on only one chain of arguments.

Here, Ullman-Marglit refers to the so-called *Bayes' theorem*, which separates prior and posterior probability (Niiniluoto 1986, 321). Let us assume the hypothesis H is probable in some sense of the term. Prior probability, P (H), concerns the probability of H before the evidence, E. It is always 0.5. Posterior probability, P(H/E), grows in strength the stronger E is. Bayes' theorem deals with the hypothesis H's posterior probability, while taking into account the evidence, E, and relating it to prior probability. Probability P numerically expresses the value of probability, such as 0.75.

Let us take an example. A room that has been assumed to be a reading chamber or hall has been found in Qumran. This shall be the evidence, E. The Qumran – Essenean hypothesis, H, required by the DSS theory is strengthened if the evidence, E, proves to be reliable while taking into account all the information that can be gathered to support it. The probability of the original hypothesis is therefore dependant on a complex and multi-layered *chain of evidence*. The key is in whether or not the probability, P, of the hypothesis, H, grows with the evidence, E. The force of Bayes' theorem is in the concept of posterior probability.

What makes the matter interesting in the case of Qumran is that the archaeological excavations have brought up both "negative" and "positive" findings in support and against the DSS theory. Both of these have been dealt with above – the ritual pools, the reading chambers, the skeletons, etc. I won't get back to them since it is not the aim of this piece to showcase Qumran theories, or the DSS theory or its competitors. Let us limit the focus to the reasoning.

The opposite of Bayes' theorem is a Popperian concept of science. While talking about the falsification of hypotheses and the development of science, *Sir Karl Popper* took off from the fact that what is significant in science is not the strengthening of its hypotheses but proving these hypotheses *false* (falsification, disconfirmation). Edna Ullman-Margalit claims that the DSS theoreticians were neither purely Bayesian nor Popperian. They had *combined* Bayesian and Popperian elements in their own concepts, especially in the DSS theory.

The DSS theory takes off (at least it did) from the strengthening (confirmation) of the Qumran-Essenean hypothesis. There were both textual and archaeological arguments stated in the support for the hypothesis. Still, Ullman-Margalit claims, making a good case, that the DSS theoreticians did not adapt the Bayesian theorem as it is. They merely set off from the *presumption* that their Qumran-Essenean hypothesis is correct. As the research went on, a certain *scale* was born, in which arguments of different strength broke down the unquestionable either/or truth.

What About the Legal Reasoning?

The question is more about *weighing and balancing*, to use the terminology of *Robert Alexy*. Ullman-Margalit aggravates her claim for this part in stating that the DSS theory simply *presumed* that its origins and results were true, rather than its

representatives trying to find out the truth or falsity of their theory *openly and by using pro & contra arguments*.

In the following, the focus will be on the theory of DSL. In the system of Continental law, the legal interpretation concerns the content of statutes. In this view, the task of the legal interpretation is to give meaning to the statutory text. Thus the starting point is always the legal text. In this regard, a DSL hypothesis (proposition), P, can be put as follows:

P: Legal text L = Its phrasing S.

P has to be justified. In doing this, the legal argumentation must be structured in a similar way to the reasoning in the DSS theory. The disciplines that seem to be at a distance from each other, like archaeology and law, still follow similar structures of reasoning. The DSS theory is an articulation of a *general* mode of rational discourse. In this regard, DSL is *not* a discipline that is separated from other branches of science that use interpretative method. To put it differently, DSL is a member of *the family of humanities* as well as the family of (normative) social sciences. It is not an empirical science, but it is in one way or another connected with interpretation (Fig. 13.3).

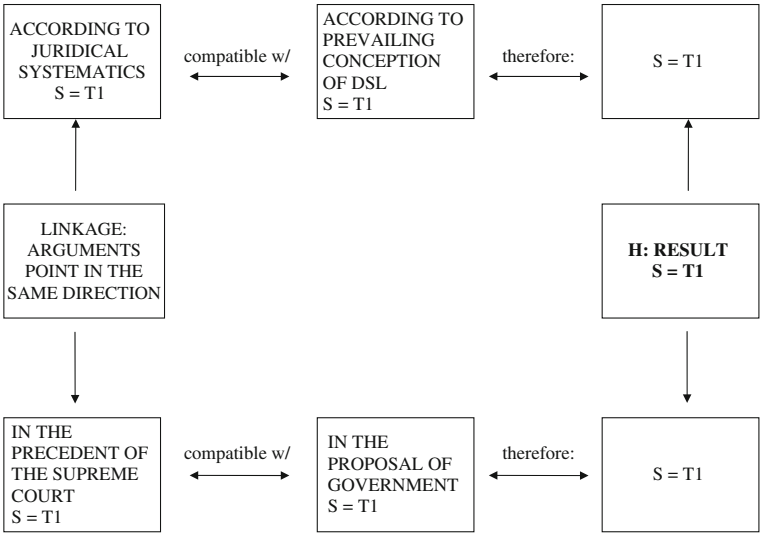

Fig. 13.3 Application to jurisprudence

This diagram presupposes that the starting is the statutory text (the wording). However, the similarity to the Qumran case is clear. It is true that the latter consists of one chain of reasoning that deals with archaeology and empirical research while the other is more about textual interpretation. Still, the archaeological line requires interpretation too. The key in both is the *internal* "compatibility" and the one *between* the chains being coherent.

Two logically independent lines of reasoning, the system argument and the preparations for the law can be joined together in the way described by Ullman-Margalit, strengthening both chains of argument. Referring to *Aleksander Peczenik*, there is a *jump* from the premises to the conclusions. Ullman-Margalit's "link of integration" means exactly the same.

There is, however, one counter-argument left. Obviously there are not necessarily only two chains of reasoning, even in more difficult cases. Let us assume that an interpretative case includes a counter-argument to the Supreme Court's preliminary ruling, according to which S is not T1 but T2. This means that the link "integrating" the two lines is not enough. As we will see later on, the reasoning must be continued, opening up other possible lines. The choice between the lines is determined by the interpretative situation (the circumstances and the context) and the adapted strategy.

This may also mean the overruling of the counter-argument. The Supreme Court decision is always *final*, it is valid for implementation, but not necessarily the right one. Since this is the case, it may be that the chain of reasons has to be *continued.*

By changing the variables we can transfer the structures of Qumran reasoning to the theory of DSL. As with the DSS theory, legal reasoning refers to chains of arguments – that is, to lines of logically independent syllogisms. We will see later on that the force of argumentation depends on, for example, how many lines of reasoning are available and how lengthy they are.

The lines of reasoning have to be linked with propositions of different strengths – just like Ullman-Margalit says. The fact that the Qumran case deals with an empirical human science, does not change the setting. Archaeological findings must also be interpreted and made parts of coherent wholes. Coherence, for its part, is the "truth theory" of DSL as well.

Part IV
On the Doctrinal Study of Law

Chapter 14
From the Constitutional State to the Welfare State

The development of society has often been described by the following axis: agricultural society – industrialised society – post industrial society – information society (Aarnio 1989b, 114). This axis offers many clues as to where we have been and where we are probably heading. However, as regards the topic of this study, it is more fruitful to choose another point of departure that elucidates the function and task of DSL better than the above-mentioned axis: the status and future of the Constitution – that is, the Rule of Law State. It is typical for lawyers to anchor their thinking in the basic elements of the Constitutional State. Many essential features of DSL, as well as adjudication, are crystallised in the rule of law ideology, which distinguishes lawyers from other professionals close to the field of law (Aarnio 1989b, 126). Briefly, the particular aspects of the rule of law ideology that are important for this study can be described as follows:

(1) In a Constitutional State, legal relationships are organised according to *general norms*, not according to decrees on singular cases, as was the case in the Middle Ages - e.g. in societies ruled by monarchical regimes.
(2) The doctrine of the separation of the State powers guarantees the (formal) *independence* of the courts of justice.
(3) In a Constitutional State, the individual is not only protected against another individual but *against the State* or other public power as well. This led, among other things, to the adjudication of administrative issues. The rights and duties of the State were also determined.
(4) A special *profession* – i.e., lawyers – was created to take care of legal issues. Before the era of the Constitutional State, issues were often taken care of by people other than professional lawyers.
(5) Certain basic principles like *audiatur et altera pars, reformatio in pejus* and *nulla poena sine lege* protect the position of an individual in cases where no exact statues are available.
(6) The *forms* are in the key position in the Constitutional State – as an example, the principle by which the formal (not substantial) equality among people has to be guaranteed.
(7) Legal thinking must be detached from the moral and social aspects. This positivistic principle means that law must not be intermingled with morality. One can criticise law as bad or immoral, but as long as this law is formally valid one cannot disobey it by appealing to moral reason.

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It is obvious that this list only consists of a minor part of the principles belonging to the foundation of the Constitutional State. It is equally obvious that the rule of law ideology has not been realised anywhere in its pure form. Still, all the basic elements of this ideology are crystallised in the above principles.

However, the world has vigorously changed, especially since World War II. Many countries, among them all of the Scandinavian countries, have entered the phase of the so-called Welfare State, although the worldwide financial crisis has made it difficult to maintain even the core elements of that kind of State. Without taking any stand on the economic or social side of Welfare States, some main features, important to the tasks of DSL, must be identified (Aarnio and Peczenik 1995, 142):

(1) The formal concept of law is increasingly accompanied by an emphasis on its *substance*. One of the main goals has been to increase the quality of life, and thus the purpose to decrease the inequality among people. Following Max Weber, one can speak about the materialisation of law. Connected to this trend, there is, for instance, a clear change in the *norm structures*. The strict rule had to leave space for all kinds of elastic norms.
(2) There is, however, another, and much more important, change going on in all Welfare States: the rise in human and basic rights. The consequence of this trend is the strengthening role of the *(legal) principles*. In a modern Constitutional State, human and basic rights are a necessary element of not only the rule of law ideology but also of the notion of democracy. We can speak about a democratic Rule of Law State in cases where human and basic rights are protected.
(3) The change in the norm structures is reflected in the methodology of DSL as well as the thinking procedure of the judges. As we will see, DSL in a modern Rule of Law State has two different methods available, depending on whether the subject matter is a rule or a principle. In the first case, the method is the traditional statutory interpretation, whereas in the case of principles the method is weighing and balancing. In other words, the classical syllogism has lost its role as the basic model. Instead, DSL has to use either rational argumentation or methods applicable to principles.

According to point (1), the law of the Welfare State is "soft" compared to that of the Rule of Law State. The idea of the Welfare State is to make it possible to adjust the provisions to the circumstances of the case. The more the economic and the social safety of citizens is in danger as a result of the economic crisis, the more important is the legal certainty. Actually, legal certainty is one dimension of the welfare. This means that the role of law *as a safety mechanism* in society is becoming a challenge for DSL as well. Scholars as well as judges must have tools to answer to the challenge. As we will see, the tool is a many sided rational discourse that produces well founded and, at the same time, just solutions to the hard cases as well.

All in all, the development of the Welfare State has caused clear changes in the old model of the rule of law ideology, or, in other words, the old model goes side by side with the development of the Welfare State. The substance of the law is becoming increasingly more important, and at times it even replaces the form of law. However, it would be an exaggeration to maintain that the Constitutional (or Rule of Law) State has disappeared. That is not true. It has only adapted to a new societal situation, but, considering the circumstances, it is still doing quite well.

Chapter 15
Two Types of Norms

Starting Point

Legal norms, like norms in general, can be divided into several subgroups, depending on their deontic qualifications, as follows:

1. prescriptions, including commands, prohibitions and permissions,
2. norms of competence, and
3. legal definitions.

This division is not a key issue as far as the present study is concerned. The need and the structure of interpretation is the same independent of the norm category. Instead, another dichotomy, that is, the division between rules and principles is significant because it is reflected in the *method* followed in DSL.

The concept of *principle* has been at the kernel of modern jurisprudence (For example: Alexy 1985, 15, 1989, 4, 243, 2007, 20; Aarnio, 1990, 180; Ávila 2006, 29; Dworkin 1977b, passim, 1981, passim; MacCormick 1978a, 155; Peczenik 1989, 74; Raz 1972, 823, 1975, 49). This results, at least partially, from the growing interest in human rights, but not only from that. In the statutory law systems in the Nordic countries, for instance, the open texture norms have gained more and more footing. The idea of strict rules solving each individual case does not function in a dynamic, quickly changing society. There has been and is a societal need for more *elastic legal norms*. Principles are one type of those norms. In recent jurisprudence, the focus has especially been on the structure and the role of principles.

On the Strong Demarcation Thesis

The opinions can roughly be divided into two: a *strong* and a *weak* demarcation thesis. According to the *strong* demarcation thesis, the difference between rules and principles is a qualitative one (crf Poscher 2007, 62). Rules and principles belong necessarily to different conceptual categories (Alexy 1985, 12; Raz 1972, 823; Lyons 1977, 414; Aarnio 1990, 180).

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This thesis is partially based on the Wittgensteinian notion of rule: Rules either are or are not followed (Finch,158). They are like railroad tracks: either one follows them or does not follow without no third alternative available (Schauer 1992, 226). This is also the case with legal rules. There can be, and always is, exceptions to the rules, and, in principle, it is possible to list the all the exceptions. In this very sense the rule are "closed" as to their nature.

The conflict between two rules can be decided with, for instance, the *lex posterior* maxim. The binding nature of principles is qualitatively different. *Francisco Laporta* has described the principles as follows. First, principles only provide *prima facie* reasons for a solution. Further, principles but not the rules have a dimension of *weight* of importance, and finally, principles are so-called mandates of optimisation. This means that the principles are closely intertwined with values as well as with political and moral goals (Laporta 2011, 279).

This means that principles only point out the *direction* in which the decision should be sought in cases when there is a collision between principles. *Torstein Eckhoff* and *Nils Kristian Sundby* speak about standards or guidelines (riktlinjer) for the decision-maker. This description makes sense when only *a certain principle* has to be applied to a single case. Let us take as an example the principle "No one may benefit from his/her wrong doing". In a case of uncertainty, when the normal sources of law do not define the solution, this principle forms a guideline. It may even be the decisive argument for the solution.

This does not hold true when *two or more principles collide* with each other. The principle having greater weight overrides the less important principle. That is the reason why there is no *binding* hierarchical order of criteria, how the collision should be decided, but only a weak order of preference between principles. This order is determined by the priority values and goals that lie behind them.

Weak Demarcation Thesis

According to the *weak* demarcation thesis, there is only a *difference of degree*, not of quality between rules and principles. Also the weak demarcation thesis is connected to the Wittgensteinian basic idea: Rules and principles are in a *family resemblance relationship* to each other. There is between them a difference of degree but not that of quality. Rules and principles have a similar role in legal reasoning, although the principles have greater generality than rules. This means that there are no special characteristics which separate the principles from the rules (MacCormick 1978a, 155; Raz 1975, 49; Golding 1970, 208).

It seems quite natural to think that the *value content* of principles is more "apparently" present than is the case with rules. According to this idea, the principles simply express values. This does not hold true. The rules have often a value content as well. In this regard, the rules and principles cannot be distinguished from each other as clearly as is often maintained.

The weak demarcation thesis seems to be linguistically problematic as well. As *Neil MacCormick* emphasises, all legal norms are defeasible:

> Any formulation of legal provisions by way of doctrine, or of litigious argument, or as part of knowledge based on an expert system, is likely to be defeasible in some circumstances (MacCormick 1995, 115)

Giovanni Sartor shares this opinion. He does not deny the difference between rules and principles in general. There is a difference, but none as regards the defeasibleness. Sartor argues that

> every norm possesses the characteristics Dworkin attributes to principles: it is defeasible in a set of circumstances not abstractly predetermined, and remain valid even if contradicted by prevailing norms in particular cases (Sartor 1995, 144).

This is the core of the story. From a semantic point of view, principles as well as some rules may be imprecise. In both cases, the lack of precision may call for weighing and balancing. Thus the difference, as far as there is some, is not a division between two *logical categories* of norms but, as was mentioned above, an empirical (or linguistic) one based on a *difference of degree*. According to this view, a norm is a "rule" to the extent that the antecedent of it contains precise descriptive terms, and its priority as regards to other norms is exactly determined. On the other hand, a norm can be classified

> as a "principle" to the extent that its antecedent contains imprecise or evolutional terms, and its priority is indeterminate (Sartor 1995, 144).

Ronald Dworkin, in his turn, argues that principles not only have a different linguistic status compared to rules but they are also valid due to a moral deliberation. That is why he uses the word "principle" to refer to *value* or *goal* principles (Dworkin 195, 91; cfr Shiner 1985, 61). As far as I see, *Robert Alexy* goes even further reminding that a principle is always a normative reformulation of a value (Alexy 1985, 15). This specification does not solve the dilemma. As we will see later on, some open texture "rules" are at least partially reformulations of values too.

Let us take an example. Dworkin quite often refers to the principle "No one may benefit from a wrong he or she has done" (Dworkin 1977b, 22). However, the use of the notion "principle" in this regard is misleading. The norm referred to by Dworkin clearly involves an either/or type quality. It is a rule. In order to avoid conceptual difficulties like this, one has to accept a third way as regards the separation the rules from the principles. Following this third line, neither the strong nor the weak demarcation thesis is valid as such. Both thesis catch, no doubt, some relevant dimensions of the problem, but both also fail to provide a satisfactory picture of the topics (Aarnio 1990, 186). According to this *third demarcation thesis*, it is necessary to keep separate at least the following types of norms:

(1) The principles expressing the basic *ideological values* of the legal order. In modem Western States the principle of the *rule of law* and the assumption of the *rational legislator* belong to this category. Certain moral principles concerning private ownership, the family, and the welfare of children are also involved in the ideological foundation

of the legal order. Some of these principles may be manifested in the statutes but some are a non-articulated basis of law.

(2) *Positive legal principles* are included in the valid law or they are assumed to be relevant to it (Tuori 2003, 327). The following examples elucidate the nature of this kind of principles:

- *Formally valid principles* like principles of basic social and political rights are directly manifested in valid statutes. To this group belong principles which guarantee freedom of speech, freedom of association, equality and so on. Some formally valid principles are manifested in private law as well as is the case with the principle of bona fides in contract law.
- Principles based on *legal induction* have traditionally been much discussed in legal philosophy (Niiniluoto 1976, 335, 1980b, 193, 1981a, 362; Aarnio 1979, 191; Cohen 1970, passim; Makkonen 1965, 177). The idea of legal induction concerns the possibility to derive a general principle from a set of particular valid rules by means of inductive reasoning.
- *Decision-making principles* in both adjudication and DSL are standards like "audiatur et altera pars" as well as the principle of legality in criminal law, and the "praeter legem" principle. Some of these principles are expressed in the statutes, as are "audiatur et altera pars" and "praeter legem". The prohibition against the use of analogy in criminal law is an example of a principle not specifically recorded in (Finnish) law. Principles of the last type are tacitly accepted in the legal community.
- A moral principle is a typical example of an *extra-systemic principle*. Prima facie, law and morality are two different things. Only legal rules can be formally valid in a certain legal order, although moral principles may have a role in legal reasoning as an argument in the choice between two or more meaning alternatives. As a part of *legal* reasoning, moral principles "become" legally relevant. Law and morality become intertwined, as shall be demonstrated below.

A Step Further

In the following, only the formally valid rules and principles will be dealt with. According to the main thesis of this study, the rules and principles form a *scale* divided into four segments. The scale includes more than two *overlapping categories* of norms. The segments of the scale are as follows: rules (R), rule-like principles (RP), principle-like rules (PR) and principles (P).

Pacta sunt servanda is a typical rule (R): either the agreement ought to be kept or not. The principle *No one may benefit from a wrong he has done* (Dworkin 1977a, 91) belongs to the group RP. From a formal point of view, it is a principle, but on a closer look it undoubtedly belongs to the category of rules. Either it is or it is not followed. Some norms are *evaluatively* as open as the principles. They belong to the group PR. An example is an open texture norm. Finally, there are proper principles (P), such as the principle of equality and other basic human rights principles.

There are no *clear* boundaries between the segments. A norm may be more rule-like than principle-like, and vice versa. This is the reason why the relationship between rules and principles can only be analysed through case-by-case analysis – i. e., norm by norm.

The distinction between rules and principles can now be classified only as a matter of degree of generality. The applicability of a norm is shading from one segment to the next. Only the extreme ends of the scale can be strictly separated. What does this, at a closer look, mean? Following the ideas introduced by *Francisco Laporta* the scale metaphor can be characterised as follows (Laporta 2011, 281):

(1) The rules are a concluding support for the solution, whereas principles are supposed to be a *prima facie* (PF) reason based on our general linguistic competence. In order to be a PF (legal) norm a rule of recognition implying the validity of it must be identified (Alexy 1985, 75; Wróblewski 1983, 311).
(2) *All things considered* (ATC), a PF legal norm does not necessarily be a part of the legal order, as is the case, when there happens to be a contradiction in the normative system.

In DSL the subject matter is always a *norm formulation* to be interpreted. This formulation is, in its turn, either PF precise or PF imprecise, i.e., vague, evaluatively or cognitively open, ambiguous, or unclear. The rules as well as the principles may have the *same* degree of inaccuracy. Therefore it is not possible to divide them in sharply distinct linguistic categories (Sartor 1995, 123).

A legal norm may be PF unambiguous as is the prohibition: Parking forbidden, and PF ambiguous as well: A contract ought to be executed in written form.

A *rule-like principle* may be cognitively ambiguous (the terms "contract", "legacy" and "cause"), or evaluatively ambiguous (adjustment of a contract). *Principle-like rules* may refer, for instance, to such open texture as "special circumstances of the case" , Finally, *legal principles* are, as to their nature, either cognitively or evaluatively open.

All things considered (ATC), a norm formulation has always a precise meaning content independent of the fact, whether or not the formulation applies to rules, principle-like rules, rule-like principles or principles. This means that, for instance, the interpreted principle of equality *expresses an ATC rule*, which either has or has not to be followed. The same holds true in a case, where two PF valid value principles are in conflict with each other. Interpreted (ATC) and applied in an optimal way they together constitute *a rule applicable to the case.*

From the deontological point of view, the rules and principles have a different role in legal reasoning. Legal rules are a matter of *interpretation*, legal principles that of *weighing*. This means that only the rules belong to the field of *deontic logic,* whereas the principles follow the *logic of preference*. Here we need, however, one specification more introduced by *Francisco Laporta*. He has separated ought to do norms (Tunsollen) from ought to be norms (Seinsollen).

In this regard, the principles deal with the ideal state of affairs, which, in its turn, can be the subject matter of weighing (Laporta 2011, 282). From logical point of view, in such a situation only the logic of preference can be applied. In this and only in this regard, it makes sense to say that a principle is an optimisation mandate (Alexy 1989, 63, 1985, 75).

Let us take an example. The principle P concerns the freedom of speech. This *principle* itself is not an optimisation mandate, because the mandate is a normative proposition *about* principles. Recalling the four categories of norms identified

above, the optimisation mandate is necessarily a rule-like norm: either it is or is not followed. It cannot be applied "more or less", because one either does or does not optimise. On the other hand, only the principles are genuine *weighing norms* (Peczenik 1989, 74). In a case of conflict between two value principles, the mandate orders the balance between the principles, and makes it in an optimal way.

Referring to *Georg von Henrik Wright*, Francisco Laporta argues that the "bridge" from "ought to be" to "ought to do" is a practical necessity following the scheme of practical syllogism: If X ought to be good, it is practical to do Y in order to achieve X (Laporta 2011, 283). This problem is left outside the present study (see more Aarnio 1997, 181–183).

There still remains one question open: Is it really possible to draw a clear borderline between ought to do and ought to be norms? Would it be more natural to say that all norms have a similar deontic structure? If this view is accepted it seems to me, that all norms should be of ought to do type. This being so a typical norm can be rewritten in the form (x) (FOxG): *If the state affairs "someone benefitted from the wrong he did" (F) prevails, then an authority ought to do G.* In this sentence, F is a description of the behaviour of the person and G a description of the legal consequence.

Depending on the context, the same normative substance could, according to this idea, be expressed either in "ought to do" or in "ought to be" language. This two-fold-thesis" meets, however, logical problems (see more Aarnio 1997, 182–183). In case that the principle is written in the "ought to do" form, it is difficult to see, how the weighing and balancing "follows" the rules of *deontic logic*. It is more consequent to interpret legal principles and norms like them not as ought to do, but, consequently, as *ought to be norms.* The logic of preference is then applicable to principles and principle-like rules, as well as rule-like principles. On the other hand, deontic logic and only it is applicable to the logic of ordinary rules.

All this means, that neither the strong nor the weak demarcation thesis is valid. It is misleading to claim that legal rules are always definite and that legal principles can only be characterised as *prima facie* norms (cfr Aarnio 1990, 192). Rules also have a *prima facie* role in discourse and, for example, a flexible legal rule is anything but definite before consideration. On the other hand, a principle-like rule may, in a certain decision-making situation, not only be *prima facie* applicable but also "definite" in that it provides the solution without the need for further arguments.

From the methodological point of view, rules and principles refer to two different activities typical of DSL. The rules are the object of *interpretation*, whereas the principles call for *weighing and balancing*. Although the latter belongs to the hard core of modern law, and may, depending on the field of law, be even more important than the traditional interpretation, the emphasis of this study is more on the interpretative task of DSL.

Chapter 16
The Formal Validity, Efficacy, and Acceptability of Legal Norms

On the Lexical Meaning of Validity

In standard language, the expression "the law in force" is tautological in a rather interesting way. For example, Webster's dictionary defines "having force" as its characteristic of validity. In other words, "this rule has force" is the same as saying "this rule is valid". Such a definition, however, does not allow us to go any further as, when we use language in this way, the problem is the concept of validity in itself (Conte and Cabrera, 1995, 17; Garzón Valdés 1987, 41). The answer to that problem requires a distinction between three concepts of validity, three ways of speaking about how a norm is a part of the legal order. They present three different language-games, and, *prima facie,* none of these has unconditional priority in respect of the others. These three concepts of validity are: systemic validity, efficacy – i.e., the actual following of a norm in society – and axiological validity. As we will see, this differentiation is also important because it reflects three approaches in the theory of DSL.

Jerzy Wróblewski has denoted these approaches with the terms systemic, factual and axiological validity (Wróblewski 1992, 75). In the following, this same distinction will be denoted by the terms the *formal* validity, the *efficacy* and the *acceptability* of legal norms. The law in force, then, can refer to anyone of these three – or to all three together.

Formal Validity

Legal rules are, *prima facie,* formally valid. The Constitution indicates which rules are part of the hierarchy of norms subject to the Constitution. The same is true of principle-type rules (PR), rule-type principles (RP) and principles (P) whenever they have been manifested in legislation. If there is no such manifestation, the Constitution by itself does not include a rule of recognition deciding the *prima facie* validity of the norm. This is especially true of value and goal principles that have not been incorporated into law. A rule of recognition must be found for them from somewhere beyond the norms of the Constitution.

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According to Wroblewski, a norm is formally valid if it fulfils the following four conditions (Wróblewski, 1979, 207, 1984a, 320, 1992, 77; von Wright 1963, chapter X.5.):

a. it has been accepted and promulgated in due course,
b. the norm has not been repealed,
c. it is not in conflict with another norm in force in the same system, and
d. if there is a conflict, there is another accepted norm for resolving it.

Hans Kelsen's view reflects in the three meanings of validity in an important way. According to Kelsen, law is the totality formed by the norms given by legal competent institutions. Legal norms, in their turn, are part of the world of "ought" ("Sollen"), not of the "is" ("Sein"). A legal norm always receives its validity from another legal norm. In this sense, the legal order always forms a delegated unity. This is what is meant when referring to a so-called hierarchy of norms. A certain norm is (formally) valid if it is given on the basis of the authority created by a superior norm. The ultimate basis for formal validity is the *basic norm* ("Grundnorm") at the top of the pyramid (Kelsen 1970).

Thus Kelsen has a certain interpretation of systemic validity. However, not all hierarchical systems of norms supported by a fundamental norm are legal ones. A classical example is the comparison between the system of Mafia and the legal order of the State. Kelsen solves this dilemma by means of the basic norm. It only gives legal force to that system of norms that, at least by and large ("im GroBen und Ganzen"), is effective.

Of the many possible systems of norms, the basic norm only makes the most effective one valid. Thus a matter belonging to the world of Sein – efficacy – becomes a necessary condition of the validity of legal norms. A legal norm is valid if it is part of an effective hierarchy of legal norms. Kelsen goes even further and requires efficacy of each *individual* norm as well. In this way, cases of desuetude are left out of his concept of validity. The norm X is valid if it is part of a *by and large effective system* of norms and it is effective in itself. On the other hand, Kelsen denounces the possibility that the validity of a norm could be determined on the axiological basis. Valid law does not require morality for its force. For this reason, natural law cannot be law in the proper sense of the word. According to Kelsen, it belongs in the category of morality.

The problem becomes a different one if, in addition to the formal validity, attention is paid to the *material side* of validity too. The problems may be illustrated by examining the way in which rules and principles are over-ridden in various conflict situations. There may be at least four different situations:

1. A norm may be valid as a *strict prima facie rule*, in which case one can only deviate from it on the basis of another legal rule. Apparently, Ronald Dworkin had this in mind when he wrote "If two rules are in conflict, one of them cannot be valid". Strict validity, however, is an ambiguous matter. Two rules may be *prima facie* (formally) valid even though the second must, all things considered,

yield. Thus, the conflict can be decided through interpretation. The interpretation may show that a *prima facie* valid legal rule is something different from an all things considered valid legal rule. Therefore, it is only possible to speak of strict validity in respect of interpreted rules. The resolution of the conflict means that the other rule must yield.

Furthermore, two rules may be *prima facie* valid in the strict sense when one is a general rule and the other is a special one. There need not be a conflict between the two, even with all things considered. Instead, one simply yields on the basis of the *lex specialis* maxim.

2. A norm may be valid as *an ordinary prima facie rule*, although it can be over-ridden on the basis of a legal principle. The norm collision is "conflict-like", and the pushing aside of the rule is a case of *contra legem.*
3. A norm may be valid as a *prima facie principle*, which means that in a case of conflict, a principle overrides another principle without a single principle losing its *prima facie* validity. A *prima facie* principle may only be over-ridden in legal consideration – that is, all things considered.
4. If a principle is valid as an *ordinary prima facie principle*, it is not possible to demonstrate even a *prima facie* preference. Principles compete in legal reasoning on an equal basis.

If it is not possible to ascertain the *prima facie* validity of a principle – there is no institutional support for it; the validity can only be ascertained with all things considered. In this case, the validity may be ascertained in two ways:

a. One ascertains whether the principle has *prima facie* institutional support in the legal order. Such support is provided, for example, by confirmation of the principle in a precedent. Indeed, many value principles are, precisely in this sense, institutional expressions of values.
b. Legal discourse, however, is also open to non-juridical arguments that have not yet received the advance institutional support, no matter whether these arguments are social facts or non-legal principles. For example, if a non-legal principle is part of a coherent background of justification that includes at least some authoritative legal sources, such as written law, this principle receives juridical relevance with all things considered. In other words, a non-legal value principle "enters" law as a consequence of the appropriate legal discourse.

The positive law includes not only the legal rules that have been given, as well as customary law, but also legal principles that are recognised as grounds of decision-making in practice. This is so when a non-legal value principle is confirmed for the first time by a superior court. The extra-legal argument receives its institutional support from legal discourse that can be appropriately controlled, even though the argument itself did not have institutional support in the legal system *before* that discourse. In these cases, a key position is held by the coherence of the result of the consideration – that is, how well the non-legal basis agrees with all the legal material that is available. The more coherent the argumentative basis, the more believable it

is that a non-legal (value) principle is also legally relevant. The coherence creates the basis for the acceptance of the principle as a legal principle.

Let us return to the concept of systemic validity. Both rules and principles are arguments for certain legal consequences. They are used to justify a decision either *prima facie* or with *all things considered*. If they are ambiguous, they would not decide the problem immediately as they must first be interpreted. The decision can only be found with all things considered. Principle-like rules (PR) and principles (P) are in the same position as they are not unambiguous either. Examples include a cognitively open principle-like rule and an evaluatively open principle.

For this reason, it is misleading to claim that legal rules are always definite and that legal principles can only be characterised as *prima facie* norms. Rules also have a *prima facie* role in discourse and, for example, a flexible legal rule is anything but definite before consideration. On the other hand, a principle-like rule may, in a certain decision-making situation, be not only *prima facie* applicable but also "definite" in that it provides the solution without the need for further arguments.

However, what is essential is that even though all kinds of legal norms are *prima facie* reasons for legal decisions, they are of *different degrees of precision*. One class consists of clear either/or types of rules, another of rules for which it is not possible to say whether or not they apply. A third class consists of principles for which we do not know the degree to which they can be applied.

If, and only if, we keep an eye on the extreme ends of the scale (R, P) it would appear that the strong demarcation thesis is valid. There really are different types of norms as far as applicability is concerned. On the other hand, the thesis is not valid for the area between the two extremes. With regard to applicability, there is no essential difference between open rules and principles.

Hans Kelsen's theory is a good example of an attempt to *define* the validity of a legal norm in a cut-and-dried manner. The weakness of this kind of norm arises from a deeply-rooted tendency to search for clear definitions of words. This does not solve the problems of legal validity. In this study, an attempt is made to give up strict definitions and again follow the Wittgensteinian idea of language-games. Why not speak of the validity in different ways in different contexts? It depends on the language we use, which meaning of validity has to be chosen.

Efficacy

In the statutory law system, all legal norms that are effectively followed in society must be formally valid. Formal validity is a necessary precondition for efficacy, but not *vice versa*. A formally valid norm is not necessarily effectively followed in the legal community. *Desuetudo* is a typical example of such a situation (Wróblewski 1992, 79). The notion of efficacy (axiological validity) in itself, however, can be understood in many ways (Wróblewski 1992, 79).

A norm may be defined as being effective in a society if, and only if, the *citizens* regularly follow it. The Danish Professor in civil law, *Knud Illum*, a contemporary and colleague of Alf Ross, made this kind of proposal. According to him, the law is

valid if, and only if, the citizens have experienced it as valid (Illum, 49). According to Illum, the "legal conviction" of the people is the measure for validity. It is a purely empirical question, whether the citizens follow the norm or not, which means that the validity of a legal norm is an empirical problem too. Ross accepted this view to a certain extent. Peoples' conceptions (borgernes retsakter) define the content of legal life (retslivet) in its broad sense. As we saw above, Ross did not otherwise accept Illum's view. For Ross, people's conception about legal issues is not the *criterion* of validity.

However, there are other proposals based on the notion of efficacy. One is formulated by *Ilkka Niiniluoto.* He has defined the validity as follows: The norm N is a valid legal norm if, and only If, it is accepted by the legal community C as part of the legal order (Niiniluoto 1981b, 168, 1985, 168). A proposition dealing with that kind of validity is always an empirical proposition that states something about the acceptance of N by C. There are several crucial points in that definition.

First, the notion of acceptance is problematic. According to Niiniluoto, it means "reasonable consensus". *Most* of the members of C accept N belonging to the legal order, which presupposes that the majority of C is committed to accepting N as valid. Yet, how to *measure* the majority ("most")? Does the definition mean the dictatorship of majority because it does not give any protection to the minority? Niiniluoto does not give a reliable answer to that very question.

The concept of *legal community* C is also difficult, maybe even impossible to define in an exact way. Who in the end are the members of that community: those who have a law degree, or also the laymen who are well acquainted with legal order, or maybe all those who are interested in law?

The third difficulty is intertwined with the notion of acceptance. The definition is an expression of an extreme positivism. It does not make any difference between the acceptance by rational means and acceptance produced by manipulation for instance. According to the definition, an extremely unjust law is also valid if it has been accepted by the majority of the legal community. Finally, the definition does not solve the problem of a new statute that has not yet been accepted by any member of the community but is certainly formally valid. It seems to me that this new statute is *per definitionem* not valid at all (Aarnio 1997, 170).

Summing up, all theories of validity based on empirical data are defective to such an extent that they cannot be accepted as the foundation of DSL. That is the main reason why the third notion of validity – that is, acceptability – becomes so important. It makes understandable the basic goal and purpose of DSL to reach as large an acceptability in society as possible. If DSL succeeds with this, it has fulfilled its social function as a source of reliable legal information.

Axiological Validity

Axiological validity is often connected to so-called natural law. In doing so, values such as justice are not merely the moral yardstick of a given (positive) legal system, they form the basis that gives the system of norms its legal force. There is also

another side to the matter. This is seen if the question is rephrased as follows: Why has legal norm N, formally valid in society X, systematically remained *unapplied*?

One answer may be that N – even though it has not been formally repealed – no longer corresponds to the generally accepted system of values. All legal norms that are formally valid do not have a guarantee of axiological validity (Wróblewski 1992, 79). In principle, it is possible that a certain norm is regularly applied by an authority but still it stands in conflict with the generally accepted value code. Such a norm is both formally valid and effective without being valid from the point of view of the value system. On the other hand, all legal norms that fulfil the criteria of axiological validity must, in the statutory law system, be at least formally valid.

However, everything that is generally *accepted* in the legal community is not necessarily right, and, as such, a firm basis for legal validity. Human behaviour is full of inconsistencies and attempts at influence. The acceptance may therefore be based on persuasion and authority, and, if so, it does not fulfil the expectations of legal certainty. Persuasion, use of force and manipulation open the door to arbitrariness, which is alien to the Constitutional State. In order to avoid this problem, the ideal model of axiological validity cannot be based on acceptance but on (rational) *acceptability*. This change of view tends to remove random factors such as persuasion and manipulation from validity. The concept of acceptability refers to the expectations of what is rational legal behaviour in society.

Nothing prevents us from saying that norm N is formally valid because it is part of the system authorised by the basic norm. Efficacy, in its turn, is important, but only one of those language-games played with the notion of validity. The third language-game deals with norms that are rationally acceptable in the legal community. Much confusion can be avoided if a conscious effort is made to keep these three different ways of speaking of the validity distinct from each other.

Sometimes it has been maintained that the formal validity of legal principles can be derived from legal rules. As the validity of legal rules is based on the rule of recognition, legal principles are also subject to the rule of recognition (MacCormick 1978b, 185). This comment does not take into consideration that the connection to the formal rule of recognition can be one of degree. In some cases the institutional support of both rules and principles is based directly on the Constitution. Sometimes, however, the institutional support for a principle can only be found as a result of legal discourse. This is the case when the Supreme Court accepts extra-legal principles as legal arguments. Before that they have no institutional guarantee in legal rules.

Thus the rational acceptability also makes it possible to *criticise* norm standpoints merely based on the formally valid law or on norms proven to be effective in society. Formally valid and effective law can still be unjust. It would not be acceptable by those who are committed to the criteria of rationality and well-founded values or moral code. The argumentation theory and new rhetoric, therefore, rest on the concept of acceptability to a large extent. What is most important is that the theory of rational legal argumentation allows the use of all three types of validity. The role of each game depends on the context in which the game is played.

Chapter 17
The Procedure of Legal Reasoning

On the Notion of Interpretation

The carrying thesis of this contribution tells us that lawyers, scholars included, are prisoners of language. The statutes are manifested in language, as are the legal decisions, and DSL only works with different kinds of linguistic materials. It also formulates the interpretations in language.

Jerzy Wróblewski specified interpretation with the help of three concepts. Interpretation in the *widest* sense of the term (*sensu largissimo*) is the understanding of any possible event, situation or process. The second type is interpretation in the *wide* sense (*sensu largo*). Its objective is human behaviour in a historical, cultural or social context. When thus defined, interpretation is the understanding of social actions and series of actions as social. The third alternative is interpretation in the *narrow* sense (*sensu stricto*), where the objects are the texts born as a result of human acts (Wróblewski 1991, 260).

Meaning Propositions

In DSL, the focus is only on the interpretation *sensu stricto* (Aarnio 1987, 67). Let us call M *meaning proposition*. It expresses the meaning content of a linguistic expression, L. One example of L, and for DSL the most important, is a statute (article), A. It is typical of M that it reveals a list or *catalogue* of the possible meaning alternatives. In a single case, the meaning proposition Mi can be formulated as follows:

Mi: L (an article) means (disjunctively) L1, L2 or L3.

From another point of view, the meaning proposition Mi can be understood as a *norm formulation*. Each meaning alternative, L1, L2 and L3, expresses a possible norm, N1, N2 and N3. In this regard, the meaning proposition Mi is an articulation of a set of norms. Depending on the linguistic or normative dimension, we can draw up either alternative meaning propositions (Mi/L1, Mi/L2, Mi/L3) or, correspondingly, alternative norms (N1, N2, N3).

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As far as the multiplicity of meaning alternatives is concerned, the following distinction is useful:

(1) *semantic* or lexical meaning alternatives,
(2) *legally* possible alternatives, and
(3) *contextually* possible meanings (Aarnio 1997, 143).

The *first group* covers all the meanings we may recognise on the basis of our lexical understanding – that is, by means of dictionaries or other common linguistic usage. This group reveals the widest possible cluster of meanings, and is very seldom used as such in legal contexts.

The task of DSL is to select those meaning candidates that the *legal order* makes possible. The frameworks for meaning provided by the statutes are wide and undergo change along with language. Still, the legal order always indicates *some* boundaries for the use of linguistic expressions.

The third alternative is the most limited. Contextually possible meanings are defined by *the proper use of sources of law*. Since a single correct result cannot be drawn from sources of law in hard cases, the third group also offers a group of alternatives, nothing more. It is the task of the scholar or the judge to make the final choice between them.

The proper interpretation does not have to be confined to the catalogue of possible meaning alternatives. What is essential is the selection procedure – i.e., a move from the lexical meanings to those which are contextually possible. This selection is necessary in the case of disagreement. In a legal discussion, the parties may disagree and often actually disagree with the meaning content of a proposition. This belongs to the everyday life of DSL. In order to determine whether the parties are or are not in real disagreement, one has to have a yardstick, as *Svein Eng* says:

> "Comparison presupposes a common yardstick and common features: Just as the comparison of two phenomena with respect to length presupposes that one has concepts of units of length and that these concepts are applicable to both phenomena" (Eng 2003, 3). In his study, Eng clarifies such yardsticks for the comparison of and choice between propositions (Eng 2003, 28–354).

In this sense, interpretation is *always a matter of language* and deals with meaning contents. From the point of legal order, the interpretation produces information about the valid norms and recommendations on which norm is valid with all things considered. A certain alternative, for instance L1/N1, is selected as the "correct" or "best justified" from more than one candidate for special reasons. With this in mind, we might use the term *interpretative standpoint* (Ps). This proposition expresses the final result from the arguments used to support the choice between different meaning candidates L1. . .Ln, for example:

Pi: The article L means L1.

Providing arguments for an interpretative standpoint, Pi, is legal reasoning. It has to be practised by the judge who solves a legal question, but it is also a characteristic of DSL, even though a scholar does not apply statutes to actual cases. The scholar maps out the *typical cases* covered by the statutes.

As we have seen, legal discourse can be characterised as a *hermeneutical* procedure, because there are, certainly, hermeneutical features involved in legal reasoning. However, hermeneutics does not include any methodical apparatus for how one should approach the statutes or other legal materials in order to produce good, correct or well-founded interpretations. Hermeneutics is more like a viewpoint or a *background philosophy* pointing out one essential dimension of legal discourse, but only that. The most essential weakness of hermeneutics is the lack of the means to *control* the interpretative propositions. Instead, the controllability is guaranteed by the *procedural theory of legal discourse.* It regulates the *selection* of the meaning alternatives in hard cases. The selection cannot be made randomly or arbitrarily.

> The Swedish reformer *Olaus Petri* recorded this in the 16th century in his instructions for judges: "Arbitrariness or violence is not the law of the land".

Naturally, there is no similar *obligation of reasoning* for DSL as for the judges. The "obligation of reasoning" for DSL follows, on the one hand, from the fact that the scholar is in the same *epistemically internal* position as the judge, and on the other hand, from the *requirement of controllability* set for science in general. In this regard, an attempt will be made in this study to build up *an ideal model of legal reasoning.* The credible and acceptable interpretation depends on the *good* reasoning procedure in DSL as well as in the adjudication.

On Justification

From this point of view, the key problem is how to *justify* the choices between (semantically and/or legally) the possible alternatives. Having achieved this task, the scholar gives an answer to the question: why is this and not some other interpretation the proper one? The general form of the *justificatory statements* is as follows:

Pj: On the grounds G, the proper interpretation for L is Li.

As far as the type and structure of the justification are concerned, two viewpoints have to be kept distinct – i.e., the *internal* and *external* justification. They are closely connected to the notion of rationality. Later on, the logic of internal justification – that is, deductive rationality – is called *L-rationality* in order to distinguish it from the logic of external justification called *D-rationality* (discursive rationality). The latter can be defined as a group of standards that makes a fair and free compromise (and sometimes a fair consensus) possible on any socially relevant question. As we will see, the rational discourse can also produce two or more well-grounded answers. Vice versa, there are no objective criteria or "final grounds" with which it could be claimed that one of the interpretative statements has better grounds than the others. In a way, discourse cannot move outside itself. All the arguments that can be presented are already included in the (possible) evaluation of which answer is better.

Internal Justification

According to *Jerzy Wroblewski*, the scheme of the *internal justification* includes the material premises for the justified statement Pj (the sources of law), the directives (rules) of legal interpretation accepted in the legal community, and the values needed in evaluating the grounds (Wróblewski 1974, 33, 1992, 30).

From the internal point of view, the scheme of reasoning is *syllogistic*. What is essential in this scheme is the *closed nature* of the inference. The conclusion can be drawn deductively from the premises. In this respect, the reasoning follows the rules of *L-rationality*, and the procedure fulfils the criteria of this kind of rationality if, and only if, it follows the deductive rules of inference. Syllogism as a form of L-rationality is only suitable for *ex post* rationalisation of the justificatory procedure. The premises of syllogism are always accepted as given starting points, which is also the reason why the internal justification is not a proper type of practical legal reasoning. The real problem for a judge, and for a scholar too, is to find the premises. Wroblewski calls this procedure the *external justification*.

External Justification

In this regard, Wróblewski deals with different substantive decisional models of the judicial application of law. This kind of model treats the final decision as an application of the rules of the substantive law. Let us look at the elements that *together* constitute one type of substantive decisional model, which is useful for our purposes:

(1) The determination of the validity and acceptability of the relevant rule of substantive law (*identification of the institutional support*);
(2) The determination of the meaning of a rule in a manner precise enough for its use in deciding the case (*statutory interpretation*);
(3) The acceptance of the facts of the case as proven and their description in the language of the applied rule of substantive law (*proof of evidence*);
(4) The subsumption of the facts of the case under the applied rule of substantive law;
(5) The determination of the legal consequences of the proven facts according to the applied rule;
(6) The formulation of the final decision of the judicial application of law (Wróblewski 1992, 31).

It is easy to see that this model includes a lot of *other elements* apart from the syllogistic premises and the conclusion. The elements (1)–(3) in particular concern reasoning *outside* the syllogistic inference. In this regard, *Aleksander Peczenik* points out, the hard case situations involve a *transformation* from the grounds to the interpretation according to certain rules of interpretation and to a given set of values,

but the transformation is *not* a logical inference but a non-deductive "jump" from the arguments to the conclusion, and this "jump", as Peczenik calls it, is governed by the standards of rational discourse (Peczenik 1989, 295; cfr Habermas 1989, 65).

> According to Peczenik, there are, taken all together, four types of "jumps": (1) the jump *into* the law, and (2) the jump *inside* the law, which, in turn, may be either (2a) a legal *source-establishing* jump or (2b) a legal *interpretative* jump. These categories will not be analysed in this study (Peczenik 1989, 300).

The external justification can also be characterised as a form of a *contextually sufficient* one. It is contextually sufficient because it only deals with material that is accepted as legal. The interpreter does ask why this type of sources of law must, should or can be used; or why these rules of interpretation are to be followed. He simply justifies the interpretation in the same way as jurists usually put forward their arguments. The interpreter makes his moves *within* the given legal framework following the rules of D-rationality.

However, the interpretation also has to fulfil certain criteria of *material rightness* – i.e., acceptability in the legal community in question. Interpretations must be based on D-rational discourse but, in addition to that, the result of the discourse must be reasonable. Providing these conditions are satisfied, the result is rationally acceptable in the community. It is both rational and reasonable.

The concept of rational acceptability is an *ideal model* for legal reasoning. Nevertheless, the reconstruction itself is not an arbitrary one; it is not only a stipulative or lexical definition of what the term "rational" means, or what it should mean. The deep justification for D-rationality cannot be based merely on empirical facts either. The idea is not to claim that people are rational in this sense in their everyday lives, or that people will, at some later stage of their development, be rational in their needs and thinking. People simply are, in many respects, human beings that are provided with a lot of irrational features.

We are here faced with the meta-level question of the *justification of justification* itself. In other words, we have to construct the deep justification of legal reasoning. The deep justification points out that legal reasoning is part of the broader complex of human experience, and that it has the same relevant characteristics as that totality has. It gives a basis for understanding a legitime legal justification in society. *Aleksander Peczenik* (Peczenik 1989, 156) emphasised that we can present the deep justification of legal reasoning, as well as the deep justification of human experience in general, as a spiral.

One way to justify the legal justification is to reconstruct its social, cultural and philosophical background factors. Here, the basic elements of the argumentation theory find their proper place as well. By means of these elements we can argue why contextually sufficient legal justification is possible, and why it is a necessary condition for a well functioning society too.

The notion of rationality is not, however, a contingent historical or social matter. Instead, the justification of rationality is *transcendental* as to its character. This transcendentality cannot be justified if the notion of justification is understood in the sense mentioned above. The concept of rationality is a *given property* of the human

culture. Our form of life is simply constructed in a certain way. Let us assume that all interpretations presented by A are totally inconsequent and non-coherent in every respect. What do we think about A? We are inclined to say that either A is crazy, or that he belongs to a culture unknown to us. It is impossible for us to understand that kind of person. A consequent and coherent way of thinking is rooted so deeply in our culture that we use it as a measure when evaluating other peoples' behaviour.

In this sense, freedom, consistency and coherency are *necessary elements* of rational behaviour. They belong to the basis of human communication that is an essential element in our form of life. Our social lives and our human communicative interaction will only function providing these preconditions are satisfied. Referring to these features, it seems to be correct to say that the reconstruction of rationality makes explicit the role and the significance of freedom, consistency and coherence hidden in the common linguistic usage of the modern minded people – that is, of us. Thus, rationality is a necessary (transcendental) element in the notion of a human being.

By means of this ideal, we get measures to weigh the *legitimacy* of legal interpretations as well as possibilities to *criticise* the results of the interpretative work of DSL. The criteria for this criticism are the following:

(1) Every sound dialogue presupposes the *common language* of both parts. They have to commit to the same intersubjective meanings. If this is not true, the whole basis for understanding – and also for acceptance and acceptability – will be destroyed. In addition to this very ground for discourse, certain other and more specific preconditions must be listed.
(2) The *procedure of justification* has to be D-rational in the sense described above. It is only then that the interpreter can avoid arbitrariness.
(3) The justification procedure must follow the established *rules of legal interpretation*. Partially by means of these rules, the interpreter has a chance to pick out the legally possible alternatives from a set of semantically possible ones.
(4) As regards the contents of the decision reached, the *doctrine of the sources of law* has the key role in the legal justification. Each interpretation must be justified with reference to at least one authoritative source of the law. In the systems of written law – as on the Continent – the most important source of the law is the law (text) itself. Yet, depending on the doctrine of the sources of law, the number and quality of the sources can vary from one culture and from one period of time to another. The interpretation, however, is only legal if it is in accordance with the established catalogue of the sources of law.
(5) In most hard cases the use of the sources of law is *not enough* to produce rational acceptability in the legal community. In many respects, the interpreter has to refer to certain empirical evidence – e.g., to social facts at a certain moment – and, what is important, to a certain set of values.

The heart of DSL justification lies in a *mixture of legal, empirical and moral arguments*. This mixture cannot be avoided in hard case situations. The interpreter always has to find a balanced combination of these distinct elements. Especially in this respect, it seems to be well-founded to speak about the reasonableness of the

interpretation. The matter is not only so that moral reasons may have the role of a source of the law in general. As we will see later on, this is usually the case only when a certain moral argument is needed to be added to a set of legal arguments. Most often, moral reasons (evaluations) are used as criteria to define the applicability of the rules of legal interpretation. For instance, it is sometimes necessary for someone to make a choice as to whether to apply the model of analogy or not, and, if he decides to make use of it, he has to refer to certain evaluations in defining the reasons for similarity between the two or more cases.

The Structure of External Justification

Let us now return to the external justification in a more detailed way. The major premise of a syllogism is always open to the question: Why was this premise chosen? The internal justification has no answer to this. One has to go "outside" the original syllogism and provide reasons for the premises themselves. In the course of this procedure, the syllogism is reformulated, having the contested premise as its conclusion.

This step opens a *new internal justification*, which is on the meta-level – that is, external to the original internal justification. If the meta-level justification is not sufficient, the external justification has to be carried on by formulating a third level syllogism, and so on. The procedure goes on until the chain of syllogisms takes an acceptable form.

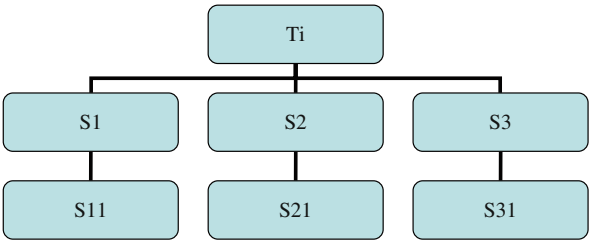
The reasoning is not fully deductive, even though the conclusion is deduced from the original premises by a net of (new) syllogisms. However, the logic alone does not determine the *meta-level premises* used to support the questionable lower premise. As Peczenik said, a "jump" is needed to bridge the move from the net of premises to the final conclusion. The selection of the "next step" arguments results from a practical discourse based on different kinds of materials called the sources of law.

In DSL, the *major* premise normally refers to the text of a given article, L, such as chapter 23, section 8 of the Inheritance Code. The *minor* premise gives information about legislative history or precedents, or about some other sources of law. For instance, the minor premise tells us that, according to the legislative history, the meaning content of the major premise is L1. The conclusion is the interpretation:

Ti: The article L has to be given an interpretation L1.

If, for some reason, this conclusion is not satisfactory, the chain of syllogisms branches out into a "syllogism tree", having as its branches different sources of law which, in order to support the interpretation, point in the same direction. What is important is that there cannot be any logical relationship between the different branches. The argument x in no way follows logically from y or vice versa. The arguments merely support the original syllogism. They form a kind of puzzle, the entire shape of which decides whether the arguments are adequate or not.

The decisive character of the "syllogism tree" is the *coherence* of the arguments, not solely their internal logic. For example, the reasons can take the form of a scheme, presented below, in which every syllogism (S) supporting the interpretation Ti constitutes one loop:



The interpretation Ti can be strengthened with the syllogism chain S1–S11 and/or the chain S2–S21 and/or the chain S3–S31. Chains can be added or carried on but the decisive matter is always that the syllogism closer to the interpretation can be inferred from a syllogism on the next level.

From a procedural point of view, the external justification is a *dialogue*, in which, for instance, the person A is the interpreter and B the party to whom the interpretation is presented. *Chaim Perelman* called B the *audience*. Using this idea, the structure of the interpretative procedure can be specified as follows: When A presents B with the interpretation Ti, and B contests Ti, A needs to provide further reasons S1 and/or S2 and/or S3. Thus a dialogue is born, the starting point being the disagreement between A and B on the content of interpretation.

The disagreement can be either *linguistic* or *factual*, or both (Victor 1977, 109). Linguistic disagreement is at hand when A and B use the same linguistic expression as regards different objects or different expressions in reference to the same object. Factual disagreement prevails when the parties – regardless of the terms they use – have adopted a different conception of the facts referred to by the language they use. The disagreement can also be *apparent* or *actual*. In the case of apparent disagreement, there is no need to carry on the argumentation. It is enough to make the use of language "technically" uniform or to reveal the disagreement. In the latter case, the parties may preserve their differing language-games, but this difference is not essential for factual unanimity.

Factual disagreement may derive from several different matters. In this chapter I will not analyse in detail the general disagreement with propositions, and the yardsticks needed for the comparison between them. This has been done thoroughly by *Svein Eng* (Eng 2003, 28). Here, only such a dimension of this problem as is necessary for the understanding of rational (legal) discourse will be analysed. First of all, the disagreement may be either *theoretical* or *atheoretical* (Victor 1977, 21). To generalise, theoretical disagreement takes place when there are differences between the cognitive systems adopted by A and B. Atheoretical disagreement, on the other hand, is based on different value-codes. Due to the different value-codes, the parties have different goals as well.

Theoretical disagreement can take two forms as well. First, A and B may have a different conception of the state of affairs prevailing in reality. This could be called factual difference. It occurs, for instance, when A and B disagree on the statistics of societal data. As regards the theoretical disagreement, A and B have adopted a different theoretical conception of the world. They have different theories for how

nature and/or society are structured, or give different interpretations for a specific theory. As an example, there could be disagreement on whether a given society is a democracy or not. If A and B share the same information about the societal facts, and they still have different view, their disagreement results from different theories on what democracy is.

The theoretical differences derive from the nature of the so-called theoretical terms and their status in human knowledge. The problem is probably even more typical in the social sciences than it is in the natural sciences. The difficulties may concern the question of whether our theoretical conceptions of society are "purely" theoretical, or at least partially bound up with evaluations or, in a wider sense, with ideological elements. In this context, these problems will be ignored.

If the alternative meaning content of the statute is marked with the symbol M1 and the other possible alternative with M2, the dialogue is a kind of stepped procedure: arguments and counter-arguments alternate, demands for conceptual specification are made, reasons are provided for grounds, etc. The counter-arguments for alternative M2 presented by the addressee may in some cases be pro-arguments for the other interpretation, M1. In this case, the setting for the interpretation is reversed, as stated above. What supports alternative M1 speaks against alternative M2.

Arguments also have a different role as regards the strength of the reasoning. Some reasons give *direct* confirmation for M1, others only *indirect* support for it. Their purpose is only to strengthen a specific part of the argumentative chain.

The form of a chain can also be different according to the situation. There is no one shared structure for all, that is covered by the term "argumentation", even though the initial presumptions have been limited certain types of language-games in the problems discussed above. Thus it may be seen that the reasons provided, even in accordance with these boundaries, are a totality of complex and multiform family-resembling language-games.

On the Notion of Rationality

The notion of rational (legal) reasoning is in need of a lot of specifications. Let us start with certain ideas by *Max Weber* (Weber 1972, 396, 505). For him, the modern state, the capitalist economy and formal law represent the rationalisation of Western society. Magic and the allure of mysticism have been set aside to make room for science and the scientific world-view. Music, the arts and architecture have also had their share from the development of rationality. The change has also meant that the different areas of culture have separated from each other. A typical example of this is the separation of law from morals.

Max Weber made a distinction between two typical cases of rationality: *goal-rationality* and *value-rationality*. An action is goal-rational if, and only if, it is based on instrumental weighing. If the means are adequate for the set of goals, the action in question is rational. For the actor, objective reality and society are only preconditions or means for action. The key word in goal-rationality is efficiency. The action is solely measured on the efficiency of the means created to further the

goals. It is common in these cases that the means begin to define the goals. The goals served by the chosen means are those that are seen as good and worthy of promotion. On the other hand, goal-rational actions are not entirely free, not even in ideal circumstances. The selection of means is restricted by several external factors. Man cannot do everything he might want to. The restrictions can be characteristic of negative liberty – i.e., physical (laws of nature), human (lack of skill), social (political strengths) or legal (valid law).

Value-rational action is based on the actor's conscious belief that the behaviour is valuable, regardless of the consequences. The actor does not weigh his act in relation to the goals but deliberates on its worth in itself. This requires the existence of a specific system of values. The action is either good or bad in relation to this system, which may be religious by its nature, to mention just one example.

The actions may also be *irrational*. Weber sees that this is the case when actions are based on feelings or attitudes (affective behaviour). For example, a person gets angry at the words of another person he sees as unjust and takes revenge. Action solely based on tradition is also irrational. It is "blind", not deliberating on the relationship between the means and the end or weighing the value of the action regardless of its consequences.

For Weber, the rationality of modern law is *formal*. Law is a servant to certain goals worthy of promotion in society. In this sense, law has only instrumental value, being a means to achieve certain ends. Once it has acquired the regulated form, law is, in principle, a complete system of rules, and its meanings are produced with the help of logical reasoning and one in which a specific case can be brought under the law with a simple operation of subsumption. The theoretical tool of this kind of reasoning is, as we saw before, the syllogism. As such, Weber's model has no room for the modern DSL, which requires the selection between several meaning alternatives. Like Hans Kelsen's "pure theory of law", the Weberian legal thought only produces meaning alternatives, nothing more.

For Weber, the recently strengthened tendency for modern law to seek materially acceptable results instead of or alongside formally correct ones represents a distortion of the rationality of law. The process by which law becomes more material breaks the systematic nature of law and the formal rationality characteristic to it.

Max Weber's conception of law and its rationality is narrow, and corresponds to the (legal) positivist thinking. Weber's model has no room for practical discourse. For this reason, his notion of rationality cannot be applied as the background to a modern theory of argumentation.

Instead of the Weberian model, the theory of *communicative actions* introduced by *Jürgen Habermas* forms a firm basis for the further analysis of legal interpretation (Habermas 1981, 11, 571, 1973, 220, 1990, 303). The goal and purpose of a communicative action is to reach a mutual understanding, at least a consensus. For this reason, communicative action is not goal-rational in a Weberian sense. Language and communication are used for no other reason than to convince the parties to a dialogue of the standpoint being disputed. The final result is accepted on the basis of the arguments, and of nothing else.

Genuine mutual understanding can only be reached in a free *discourse*. That is why the three dimensions of freedom (liberty), and especially the Skinnerian version of it discussed in Chapter 9, are exactly at the core of legal reasoning. Any kind of persuasion, manipulation and conscious deception must be excluded because it is only in the free discourse where the weight of argument finds its place.

Habermas sets still one additional requirement for rational reasoning. He calls it the *principle of discourse ethics*, according to which, the *principle of generalisation,* or, in other terms, the principle of universality, has a similar role in the field of law and morals as the principle of induction in the empirical sciences. Only such legal or moral norm, the consequences of which every individual within the norm's sphere of influence could accept as being in the best interest in the party's own terms, is valid (Tuori 1989, 125). In short: valid norms concern the common interest. In Habermas' opinion, the principle of discourse ethics makes it possible to reach *unanimity* on what is right and wrong in practical discourse concerning norms in the area of law and morality.

As far as I see, a discourse that utilises the rules of discourse ethics, guarantees everyone the *possibility* of taking part in the rational discourse, and, by means of this discourse, to reach a fair compromise. In this sense, rational discourse produces the playing field. A fair compromise is at hand when the *interests* in question are shared to such a degree that even their partial realisation is beneficial for all. In other words, the compromise is worth accepting even if the benefits are scaled down. All this presupposes some further criteria to be fulfilled:

(1) Everyone who is capable enough has the right to take part in the speech situation.
(2) Everyone has the right to contest any claim presented in the discourse, as well as the right to present any possible counterclaim.
(3) No one can be prevented from taking part in the discourse through internal or external coercion, or from presenting criticism within it (Alexy 1989, 177).

These are not only arbitrarily set requirements or qualifiers for theoretical and practical discourse. An ideal speech situation cannot be realised at all if any one of these requirements is not heeded. Thus the preconditions (1)–(3) are the *necessary criteria for an ideal speech situation*. At the same time, these criteria set the foundation for what rational discourse conceptually is.

At the heart of these criteria are two related notions introduced by *John Rawls*: the idea of equal respect and the idea of fair terms of cooperation. As *Martha Nussbaum* emphasises, "one might add to these two the closely related notion of human dignity" (Nussbaum 2011, 2). Nussbaum refers to "A Theory of Justice" (1971), where Rawls writes that each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. These three notions are, in their turn, connected to a fourth: stability. Rawls thinks that a society cannot remain stable over time if individuals or groups are treated with deficient respect. Although Rawls' focus is on political theory, respect, fair terms of cooperation, human dignity and stability also show a dimension of the ideal speech situation. The most important here is fair cooperation.

A detailed analysis of the relationship between the ideal speech situation and the Rawlsian idea of the foundation of political liberalism is not included in the present study. I only refer to what Martha Nussbaum has written (Nussbaum 2011, 2). On the other hand, the discursive model still needs some essential additional comments. Being rational, the free parties are – at least tacitly – ready to accept certain basic requirements for rational communication:

(1) In the case of objective reality, the claim must be *true (Wahr*).
(2) The claim to correctness *(Richtigheit*) concerns norms and the validity of normative statements. In this regard,
(3) the requirement of *sincerity (Wahrhaftig)* cannot be tested in the discourse in the same way as truthfulness and rightness. To put it simply, sincerity becomes evident in cases where a person behaves in harmony with the thoughts, emotions and hopes he otherwise expresses.

Robert Alexy speaks about correctness, although he also emphasises that the sentence "X ought to be done" corresponds to the fact that X ought to be done (Alexy 2009a, 275; cfr Alexy 1989, 104, 177 n 3). This definition of "legal truth" does not appear to be convincing, and it will not be discussed in more detail here. Instead, the correctness is understood here as a norm's general validity reached through reasoning.

The Preconditions of Rational Legal Discourse

Thus the preconditions of the rational (legal) discourse are (1) freedom, (2) truth, (3) normative correctness and (4) sincerity. According to Habermas, they are the *universal requirements* of all (rational) human communication. In everyday speech, they are set as the certain foundation for the communication without further reasons, and are not contested by anyone who seeks shared mutual understanding. In this regard, one could say that these Habermasian criteria belong to our form of life (Habermas 1981, 51, 1983, 31).

A critic may maintain that the Habermasian criteria are problematic as to their universality. Habermas has only introduced an articulation of the Western conception of rationality, and this kind of rationality does not, therefore, exceed the cultural borders. This is, however, only an *empirical* counter-argument. As far as the conceptual foundation of rationality is concerned, the Habermasian criteria can be defined as universally valid. They belong to the *notion* of rational communication.

Things being so, the terms of truth and correctness have a key role (Habermas 1973, 218; Toulmin 1976, 232). According to the correspondence theory of truth, a proposition (sentence) is true if, and only if, the state of affairs to which the proposition refers actually exists. The truth is a relationship between a proposition and fact. Let us take a simple example:

Q1: What colour is this paper?
A1: The paper is white.

The answer notes the paper's quality of "being white". If things are as they are claimed to be, the answer is empirically true according to the correspondence theory. This can be called a Tarskian truth. The answer can be tested empirically. On the other hand,

Q2: What should I do in a situation like this?
A2: You should greet him politely.

This answer is neither true nor untrue. The answer A2 expresses a normative standpoint, the correctness of which can be questioned, and this doubt is the reason for providing additional reasons. Without additional arguments, A2 is not an acceptable answer. The extra arguments are needed for an answer to the next question: Why is a polite greeting the duty of the questioner in this situation? And so on.

Even though the "truthfulness" of the answer A2 is impossible to test empirically, the respondent cannot evade the demand for reasoning since the discourse is *founded* on a tacit claim of *correctness*. In this way, the conditions for acceptability are conceptually connected to the criteria of rational discourse. If reasons are not provided in a situation like this – where, for example, the correctness of the norm has been questioned – the speaker is violating the preconditions of rational communication. He or she has not accepted the necessary basic demand of rational discourse – that is, the expectation of reaching mutual understanding. The speech situation either breaks off, or the speaker tries to convince the other participant by means of pure authority or, for instance, manipulation.

The communicative procedure in which the truth is tested is *theoretical discourse* (Alexy 1989, 199, 232). Its counterpart, the *practical discourse,* aims at providing arguments for the correctness of normative statements. However, the theoretical as well as the practical discourse has only one *functional principle*: let the arguments speak for themselves. For this reason, the discourse has to be free from external influence, especially from coercion, manipulation and persuasion. In this kind of ideal situation, the rules and principles of rational discourse guarantee the (possible) acceptance and acceptability.

Jürgen Habermas goes much further than this. He does not accept the traditional correspondence theory at all. He makes a distinction between the notions of "fact" and "object". Facts are what statements state, what objects of experience are in the world. For Habermas, the facts are dependent on language, but, at the same time, the truth value of propositions is dependent on facts. This very dilemma is solved, so goes Habermas' argument, by means of the consensus theory of truth. As we will see later, this theory is not based on correspondence but on the theory of speech act (Habermas 1973, 214; Alexy 1989, 103).

In this contribution the *concept* of truth has been understood in the Tarskian sense of the term, not in the Habermasian. A proposition is true if, and only if, it corresponds to the reality. The concept of coherence, in its turn, is more connected to the criteria by means of which the correspondence *can be reached*. However, in all cases where the correspondence between a proposition and reality is (at least) problematic, the traditional theory of truth loses its explanatory force (Wintgens

1993, 483). This is the case with DSL as an "interpretative science". There is no "reality" to which the interpretative statements could be in "correspondence". The shared beliefs as the basis of the legal ontology are not the same as "empirical legal reality". The idea of shared beliefs already points out that there is no "direct" connection to the reality. The facts of law are institutional facts.

The Habermasian consensus theory is not accepted in this study as a *general theory* of truth. However, its hard core – that is, the connection with communication and communicative rationality – as well as the significance of consensus in legal reasoning has to be taken seriously. From the viewpoint of legal reasoning, all of these elements help to understand the special features of DSL.

In recent years, the theory of legal argumentation has seen many attempts to specify those conditions for discursive rationality that Habermas has presented. This does not mean so much formulation of new principles or a new form of rationality, but *articulation* of the principles being the foundation of practical discourse.

There is no need to introduce the rules and principles of D-rationality in detail here. It is enough to refer to that which *Robert Alexy* has presented in many contexts (Alexy 1989, 177; Peczenik 1989, 187; Aarnio 1987, 196). According to Alexy, D-rationality is assumed to be a *special case of practical discourse (*Sonderfallthese: Alexy 1989, 15, 212, 1999, 374; cfr Günther 1993, 143). Philosophically, it is connected with the Aristotelian thematics on practical reason. Discourse according to the practical reason is "good discourse", given that the analyses Aristotle makes of virtues and St. Thomas Aquinas of inclinations are not in the foreground in the characterisation of rational discourse.

On Coherence

Notwithstanding the number, structure and content of the discursive rules and principles, another notion is worth introducing: the concept of *coherence.* This concept has inspired much discussion and disagreement in legal theory. The problems mainly concern the notion of truth and its relationship to the concept of coherence (Habermas 1973, 212, 242, 252; Alexy 1989, 101; Rescher 1985, 169). According to Habermas, a proposition is "true" if, and only if, the validity claim with which we present it is justifiable. Further, that claim is justifiable if, and only if, people taking part in a rational discourse would agree with that proposition.

Leonor Moral Soriano emphasises that the coherence of the *legal system* has to be kept apart from the coherence aspired for in legal interpretation or case-by-case applications of law and the related argumentation (Moral Soriano 2003, 296). The remark is important because the entire discussion of coherence conducted in the area of the theory of argumentation has exclusively concerned the compatibility of the *grounds* presented in support of the interpretative statement. The difference becomes apparent in the way *Neil MacCormick* describes the core content of coherence from the point of the *common law* system. His attention is focused, on the one hand, on the *facts of the case* and, on the other, the coherence between the *principles and rules* applicable in the matter. In this sense, it would be especially appropriate

to discuss coherence on a "case-by-case basis". On the other hand, MacCormick's idea of coherence is normative as to its nature. Some principles support a number of legal rules and make them coherent (MacCormick 1984, 235).

Ronald Dworkin's theory of integrity of law, in turn, includes MacCormick's view, but it seems to me to be more general. Dworkin compares the lawyer, when he builds up a coherent set of reasons, with a novelist participating in writing a (legal) "chain novel". Each novelist – that is, each lawyer – has an idea to make his additional remarks fit not only the general principles but all the material that has been included the precedents and value judgements. This means that Dworkin's idea of coherence is relative to the so-called narrative view of coherence (Dworkin 1986, 225). The weakness of this view concerns the criteria for coherence.

As regards DSL, a few additional conditions concerning coherence are therefore important. They introduce the *types* of criteria one should take into account when deliberating on compatibility and coherence (Aarnio 1987, 120). The following criteria form a synopsis of a more detailed theory introduced by *Aleksander Peczenik*, partially in collaboration with *Robert Alexy* (Peczenik 1989, 159, 167; Alexy and Peczenik 1990, 13):

(1) *The length of the syllogistic branches that can be presented in support of the arguments corresponds to the strength of the arguments.* If, for example, reference is made to the government proposal, this is justified with the committee report in its background and the report with its own background studies, and the reasoning becomes stronger with each additional syllogism.
(2) The *number of syllogistic branches* used to strengthen the reasoning corresponds to the credibility of the presented statement. If, in addition to legislative history, the interpretation can also be supported with precedents, statements of DSL and practical arguments, it becomes stronger than any reasoning supported by only one chain of syllogism.
(3) The amount of *networking* among the different branches of the syllogism corresponds to the durability of the reasoning in question. Here, networking means that, for example, a practical argument branches off from law in the direction of economy, history, social relations or morality. Arguments of these areas do not need to have a direct connection with the legal problem being justified, but they do bring credibility to the arguments used. The argument is "surrounded" by a network of arguments that strengthens its credibility.
(4) The syllogistic chains used should be *logically independent from each other*. If there is a deductive dependence between the chains, one chain does not confirm the other.
(5) The most difficult additional condition for coherence concerns the *relevance of the arguments.* It is self-evident that the syllogistic chain should relate to the matter being disputed. The reasoning cannot be arbitrary. However, relevance is difficult to define theoretically. It is decided by the situation of reasoning, in which the relationship between the reasoned statement and the reasoning shows the degree of relevance. Irrelevant reasoning is excluded from the process of rational deliberation.

The degree of coherence, or its *strength,* depends upon the combined effect of the aforementioned preconditions. The longer, more voluminous and more networked the syllogistic chains supporting the argumentation, the more coherent the argumentation can be seen to be. The sufficiency of compatibility is, in the end, determined in the process of rational discourse case-by-case.

The problem of coherence can be elucidated with an analogy to a puzzle, being constructed as the game proceeds until the entire character is reached. There is, however, a decisive difference between the child's jig-saw puzzle and the "puzzle-game" of a scholar or judge. As far as the child's puzzle is concerned, the goal – that is, the final and proper character – can be identified on the cover of the game. This is not the case with the lawyer's "puzzle-game". The lawyers, scholars included, build up the puzzle in the course of the reasoning. This causes a problem for reasoning based on coherence.

Whatever the combination of moves, and however these combinations are described, a question, already mentioned above, still remains open: *When can the chain of grounds be broken?* When are there enough pro-arguments to ensure the acceptability of the interpretation? Does such an ending even exist, or is it that an end actually exists but it cannot be recognised? In more general terms, the same question can be formulated as follows: How do we *know* that we have reached firm ground (a bedrock) on which to say that *here,* no more arguments are needed.

There are no other answers but one: it is impossible to define a *clear borderline* at which reasoning could, or even should, be broken off (Naess 1995, 220). The breaking of the chain of reasons depends on the totality of the chains, and, in the end, whether this totality is coherent enough in order to *convince* the other party of the interpretation.

This *does not* mean that we are "fundamentalists" *vis-à-vis* those who do not accept our view. All legal language-games are family-resemblent, so that the scholars dealing with a certain legal order can understand each other. They can even accept a lot of the arguments used by the other parties. Lawyers belong to roughly the same (or a similar) form of life. On the other hand, all members of a certain legal community do not necessarily share exactly the same basic assumptions. There are different *audiences* in a legal community. The "ending point" is connected to the rational acceptability achieved in a certain audience, and herein lies the basic rhetorical feature of legal thought.

To repeat, the chain of reasons can be "ripe for breaking" once the coherence of the reasons is sufficient. In this way, argumentation is always connected to the difference between internal and external justification, to the discursive nature of reasoning as well as to *compatibility*. Therefore, the theory of coherence is not only a sufficient but also a necessary element of the theory of argumentation.

The only "final point" is reached when all the parties are convinced of the sufficiency of the reasoning. The situation is similar to a hermeneutic circle. When trying to understand an action, event or text, one proceeds around the circle one round at a time in order to deepen one's understanding until no other information is necessary.

Chapter 18
The Sources of Law

Single arguments referred to in legal reasoning are those that make the conclusion valid as a *legal* standpoint – that is, that connect the arguments as well as the conclusion to the legal order. From this point of view, the arguments are called *the sources of law*.

The Doctrine of the Sources of Law

The doctrine of the sources of law (later: DS doctrine) is thus a cornerstone of argumentation. It draws a boundary between *what is legal and what is not*. In the words of *Torstein Eckhoff*, the matter concerns the foundations used when one formulates a statement *de lege lata* (Eckhoff 1987, 11). In a way, the sources of law locate the limit of law. However, the source problem is only a part of a more fundamental problem with the limits of law (cfr Tuori 1988, 168).

The significance of the DS doctrine lies in the fact that there is no other way to define what is "legal" and to separate it from "non-legal" in the adjudication or in DSL. It is exactly the DS doctrine that gives the lawyers, judges and researchers of any given age the pieces of the interpretative game that forms their constitutive rules and creates a foundation for L-rational and D-rational deliberation (Peczenik 1989, 313). In this sense, the DS doctrine reflects the conception of law prevalent at a given time in a given society.

For the above reasons, the DS doctrine has been an essential part of the theory of legal reasoning, and as such very much discussed, for instance, in the Nordic tradition. The most distinguished contributions are those of *Torstein Eckhoff, Aleksander Peczenik*, *Jacob Sundberg* (Sundberg 1978, 24) and *Stig Strömholm* (Strömholm 1988, 289), to name a few. Generally speaking, the interest has been bound up with pragmatic legal research, a traditionally much-debated subject in the Nordic Countries.

In the Nordic thinking, *Aleksander Peczenik* was the first to divide the sources into categories according to their *binding force* – i.e., into the groups of "ought to be", "should" and "permitted" sources. Since then, the development of the DS doctrine in the Nordic countries gone side by side with the development of the theory

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of argumentation, being a part of the that theory. My first systematic attempt to form a DS doctrine was published in 1978, but I made the main efforts in co-operation with Peczenik (Peczenik 1988, 237, 1989, 313; Aarnio 1987, 77). What follows, is based on this co-operation.

In his dissertation, *Christian Dessau* analyses the legal-theoretical conceptions of Robert Alexy, Aleksander Peczenik and myself (Dessau 2008, 58). Dessau was interested in the *cultural dependence* of the DS doctrines in Germany, Sweden and Finland. In this regard, Dessau was a pioneer trying to find the cultural foundations of the similarities, as well as the differences, between the Central European and the Nordic views. The result of the analysis is important. The DS doctrines differ not only in a specific country according to the period of time being considered but also between different countries. There are no single and "correct" DS doctrines independent of the time, place and culture, which means there is no one and equal substantial DS doctrine that covers the whole of Europe, let alone the world.

The other feature of DS doctrines is as important. The content of the DS doctrine varies a lot, not only depending on the legal culture but also *inside a certain legal order* being partially different in different branches of law. The sources are not exactly the same in administrative law as they are in the penal or civil law. This special feature of modern law is called the *polycentricity* of the DS doctrines. This substantial phenomenon is not dealt with in this study.

In general, the *notion* of source could be characterised as *any* argument, in support of which the interpretative standpoint is either *found* (context of discovery) or *justified* (context of justification) as legally valid. Later on, only the *justificatory dimension* will be discussed.

The next specification concerns the *weight* of a legal source. As regards the interpretative procedure, it may be either *positive*, *negative* or *indifferent.* A source has a positive weight if it strengthens the justification. In the theory of argumentation, the term "pro-argument" is used to describe this. A negative weight reduces the credibility of the decision or interpretative proposition. It is a contra-argument. Sometimes a source has neither positive nor negative weight. For example, in a simple (routine) case, the statement may be justified with pragmatic reasons, although the conclusion can be derived directly from the statutory text.

In Napoleon's France, in the time of the legal codifications, there were only two valid sources: the statues and the intention of the legislator. As far as the foundation of law is concerned, the length of the list of sources is not, however, as essential as the qualification *legal* vs. *non-legal* arguments. In this regard, the DS *doctrine* can be understood in a *wide* or a *narrow* sense.

In the latter case, the DS doctrine only deals with the *authoritative* (or official) arguments used in legal justification. *Stig Strömholm* is one of those who defend this *reductive* definition (Strömholm 1988, 294). According to him, only the statutes, the intention of the legislator and precedents are proper sources of law. Usually, however, the definition is more liberal. According to this view, the DS doctrine also contains other arguments that are not authoritative.

In the *broadest sense* of the term, the DS doctrine also includes *the rules of the use of the sources* as well as *the other norms of legal discourse.* From this normative point of view, the following elements should thus be included in the DS doctrine:

(1) Constitutive rules, defining the sources
(2) The rules for the categorisation of the sources as regards their deontic nature, either

   (a) prescriptive norms (strongly binding sources),
   (b) permissive norms (permitted sources),
   (c) technical norms (weakly binding sources)

(3) The standards of rational legal discourse, which define *how* the sources should be used in the argumentation in order to guarantee the maximal acceptability of the reasoning.

Understood in this broad sense, the DS doctrine covers all the *argumentation theory*. That broad concept is too extensive and includes too many different elements. It no longer serves the idea of the DS doctrine. For this reason, the DS doctrine is separated from the argumentation theory in the following, and the DS doctrine, in its turn, is understood only in the wide sense referred to above.

In this regard, a distinction should be made between a *source of law* and a *source of information*. The first category consists of the authoritative or substantial grounds on which the legal decision is either justified or made. The source of information literally gives information *about* the sources of law. The intention of the lawgiver is a source of law, while the documents, like the draft of law, give information about what the intention actually was. The same holds true as far as the precedents are concerned. A precedent is a source of law, whereas all kinds of literal or computerised material talking about the precedent is the source of information. In this context, the term legal informatics is often used. However, I see it as misleading, because the term "informatics" normally refers to the theory of the informational value of propositions. The source of information is, in its turn, connected to electronic search systems or the like. These practical problems do not belong to the theory of DSL.

The next distinction concerns *factual* and *ideal* sources of law. Factual sources consist of the arguments used *de facto* by DSL (or in the adjudication) in making or justifying the decision. Ideal sources of law are a group of arguments used in a *model* of legal reasoning. Therefore, ideal sources of law are part of the theory of argumentation if it is understood as *an ideal model of legal discourse*. The DS doctrine dealing with ideal sources articulates the tacit commitments accepted in the legal community as far as the *valid law* is concerned. In this regard, the ideal DS doctrine is an essential part of the theory of rational legal argumentation, but the DS doctrine itself does not *include* the rules of that type of argumentation.

Robert S. Summers has separated the *sources of law* and the *materials* (Summers 1992, 125, 138). This distinction is important because *materials* other than the

proper sources of law may also be used in legal discourse. Examples of such are the *analogy* and the *e contrario* arguments. It does not sound good to say that the analogy between A and B is a *source of law*. Instead, analogy is not only an accepted but a common *argument* used to justify a legal interpretation. Besides, it is not just a pattern of *legal* reasoning. On the contrary, practically all the human thought apart from deductive inferences is, to a large degree, built on repetitive similarity reasoning and expectations of invariance.

Analogy and e contrario arguments have a *dual role* in legal argumentation. The analogy principle is one of the *rules of reasoning* directing legal discourse, as are the e contrario and the *argumentum a fortiori* principles. Similarity and deviance, in their turn, are arguments. The same goes for the reference to e contrario, or to a fortiori. Both can either be an argument or a pattern of reasoning.

Besides the above distinction, *Robert S. Summers* has introduced another concept-pair of great importance: a separation between *goal reasons* and *rightness reasons* (Summers 1978, 724). The first looks "forward" – that is, into the consequences of a given interpretation. This pattern will be analysed in more detail later in connection with consequential reasoning.

Rightness reason refers to a ground that is (morally) right. As such, it looks "backwards" and takes into account arguments and criteria that have already been accepted. In this "Summersian" sense, most of the material (substantial) arguments used in DSL are rightness reasons.

The Normative Status of the Sources of Law

As an ideal model, the DS doctrine is normative, which means that the doctrine gives the criteria first, what is *law,* and second, what is a *good* (correct) law. In this regard, the degree to which the single sources are *binding* is the key issue. Here, the tripartite classification made by *Aleksander Peczenik* is of great importance (Peczenik 1989, 319, 1991, 311). Notwithstanding the details, the following categorisation serves as my starting point:

1. Strongly binding sources of law
    a. Norms external to national law
        - The binding parts of European law
        - Norms of the European Convention on Human Rights
        - Certain precedents of the European Court of Justice
        - Certain precedents of the European Court of Human Rights.
    b. Norms of national law
        - Fundamental rights of the Finnish constitution
        - Statutes and lower-level norms given by virtue of laws (etc.)

- International treaties incorporated into national law
- System arguments.

c. National custom

2. Weakly binding sources of law

d. The intention of the legislator
e. Precedents.

3. Permitted sources of law

a. Practical arguments (economical, historical, social, etc.)
b. Ethical and moral arguments
c. General legal principles
d. Standpoints presented by the doctrinal study of law (prevailing opinion)
e. Comparative arguments
f. Others.

4. Forbidden sources of law

Reasons that can be held as forbidden are only arguments that are against the law or good practice and those that are openly political.

Strongly Binding Sources

The concept of binding source is equivocal. A legal source can either be *strongly* or *weakly* binding. As regards the former, the term *formally binding* has also been used (MacCormick and Summers 1997, 551). The notion of *formally binding* means that ignoring the legal source as an argument makes the decision illegal, and it should thus be overruled in appeal (MacCormick and Summers 1997, 554). Further, this sense formal binding can be:

- *Strictly binding*: The legal source has to be used in all issues it concerns;
- *Defeasibly binding*: The legal source has to be used in all issues it concerns, *unless* an exception prevents this (exceptions can be well-defined or subject to interpretation).

According to the Nordic DS doctrine, the following sources are strictly binding:

The Statutes

The starting point of the interpretation is always the *wording of the statute*. The setting is the same as, for instance, in the interpretation of a last will, in which the text is in a key position. *Jerzy Wróblewski* presented a noteworthy distinction as regards

the literal interpretation (Wróblewski 1991, 260, 1983, 311). He characterised the literal meaning using following qualities:

1. *Clear or plain meaning*. Here the matter is not actually about interpretation but more on the redundancy of interpretation.
2. *Lexical meaning*. It is the meaning found in *the* general semantics of language. This meaning becomes evident in the normal linguistic practice, or it can be found in dictionaries.
3. *Grammatical meaning*. This concerns the syntax of the language at issue.

The linguistic argument is already necessary due to language itself. We understand language through its ordinary meanings in circumstances in which we have learned to play language-games and still play them. Therefore, language-games of ordinary language are a natural starting point for us, and the game that contests them resides on the meta level. It is not a game played *in* (ordinary) language. On the other hand, where the statute is unclear in one way or another, the reference to the wording of the statute is an *argumentum absurdum*.

The so-called *Bielefelder Kreis* found references to the wording of ordinary language primary in all compared legal orders. According to this comparison, the linguistic dimension is not the only reason why the literal meaning has such strong weight. *Neil MacCormick* pointed out that this is just a necessary part of respecting authority. If someone in authority issues a norm of some kind, necessarily using some language or other to do so, one does not respect that authority unless one reads the norm text in the language and register in which it is issued (MacCormick 1991, 382).

MacCormick adds that the power of the linguistic argument is also in that the citizens of a Constitutional State should, at least in principle, be capable of reading their rights and obligations from the law. They should become evident to the people directly from the legal texts. Even though this demand is impossible in practice, it expresses an important democratic principle. The wording of the statute as a starting point thus receives support from the founding values of democracy and the Constitutional State.

The statutes provide information on the *legal order* – that is, the mass of legal norms, whether the norms are, for instance, regulative or constitutive. As was stated above, law is always a *system*. It is a general whole formed by means of conceptual commitments, easy to use and efficient in terms of intellectual economy. The system locks down the structures that define the decision-related possibilities that can be used in different situations. If the boundaries of the system are breached, the decision does not correspond to valid law.

Non-national Sources of Law

In the countries belonging to the European Union, certain norms external to national law are strongly binding. The binding force of the decisions of the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ) does not depend

on the loyalty of, for instance, Finnish instances in following them. Examples can be sought from the principle of primacy of EU law and the minimum requirements of a fair trial. The decisions of the ECJ and the Court of First Instance are strongly binding *in principle*. They have a so-called *erga omnes*-effect. In summation, a source-related "metanorm" concerning this legal source would be written as follows: A norm which is external to national law should be unconditionally followed in all circumstances.

However, one reservation concerns all legal norms, even those that are strongly binding. The norm is binding, assuming *that it can be applied in the first place* to the case at hand. Applicability can be excluded primarily by stating that there is no sufficient analogy between the decided case and the case being decided. This fact does not prevent us saying that the source is strongly binding in the aforementioned sense.

The EU dimension includes problems of another type. The ECJ has no means of executing its decisions in the Member States. This is the responsibility of the national authorities, and because of this, the decisions of the ECJ have to be accepted by the national courts in order to be effective. Sometimes this succeeds and sometimes it does not.

> The car taxation decision (Nunes Tadeu) did not have a direct effect on Finnish taxation practice. The precedent wasn't seen as generally binding in Finland. It was only a decision concerning Finland (C-101/00 *Siilin* (2002) ECR I-7487) that started the repairs to the discriminatory elements in Finnish car taxation. In this sense, the binding force of the decisions given by the ECJ can be seen as *de facto conditional*. If criteria X are fulfilled, the norm N external to national law has to be applied.

In any case, sources external to national law demand that the aforementioned category of sources of law that are strongly binding is augmented. In this contribution, the EU law and the human rights commitments have been placed at the top of the scale of binding force.

There is no special difficulty in placing new sources in the three categories of binding force. As was mentioned above, the matter concerns sources of law that are *problem and situation-specific*. When categorising the binding force in a Peczenikian way, the *weight* given to a specific source, such as a precedent of the ECJ, is not essential in an individual decision-making situation.

Other strictly binding sources, like the statutes and national custom, can be overruled in terms of their binding force. They can be bypassed if there are special grounds for doing so. This is the case, for instance, as far as *contra legem* decisions are concerned. These cases are left out of this study.

Weakly Binding Sources of Law

Therefore, the next category is the *weakly binding* sources. Traditionally, *the intention of the legislator* has been connected to that category. The task of DSL is to clarify the "intended system of law". Here the "intention" is, however, a problematic

concept. Law is, of course, a teleological phenomenon by its nature. It exists for a certain purpose or goal, which may be the realisation, upholding or terminating of a specific state of affairs.

The Intention of the Legislator

The teleological thesis maintains that man's practical reason is always directed toward a goal, and for this reason, his actions can be understood and explained by referring to a certain setting of goals and means (Strömholm 1988, 319; Peczenik 1989, 345; Kenny 1970, 146). This also goes for law, but the extension of the teleological thesis to cover an institutional phenomenon like law raises at least two further questions. First, goal-oriented activity requires an *agent* who sets the goal and acts in order to reach it. Second, there must be the *will* to realise the goal. In the case of law, it is natural to define that will, as lawyers traditionally do, as the *intention of the legislator*.

The basic problem is as follows: How is the will of the legislator constructed, and which facts are to be used to base that construction? Further, who or what is *behind* the will when discussing the will of the legislator? *Karl Olivecrona*, among other Scandinavian realists, held the question as incorrectly formulated. There is no such thing as the will of the legislator. To distance himself from the will theory, Olivecrona set up to defend the so-called theory of free imperatives (Olivecrona 1971, 120). However, a move like this does not solve the ontological problem regarding the foundation of law. What does a "free imperative" actually mean?

In the ordinary legal language-game, it is natural to say that the Parliament "behaves" in certain way, makes decisions and enacts (formally) valid laws, has "goals", "purposes" and "intentions". Often, it is also said that the Parliament "believes" certain means to be necessary or sufficient with regard to its decisions. Are these expressions only a part of everyday linguistic usage without any philosophical interest, or are they *symptoms* of a possibility to use them as basic notions of a general theory of collective actions, and if it is possible, in what sense is the collective agent "doing" something and doing it "intentionally"?

According to *Karl Popper's* ontological view, collective agents are man-made entities relatively independent of their members – that is of the individuals. Collective agents thus belong to the Popperian *World3*. For our purposes, this is not a satisfactory answer, or, at least, it is only a tentative one. The ontological status of the (Finnish) Parliament is problematic. The Parliament consists of individuals functioning in certain social roles. In this regard, the Parliament is a collective constituted of individual members (in the Finnish case, of 200 people) all functioning in a certain social role defined by statutory law (especially by the Constitution) and by the political tradition of the country.

The *social role* is thus an intermediate link between an individual and the collective called Parliament, because only such a person who has the role of a Member of Parliament can be an element of the institutional entity "Parliament". However,

this is not an alternative to the Popperian ontology. At least one more question can be formulated: What combines the social roles so that one can speak about "giving law", "having a goal" "intending something", etc.

Here again, is the time to recall *Eerik Lagerspetz'* ideas on ontology. Such an entity as "The Finnish Parliament" can be compared to phenomena like "money", "faculty of law", "marriage", etc. Lagerspetz writes:

> Neither is it enough that members of a community just happen to believe that some objects are money: they must also know that this belief is generally shared by other members. Finally, these attitudes must be related to actions. They must appear as (at least partial) reasons for the members of the respective societies to do certain things (Lagerspetz 2009, 192).

As was referred to above, the mutual belief is *reflexive*, or, if preferred, circular: The beliefs referred to in the analysans refer, in their turn, back to these beliefs. The reflexivity is, however, not a weakness of the definition. As Lagerspetz points out, every individual sees the behaviour of all others as a part of his own environment with which he or she has to cope.

What about a situation in the Parliament when there is a significant *disagreement* among its members? In this very situation, can one speak about shared mutual beliefs at all? To my mind, yes. The shared mutual beliefs are the necessary condition for the constitution of a collective agent. The members of the collective agent have to share beliefs concerning *what that collective agent is*.

A collective agent does not *exist* at all without this kind of "agreement" or "convention", because in the case of *full* disagreement, the situation would be similar to everyone warring against everyone else. There has to be at least "agreement" concerning the "hard core" of the agent, and that "agreement" must cover at least the majority of the members. In the simplest form, that mutual "agreement" is as follows: "This is the (Finnish) Parliament". Whether the Parliamentary members agree as far as a certain material decision is concerned is quite another problem. This disagreement does not concern the *constitution* of the agent but the *content* of the law.

What is said now about the ontology has an important consequence as regards the epistemological and methodological perspectives. The "will of Parliament" is only in a very vulgar sense the brute sum of the "wills" of the individual members of Parliament. This could be the case if, and only if, all the members of Parliament:

1. actually have that special "will" (intent to achieve E),
2. express this "will" in a non-contradictory way, and
3. there are no interfering factors preventing an individual member from realising his "will".

In the majority of Parliamentary decisions this is not the case. Therefore, this type of vulgar epistemological or methodological individualism does not hold true. On the contrary, there is a scale of situations, and these situations are not at all like the simple example above.

> In an extreme case, a Member of Parliament may even sleep through the whole procedure. In this case, the individual intention or will of that member does not actually exist.

Thus the principle of moral symmetry discussed by *Georg Henrik von Wright* in his "The Varieties of Goodness" cannot be applied here either. Von Wright describes this man's sense of symmetry by saying that if my wants are satisfied at the expense of another man's, then why not his wants at my expense. Parliamentary decision-making is not comparable to that kind of moral symmetry.

Normally, Members of Parliament are divided into (political) groups having asymmetric, even contradictory, intentions and, concerning the subject-matter, different epistemic beliefs. An individual "will" is not significant in such a system because in Parliamentary voting, individuals normally follow the orders and rules of their political party or reference group rather than their own intentions.

Using von Wright's terminology, the action is rather more *parasitic* than symmetric. Von Wright defines a parasitic action as follows:

> If X adds to the greater advantage of getting his share also the smaller advantage of skipping his due, he will necessarily deprive some of his neighbours of their share in the greater good (von Wright 1971, 91).

This parasitic nature of political relationships is typical of both the formation of the "will of the group" and that of the Parliamentary "will". Neither of these "group wills" is normally the same as an individual will, or a number of such wills.

Taking all this into account, the above conventionalist view touches the epistemological and methodological core of our problem. It is difficult, even impossible, to identify Parliamentary "will", "goal", "purpose" or "intention" simply by reducing it to individual purposive acts. Parliamentary "will" is, epistemologically, always only a *result of a political procedure*, and speaking about the "will" presupposes the analysis of that procedure from a systemic point of view, as, for example, *Werner Krawietz* has done in many contexts (Krawietz 1981, 299).

Methodologically, it is thus no sense to try to grasp the individual "wills" of Members of Parliament but to analyse the *procedure* formulating the "collegial will of the Parliament". As far as the explanation (understanding) of this procedure is concerned, it may, so to speak, be either *norm-oriented* or *intention-oriented*.

A norm-oriented Parliamentary procedure can be understood merely by referring to the norms regulating it. For instance, in order to understand why Parliament followed a certain order in passing the statute, one may only refer to the wording of the Constitution, according to which no other procedure was possible, and this very fact provides a sufficiently exact basis for our understanding.

However, there are still numerous cases (perhaps even the majority) where it is perfectly inadequate to just refer to certain norms. In these cases, Parliament not only followed certain norms but intentionally chose alternative A instead of B. In these situations, the behaviour is intention-oriented (purposive) in the sense of deliberation, and there seems to be no problem at all in connecting such notions as "goal", "intention" and "belief" to a collective agent too, and say, for instance:

> The Finnish Parliament behaved in such-and-such a way because it wanted to achieve the goal E and believed the statute S to be a necessary means to realise this goal.

In this case, the "behaviour" of a collective agent, like the Finnish Parliament, also consists of a series of activities, which, in their turn, are constituted by a number of individual actions. Despite this complexity, one has good reason to speak about "the action of Parliament" if the notion of "action" is understood as a general description of the "total" behaviour of the agent in, for instance, "passing a certain statute" (Aarnio 1999a, 37).

Here we come to another problem close to the essential duties of DSL. This problem concerns the distinction between the *will* and the *intention* of the legislator. In DSL, the ontological problem of the will of the legislator is not the core issue. Instead, it is essential to know, why a certain statute was given, and why it was formulated in a certain way. It is this sense of the statute what is important to identify during the research procedure, and here also the intention of the legislator finds its proper place. This is the reason, why the intention has been so important source material in Nordic DSL If the focus is on the intention and not on the will of the legislator, the problem turns to be epistemological and methodological more than ontological one. What does this change of the perspective mean?

As we saw before, legal norms are born as the result of intentional activity. The legislator has a certain goal and a defined belief in the means that lead to this goal, and these premises can be used to understand why the given actions were taken. The model therefore explains not only the *fact* that law is a teleological phenomenon but also the *manner* in which law becomes real and the *foundation* of the binding force of law.

In DSL, the most important methodological problem is to identify the material distinction between the *subjective* and *objective* intention of the legislator. The first is the *actual* meaning, which can be traced from documents and can be clearly articulated or be subject to reconstruction on the basis of the material at hand. This intention is closely connected to the societal power. The legislator, such as the majority of the Parliament, wants to change either the legal or moral basis of society, or both. In this very sense, the political groups represented in the Parliament have a desire for societal power.

> In his studies of the Middle Ages, *Michael Mann* has dealt with societies in which four sources of power could be found – in other words, ideological, economic, military and political ones. These sources were represented by bishops, clerks, noble men and landowners. The leading figures in each group had a strong and consequential desire for power. This desire caused hard and dirty struggles between the possible power holders. The struggle for ideological power was especially characteristic of the Middle Ages, but not only for that time (Mann 1986/1992, 1–33).

Since then, ideological power has always been at the core of the societal power structure. The struggle for it in Western democracies is not as dirty as was centuries ago but it is still one of those, often invisible, issues that divide people and political groups. In this regard, the present Members of Parliament can be compared to the medieval bishops and clerks who represented two different, and also contradictory, ideologies of their time. Independent of time and of society, ideological power is important for those who want to monopolise the interpretation of what is good in life as well as the forms of a well functioning society. This kind of ideological power

is normally allied with the economic and political power. This is also the case as far as the legislative power is concerned.

From the sociological and socio-psychological points of view, the desire for power is one part of the explanatory basis on which one can understand the behaviour of such a collective agent as the legislator. However, this is not at the core of the present contribution. More important is find out what the *role* of the intention of the legislator is as regards the teleological nature law.

The law becomes detached from the legislator in the case of old statutes and those in which the legislative history is superficial or lacking; the legislator's composition may have changed several times in the time between the passing of the law and its interpretation. Partly due to this, it is not natural to state that the newest legislator has confirmed and updated the earlier legislator's subjective intention. This is not the way in which argumentation in DSL is carried out, nor is there any need for it. Instead, the scholars speak about *the ratio of the legislation*. The expression refers to law as a *system* that has become detached from the actual legislator. In the procedure or argumentation, the statutes get a certain content, *an interpreted meaning with all things considered*, for the audience it covers. The ratio of legislation is thus the *result* of (rational) legal reasoning, not an argument justifying the conclusion.

The legislator's intention may also be regarded as a hypothetical one. The hypothetical intention refers to the idea the legislator *would have* presumably had if the given circumstances were known when passing the law, or if they would have been of relevance in terms of the regulation's content (Aarnio 1987, 125; Perelman 1979, 79). This concept is not essential to the present study, although it can be found in the legislation of some countries, such as Austria (ABGB Art.6).

Precedents

The fact that the precedent is weakly binding is based on the following technical norm: If you wish to produce a decision that is unlikely to change in a higher instance, give the precedent the weight of a legal source. The efficiency of the technical norm (the binding force of the legal source) is reduced in cases where there are more than two conflicting precedents and one of them is old or was given in circumstances other than those in which the case is now to be decided. The rationales for precedents are not dealt with in this study. That topic is of great importance in the comparative studies where a question arises about the power of the courts to create law: Does a certain system accept the existent of judge-made law, and is this acceptance formal or not? (Bankowski et al. 1997, 481)

On the other hand, being weakly binding also means that the precedent is not *legally binding* toward another court (Strömholm 1988, 333; Peczenik 1997b, 461; Marshall 1997, 503). Such an effect has not been given to the decisions of the highest instance in the Nordic countries, which is also illuminated by the fact that a decision that only refers to precedent is not sufficiently justified as a valid *legal* decision (Aarnio 1997, 85).

> An interesting exception to the legally binding force of the precedent can be found in Section 21 of the standing order of the Finnish Supreme Court. Pursuant to the provision, the Supreme Court itself is bound to a decision it has given in a similar matter. If it is wished to deviate from the line, the decision has to be made in a strengthened division or in plenum. Thus, it could be said that the decisions are horizontally legally binding for the part of the Supreme Court (Aarnio 1991, 67).

The theoretical questions, why and to what extent should the precedent be followed are widely discussed in the theory of law. According to *Aleksander Peczenik* at least the following reasons are necessary to be mentioned (Peczenik 1989, 335, 1997b, 461):

(1) Precedents promote *uniformity* of practice. For instance, according the Finnish procedural law, this purpose is the main reason for making decisions of precedential value.
(2) For the *economy* of the working procedure, it is appropriate to avoid evaluating similar cases afresh.
(3) The *expertise* of the courts increases the higher the instance that is solving the case. This results from the structure of the courts. In most countries, the higher courts consist of sections of more than one judge – in Finland, for instance, the section of the Supreme Court is normally five judges (Aarnio 1997, 66).
(4) The *flexibility* of adjudication is an advantage compared to the legislation, which cannot react to the changes in society as effectively as the courts.

On the other hand, there are also some contra-arguments, which show that in the statutory law system, too extensive use of precedents causes difficulties as regards the judicial ideology. First of all, the constitutional task of the court in the democratic Rule of Law State is to solve *single cases*, not to give general rules. The latter task, according to the separation of State powers, belongs to the Parliament. The precedent is, however, a general norm to be followed in all similar cases. Therefore, a too extensive ruling by the precedents may be in conflict with the principle of the separation of State powers.

The increased power of the high courts is contestable from the democratic viewpoint. Parliament is elected according to the rules and principles of democracy, not the courts. As far as the Western democracies are concerned, the danger of a "judge state" (Richterstaat) must not, however, be exaggerated (Peczenik 1989, 336). For instance, in Finland, the prospective ruling performed by the Supreme Court is limited and fits well into the frame of democracy (Aarnio 1997, 99).

Sometimes, the notion of precedent refers to the *facts* (case) on which the decision has to be given. In this contribution, the term "precedent" means the *decision* made by the highest court. This conceptual choice makes it clear that the precedent is a *norm* to be followed in an identical or similar (analogous) constellation of facts. The essential elements that define the use of a precedent in subsequent cases are the *ratio decidendi*. The other elements are *obiter dicta*. The ratio decidendi is a (conceptually) necessary element for the precedent because otherwise there is no possibility of comparing the precedent to a subsequent case to be decided (Peczenik

1989, 334). In a single case, it is not at all easy to decide which elements are *essential* to such a degree that they can be accepted as the elements of ratio. This depends, for instance, on the reasons adduced by the court in the decision as *justifying reasons* and with the belief that they actually are *necessary* justificatory reasons. However, the reasons may be estimated as necessary even if not adduced in the decision at issue (Eckhoff 1987, 143). In these complicated and varying situations is important to find "reflective equilibrium", depending on the facts of the case, substantive norms applicable to the case, procedural rules, moral evaluations, etc. (Peczenik 1989, 335).

According to the Nordic legal systems, precedents in the *narrow sense* (sensu stricto) consist of all the substantial and public decisions of the Supreme Court. They have a weakly binding normative force. Precedents in the *wide sense* (sensu largo) consist of every decision that *may have* precedential value in the future court practice. In the Finnish system, these include cases that have not received appeal permission, and the decisions of Appellate Courts to which the appeal has not or could not be sought. These decisions are not strongly or weakly binding, but they can be used to support the reasoning as permitted sources of law (Aarnio 1991, 94).

Precedents in the proper sense of the term can only be discussed *inside the judiciary*. The reason for this is simple. A precedent only has value as regulative information in terms of the highest instance itself or in relation to lower instances. A precedent only directs the future adjudication. Of course, precedents have value outside the judiciary as well. DSL uses precedents as "weakly binding" arguments when providing reasons for an interpretation that is expected to be accepted by the judiciary. Attorneys use precedents as "predictions" of how a given matter will be solved or in deciding whether an action should be filed.

The Finnish system of precedents, as well as the Continental systems in general, is based on an idea about *prospective* regulative information (Aarnio 1991, 88). The highest instance aims to (consciously) affect the future administration of justice. The *Retrospective* dimension in the American style, in which the deciding instance always tries to find legal instructions from earlier decisions, is foreign to the Continental doctrine of precedent.

Permitted Sources

This category includes different types of practical arguments as well as legal principles. Historical arguments can either function as part of the consequential reasoning explained below, or as a source of information concerning the background to the statute (legislative history), or the development of the statute itself. A historical argument can also refer to the history of institutions. The goal may be to make a specific institution, such as the rights of the spouses in divorce cases, understandable by describing the development from the previous matrimonial property system to the current one. Similar distinctions can also be made with social and legal-comparative arguments.

Consequential Inference

The consequential inference is a pattern of legal thought used in both the adjudication and DSL. Actually, it is the model of thought in all such cases where the ordinary sources of law do not give sufficient justificatory support to the decision. A typical subgroup of this model is the *teleological reasoning*: The decision is justified because it ensures the furthering of the state of affairs, and this state of affairs is the best or, at least, most acceptable goal to be reached. As was referred to before, *Robert S. Summers* calls this argument form goal reasoning. A special, and also often criticised, consequentalist model was developed by *Per Olof Ekelöf*. He called his doctrine *teleological legal interpretation*. Its core was in finding a well-justified goal (telos) for the statute at issue, and to adjust the interpretation of the statute in accordance with this telos (Ekelöf 1958, 84; Peczenik 1989, 409).

The consequential discourse analysed below is closer to Summers' goal reasoning than to the theory of Ekelöf. The key part of consequential deliberation is in the comparison of more than one consequence with each other. The final choice between the consequences is a value-based order of preference as regards the "goodness" of the consequences. In this sense, the consequential deliberation is nothing more than a special type of weighing and balancing, now concerning the *weighing of consequences*.

The consequential deliberation always concerns interpretation in a relatively *open situation*. For instance, the interpreter has two interpretative alternatives (L1 and L2) for a statute L. The alternatives are the results of the previous use of the sources of law, such as from the statutes, the intention of the legislator, and from precedents. These sources have fixed the framework of legally possible interpretations as far as the statute is concerned. However, the primacy of L1 and L2 can no longer be derived from the DS doctrine. The reason may be that there are two contradictory precedents, and no other even weakly binding source of law. In this situation, one might invoke the consequences of the interpretations – that is, C1 and C2 (Aarnio 1987, 132).

The consequences can be *general* or *individual*, and are usually based on social or economical interests. For this reason, the process could also be characterised as the weighing of interests. The consequences can be *systemic*, in which case they concern contradictions caused by a specific interpretation elsewhere in the same system. The consequential deliberation leads to the evaluation of the legal system in the given area, and thus returns to the so-called systemic reasoning. Sometimes the consequences are *extra-systemic*, such as of the ethico-moral or sociological type. In such cases, the reasoning may lean on fundamental or human rights or on certain sociological data.

If there are enough justificatory reasons for C1 and C2 to be the consequences of L1 and L2, then C1 and C2 have to be compared with each other and one of them has to be positioned as primary. This is where the weighing of interest appears in practice in, for example, cases concerning the interests of the buyer and seller or the individual and the general government. The comparison cannot be value-neutral,

which is why the consequential reasoning is a good example of value-based legal argumentation, as are also *analogy* and reasoning *e contrario*.

Let us assume that the consequence C2 gains primacy in comparison to C1. In this case, the reasoning proceeds as "feedback": Due to the consequence C2, the interpretation L2 should be defended with better reasons than L1. The chain of arguments has thus become to the end, and the reasoning is concluded. However, let us still recall some general views.

On principles as the Source of Law

In modern law, the problem no longer lies in whether or not the DS doctrine is relevant but in the *strength of reasoning* (degree of being binding). In general terms, the question concerns the boundary between what is law and what is not. This borderline has turned to be especially important due to the role *different kinds of principles* have in modern legal reasoning. Without unnecessarily repeating what has been said above, the following viewpoints are worth mentioning.

Does the growing significance of principles mean that the focus in legal reasoning is moving from *concepts to principles*? This is not the case. Even though principles having a different content and a different hierarchical level have become rooted in the legal *order*, it cannot be said that the notion of *the legal system* has crumbled, neither has its significance in terms of legal *thought* been reduced. As far as legal reasoning is concerned, it would be more proper to speak of the *return* of the conceptual frameworks (of *ius commune*) instead of emphasising the vanishing of the conceptual approach.

What *Robert S. Summers* has written on the forms of law and its systemic character also point in the same direction (Summers 2006, 17–36; Summers 1992, 154). The legal decisions can only be made *within a system*. If systemic boundaries are breached, the decision can be "good and correct" from a social point of view but it is no longer legal. As this is the case, the *boundaries* of the system have become especially important, as have the location of the boundaries. Legal principles, in their turn, have a difficult dual role, which easily makes the thought move in a circle. The principles partly point out the boundaries of the system, but a principle can only express the boundaries of law if we know that it actually is a *legal* principle.

There is one way out of the circle. In order for a principle to have the status of a *legal source* in reasoning, it has to have *institutional support* in sources of law that are strongly or weakly binding (Hart 1961, 97; cfr Dworkin, 1986, 40). This requires that at least one of the following two preconditions is fulfilled:

1. If the legal principle is *manifest in the legislation*, it becomes a strongly binding legal source. Institutional support can be found in a regulated norm.

This is the case of basic human rights protected by the Constitution. However, this concerns also such principle-like rules as the "general" principle of adjustment

of contracts in Finland (Article 36 of the Contracts Act). Before this article, the legal literature had sought institutional support for the principle from different fields of the legal order. In this, some kind of *induction* was used to justify the generalisation of the principle to concern adjustment cases not expressly mentioned in the individual statutes.

2. If the legal principle is *not manifest* in the legislation, it may gain the status of a weakly binding legal source through *acceptance*. Here, the principle receives institutional support mainly by the precedents.

However, the legal principle is often tacitly accepted in the precedent but is not publicly expressed among the reasons. It may even have a decisive impact but be "covered" with other arguments. Such principles that are not manifest but are used in practice are, for example, "pacta sunt servanda", "no one can benefit from his own wrongdoing", "the heir cannot have a better right than the deceased" or "falsa demonstration non nocet". Practical reasoning usually refers directly to the relevant precedent and not to the principle tacitly expressed in its justification.

Therefore, a specific general principle (at least, in Finland) rarely, if ever, receives the status of a legal source *solely* in support of acceptance, and if a principle has the value of a legal source, its *position* is in the category of *permitted* sources of law. When used independently, legal principles can be compared to moral grounds. Neither type of argument has "direct" institutional support if they have not been manifest.

Ota Weinberger hits the nail on the head with his idea that a moral argument "becomes" a legal one, if, and only if, it is included in valid legal argumentation (Weinberger 1982, 43). I fully agree with Weinberger. Here lies one borderline between law and non-law. *An argument used in a moral context continues to be a moral one if it is not accepted as a source of law.* In this regard, the quality "to belong to the sources of law" is the same as the quality "to have institutional support", because the latter can only be reached if an official institution – that is, the court – accepts the moral argument as a legal one. This also goes for general legal principles.

Because legal interpretation can only function *within* the framework of the legal system, the flexibility that crosses the boundaries of the system breaks the spine of the law. This breaking, in turn, is a threat to the democratic constitutional State, the core of which remains the *guarantee of maximum legal certainty* (Aarnio 1989c, 409). In modern law, it is, for its part, built on *predictability*, which is supported by systematisation and stability, among others. Actually, legal protection is often thought to consist only of predictability, which is seen to guarantee the well-functioning of the social system, whereas the lack of predictability makes law arbitrary "non-law" that changes from case to case.

Regardless of whether the matter is understood in such a narrow way, it is obvious that no democratic *Constitutional* State can sacrifice predictability on the altar of flexibility and case-based reasonability. Flexible regulations, their large-scale application and "soft" interpretation jeopardise predictability. Law stops being law and primarily becomes the delivery of "reasonability".

Chapter 19
One Right Answer?

One of the most problematic topics in legal theory is, and has been, the doctrine of the one right answer. A lot of scholars have critically dealt with this doctrine in many texts – either directly or indirectly. For instance, from one point of view, the theory of coherence focuses on the basis of the doctrine of one right answer. However, it seems to me that the most important critical reflection on that doctrine is moral-philosophical as to its nature (Aarnio, Alexy and Peczenik 1981, 257, 274; Peczenik 1989, 301). As was mentioned before, this critical view may be qualified as a moderate conventionalist relativism.

Final and Right Answer

Let us start, however, with some basic concepts of the one right answer doctrine. First of all, two basic notions have to be kept separate – i.e., the *final* and the *right* answer. The former is a necessary condition for every well-functioning legal system. The use of legal power simply presupposes that at a certain stage of the legal procedure the system produces an *enforceable* decision in each single case. In this regard, the final solution is an essential part of the rule of law principle (Rechtsstaat).

However, the final answer is not necessarily the right, or, even less, the *only right one.* When speaking about the one right answer, certain formal and substantial criteria of rightness necessarily have to be defined. In this regard, at least two different versions of the one right answer can be identified.

According to the *strong version*, the one right answer always *exists* and can also be *detected* in each single case (Aarnio 1997, 217). The answer is "hidden" somewhere in the legal order, and the skill of the judge or scholar is to make explicit that which is already implicit. This kind of a doctrine is only valid on an assumption of a closed legal system. The conclusion is always *deducted* from axiomatic and evident premises. The idea of a closed legal system was represented in the extreme doctrines of the rationalistic natural law, as well as the conceptualist doctrinal study of law (Begriffsjurisprudenz). Traces of such thinking can hardly be found in the present Western legal theory.

A. Aarnio, *Essays on the Doctrinal Study of Law*, Law and Philosophy Library 96,
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The *weak version* accepts the *existence* of the one right answer but admits that it *cannot* always (maybe not ever) be *detected*. This version has been represented by several positivistic doctrines. For instance, nearly all the scholars in Finland in the 1970s agreed with this view. As *Jerzy Wróblewski* has pointed out, the basis of this version is mainly the idea of a gapless legal system. That was the reason why Wróblewski only saw the one right answer as a *useful ideology* that helps lawyers to orientate in their practical work. From a theoretical point of view, that ideology, according to Wróblewski, turns to be a problematic one (Wróblewski 1974, 33, 1992, 265). It is true that the judge or scholar could consider it important to have the right answer as a *guideline,* although we as human beings perhaps do not succeed in finding the right answer. Still, we assume that it *is* "there". Otherwise – some could say – all legal decision-making, as well as DSL, would become blind and arbitrary.

Especially the strong but partially also the weak version is connected to the syllogistic form of legal reasoning. When chosen in a certain way, the first and second premises give the impression that the conclusion is "certain". There are, however, a lot of problems intertwined with the weak version. First, we meet the problem that, according to *Charles Peirce,* is called the *fallibilistic dilemma* (Popper 1963; Niiniluoto 1983, 80). Even in cases where the right answer *can be found in principle*, it is not necessarily possible *to know* that it has been found. Yet, if one does not have this kind of knowledge, the one right answer-assumption is a very weak practical guideline for a judge or a scholar. They never know that they know. Even more problematic, however, is the *existence* of the one right answer. What does it exactly mean to speak about such an "existence" in a legal context?

Hercules J

In the following, an attempt will be made to argue that there no right answers *exist* in legal reasoning (the ontological thesis). Therefore, such answers cannot, of course, be *detected* either (the epistemological and methodological thesis). Here, some short references to *Ronald Dworkin's* ideas about the one right answer are necessary for the next critical step. I will not deal with the huge amount of literature concerning Dworkin's theory. The purpose is to restrict the analysis to those elements in Dworkin's thinking that are essential as regards the foundation of DSL. What follows is thus a discussion between Dworkin's arguments and those of my own (Dworkin 1977a, 58, b, 40, 90, 1981, 38; Peczenik 1989, 305; Aarnio 1987, 158). From this point of view, the many discussions I was privileged to have with Neil MacCormick were of irreplaceable importance (Aarnio 1981, 40 n 9) .

As regards the one right answer, the title of Dworkin's work is very illuminating: *Taking Rights Seriously* (Dworkin 1981, 1977a, 38); the title anticipates his criticism in two directions. On one hand, Dworkin casts a penetrating eye on positivism, which, according to him, only accepts as rights of the individual those that the law (the positivist legal system) grants the individual. On the other hand, his criticism is directed at utilitarian, for instance Benthamite, conceptions: Law must attempt to

produce the greatest possible good for the greatest number of people (Aarnio 1981a, 39). According to Dworkin, this gives no safeguard against infringing the rights of the minority since it is possible to maximise want-satisfaction over a whole society without showing equal concern and respect for all its members.

Dworkin divides rights into two groups, institutional and primary (background). Both belong to the category of political rights. A legal right, in turn, is an institutional right that entitles the claimant to a favourable decision from the courts. For instance, the right of ownership is the right to receive protection from the court against certain infringements. From this point of view, rights, to the individual, are counterparts to the activity – i.e., the wielding of power of the courts. However, the rights belong to the individual almost *ex ante*. Individuals have rights regardless of whether or not the authorities uphold them. In a way, rights "exist" before the decision. According to Dworkin, this is one of the reasons why rights are to be taken seriously.

According to Dworkin, a legal problem must be solved primarily on the basis of what *the law states on the matter*. If the wording of the law is not clear, the decision is to be given in accordance with the principles of the law. On one hand, the decision-maker must take the demand for equal treatment into consideration: similar cases must be dealt with in a similar fashion. However, in individual cases this principle receives its actual meaning from positive law. Apparently one could say that, for Dworkin, the principles of positive law, which give concrete form to the principle of giving everyone equal concern and respect, form the ultimate base for the decision. Actually, it is precisely this point that is interesting in Dworkin's theory.

Dworkin begins with a case that, in accordance with the traditional terminology, he calls a "hard case". A typical feature of such a case is that no provision supplies a clear answer to it; the ratio of law to be identified, and court decisions, as well as other interpretative materials, point in different directions. They "pull both ways". In an example case, A, according to the provision, has right X, B having right Y. Both parties have a right in regard to the other (primary right), and both parties have a right in regard to the authorities (secondary right). In such a situation it is necessary that one is able to justify the decision in the best possible way. In this manner, Dworkin's construction of the problem ties in with the idea of "one right solution".

It is true that Dworkin does not say that there is one and only one correct solution in every case, but he maintains that one correct solution is possible *in principle*, and that such a solution exists in *most cases*. There are situations ("tie judgements") where the right of the plaintiff can be justified just as well as the right of the defendant. In such a situation it is impossible to say what the right solution to the problem is. But there are also cases where one can clearly justify the idea of the correct solution.

For that justification, one needs a theory of law – let us call it the *basic theory*. *Neil MacCormick* has emphasised that it is not a descriptive theory *about* law, but specifically a theory *of* law (MacCormick 1978b, 591). For Dworkin, such a theory has a decisive role. As a "soundest theory of law" it makes it possible to

understand and see the sense in legal provisions and court decisions as a system that, on one hand, protects the rights of individuals and, on the other hand, takes collective interests into consideration. The basic theory also incorporates the principles that give meaning to the abstract principle of equality. It is specifically through this it is possible to say that the basic theory, and exactly that, justifies legal decisions.

The basic theory does not, however, express principles protecting the right of individuals or goals connected to the collective interests ("policies"), The basic theory gives these an order of priority "by assessing weights to them", as MacCormick formulates his opinion (MacCormick 1978b, 593). In this way, the basic theory justifies a decision in the best possible way. On the other hand, the basic theory is not a matter that can be *discovered*, for instance, through intuition or something like that. For Dworkin, the basic theory is always a constructed theory – or more correctly, a theory that can be construed. However, it is still "the best possible".

Dworkin also argues that the principles of the soundest theory of law are themselves a part of the law, why they also carry legal authority. Things being so, a crucial question comes up: What are the underpinning criteria of their being a part of law? They cannot be of this kind only because they are a part of the soundest theory of law. An answer like this easily leads to a vicious circle.

Let us begin with the criticism brought up by Neil MacCormick. The idea behind Dworkin's "best possible" theory is explained through recourse to an idea of a superhuman judge, "Hercules J", who, with his semi-godlike qualities, is able to create a theory that brings together the different elements of a legal system. McCormick summarises the Dworkinian idea as follows:

> No one can be a Hercules, but the very fact that we can intelligibly postulate such a being justifies the claim that every judge can and should try to get as close to Hercules' competence as he can (MacCormick 1978a, 594).

As a matter of fact, compared to a "human" judge, Hercules J really is omniscient, he has an unlimited time at his disposal, his information about the case and about the relevant arguments is unlimited, he is capable of making even the most difficult choices (omnipotent) and is also dispassionate. Further, Hercules J. is perfectly disinterested, and what is important for the impartiality, he is capable, without limitation, of changing roles with others. Hence Hercules J. is an *ideal person*, a metaphor or illustration exemplifying the ideal speech situation introduced by *John Searle.* That is why Hercules J is capable of making the "best possible" legal decisions.

That kind of "Super Hercules" would be like a Platonian tyrant who dictates the right solutions to people. Such a tyrant is impossible in the legal world. Hercules J. more resembles Plato's Philosopher, who only guarantees the framework of unanimous decisions or of fair compromises between the members of the legal community at issue.

This is partially due to the fact that Hercules J. cannot be merely a rational automaton, or a machine that only deals with the available arguments according to an expert system, like a computer. In the case of Hercules J, the reasoning must

be based on coherent arguments. The coherence, in its turn, presupposes several criteria, which must be weighed in relation to each other. However, there is no way of balancing the final reasons objectively because the "best" balance must be the "most coherent" one. As Neil MacCormick has noticed, this, in its turn, presupposes a meta level – i.e., a "Super Hercules J." actor capable of solving the conflicts between those two under ordinates, etc. – ad infinitum (MacCormick 1978a, 593).

All things considered, one can raise a question: Is a single right solution in each *hard case* really possible? I very much doubt it. The target of my criticism turns to the notion of "disinterested". The qualification is one of those that make the judge out to be a Hercules, something more than a human being. Yet, is this kind of superhuman actor really necessary as regards the theoretical basis of legal reasoning?

To begin with, in Hercules J's case, the interpretation is also a *creative procedure* constantly producing new paths of reasoning, and if the creative procedure leans on just intuition, no one can evaluate the results, not even another Hercules J. Hercules J. himself is not only a rational but also a creative being in the substantial sense of the term.

Here, my view seems to get some support from the ideas of *Robert Alexy*. He qualifies human rights as *moral rights*. The moral character of those rights, however, does not prevent their transformation into positive law. From this point of view, human rights are "legalised" moral rights. The key problem concerns the preconditions and qualifications of rational discourse. As Alexy puts it, the discursive capabilities of the decision-maker must be connected with an interest in making use of them in real life. Alexy calls this interest simply "interest in (or claim to) correctness" (Alexy 1989, 104). This very interest, as with any interest, is connected with decisions, and, as Alexy emphasises, these decisions concern the fundamental question of whether or not we accept our discursive possibilities.

As far as I see, the Dworkinian Hercules J has to accept the interest in correctness. But this does *not* result in Hercules J being perfectly independent of *material* interest. He is committed to promoting the "best possible interests". Let us accept this. Then, what about *two* Hercules Js, both of them being rational? Are they also capable of objectively solving *genuine axiological problems*? If they do, they must use *intuition* for this purpose, which leads to a strange situation: either of the Hercules cannot *know* the reasons on which the other party's intuition is based. Intuition is *per definitionem* only based on "internal reasons", "direct seeing", or the like. *The final choices* in this legal reasoning are not only dependent on the rationality of the reasoning procedure but on unreasoned interests too. The final choice of (evaluative) premises results from "inside" the *weighing and balancing.*

Let us now recall an ordinary decision-making situation once again. Person A's justification for the solution to a legal problem includes a standpoint on an intrinsic value. Person *B* represents another, incommensurable standpoint. Then, there is *no common* measure to compare the standpoints, and thus there are no right answers and none of the answers is *generally* the best possible. All of them are right only regarding given *criteria*. The situation is comparable with the following example: this piece of art is beautiful due to the criteria x.

Mere rationality does not, as a matter of fact, guarantee the material content of the decision. Rationality is connected to the process of discourse, and concerns the legal framework of decisions. The interpretative discourse has to fulfil the requirements of D-rationality, but, *in addition to that*, the final result itself has to meet the *material preconditions* of legal certainty. It has to be in accordance with the law *and* justice. This ideal model simply produces the "best possible" justification connecting the solution to the legal order in an acceptable way.

Acceptance and Acceptability

The only right answer presupposes criteria covering *both* of the competing standpoints. In regard to those criteria, a choice can easily be made. However, it is still possible to ask, as *Neil MacCormick* did, whether the meta-criteria are the only right ones, and so on. Therefore, it seems to be useful to draw a distinction between the *acceptance* of and the *acceptability* of the final result.

A certain solution may have extensive support in legal community for a variety of reasons, and may thus be widely accepted and effective. Efficacy is, however, not necessarily the same as producing the "right" solution, nor is an "effective" interpretation necessarily acceptable in the *ideal* legal community consisting of individuals who share the standards of rational reasoning. The theory of rational discourse is a *model* for, and not a description of, the actual reasoning (Soeteman 1989).

In this regard, the purpose of the model is to formulate the criteria of the "best possible justification" instead of one right answer. "The best possible justification" is, in its turn, an *ideal* justification – that is, a standard that can be used as a guideline in practical DSL. As we have seen, the function of the DSL is, besides the recommendations as regards certain statutory interpretations, also to *criticise* the prevailing ways of thinking, whether they were produced by the DSL itself or, for instance, by the courts.

In Perelmanian terms, the theoretical model presupposes an *ideal* audience, where the acceptance is given by idealised persons who not only share the standards of rationality but who also have (to some extent) a coherent value code. Actually, there are three different dimensions or perspectives to the same problem: Hercules J, the ideal audience and, seen from a justificatory point of view, the reasoning with all things considered. All three dimensions characterise the idea of why and how it is possible to receive a convincing conclusion in legal disputes.

Let us, however, continue with the notion of ideal audience. It is not a universal one. Those who accept the criteria of rational discourse may also *disagree with the basic interests*, especially with intrinsic values. That is the main difference between my view and that of Dworkin and Perelman. It is possible that there is *more* than one ideal audience as it is possible to identify two or more Hercules judges.

The principles of moderate conventionalist value relativism mean that even people considering matters rationally may (in principle) have differing conceptions of

the basic values. The ideal legal community measuring the acceptability is thus not necessarily *internally homogeneous*. It may include groups with different opinions on good and bad, right and wrong. Thus the members of a certain ideal audience may have different interests, which is why they may *prima facie* disagree with the interpretation. However, by committing to the claim to correctness and sharing a value system that consists of family-resemblant value standards, they are *necessarily* willing to co-operate. If they do not do that, they are *either* not bound to the claim to correctness *or* their value system does not make a compromise possible, but if both preconditions are fulfilled, they are able to transcend their different interests and agree with each other (Aarnio 1989c, 416). Things being so, there may still be *another ideal audience* (A2), the members of which accept the standards of rationality and agree with a certain value-code that differs from the one accepted by the other audience.

In the *actually existing* legal communities, neither the claim to correctness nor the family resemblance of value systems comes true. We are and always will be human beings. Even the best of our aspirations to be rational remain half-finished. As far as the theory of acceptability is concerned, the legal community at issue is indeed an ideal one and only that. The yardstick of acceptability is rational discourse, which is the theoretical reason why the Habernasian principles of discourse ethics, Alexy's ideal dimension of law and Searle's ideal speech situation are necessary tools to understand the foundations of law and legal reasoning. They are ideals, but they are not theoretically empty. They give standards for optimal human discourse, and, as such, are yardsticks for actual discourse too. In this very sense, the theoretical preconditions of rational discourse are like the model of meter in Paris, which Wittgenstein used as a reference to certainty.

Still, in cases where the disagreement is tolerated, a problem arises: In what kind of an ideal community can acceptability be pursued in the first place? Here, the so-called *majority principle* finds its place (Aarnio, 1989c, 421). This principle means that if the *majority* of an ideal audience is ready to accept, let us say, the solution S1 from two possibles, this solution is the "best possible" one *for the moment*. This does not mean that the members of an ideal audience "vote" for S1 or against S2. The majority simply gives the *largest possible acceptance* for solution S1. From the societal point of view, the other solution, S2, is like a minority proposal, "weaker" than S1.

Yet, it can be asked whether the majority principle, even when thus restricted, is not too severe with the minority opinion (Aarnio 1997, 225). As far as I can see, this is not the case. This majority has nothing to do with the majority principle of a political democracy, as can be seen in the following:

1. First, the model only deals with legal reasoning in an *ideal* speech situation. The protection of the minority would have significance in a factual legal community – that is, in an audience where all kinds of power constellations play some role, whereas in an ideal community the use of power is not a problem. This follows from the very concept of the ideal speech situation. The participants are supposed to be free.

2. As regards the basic rules and principles of the rational discourse, all relevant reasons are taken into account. Thus the minority opinion is also part of the reasoning.
3. Because all members of an ideal audience commit to the standards of D-rationality, they all must necessarily accept the majority principle as well. This acceptance is based on the very concept of rationality. A rational person may ask: Which would be the competitive principle if the majority principle were not accepted? It seems to me that a decision would be reached by lot.
4. The last-mentioned issue is connected to another one: Why not be satisfied with *two* (or more) equally well-founded and thus rationally acceptable solutions, e.g. with S1 and S2? Why is it necessary to commit to the majority principle at all?

In his regard, a few additional arguments have to be taken into account. The social co-operation presupposes that people can agree with certain solutions. This can be illustrated as follows. If the legal community consists of only *two* members, A and B, who both have abilities of Hercules J., and a permanent *disagreement* between the viewpoints prevails, this disagreement causes uncertainty about what is right and what is wrong. There are also two equal candidates for the "right" solution, S1 and S2. In this case, the authorities need a *final* solution for the execution.

However, this final solution does not decide the tension between A an B. No one can say whether the final solution is right or not. It is only one of the well-founded alternatives. Because there is no majority in the community, the problem of the majority principle cannot be raised either. The *choice* between S1 and S2 can only be made by *lot*, or by a *fair compromise* (consensus) made by A and B as regards the final solution (e.g. on S1). As we have seen, the fair compromise does not result from a mere rational discourse. That discourse only makes the compromise possible. The other criteria are based on value systems and their family resemblance.

Majority Principle

Thus the acceptance of more than one possible and "equally good" answer is theoretically even necessary. First, the moderate value relativist view, represented in this contribution, departs from the assumption that there are right answers in legal order *ex ante*. Second, all well-founded solutions, S1 as well as S2, are *ex post* "right" in the sense that they are the proper (legally possible, relevant and well-founded) answers *within a certain justificatory framework*. The final choice between S1 and S2 is a compromise in the true sense of the term. One cannot add more arguments because the discursive procedure has come to the limit of rational reasoning. It is impossible to go "outside" the rational frame and outside S1 and S2, comparing them with each other at the meta level – ad infinitum.

If A and B form the majority of an ideal audience compared to C, the disagreement concerning the solutions is the same as above (Aarnio 1997, 227). Due to the basic assumption, this legal community is rational as to its nature: Every member of an ideal audience

a. commits to the claim to correctness and
b. accepts the standards of D-rationality;
c. accepts the idea of social co-operation and
d. the principle that the social co-operation presupposes predictability.

The list is only a summary in which the first two points include all the preconditions of the discourse ethics, whereas the other two concern the social dimension, or the life world in the sense analysed by *Charles Taylor*. If these commitments are accepted, they are, at the same time, arguments for a further standpoint: Every hard case *should have* one answer. This does *not* mean, however, that such an answer is the "only right one"; it is the "best possible one" in the ideal community on the criteria (a)–(d). "The best possible", in turn, means that the *majority* of the audience can agree with each other about this answer, and do not do so by lot.

Because the majority principle also has a real side – that is, a commitment to a certain *value system* – it is elastic and makes the dynamic development of ideas in society possible. The value system can change so that in some situations the dissenting minority opinion will obtain the support of the majority. This is so due to the changes in the value code. The audience, after having reconsidered the matter, is then convinced about the unreasonableness of the former majority opinion.

The majority principle itself is a *model* – that is, an ideal. In an actual social situation, the majority opinion does not necessarily – maybe ever – come about on mere rational reasons. The argumentation may involve authoritative features and, in that way, even persuasion, although the argumentation is believed to be rational. In an organised society, the strengthening of the rule-of-law is a natural goal. As a model, the majority principle has an important role in this development.

This principle is also in accordance with the interests of each rational human being pursuing his own interest. *Robert Alexy* formulates a similar idea from his own point of view, reminding us that it is a fundamental question of whether or not we accept our discursive possibilities (Alexy 1989, 121). As Alexy points out, this is a question of whether we want to see ourselves as discursive beings, and that is a decision about who we are (Alexy 2004a, 24, 2009b, 21). As was pointed out before, that is why the theory of rational discourse and the majority principle are useful tools, even if they cannot be attained in actual legal life.

Understood in this way, rational acceptability is a *regulative principle* for legal interpretation. The goal of every legal scholar and every decision-maker is to reach the maximal rational acceptability for his standpoint in the (legal) community. In other words, legal interpretation must always fulfil the criterion of rational discourse, and – at the same time – produce reasonable results.

In this sense, rational acceptability has the same general role in legal reasoning as the concept of truth has in the (natural) sciences. It is an ideal for DSL. This ideal cannot actually be reached, but it can be approximated. The more the criteria of rational acceptability are fulfilled, the more satisfactory is the reasoning. In other words, the genuine social relevancy of legal reasoning is dependent on its degree of rational acceptability.

Taking the previous analysis as the point of departure, the following *regulative principle* (RP) could be suggested as a summary of this contribution (Aarnio 1987, 231).

> RP: Try to reach such a solution and such a justification in a hard case situation that the majority of the rationally reasoning members of a legal community may accept your standpoint and your justification.

The regulative principle is a relative to Dworkin's idea of Hercules J. According to Dworkin, the best possible legal theory justifies the claim that every judge can and should try to get *as close to Herculean competence as he can*. Still, there is a radical difference between this Dworkinian principle and RP. Due to the possible disagreement concerning the values, the regulative principle does not guarantee *unanimity* in hard cases. On the other hand, the relevance of RP is not based on persuasive arguments alone, or on mere formal authority, but on the rational strength of the justification, as well as agreement with certain basic values. Every statement must, also in the case of basic values, be reasoned, as far as it is possible.

An interpretation that fulfils *both* criteria – rationality and maximal agreement with values – also maximally satisfies the *expectation of legal certainty* in that society. And furthermore, the standpoint has the maximal legitimacy in that society. Thus RP is not a manifestation of the "Besser-Wisser" ideology, and it does not give any authority to proclaim: I am right. Instead, RP tries:

1. to invite the interpreter (scholar or judge) to follow the standards of rational discourse, and
2. to warn him/her of the severe problems with value objectivism.

One may remark here that if all the members of the ideal legal community accept the majority principle, and, being rational, try to follow the regulative principle, what prevents the emergence of a *circle*? If they all try to find a solution that would be acceptable to the majority, would there be any majority opinion if the opinion of every member is dependent on the opinion of the majority?

This remark does not hit the point of the majority principle. It is *per definitionem* impossible that the opinion of every member is dependent on the majority opinion. The majority comes into existence in an ideal community due to the disagreement with the *basic values*. This means that there are two or more independent opinions as regards the value code, because the final choice of the basic values cannot be reasoned rationally. It is not only final, it is also a mere choice.

The acceptability by the majority of an ideal community is the *most* that the judge or the scholar can *try to reach* in his reasoning. This kind of ideal acceptability gives a guideline for reasoning, but, at the same time, it is the most objective measure for criticism too. Finally, acceptability as a goal of legal reasoning is "enough" for human beings. Why? Simply, therefore, that by following the regulative principle, people's expectations of legal certainty can be maximised. In this regard, the regulative principle is one of the *basic guarantees of a Rule-of-Law State* (Rechtsstaat), unlike the assumption of "one right answer", which does not help in this at all. It

does not fulfil our societal needs, and does not serve as tools for a lawyer trying to attain the maximal acceptability. What we really need in society is not a mysterious one right answer but a rational justification of decisions, as well as a certain type of regulative principle for legal reasoning.

As a matter of fact, we are searching for the philosophical grounds of DSL in the wrong direction if we attempt to construct it solely on the basis of cognitive theories. If, for example, we claim that it is only possible to speak of rational acceptability when the underlying values are cognitive, then, in the social view, an incorrect model has been attached to the legal order.

The ideology of legal certainty does not assume the adoption of a cognitive value theory. For the well-functioning management of our common legal matters in society, it is necessary, and also sufficient, that we reach a *representative consensus* on the value system that is the basis of the legal order. The representative consensus on the value system here means that people have come to terms concerning the contents of two or more different moral standpoints. In other words, the values are relative to the moral codes at issue but there is common ground on which to reach a compromise between different codes.

This has important consequences as regards the research strategy that is to be followed in DSL. If the strategy is based on the Kelsenian model concerning the formal validity of legal norms, one is close to the idea that DSL merely has the task of describing the proper *alternative interpretations*. On the other hand, the model of legal realism emphasises the *predictive aspect* of legal science. In the present study, the third alternative has been emphasised. The concept of legal validity is connected to legal certainty, and, furthermore, to the concept of *rational acceptability*.

As to the research strategy, this means that the rational *justification* of interpretations has the key role. Justification, furthermore, is necessary for the sound functioning of society. Anyone can make a decision in a hard case situation, if one has certain basic information about the legal order in question. The result, as such, however, is of no importance at all. It may be right or wrong, good or bad, depending upon the criteria of evaluation.

If we try to criticise the decision as far as its legitimacy is concerned, the problem turns out to be of quite another character. In that case, we need reasons. The same holds true in DSL: the interpretation that functions without any reasons whatever is only based on authority. Yet this kind of interpretation does not satisfy the deepest expectations that are present in a democracy. The whole concept of democracy, and sound social life too, presupposes the means to evaluate interpretative standpoints concerning the legal order in a critical sense. Hence the concepts of legal certainty, rational acceptability and justification belong closely together. They also build up a totality in which justification is a necessary tool with which to realise the other elements of the whole totality. This is why one part of the whole cannot be removed without breaking the whole.

Chapter 20
On the Systematisation

The Need for Systematisation

Legal order is a normative totality consisting of rules and principles. As such a totality, it has a double function. First, it gives citizens patterns of behaviour (primary norms), and second, the legal order gives the authorities the basis on which to solve the conflicts between the citizens, or between the citizens and the public power (secondary norms). Legal order is, to some extent, a *pre-systemised* unit that consists of a collection of statutes concerning legal phenomena, like contracts, obligations, companies, crimes and legal procedure – e.g. the Finnish Decedent's Estate Act, which is divided into chapters, sections and articles.

Compared with legal order, the *legal system* is a meta-level unit reformulated by DSL, and only by it. The courts and administrative authorities do not have the task of systematising the legal order; they either solve singular cases or take care of the administration. There are, however, many good reasons why the pre-systematised units have to be reformulated:

1. Reformulation would produce *a survey of the mass of legal norms*. In modern societies, there are such a huge number of valid legal norms that the use of a pre-systematised unit would be impossible in practice. It would simply take too much time to identify those norms applicable to the case.
2. Reformulation is also ideal for the *economy of legal thought*. Well executed systematisation saves time and energy, and it is not necessary to reformulate the normative unit separately every time a certain part of the legal order has to be applied.
3. The value of systematisation is also in the *preciseness of thinking*. A functioning reformulation is like a well-polished lens through which the lawyer looks at the normative unit. The preciseness of legal thinking makes it possible to identify the proper questions to be solved, as well the interpretative alternations for the final decision or recommendation.

The lens metaphor elucidates both the strong and weak side of systematisation. The lens allows us to see clearly only that which hits the field of view. As *Ludwig Wittgenstein* said, we cannot think what is impossible to think – i.e., we cannot go

A. Aarnio, *Essays on the Doctrinal Study of Law*, Law and Philosophy Library 96,
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outside our thinking. This is also the case in every legal systematisation. They are the limits of thinking, and we cannot even put questions that are beyond the scope of that special reformulation.

The strength of systematisation is in the richness of the questions. The richness may be found in the more exact way to identify the problems, but also in the range of interpretation alternatives. As we will see later on, the more exact our thinking, and/or the larger the net of alternatives, the richer our thinking.

The Theories in Law

It is necessary to make a distinction between the *theory of* and *about law* and the *theory in law* (later: theory). The first one deals with law as such – for instance, with the origins of law, the validity problem or legal thinking. The *theory*, in its turn, concerns certain legal institutions, such as contract, ownership or legal person. In this study, the *theory of ownership* has been used as an example of a theory. In the following, the detailed analysis presented by *Ralf Dreier* has been taken as the point of departure. It is best in this very field that I know in the modern jurisprudence (Dreier 1978, 70, see also Pöyhönen 1981, 19). According to Dreier's guidelines, the essential elements of the theories in law can tentatively, but only tentatively, be specified as follows:

1. The theory is always based on certain *ideological background* assumptions. The theory of ownership presupposes a market economy and, at least to some extent, free power to possess the object and use it in economic change. The ideological assumptions are not normally manifested but are a tacit foundation of the theory.
2. The theory always includes a network of concepts consisting of
   - a certain number of basic notions,
   - principles that arrange the relationships between the notions, such as in a hierarchical order, and
   - inference rules, by means of which the notions can be used.
3. The normative foundation of a theory of legal rules and principles, such as the (Finnish) statutes of the Decedent's Estate Act, or the Act of the Title to Property Registration. These rules and principles define the establishing, content, functions and termination of the legal institution at issue (Pöyhönen 1981, 98).

All the theories are open to the changes according to the societal dynamics. On the other hand, it is not possible to redefine them arbitrarily so that the theory does not have any contact with the social reality. Legal order, also in its reformulated shape, is always a holistic totality, where a single part of it cannot be changed without changes in some other parts of the whole. In this way, the changes of theories are always intertwined with the legal tradition, building a new level to that tradition. This feature of the theories will be dealt with in more detail later on.

Reformulation of the System

Carlos Alchourrón and *Eugenio Bulygin* characterise legal systems as normative systems composed of legal sentences (Alchourrón and Bulygin 1971, 21). They use the term "sentence" instead of the notions "norm" and "rule". According to them, the term "legal sentence" is more neutral than the expressions "legal norm" or "legal rule". Characterised in this way, the notion of *legal system* is more general than the concept of *legal order*. Here, the authors, independent of their starting point, are on the same line as the majority of scholars dealing with systematisation (Wróblewski 1972, 812). In Finland, *Otto Brusiin* made this distinction as early as the 1930s (Brusiin 1951, 49).

Alchourrón and Bulygin sketch a simplified model of a legal system in order to show how the concepts and theories actually operate in legal science. The key notion is *reformulation* of the system, according to which the system is changed so that the *normative consequences of it remain the same* as before. The reformulation replaces the original systemic basis by another, deontically equivalent one, nothing more. The reformulated system is simpler, more abstract and more general, which fulfils the demands of the economy of legal thought (Alchourrón and Bulygin 1971, 3).

The authors understand "interpretation" as a "determination of the normative consequences" of a set of legal sentences for a certain problem or topic. This means that the task of DSL is to *make explicit* that which is already hidden in the legal order. This means the same as the construction of a complete system. The construction presupposes the existence of certain elements that are the starting points for the systematisation (Alchourrón and Bulygin, 9). These elements are:

1. a problem or a group of problems (a topic) for which the regulation by law is of interest to the lawyer,
2. a set of legal sentences relevant to the topic in question, and
3. a set of rules of inference used by the jurist in the derivation of the consequences.

According to Alchourrón and Bulygin, the universe of discourse is a set of all states of affairs or situations that define the issues to be decided, for instance, a situation in which a certain person (A) has transferred to another (B) the possession of real estate owned by a third person (C). The universe of cases, in its turn, covers particular cases defined by certain criteria or properties. Depending on whether a given property is present or not, we obtain several combinations of properties.

The universe of actions consists of individual actions being deontically relevant. Signifying the actions with "R", for example transition of real estate, the obligatory character of action R by "0", prohibition by "Ph" and permission by "P", the universe of actions can be described with the symbols "OR", "PhR" and "PR". In the universe of solutions, a solution correlates to a certain case, giving it a deontic character – e.g., the real estate has to be returned to the proper owner.

The concept of a normative system can now be characterised with these notions. Let P be a set of sentences. Each such ordered pair of sentences (e.g. p and q), of which the latter (q) follows deductively from the former (p) when p is combined

with the set of sentences P, constitutes a deductive correlate for P. If in a deductive correlate from P the former element (p) is a case and the latter (q) a solution, the correlate is normative. If there is at least one normative correlate among the deductive correlates of P, this set of P sentences has normative consequences.

Following these definitions, a normative system is a set of sentences having at least one normative consequence. Hence a normative system is always deductive, and, when the basic sentences have been chosen, axiomatic too. A solution (Si) may follow deductively from a case (Ci) if, and only if, there is a conditional clause ("If Ci, then Si") connecting the case to the solution. Such conditional clauses may be obtained from the statutory text, judicial decisions and other kinds of official material. Independent of their origin, the set of conditional clauses forms the systemic basis.

Alchourrón and Bulygin characterise the *constructing* (formulation) of the systemic basis as a two-phased procedure. First, the set of relevant cases and solutions are defined. Second, solutions are derived deductively for the cases belonging to the universe of cases. Then one has obtained all the (possible) normative consequences of the system.

The systematisation of legal norms is thus equal to the reformulation of the systemic basis. The original is replaced with another including concepts (terms) that are of a higher level of abstraction. The clarity and demonstrativeness can thus be improved *without altering the substantive contents* of the system. The normative consequences of the old and new systems are the same. The systems are identical. Interpreted in this way, the formulation of a system and its reformulation are thoroughly *rational activities*. The only accepted rules of inference are the rules of logic. The systematising activity in DSL only provides the legal community with a *new mode of presentation* of the system. The (genuine) modification of the system does not belong to DSL. The formulation of a new systemic basis is the task of the legislator and, in everyday practice, of the judge.

Alchourrón and Bulygin introduce an extreme *positivist* conception of legal systematisation, and, what is more important, of the task of DSL. All sound normative consequences are derived from the premises solely by means of deduction. The authors admit, however, that the systematisation is not a mere mechanical activity. They think that the discovery of the general principles requires "a considerable degree of creative activity", as does the discovery of the logical or mathematical conclusion from a given set of sentences as premises. This kind of activity presupposes creative imagination. In DSL, the creative feature does not involve the creation of new *substance*. This positivist view is not, however, adequate in all its details as far as the *practice* of DSL is concerned. Let us begin with some comments concerning legal traditions.

Every legislative reform is based on legal traditions independent of individuals, including the lawgiver. Traditions are like language, which is presupposed, not an "accepted" totality. One part of the traditions is theories in law, the accepted value codes and ideological assumptions, and the basic legal structures. In this sense, the legislation does not start from nothing, and the social institution forming the focus of the legislation never changes completely. It is only transformed and reproduced.

The new legislation either changes, supplements or clarifies the old, nothing more. Hence, behind a legislative act there is a many-shaded group of various elements:

1. Previous pre-systematised legislation as the framework for new legislation. Here, DSL has a special role. The drafters of the legislative reforms normally receive their basic concepts from DSL.
2. Information regarding the existence and/or the details of certain societal phenomena, such as the expectations of the consequences of legal reforms, as causal estimates of changes in criminality in relation to certain punishment scales.
3. A theory-like set of propositions like the economic theories (Smith, Keynes, etc.) "behind" the theories of commercial law.
4. Normative and axiological assumptions or ideologies of how things should be in society. It is specifically through such factors that the "quality" of statutes is outlined. A social fact only becomes a defect in society when placed in connection with these factors. Something is wrong in society only in accordance with a certain evaluation. Basic ideologies function, often implicitly, as measures of this kind. Legislation, in its turn, is a way to amend faults, or at least lessen, their significance.

This totality can be called the *pre-theory of law* (Aarnio 1987, 240). The factors involved in such a pre-theory are not in spurious relation to each other. Instead, they form a preliminary systematised whole that includes a lot of theoretical elements. On the other hand, the pre-systematised totalities are not theories *sensu stricto* comparable to the scientific ones, although they are "theoretical" enough from the legislative point of view.

In the statutory law system, the results of wielding legislative power are statutory texts formulating valid norms. These norms, together with the pre-theoretical system, form the *basic system* denoted here with SB. This is the system to be formulated (constructed) for legal pragmatic purposes using the conceptual tools defined by Alchourrón and Bulygin. SB includes the set of formally valid legal norms. From the legislative point of view, SB can also be called an "intended system" because it manifests the pre-theoretical view adopted in law. The task of adjudication is to adapt the intended system to the social situations at issue. DSL, in its turn, not the judiciary, is to formulate the basic system as well as possible. The particular problem is the very concept of *identity* between the basic system and that which formulates it, say SD (doctrinal systematisation).

One characteristic of the normative system introduced by Alchourrón and Bulygin is that it contains all the logical consequences that can be derived from the system. One can, however, hesitate if normative systems as human products actually are capable of containing all their logical consequences. Here, a set of legal norms can be compared to a set of beliefs. It seems to be impossible that people really believe in all that is entailed by their beliefs. The same holds true as far as law is concerned. For instance, the legislators do not prescribe all that is entailed by their directives.

The legal dynamics does not presuppose an idea that the basic system SB must be regarded as a set of norms containing *all* its logical consequences. The law is an *intended* unit, which may only involve some of the logical consequences. Taking this as a starting point, law has to be understood as a set of norms that contains its *relevant* logical consequences, and only them. This is so due to the so-called *theory loadenness* of the legal concepts.

As regards the standard opinion in the philosophy of science, an observational statement is (to a certain extent) theory-laden. In science, a "pure" observation (a brute fact) is impossible. As was mentioned above, theories are like lenses framing all our information about reality. The concept of theory-loadenness concerns DSL as well. Legal order is expressed in ordinary language with all its problems, as is the case of concepts used in DSL. It does not formulate its propositions in the form of logic (if p, so q). The legal dogma concept used to formulate (or reformulate) the legal system *qualifies* certain social states of affairs as legal ones and defines the limits of legal interpretation.

Yet, at the same time, the theory-loadenness means that every dogmatic system organises legal norms of SB in relation to each other by means of linguistic, not logical, tools. The system must, of course, also fulfil the logical preconditions, but it is, in the last instance, a material (substantial) system. It is impossible to identify the normative content of the basic system without a certain legally relevant conceptual basis.

Further, the "systemic place" of a norm in relation to another norm affects the understanding of the first one. This understanding is not merely a question of formal connections between norms but of the substantive content of the norm. Let us take a closer look at this problem.

The pre-theoretical systematisation (SB) and the doctrinal systematisation (SD) give the systemic framework for lawyers to understand the norms belonging to the legal order. Seen from this point of view, SD is the "scientific" *formulation* of SB. The notions included in the system SD formulate all the intended consequences of the legal order. The dogmatic systematisation is the theoretical basis making, first, the interpretation possible, and second, giving the substance to law. The interpretation of norms belonging to SB has, in turn, a feedback effect. If the system SD does not give satisfactory answers to a question raised in practice, there is a "practical necessity" to change the theoretical background and *reformulate* the system, which means the change from SD to a system SR. This has a reflection on the interpretations, and so on (Aarnio 1997, 242).

The praxis is thus the "test" of the formulation of SD. The conceptual network has to be socially useful – i.e., its capacity to solve legal problems must be rich enough for the present social needs. If SD is not satisfactory in this regard, it must be replaced by another one, SR. However, the solutions given in SR *differ* from those given in SD. The system reformulation (SD->SR) is thus *not* a perfectly deductive operation in the way Alchourrón and Bulygin have maintained. The DSL system does not only raise the level of abstraction, or something similar. The notions of the system, as those of SD and SR, are theory-laden, and the formulation necessarily changes the view of legal norms.

The benefit of such a reformulation is, for example, that it makes the system simpler. There are fewer basic terms; their scope is larger; etc. Thus the system is not only more abstract but also more general. The new set of notions opens a way to pose new questions, and these, in turn, make it possible to give new kinds of answers – that is, interpretations to legal norms. Let us look at the problem by means of an example.

There are two DSL systems (reformulations of SD), SR1 and SR2, and no identity between SR1 and SR2 prevails. This is due to the fact that they use different conceptual apparatus. One cannot pose in SR1 problems known under the system SR2 as the new reformulation of SD. The answers cannot then be identical either. The system SR2 thematises the norms belonging to the basic system in such a way that new concepts are introduced and conditions are thus created for the formulation of new sorts of questions. In this way, little by little, SR2 transforms the previous system SD into a form that would not be possible on the basis of SR1.

In actual practice, the systematisations are "intertwined" with each other in such a way that it may be difficult to clearly distinguish which systematisation is prevalent in any particular context. The changes take place stepwise, and, depending on the number of common terms and their relevance, different systematisations may even "coexist" over lengthy periods since they supply "equally viable" answers to some problems.

Summing up, if this is true, as I believe, Alchourrón and Bulygin are not right as far the DSL systematisation is concerned. The basic system SB and the formulation of it, SD, are not identical as far as the normative content is concerned. They are two contextually different ways of understanding the legal order. The same holds true with regard to the reformulation, say SR2. The reformulated system, of necessity, also receives different content to that of the basic system (SB). This is so because every operation to define the solutions given in a certain system presupposes a conceptual network. The solutions are defined "through" legal concepts; a mere deductive inference is impossible. One has to know the content of the legal system, and that knowledge is only possible by means of notions proper for the legal purposes.

As to the relationship between systematisation and interpretation, the most important point is that the basic function of interpretation – i.e., the identification of the normative and factual dimensions of the juridical problem – naturally takes place *within* the cognitive context provided by the currently adopted systematisation. Systematisation alone is not sufficient for the purpose of finding out which particular norm a typical case at hand falls under, but systematisation does provide the indispensable theoretical context for this juridical problem solving.

On the other hand, interpretation itself is the "knowledge manufacturing" process in legal dogmatic research, which proceeds by way of employing theories in law. Answers to questions such as the question of why, in given circumstances, replacement systematisations of a particular type were adopted to the exclusion of other given alternatives can only be obtained if the larger epistemic context of the emergence of different juridical theories is investigated.

As the theoretical part of DSL, the legal system is a product of a cognitive activity organising the elements of legal order into a certain relationship with each other, whereas the interpretation is the practical function of legal research. *Carlos Alchorrón* maintained that in the end, the dynamics of the legal order are produced by the practical lawyers (Alchourrón 1986, 83). This is not the whole truth, although, besides the legislator, the judge – and especially the judges of the Supreme Court – is an important "creator" of the legal order.

As is the case in science in general, the practical and the theoretical elements of DSL are *intertwined with each other*. The systematisation of (legal) norms cannot be carried out regardless of the (detailed) substantive knowledge of the norms, and vice versa. In regard to the change and dynamics of legal knowledge in general, the legal system gives a framework for legal interpretation, and, on the other hand, every interpretation must be realised within a certain systemic frame. The *product* of this joint activity (systematisation vs. interpretation) is the legal system, which gives the necessary conceptual framework for every interpretative approach. In this way, DSL take part in the societal dynamics as do the judges and the legislator.

In the next chapter the final conclusions will be drawn with regard to the role of systematisation and that of the theories in law. They have a key role as far as the changes in DSL are concerned, and these changes based on system reformulation articulate, in their turn, the status of DSL in the societal dynamics (Alchourrón 1986, 85).

Chapter 21
Change or Development?

The Standard View

It is time to tie the threads together. What kind of a study is DSL compared to the old doctrinal study of law introduced in the first chapter of this book? In his dissertation, the Danish legal philosopher *Jörgen Dalberg-Larsen* presented the idea that no substantial changes have taken place in the doctrinal study of law for centuries (Dalberg-Larsen 1977, passim.). This statement was radical and forced me to make a comment. I had just launched a research project, the objective of which was to examine the possibilities of applying *Thomas S. Kuhn's* theory of the turning points of science to DSL (Aarnio 1986, 161; Mikkola et al. 1988, 63). It was, and still is, clear that Kuhn's model cannot be applied to DSL as it is since this discipline is not part of the family of "hard" sciences like astronomy and physics (Peczenik 1984c, 137; Wróblewski 1984b, 253).

Outlines of the Kuhnian Model

According to the traditional view of scientific progress, science develops by adding new truths to the stock of old ones, or increasing the approximation of the theories to the truths, and, in the old case, the correction of past errors (Verronen 1986, 139; Bird 2004, 4). Thomas Kuhn rejected this ideal and articulated an alternative account. His central idea was that the development of science is not uniform but has alternating "normal" and "revolutionary" phases (Kuhn 1970, 92; Musgrave 1979, 336, 1980, 39).

> In 1963, Kuhn published "The Structure of Scientific Revolutions", the first in the series "International Encyclopaedia of United Sciences", edited by *Otto Neurath* and *Rudolf Carnap* (Bird 2004, 2). The second edition was published with a postscript in 1970. This very edition has been the basis of my study.

In normal periods, the development of science is driven by adherence to a paradigm essential to that field of research. Kuhn calls the science prevalent in normal periods *normal science*. The function of a paradigm in the normal phase is to supply puzzles for scientists to solve and, at the same time, to provide tools for the puzzle solving

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(Kuhn 1970, 35; Bird 2004, 5). The core of the normal science conveys the idea that, like a person doing crossword puzzles, the scientist expects to have a reasonable chance of solving the scientific puzzle. The scholar takes it for granted that the puzzle solving depends, at least mainly, on his own ability as a scientist. This is possible if the puzzle itself, as well as the solutions, are familiar to the scientific community and to the scholar as a member of that community.

In a crisis (or revolutionary) situation, confidence is lost as regards the paradigm's power to solve acute puzzles. Kuhn calls these "new" puzzles *anomalies*. Not all periods of science lose their capacity for puzzle solving to such a degree that the puzzles could be classified as anomalies. However, a certain period may find itself without a solution to a relevant scientific problem. In this case, a new and revolutionary pattern of thought is necessary. However, this not a case of a simple rational choice between the competing theories or patterns (Kuhn 1983, 563). On the other hand, the revolutionary science is *not cumulative*. The new scientific pattern means a revision of former theories and practices, and the new one may be unable to solve puzzles that were solved in an earlier phase. This feature of scientific development has become known as "Kuhn-loss" (Kuhn 1962, 99; cfr Toulmin 1970, passim.).

Contrary to the ideas of Sir *Karl Popper*, Kuhn maintains that normal science can only progress on a precondition that there is a strong commitment by the scientific community to their shared theoretical beliefs, values, instruments and techniques (Kuhn 1970, 182). Kuhn also adds metaphysics to the list – that is, the hidden commitments being a part of the foundation of science in general. Kuhn first called this complex totality of shared commitments paradigm, and later, *disciplinary matrix* (Kuhn 1970, 183; Verronen 1986, 58). The unsteadiness in the use of the notion of "paradigm" caused a lot of confusion among Kuhn's critics.

What use are these notions, introduced to explain development in sciences, as regards DSL? This question cannot be answered without first defining certain basic concepts, by means of which the applicability of Kuhn's theory can be evaluated. As far as DSL is concerned, three notions, and thus three factors of change, have to be taken into account:

1. the *world* in which the doctrinal study of law is practised,
2. the concept of *change,* and
3. what we understand *the doctrinal study of law* to mean.

No further conceptual discussion of the first point (i.e. of the world) will be engaged in later on. Instead, the focus will only be on the notions of change and, once again, that of DSL. However, one implicit presupposition still has to be kept in mind. As a civil lawyer, I best know the doctrinal study of law in that area. For this reason, my examples are chosen from civil law studies. The possible, even probable, difference between civil law and, for instance, public law has not been taken into account. Let this reservation be the background on which some few remarks about the concepts of change, development and progress deserve our attention.

By *change*, I mean the transition of the world from state *t1* to state *t2* (von Wright 1968, 37, 1971, 43). In this very sense, the change is an objective concept in which

the *cause* of the change is of no importance. One can, of course, deal with properties like the intensity, speed or size of the transition, and – taking an example – speak about the "big steps of change". These kinds of substantive qualifiers have been left out of this contribution. They are of no help in our search for an answer to the question: Is it conceptually possible to identify the "Kuhnian" changes in DSL?

The notion of *development* has a different status to (mere) change. It is always intertwined with *evaluative* criteria (Aarnio 1997, 247). A *positive* development means that state *t2* is defined with criteria *k1* … *kn* as being "more valuable", or "better" or "greater" than the basic state *t1*. *Negative* "development", for its part, is regression from state *t2* to state *t1* by the same type of qualifiers. Thus development is always *relative* to its starting point (to state *t1*). The problem with this definition lies in the quality of the "more/less valuable than". Man has, without doubt, developed from a producer of primitive stone tools to a user of information technology, but has he developed in the making of a *stone* object? The change is, no doubt, development, if the effectiveness in using the technical tools or the speed of production is adopted as a criterion. If change is separated from criteria like these, it only becomes a transition from one state of affairs to another.

Progress is a subspecies of development (*sensu largo*), but supplemented with additional qualifiers. In this regard, progress is conceptually linked to a certain *final state of affairs*. This characteristic is highlighted in the word "progressive", referring to the strivings of an individual. As far as society is concerned, the most famous theory is, of course, *Karl Marx's* theory on the socialist and communist society. This kind of "progress" will not be discussed in this presentation.

A developed community is not necessarily progressive. This is the case if its state of objectives is not aimed toward development. Therefore, progress is conceptually a matter that is *wanted*. It would be curious to use the word "progressive" to describe a person who is satisfied with the status quo, or even ready to regress. On the other hand, it seems natural to think that we progress as human beings if we develop into "better people" and become, for example, more socially skilful. These qualifiers are characterised by certain criteria that shape ideal states of objectives.

Whether or not the Kuhnian model can be applied to DSL is still a problem (Peczenik 1984c, 141; Wimmer 1979, 37). For the further analysis of change, development and/or progress of DSL, I recall *David Nehrman's* theory on legal interpretation and the filling of gaps (see Chapter 2). In light of his theory, two factors directing the change of law can be identified:

1. the totality of *cultural commitments,* and
2. the totality of commitments that *conceptually* hold legal thought together.

The *cultural commitments* specify, among other things, social relationships (relationships between people, relationships in production, etc.) and the moral code accepted by people. Cultural commitments also define the relative priorities of different conflicts. In a socialist system, the economic conflicts between individuals have been minimised, whereas a market economy relies on competition to dictate the relationship between the strongest and weakest.

Cultural hypotheses also lock down the means of conflict solution that are favoured – that is, use of force, negotiation or consensus. As a matter of fact, cultural commitments also define the *limits of law*, such as the questions that should be solved by a democratic Constitutional State and those that should not. Finally, cultural commitments reach all the way to our conceptions of the origin of law and the role of law in structuring social relationships. These conceptions are historically and locally variable. The Aztecs' conceptions of the origin and role of law were quite different to those found in democratic systems.

When focusing on the European tradition, we should first bring up the influence of Roman law from the group of legal commitments – especially the Institutions formulated by Justinianus' *corpus iuris civilis* and, later on, *jus commune,* which provided the conceptual background for building the modern European law (Van Caenegem 2006, 109). Nevertheless, whatever the historical background, the concept of law is always defined by means of a certain "conceptual culture", and the law of each age is only a sequel of long-standing development started in Antiquity and essentially based on the Judeo-Christian tradition. Taking this for granted, I will come to analyse the change in the doctrinal study of civil law in a more detailed way.

To use *David Nehrman* as an example again, it seems to be evident that the conceptions of the *content* of law always change when the cultural or other commitments that hold law together go through a transformation. As regards the theory on the formation of that issue, As was referred to above, *Kuhn* introduced the concept of *paradigm*. Part of the blame for the concept's varied use must be directed at Kuhn himself. His concept of paradigm was many-sided to begin with.

On one hand, he used the concept to mean a *model*, or a view, of science, On the other hand, the notion referred to *model cases* of research (exemplars). Some well-deserved criticism was directed toward Kuhn for this confusion and, as a result, he later adopted the concept of a "*disciplinary matrix*" specific to each branch of science. As we are about to see, this concept is also fraught with problems, but, nonetheless, it does take the matter forward.

To make a rough generalisation, the disciplinary matrix (later: matrix) is the *consensus on exemplary instances* of scientific research (Kuhn 1970, 23). Kuhn calls the *exemplars of good science* paradigms in the narrow sense of the term. Thus the consensus of a disciplinary matrix is primarily agreement on paradigms as exemplars. Understood in this way, the disciplinary matrix not only explains the normal science but also the crisis of it, as well as the renewal of normal science. It is important to emphasise that, according to Kuhn, there is a *matrix specific to each discipline*.

Following this line of thought, the matrix is a *framework that connects scientists* as a matter of consensus. It explains the fact that relatively trouble-free interaction can be found to exist between scientists of a certain area. The matrix also helps us understand how unanimity of a relatively high degree can be accomplished in the "professional evaluation" of research. From this point of view, the conversation sparked by *Ilkka Niiniluoto* about the hallmarks of science deals with the same things as the Kuhnian matrix. With its help, the scholars are able to reach some degree of consensus on

- what is *science* in general,
- what is scientific research in *any given area*, and
- what is *good scientific research* in a given field.

A "shared" matrix also makes DSL to be the doctrinal study of law, sociology to be sociology, etc. When it comes to law, for example, being conscious of the matrix and articulating it in an understandable way helps to identify (with relative ease) the intellectual interest specific to law, as well as the intellectual point of view that satisfies this interest.

Still, these kinds of general observations of Kuhnian thought would not take us far in the analysis of the change in DSL. Kuhn's theory, meant for the "hard" sciences, has to be submitted to a substantially more detailed analysis than was done before. Only in this way is it possible to get something useful out of it, and only if the basic concepts have been *redefined* is it possible to see what kind of specifications the Kuhnian theory needs in order to be adequate as far as DSL is concerned.

Kuhn's basic idea is that scientific research is a *process* in which the scholars constantly confirm existing truths and reject those that do not fit in with the shared conception of the "truths" of a certain area. Still, Kuhn was not as interested in steady continuity as he was in the *breaks* in the scientific development. Therefore, the focus of Kuhn's analysis is on the *discontinuity* of the development of science.

This means that the notion of *incommensurability* gets a central role in Kuhn's thinking. According to the standard view in the philosophy of science, the judgement of the *epistemic quality* of a scientific theory is based on the use of standard methods for reaching the acceptable evidence of a certain theory. Kuhn rejected this idea. He maintained that the scholars judge the quality and success of a theory by comparing it to a theory that has a *paradigmatic status*. The standards of comparison are not permanent, nor independent of theories. Paradigms and matrixes may change, and the comparison between the "old" and "new" depends on the theories involved in the comparison.

That is why Kuhn emphasised the incommensurability so much. Theories are incommensurable if they do not have a common (shared) measure for use in the comparison. According to Kuhn, there are three types of incommensurability: (1) methodological, (2) observational and (3) semantic. In the first case, there is no common measure due to the lack of methodical tools to compare and evaluate the anomalies. As regards observational incommensurability, the observational evidence can no more provide a common basis on which to compare the theories at issue. Semantic incommensurability means that the language of the theories of different periods is not inter-transable, which makes it impossible to compare those theories with each other.

To shape this, Kuhn draws a picture of the general phases of scientific development. He describes development by taking off from a *pre-paradigmatic* phase, where the intellectual framework that connects the scientists has yet to be stabilised. As time goes on, a certain model of science (paradigm/matrix) is *stabilised* as the

shared horizon of discussion among the scientists. Thus a matrix that dominates all scientific discussion in a certain area is born. Only the thoughts presented within it are "scientific", while the ones that deviate from it are "unscientific".

The dominating matrix is *articulated* in the scientific *theories* of the given field of science. This is one of Kuhn's fundamental findings. According to him, as time goes on, certain facts can no longer "fit" in the frames of the theory. They cannot be explained by the theories approved by the matrix. Normal science is being tested, and this test finds its form in unsolved scientific problems, *anomalies*. Once there are a certain number of anomalies, the dominating matrix gets into a crisis. Up to a certain point, the dominant way of thought can be supported with suitable additional hypotheses, but the increasing pressure of the anomalies will in time give rise to a need to revise the matrix itself. As was referred to above, a *crisis of science* is at hand (Kuhn 1970, 12). This can be solved in one of three ways:

1. The anomalies prove to be *apparent*, so in the end they can be explained on the basis of the dominant matrix, possibly by making specifications to it.
2. The situation that seems to be anomalous is *eliminated* from science, such as "unscientific", and is thus placed into waiting for better times.
3. The new matrix is victorious, giving rise to a *rupture* or *change* in the scientific model, or what Kuhn calls a scientific revolution.

According to *Veli Verronen* (Verronen 1986, 59, 160; Aarnio 1981, 99), the incommensurability of two matrices *means* the following:

(1) The world described by matrix M1 is formed of *different entities* and is dominated by conformities that deal with different things than the world represented by matrix M2.
(2) The *normal science* defined on the basis of matrix M1 is different from the science dominated by matrix M2.
(3) The *facts* interpreted on the basis of matrix M1 are different from those interpreted by matrix M2.

Incommensurability can be described with these conceptual tools and with the help of the example of two different puzzles, used by Verronen. Puzzle *P1* cannot be assembled from the same pieces as puzzle *P2*, even if some of the pieces are similar. The pieces left over from the puzzle *P1* (the anomalies) do fit into puzzle *P2*; in this case, the puzzle itself (its basic character) must be changed in order to match the new system of pieces. What is integral in this is that the switching of puzzles, the change in thought, can and will only happen when there are a certain, relevant number of "unexplained" pieces left outside the former puzzle *P1*. The following scheme, illustrating the change and rupture of science (scientific revolution), encapsulates the integral parts of Kuhn's thoughts in relation to the dimension of time, the status of the theory's development and the formation of the scientific community.

Scientific community	Period	Level of theory
Pre-paradigmatic phase	An unsystematic collection of facts, an unclear way of recognising scientific problems	Competing schools
The Matrix	Model cases (exemplars)	The beginning of professional research
Normal science	The solving of problems	Textbooks, university disciplines
Anomalies	Difficulty of prediction	Trust in the matrix lost
Crisis	The matrix collapses	Conflicts and different conceptions
Revolution	A new matrix is born, new stabilisation of the scientific publications, new matrix, etc.	The scientific community splits

Kuhn and the Social Sciences

There has been intensive discussion about the possibility of applying the Kuhnian model to the human and social sciences. Kuhn himself did not promote an extension of his views to other than natural sciences. According to him, the hermeneutic re-interpretation is the essence of the human and social sciences. They are permanently searching for a deeper understanding of their field. Actually, they *are* interpretative and thus hermeneutic sciences. Although the natural sciences have to interpret their findings, that interpretation has a different role. An established interpretation (self-understanding) is a *precondition* of the natural sciences, and the re-interpretation is a *result* of a scientific revolution, whereas, due to the simple fact that the social and political systems are changing in a way that calls for new interpretations, the social and human sciences are always at the stage of re-interpretation (Kuhn 1991, 17, Bird 21).

Notwithstanding Kuhn's criticism, his model has some advantages as far as the social and human sciences are concerned. The main reason is that the model permits a quite liberal conception of what science is compared to the standard picture. Kuhn also rejected the idea of the decisive role of rules as determining scientific outcomes. This view leaves room for different factors external to science, making it possible to explain the development of other branches of science and not just the natural sciences (Bird 19).

It seems to me that Kuhn underestimated the stable features of the human and social sciences. It is widely accepted that the target of those sciences, and that of DSL, is changing all the time. As we have seen before, this does not mean that DSL loses its structural features as a science. Therefore, the fundamental question does not concern the applicability of the Kuhnian model *in general* so much as the possibility (and necessity) of re-interpreting Kuhn's basic concepts so that they can be applied to DSL. For instance, the idea of a matrix seems to be useful for the needs

of DSL, whereas a *direct application* of the Kuhnian notion of a matrix would go against Kuhn's original thoughts. This is why, as regards DSL, it is important to first specify the *notion* of the matrix applicable to DSL, and, second, to identify the *theory* articulated in the matrix of DSL. Let us begin with the notion of the matrix. In its Kuhnian sense, the matrix is comprised of the following elements:

1. *Symbolic generalisations* – that is, ways of verbal conceptualisations of the necessary elements needed by the matrix;
2. a communal (not solely individual) commitment to the *structuring models* of a certain branch of science;
3. a similar commitment to the *values holding the scientific community together*, as well as to the norms and instructions that direct science, and
4. shared scientific exemplars – that is, *paradigmatic solutions* that highlight the way normal science solves problems that may appear (Aarnio 1997, 253).

The matrix is elastic, but without limits and *without any "paradigmatic" commitments* the discipline at hand would not be possible. In this sense, the matrix is the "normative" foundation of every discipline. Nonetheless, it is obvious that the more specified the matrix of a certain discipline becomes, the more vulnerable it is to "extra-scientific" critique. It can also easily be worn out, regardless of whether a replacement matrix is on its way.

Matrix of DSL

Following these ideas, what could be the *matrix of DSL*? The question is easy to pose, but an answer is hard to find. If we try to grasp what, in general, DSL is in comparison with other disciplines near it, serious consideration must be given to at least the following *special characteristics*:

1. The obligatory subject matter of DSL is the *valid statutes* of law. Thus DSL is an typical institution of the statutory law.
2. *The function of DSL* is to interpret *the rules and principles* belonging to the statutory law-based legal order. The matrix should therefore include a hypothesis on the way in which DSL works compared with other disciplines also dealing with normative material.
3. The societal function of DSL is based on the division of labour between different social sciences. It reflects an interpretative, *not empirical*, interest as regards the law, and thus satisfies the interest in knowing the interpreted content T of a statute S at the time t1, although the doctrinal study not only interprets the statutes but also systematises the normative material.
4. DSL is a *non-positivist discipline* due to its dual nature. The foundation of DSL includes both an ideal and a real dimension.
5. The non-positivistic thesis, which connects law and morals, is essential as far as the legal reasoning is concerned. In hard cases, there cannot be purely

value-neutral choices between the alternative meaning candidates. Therefore, the matrix of DSL includes the presumption *that* values (and moral principles) have a role in legal discourse.

6. The *linguistic-conceptual commitments* of DSL are the core of the interpretative studies, which are always based on a tradition like, in the case of DSL, *ius commune*. This common European legal inheritance transfers the traditions of civil law to the modern law in Europe. *Ius commune* is the basis of the *systematic structure* given to the legal order.
7. *Commitments concerning the notion, role and normative status of the sources of law*. The scholars as well as the judges are united by similar categories of arguments, and the degree to which they are bound to them. The sources of law are the necessary material with which the separation between law and non-law is made. If there are no acceptable sources of law to present in support of the interpretation, it is not a legal one.
8. The DSL matrix also includes commitments as regards the *method of legal reasoning*. DSL belongs to the family of interpretative sciences, and has a special place in that family. The task of the doctrinal study is to produce reasoning that convinces the audience; its method is therefore discursive as to its nature.

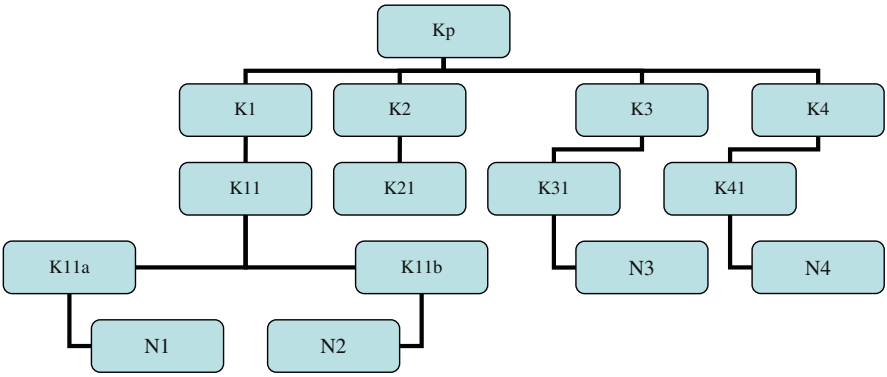
The formulation of the commitments included in the matrix is not exhaustive. For instance, the significance of the linguistic-conceptual commitments should have been described in more detail. Without linguistic-conceptual commitments there can be no talk of legal thought based on such systems. It is exactly this common conceptual basis that makes it possible to *identify a legal problem*, as well as to chart the possible *interpretative alternatives*. Because of this, it is not possible to practise credible DSL or adjudication separated from the linguistic-conceptual commitments (the system).

Let us take the next step. The DSL matrix is articulated as the *theories* used in the studies. Notwithstanding the substantial analysis of those theories, and without repeating what has already been said about the theories in law, the following elements can be listed:

1. *Norm propositions* that, first, define a *rule of recognition*, that is – express (often implicitly) which norms are valid – and second, that demonstrate the *content* of the legal order pertaining to a certain area or problem. This dual function is a consequence of theories being cognitive wholes that help to recognise the law. If a theory cannot give institutional support to those norms that are maintained to define the content of law, the theory does not have any role in the legal discourse.
2. *Fact propositions* define the states of affairs behind the theory. For example, the theory of private ownership presupposes that there are certain markets and means of payment, as well as other necessary preconditions, for the exchange of commodities. They provide a foundation for the political stand toward ownership adopted in society, without solving this matter in any simple way. In drawing this border, one also needs tools to prioritise different concepts – that is, one needs value statements.

3. *Value statements* have a status of different strengths in different theories. To put bluntly, they can either express *intrinsic* or *instrumental values*. As far as the first group is concerned, they articulate what is good for human beings in general. In this respect, they are *prima facie* values. In DSL, the instrumental values, not the intrinsic ones, are the normal tools of scholars and judges. The instrumental values are bound up with the question of the usability of the theory in solving certain legal problems. For example: The modern theory of property rights is *good* if, and only if, it guarantees the dynamics of society.

The conceptual framework, special for every case, gives the theory its structure as a theory of DSL. The theory of ownership and the theory of contract are examples of conceptual frameworks. To put it schematically, the structure of those theories is similar to the structure of any kind of scientific theory:



The used general concept (Kp; for example, right to property) is organised by a certain group of sub-concepts (K1–K4; the owner's primary right, competence and dynamic protection of different kinds). The sub-concepts (k11, etc.), in turn, become more accurate with the following level, and this process continues until a suitable conceptual accuracy is reached for describing the system of norms. The concepts of the lowest level in the hierarchy refer to a certain norm (N1–N4) or a group of norms, where a norm can be a rule or a principle, depending on the way the mentioned phenomena have been regulated in a given area. Following the example, the norms might deal with the owner's vindicative protection, the securing of possession, registration of title to a property, mortgage, assignment competency or different forms of protection of exchange.

The instruments sketched above make it possible for us to sum up the definition of a theory used by the doctrinal study of law:

> Def: The theory used in DSL consists of a set of norms, concepts and propositions, and of value statements and moral principles, with the help of which it is possible to identify the legal problem and frame the number of legally relevant interpretation alternatives for the final interpretative choice.

Theoretical and Practical DSL

As we saw before, the theories are tools for systematising norms (formulating and reformulating a system), and as such they belong to the level of *theoretical* DSL In this sense, theories, and especially them, serve the economy of thinking in providing an internally cohesive way to describe a certain set of legal provisions in a general form. From this point of view, the *change of the doctrinal study of law* seems to concentrate on the transition from theory *T1* to theory *T2*. Let us now have a closer look at this hypothesis (Pöyhönen 111).

The theoretical part of DSL deals with the systemic connections between norms and concepts, whereas the function of the *practical* part of DSL concerns the interpretation of the statutes, and that of the other legal source material. The practical part of DSL introduces information and/or recommendations as far as the content of legal order is concerned. In this regard, the practical part of DSL is always interpretative as to its nature.

The theoretical and the practical parts of DSL are in constant *interplay with each other*. Every legal interpretation is produced *inside* a certain theoretical (conceptual) framework. This, in its turn, is formulated by the theoretical DSL. In a puzzle case, where the conceptual frame cannot give support to an acceptable interpretation, there is a need to more closely *redefine* the necessary conceptual background. This is a typical case in the phase of normal science. On the other hand, a new conceptual framework normally gives rise to a new set of practical interpretations. That is what is meant by the term "interplay".

The norms covered by the theory might be numerous, inaccurate by expression or contradictory, thus giving rise to what *Alchourrón* and *Bulygin* refer to as a gap in knowledge. In some cases, the norms might be strained by a normative gap – that is, the system does not contain a valid legal norm at all as regards the problem at issue. As far as the elimination of contradiction is concerned, it must be taken into account that the system of norms cannot in itself necessarily be contradictory, as has been convincingly shown by *Georg Henrik von Wright* (von Wright 1985, 263). The question may also be about two (or more) mutually contradictory systems, and the elimination of contradiction thus always means selecting a certain system of norms and rejecting another.

An interpretation using the theories formulated by the theoretical DSL strives to specify inaccuracies, block the normative gaps and eliminate contradictions. This is where the law-creating, or constitutive nature of DSL becomes clear. The same phenomenon has been characterised from the perspective of judges in *Richterrecht* – that is, the law created by the judges. DSL performs the same task as judges by presenting reasoned interpretative recommendations, even though these recommendations do not, of course, have the same normative status as legal decisions. They are only permitted sources of law.

Change – How and When?

As was pointed out above, the change in the doctrinal study of law concentrates on the transition from a certain theory (T1) to another one (T2). The theories T1 and T2, for their part, are articulations of a certain matrix (M1/M2). It logically results from these starting points that the change in DSL, if there is something like that, is the *change in the matrix*. This can happen in two ways.

In a change *external* to the matrix, the matter is about the matrix's change into something else. An *internal* change is a new interpretation given to the same matrix. When the whole matrix changes, the whole "character" of DSL changes along with it. An example of this kind of change would be the doctrinal study of law's abandonment of interpretative (and weakly normative) study and reorientation toward the regularities studies by the empirical social sciences. This change could be roughly described as the transition of the doctrinal study of law into (empirical) sociology.

A change like this is foreign to the history of DSL, and the reason for this is quite clear. It is the social *interest of knowledge* that keeps DSL as the doctrinal study of law. If the doctrinal study of law gives up its task as an interpretative study, some other discipline will quickly arrive and assume this very task for itself. This is because the interest in knowing something of the content of legal norms does not disappear from society merely through the theoretical redefinition of the task of the doctrinal study of law. There has to be some discipline that takes care of the interest of knowledge all the time and in every legal order.

For instance, the so-called interest-based study of law (Intressenjurisprudenz) defended by *Rudolf von Ihering* was not revolutionary in this sense. It did not cause a radical transformation of DSL, and would not have done had it become effective. Only the arguments used by the study would have been changed. It is also possible that the interest-based study of law would not have had the strength to change the thinking internal to the matrix. It was in any case left as a theoretical model without any clear practical applications, even though it has to be said that after Ihering, different societal interests have made their way into the group of arguments using the doctrinal study of law. The matrix itself remained an interpretative one.

The same goes for the application of Scandinavian realism formulated by *Alf Ross* in his theory of prediction. It had no effect on changing the legal research. *If* DSL really had been able to have followed Ross' model and still remain as *the doctrinal study of law*, it could have been said that the matrix of DSL had changed. DSL would have changed from its traditional form of giving recommendations into an empirical science that predicts the behaviour of officials. However, the Rossian theory of prediction was not of that kind and proved to be a hermeneutical application of the interpretation of law.

In normal science, the key theories, instruments and values, as well as the metaphysical assumptions, are kept fixed. As such, they permit a cumulative process of puzzle-solving cases. In the phase of scientific revolution, the disciplinary matrix undergoes a revision. Knowing this, one can ask whether *Jörgen Dalberg-Larsen's* claims about DSL not going through a *change of the matrix* at all in its history are true.

Let us look at another dimension of the (possible) change – that is, at the notion of *paradigm*. When speaking about exemplary instances of good scientific research, Kuhn had in mind the notion of paradigm in the narrow sense. The consensus of a disciplinary matrix is basically agreement on *paradigms as exemplars*. In this sense, the European law – at least that of Nordic countries – has gone through some "revolutionary" changes from one phase to another.

In this sense, the *internal* change in the matrix M seems to be more apparent than the external one. As regards the internal change, the question is mainly about the *change of interpretations given to the dominant matrix*. Let us assume that an interpretation *M1* of the matrix M represents DSL at a time *t1*. Following from this, the traditional theory of property rights *T1* is the articulation of *M1*, and further, this way of dealing with the property law becomes normal science. *T1* makes certain questions possible, and provides an answer to those legal problems of property law that occur in society at the time *t1*. When it comes to property law, DSL can only pose the questions the theory *T1* allows it to ask. Although the theory T1 may slowly change during the years, the matrix M itself remains unchanged. From a doctrinal-historical viewpoint, this was the case in Finland all the way up to the years following World War II.

Still, without the lawyers seeing it at first, the theory *T1* began, due to the external factors, a slow descent into a *phase of rupture*. A paradigmatic exemplar, which caused difficult problems, was the part-exchange trade: the seller was no longer the owner, but the buyer had not yet acquired a full right of ownership. An interim state had appeared, for which the theory *T1* no longer had a puzzle-solving capacity. Societal changes had given rise to an *anomaly* from the traditional theory point of view. In time, other anomalies appeared as well, until the situation had come to a point where it had to be realised that the theory *T1* no longer functioned in an adequate fashion. It did not satisfy the interest for knowledge that had appeared through the change in societal circumstances.

In this setting, "a new theory of ownership had to become". The reason for that was external to the doctrine (theory) T1 and could thus be found in society, not in the doctrine itseself. New societal circumstances, first of all the rapid growth in the economy, caused pressure for change in DSL too. Lawyers needed tools to answer totally *new types of questions*. In this sense, there was a "social demand" for the new theory of property rights – that is, for the theory *T2*. The articulation of the matrix had to be changed.

The theory *T2* gave an answer to all the legal problems that had been born in the framework of theory *T1*, but, in addition to this, theory *T2* also answered new questions and could remove the anomalies of theory *T1*. In the process of change that is often slow and indiscernible in the phase of normal science, theoretical and practical DSL work in interaction. Theoretical DSL provides the structure for thought while practical studies find the adequate applications. The theoretical structure might sometimes have to be adjusted on the basis of the experiences of practical interpretative situations. Still, this can no longer be done at some point, which gives rise to the first symptoms of the difficulties in the matrix. *The time has come for a*

new matrix. The paradigmatic exemplars of, for instance, the dynamics of ownership, are here the core of the new matrix. Historically, all this happened with matrix *M1* in Finland after World War II.

DSL changed from the interpretation M1 of the basic matrix M – that is, from the matrix *M1* into another interpretation (M2) of the same matrix. New paradigmatic exemplars finally established the status of *M2*. The new exemplars renewed legal thought, for *M2* made *new questions* possible, and these questions paved the way for *new answers*. The world is full of answers and one must only ask the right questions. Under the dominance of *M1* it was not possible to pose such questions as could be asked under *M2*. Some questions, like the ones about the interim state in part-exchange trade, could not even be *thought* in the first place under the old theory and within the old interpretation M1. As far as the modern Finnish civil law is concerned, *T2* could do that; therefore, it now represents a *normal-scientific* approach to property law. In different fields of law one can identify numerous examples of a change of the prevalent matrix. As a matter of fact, the history of civil law is full of such changes (Aarnio 1997, 256).

Every theory and every matrix have their limits. As was referred to above, they are like lenses that allow one to see only to the extent allowed by their grinding and surface area. We cannot go outside the theory – i.e., outside our thoughts at a specific moment in time.

In using concepts like this, the change in DSL seems to be connected to the change in the *systematisation* of legal material. The systematisations are comprised of the theories that form the framework "through" which the legal order is analysed. A new totality of theories, a new way of systematising legal norms, is more adequate than the previous, because the solving power is greater than before. In this setting, a far greater number of legal problems can be conceptualised. And this is the case because the conceptual apparatus of the new theory is finer and more efficient when it comes to economy of thought and richer by its content in terms of the answers it provides.

Thus the DSL both changes and remains unchanged, depending on whether the focus is on the *matrix as a whole* or on the *interpretation* of this matrix. DSL as an interpretative study has preserved the essential features, at least since the days of David Nehrmann. Scholars are still committed to the basic tasks of DSL. On the other hand, it is possible to identify phases in which the renewal of *interpretation of the matrix* is and has empirically been necessary due to the lacking puzzle-solving capacity of the prevalent thought, as was the case in the Finnish civil law after the Second World War. Slowly, the new interpretation of the matrix is getting the status of a normal science and the scholars are committing themselves to the new key theories, as well as applications of those theories concerning paradigmatic exemplars of the time.

From a doctrinal-historical point of view, the processes of change are challenging to recognise because they often concern times of intellectual rupture. These ages vary depending on the area of law and the point of time in question. That is why it is not possible to present a *general*, empirically verifiable picture of the changes of or

in DSL as such. In DSL, taking it broadly, there are simultaneously both enduring and changing elements.

Change is like a kaleidoscope, where the generalisation of a certain view to cover all of the doctrinal study of law irreversibly distorts the whole image of the process of change.

Another metaphor aims at the same objective and, in my opinion, does a better job than the previous one. DSL as a whole is a constantly changing *totality of language-games*. Some of the games are left out of use while others replace them, but at any given moment it is impossible to say that *one game* represents the *whole* of DSL. The state of the doctrinal study of law at different times can be *seen* in the language-games played in its name, even though this state cannot be *expressed* conclusively.

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