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Law and Philosophy Library 8

On Law and Reason

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norm, belonging to a certain legal order, the answer can only consist in a reference to the *Grundnorm* of this legal order, namely in the statement that this norm has been enacted in accordance with the *Grundnorm*" (Kelsen 1960, 202).

In this manner, Kelsen succeeded to answer the natural-law question, Why is the law binding?, and yet to reject any analytic connection between law and morals.

But how can a mere presupposition constitute a ground for legal validity?

In my opinion, one can regard the *Grundnorm* as a conclusion derived from two premises, the first stating what the lawyers have a disposition to regard as valid law, second explaining the meaning of the word "valid". One can imagine the following inference.

Premise 1, stating what the lawyers have a disposition to regard as valid law	The constitution is valid law
Premise 2, a definition of the concept "valid"	"Valid" means "such that one ought to observe it"
Conclusion - the *Grundnorm*	One ought to observe the constitution

To put it simply: "The constitution ought to be observed because we lawyers have a disposition to think that it ought to be observed".

One can regard this disposition of the lawyers as identical with the *existence* of the social norm "the constitution ought to be observed". Consequently, the *Grundnorm* can be said to exist in the legal practice in which it is presupposed; cf. Peczenik 1981, 294.

If this interpretation is accepted, Kelsen's views become a special case of von Wright's theory of validity (cf. section 5.1.3 supra): The validity of the constitution is not validity relative to the *validity* of another norm. It is validity relative to the *existence* of another norm, namely the social norm "the constitution ought to be observed".

Yet, one can deny that the existence of *this* social norm is sufficient for derivation of legal validity of the constitution. One can ask the question: To be sure, the lawyers think that the constitution ought to be observed, but ought it, really, to be observed? Within the - contextually sufficient - legal reasoning, the latter question is meaningless, since one takes for granted that the constitution ought to be observed. But within a deep justification of legal reasoning, the question is vital.

One can answer it, e.g., by stating that positive law is valid only if its content corresponds to natural law. A better answer is, in my opinion, this: The constitution ought to be observed because it is a necessary condition for coherence of the legal order. *Chaos* would occur in a society in which no coherent legal order existed. Chaos is morally worse than order, provided that order is not extremely immoral; *see* section 5.8.2 infra.

Kelsen did not solve the problem of the deep justification of the law. He has merely pointed out that the problem not a *legal* one.

Moreover, though Kelsen admitted that morality causally affects the content, interpretation and efficacy of the law, he regarded moral judgments as exceeding the limits of the pure theory of law. In consequence, evaluative interpretation of law was uninteresting for a "pure" theorist. Practical lawyers were thus left alone, to

cope with such problems without any theoretical aid. The hypothesis is plausible that such a disinterest must cause a lesser degree of rationality of legal interpretation, thus contradicting the postulate of rationality, expressed in section 5.1.1 supra. Paradoxically, it may also cause a lesser degree of fixity of the law. Since the pure theory of law emphasises the role of will and fiat in the process of legislation, a Kelsenian legislator would not be particularly inclined to submit his judgment to rational testing. He would rather freely change the law and thus make it less fixed.

5.3.2 Herbert Hart's Theory of Law

Herbert Hart has followed Kelsen in many respects.

According to Hart, the law consists of social rules, written or not. A custom to obey rules differs from a mere custom to behave in a certain manner. To obey rules presupposes that one also has a certain attitude of acceptance. This does not mean that one continually experiences emotions, "analogous to those of restriction or compulsion… There is no contradiction in saying that people accept certain rules but experience no such feelings of compulsion. What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'" (Hart 1961, 56).

One can regard legal rules from the external and the internal point of view, that is, "either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct" (Hart 1961, 86).

The law differs from other social rules. It thus consists of primary and secondary rules. "(W)hile primary rules are concerned with the actions that individuals must or must not do, the secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined" (Hart 1961, 92). Hart makes a distinction between three kinds of secondary rules. The rules of *adjudication* determine the procedure of conclusive ascertaining whether the primary rules have been violated. The rules of *change* determine the procedure of changing the primary rules. The *rule of recognition*, finally, prescribes the criteria by which the validity of other rules of the system is assessed (cf. Hart 1961, 92 ff.).

This view resembles Kelsen's hierarchy of legal norms. Both Kelsen and Hart accept the idea that the validity of a legal rule depends on its having been made in accordance with higher rules.

Ronald Dworkin, on the other hand, admits two kinds of valid legal norms. Legal rules are valid because some competent institution enacted them. Legal principles must to a high degree simultaneously fulfil two demands. They must conform to "a sense of appropriateness developed in the profession and the public over time".

At the same time, they must fit statutes, judicial decisions and their "institutional history"; cf. section 5.9 infra.

According to Hart, most parts of the rule of recognition are "not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers" (Hart 1961, 98).

The rule of recognition is similar to Kelsen's *Grundnorm*. To be sure, Hart has claimed, what follows: "The question whether a rule of recognition exists and what its content is…, is regarded… as an empirical, though complex, question of fact. This is true even though… a lawyer… does not *explicitly state* but *tacitly presupposes* the fact that the rule of recognition… exists as the accepted rule of recognition of the system… Kelsen's terminology classifying the basic norm as a… 'postulated ultimate rule'… obscures the point stressed in this book, viz. that the question what criteria of legal validity in any legal system are is a question of fact" (Hart 1961, 245). But Hart has also claimed that the lawyers cognise the law from internal point of view, "and that is a point of view which regards the law as a body of standards that ought to be complied with. Does it not follow that propositions about legal rights, duties, validity, and so on, express conclusions about what ought to be done?" But how can this be if the lawyer does only study facts and does not assume the *Grundnorm*?

At the same time, Hart's "question of fact" is the same in Kelsen's theory. It is a *fact* that the lawyers assume the *Grundnorm*. In other words, it is a fact that their use of language and their practice of reasoning, making decisions etc. *show* that they (1) have a disposition to regard the constitution as valid, and (2) understand the word "valid law" as "the law one ought to observe".

The difference is perhaps this only. The *Grundnorm* states precisely what all the lawyers presuppose. The presupposition is therefore abstract and formal; it has always the same content, that is, one ought to observe the constitution, whatever it may contain. Hart tends, on the other hand, to give his "rule of recognition" a richer content which may vary from one legal order to another. But this makes Hart's theory open to the following objection, expressed by *Summers*: "Hart has claimed that 'at the foundations' of a modern legal system we find one accepted rule of recognition (or a few such rules) specifying all criteria of valid law. This vastly oversimplifies the actual phenomena. Instead, we find many particular tests of validity" (Summers 1985, 71) and these are "fluid and changing" (id., 75).; cf. section 5.8 infra.

Hart's theory also resembles Kelsen's views concerning the separation of law and morals.

The following ideas of Hart are, however, more original. Any moral rule has the following characteristics: 1) It is regarded as something of great importance. 2) It has evolved spontaneously, and cannot be brought into being or changed by deliberate enactment. 3) It makes moral blame dependent on intent or negligence of the person blamed. 4) Finally, it is sanctioned by criticism of immoral actions, not by force. Hart has also made a distinction between the commonly accepted morality and a critical morality of an individual. The latter "must satisfy two formal conditions, one of rationality and the other of generality", the former may in some cases fail to do it. The latter may thus constitute the basis of criticising the former.

Critical morality also "has its private aspect, shown in the individual's recognition of ideals which he need not either share with others or regard as a source of criticism of others… Lives may be ruled by dedication to the pursuit of heroic, romantic, aesthetic or scholarly ideals…" (Hart 1961, 179).

No doubt, morality causally affects the content, interpretation and efficacy of the law. But according to Hart, no necessary conceptual link exists between the law and morality. The basis of legal validity consists in the factual existence of the social practice determining the rule of recognition, not in moral values. The content of the law thus *can* be immoral. In this connection, Hart has pointed out, what follows.

1. When such normative words as "ought to" are used in the law, they need not carry any moral judgment whatever.

"Those who accept the authority of a legal system look upon it from the internal point of view, and express their sense of its requirements in internal statements couched in the normative language which is common to both law and morals: 'I (You) ought', 'I (he) must', 'I (they) have an obligation'. Yet they are not thereby committed to a *moral* judgment, that it is morally right to do what the law requires" (Hart 1961, 199).

2. The conceptual separation of law and morals makes it possible to criticise the law from the moral point of view.

"What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny" (Hart 1961, 206).

By the way, Kelsen (1960, 68) expressed a similar view.

One may, however, criticise Hart's theory on the following grounds.

1. "As the common terminology of legal and moral discourse indicates, the elements of moral and legal reasoning share a common framework even though they have considerable differences of internal detail. This means exactly that there is at least one necessary conceptual link between the legal and the moral, namely that legal standards and moral standards both belong within the genus of practical reasons for action, whatever be their weight as such" (MacCormick 1981, 161).

This fact causes a tendency to mutual adaptation of the law and morality. No doubt, one can *say* "from the legal point of view, I ought to pay tax amounting to 102 % of my income, yet from the moral point of view I ought not to do it". One cannot, however, both pay and not to pay the tax. The conflicting demands create a predicament which one must solve, either by assuming a priority order between the legal and moral norms in question or by reinterpreting, modifying and thus reconciling the moral and legal claims. A natural result of this harmonisation is to permit a minimum of morality to serve as a criterion of legal validity, according to the maxim "extremely immoral 'law' is no valid law"; cf. section 5.8.2 infra.

2. This fact does not exclude the possibility of moral scrutiny of law. One may express a critical attitude towards valid law in the following ways.

   a) One may criticise a particular legal decision, without denying that the legal system as a whole is morally acceptable. In this way, one may criticise Swedish tax laws, without doubting that the Swedish law as a whole is fairly good.
   b) One may also criticise a great number of legal norms and conclude that the whole legal order is objectionable, yet valid. In this manner, one may criticise South African or Soviet law, still without expressing doubts as regard its legal validity.
   c) Finally, one may criticise the legal system as a whole in a particularly severe way, i.e., as extremely and extensively immoral. First such an extremely severe criticism of, e.g., Hitler's or Pol Pot's "law" may lead one to denying its validity.

Hart's theory resembles Kelsen's views concerning another problem, too, namely judicial discretion. His starting point is that the law is vague, it has an "open texture".

"Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*… Natural languages like English are when so used irreducibly open textured" (Hart 1961, 124–125).

This vagueness is a result of two factors, the discussed properties of the language and the functions of the law.

"In fact all systems… compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for latter settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case" (Hart 1961, 127).

The vagueness of the law makes judicial discretion necessary.

"The open texture of law leaves to courts a law-creating power… Whatever courts decide…, stands till altered by legislation; and over the interpretation of that, courts will again have the same last authoritative voice" (Hart 1961, 141).

In this connection, one may notice that *Dworkin* rejects the idea of "strong" judicial discretion. He recognises vagueness of the legal language, yet insists that a perfect judge, bound by the enacted law, can interpret it in the light of legal principles together with his moral judgment, and thus find the one right answer to all legal questions. The enactment together with the principles give the judge a precise directive. The enactment must thus be precise in the context of the principles. In other words, Dworkin claims that almost all legal norms are contextually precise, though they may be lexically vague; cf. section 5.9.3 infra.

In my opinion, the truth lies between Hart's and Dworkin's positions. Dworkin is right that the judge is bound, not only by enacted rules but also by results of

coherent thinking which involves weighing and balancing of the enacted law and one's own moral evaluations. Hart, on the other hand, is right when implying that such an act of rational weighing and balancing cannot generate the one right answer to all difficult legal questions. Sooner or later, discretion is necessary. The main reason for it is that weighing and balancing ultimately are based on one's will and feelings, cf. section 2.4.5 supra. Yet, the role of feelings is restricted. They may govern a choice between highly coherent norm- and value-systems but they cannot justify a a random cluster of incoherent solutions of particular cases.

In other words, Hart's theory plays down the postulate of rationality of practical reasoning in the law. Having the "law-creating power" to make "official choice" a judge might find it easy to follow rather his moral intuitions than the bounds of reason. This would also lower the degree of fixity of the law.

Although Hart certainly is a legal positivist, let me end this presentation with a brief discussion of his natural-law theory (Hart 1961, 189 ff). In fact, Hart recognises that important reasons exist, given survival as an aim, for the conclusion that both law and morals should include the following "minimum content of natural law". (a) Human vulnerability is a reason for the norm "Thou shalt not kill". (b) Approximate equality of people "makes obvious the necessity for a system of mutual forbearance and compromise which is the base of both legal and moral obligation". (c) Limited altruism of people, the fact that they occupy an intermediate position between angels and devils, create both the necessity of rules and prospect of their efficacy. (d) Limited resources justify the institution of property "(though not necessarily individual property"; Hart 1961, 192). (e) Limited understanding and strength of will create necessity of sanctions.

When a positivist finds it necessary to discuss such problems, doesn't it show that the positivistic jacket is too tight for his juristic body?

5.3.3 The Institutionalist Legal Positivism

Neil MacCormick and *Ota Weinberger* have elaborated a more moderate version of Legal Positivism. Though MacCormick's "roots" include Hart while Weinberger's starting points are closer to Kelsen, their theories resemble each other to the extent that has enabled them to publish a common book.

An important inspiration for both theorists has been provided by *Anscombe's* and *Searle's* theory of institutional facts (cf. Anscombe 1958, 69–72 and Searle 1969, 50–53; cf. MacCormick and Weinberger 1986, 9 ff.). Institutional facts are products of human activity, such as state, law, duties, rights, money, calender, contracts, promises, marriage, citizenship, knowledge, science, culture, literature, etc. If one intends to understand the world in which people perform their actions, one must have information about institutional facts.

Institutional facts differ from brute facts, such as the fact that Peter is now running from Malmö to Lund. The existence of an institutional fact depends partly on a brute fact, partly on norms, deciding, e.g., that Peter is participating in a marathon

competition. Disregarding the relevant norms one cannot understand the difference between a valid thousand-kronor bill and forged money either. Such norms decide, e.g., who counts as an owner of a thing and what competences the owner has. They also decide what counts as an establishment of a court, what powers a court has and under what circumstances a judge once appointed may or must demit his office (cf. MacCormick 1978, 57).

By the way, the best analysis of this difference between institutional and brute facts has been provided by Legal Realists (cf. section 5.5 infra). For example, according to *Hägerström*, ownership is not identical with the use of force against a person who infringes upon that right because the right comes first and the use of force later (if, for instance, someone has stolen the property). Nor is it identical with the fact that the owner uses the property. (The owner can lose it, and a thief can use it). Neither is ownership identical with the legal rules governing ownership. The language itself argues against any such identification. One may claim that one *has* the right of ownership, but not that one *has* legal rules.

Cf. Hägerström 1953, 322 ff. and Olivecrona 1959, 127 ff. See also Olivecrona 1939, 75 ff. and 1971, 182 ff. and 186 ff. Ross 1958, 172; Ekelöf 1952, 546 ff.

However, the Realists concluded that there are no such facts as ownership, whereas the Institutional Positivists recognise them as a special class of facts.

Knowledge of institutional facts requires an internal point of view.

MacCormick has improved Hart's theory of the internal point of view. Hart pointed out that a lawyer views legal norms "as a member of the group which accepts and uses them as guides to conduct" (Hart 1961, 86). MacCormick has added the following distinction. There is "cognitively internal" point of view, from which an observer appreciates and understands another person's conduct "in terms of the standards which are being used by the agent as guiding standards: that is sufficient for an understanding of norms and the normative. But it is parasitic on - because it presupposes - the 'volitionally internal' point of view: the point of view an agent, who… has a volitional commitment to observance" (MacCormick 1978, 292) of these standards.

Institutional facts exist in time, e.g., a contract can be valid one year. They are, however, difficult to locate in space. Such questions as, How bread, high and long the contract between John and Peter is?, have no plausible meaning. Weinberger has concluded that institutional facts are "ideal", existing in time but not in space, while brute facts are "material", extant both in time and space. Though ideal, institutional facts are "real", since they can *cause* brute facts. A contract can thus affect human behaviour and through this a performance of a machine etc. On the other hand, institutional facts also can enter logical relations. A contract can thus have certain logical implications (cf., e.g., Weinberger 1979, 45).

To explain and understand brute facts, one needs theories; physics thus explains the movement of the planets etc. To explain and understand institutional facts, on the other hand, one also needs practical statements, first of all norms, and practical concepts, such as "intention", "action" and "value" (cf. Weinberger's introduction to MacCormick and Weinberger 1985, 17).

To understand a chess game one must both know the rules of chess and understand the players' plans, strength of their moves etc.

Let me add that one grasps institutional facts through stating some brute facts and interpreting these in the light of some practical statements and concepts. One can thus imagine an inference from a set of premises including a description of a brute fact to a conclusion about an institutional fact. The description of a brute fact thus supports the conclusion about an institutional fact. Such an inference is a jump, reasonable if the required additional premises are reasonable.

Norms constitute an important class of institutional facts. But MacCormick's and Weinberger's theory of law "expands the frontiers of the legal beyond what has traditionally been dealt with by positivists" (MacCormick's introduction to MacCormick and Weinberger 1986, 8). They thus assume that the *positive law* includes not only legal norms but also institutional facts these determine, such as state, rights, legal dogmatics etc. Moreover, the class of legal norms includes not only explicitly enacted rules but also principles and goal-expressing norms, supporting and justifying the rules (MacCormick's introduction to MacCormick and Weinberger 1986, 19).

The institutional positivists approve of the positivistic separation of law and morals, yet express this view in a very moderate manner.

1. To be sure, they do not share the conviction of, *inter alia*, advocates of Natural Law as regards the conceptual relation between the law and objective values. MacCormick and Weinberger thus "do not think the normativity of law presupposes or is necessarily rooted in objective values or immanent principles of right" (MacCormick's introduction to MacCormick and Weinberger 1986, 7).

Neither do they share Dworkin's more radical view that the law also includes moral principles which so far have not been expressed in either legislation or judicial practice.

2. Moreover, they claim that there are many types of normative systems, e.g., the law, morality, games etc. Different systems may regulate the same thing, e.g. law and morality may regulate the same action. If a collision occurs, one needs a super-system of norms determining the choice between the systems. Weinberger calls it a *Zusammenschlussystem* (cf. Weinberger 1971, 399 ff. and 423 ff.). Any person has own super-system, perhaps causally influenced by other persons.

Let me add that such a super-system must regulate weighing and balancing of prescriptions given by the competing normative systems. One can explain the personal, "private" character of the super-system by the fact that the ultimate act of weighing involves feelings and the will, cf. section 2.4.5 supra.

3. Yet, they recognise the fact that vagueness of the concept of the law permits different definitions of the concept. There may exist *evaluative* "underpinning reasons" (MacCormick 1978, 138) which justify the choice of a positivistic, that is, value-free definition of law.

Let me exemplify this point by recourse to Hart's above-mentioned reason for Legal Positivism. According to Hart, a value-free definition of law makes it easier for a legal positivist to criticise the law from the moral point of view. Since such a criticism is valuable, one ought to opt for Legal Positivism; cf. section 5.3.2 supra.

The following theses, asserted by Weinberger, constitute the reasons which, *inter alia*, decide that he regards himself as a legal positivist: (1) The law is a social fact, and its content is a product of social structures and human will. (2) There exists no content-determining practical reason. (3) The law is conceptually independent from morality (cf. Weinberger's introduction to MacCormick and Weinberger 1985, 49 ff.). (4) There is no bridge between the "ought" and the "is". The institutional positivists thus reject Searle's theory of such a bridge (cf. id. 22 ff.).

As regards reasoning in legal dogmatics and judicial practice, MacCormick and Weinberger accept the well-known distinction between a descriptive (theoretical) knowledge of pre-existing law and evaluative (practical) activity of making the law morally better, more rational etc. But despite this, they "believe in the possibility of practical reasoning, of rational deliberation upon practical problems, and rational application of attitudes and values in settling personal and interpersonal problems of how to act…(R)eason guides and restricts but does not wholly determine the range of action which can be considered as right or justified…" (MacCormick's introduction to MacCormick and Weinberger 1986, 8–9). The rational element, restricting arbitrariness of practical reasoning in the law, consists in the possibility to derive logical conclusions from sets of premises including, *inter alia*, theoretical propositions and positive legal norms. This rational component is sufficient for a rich set of conclusions, because the law has extensive content, comprising not only statutes but also unwritten principles and systems of goals. The set of conclusions becomes even more enriched, if one accepts MacCormick's requirement of coherence (MacCormick 1984, 235 ff.), according to which general principles thus make legal rules coherent, helping one to understand and to explain them. In brief, MacCormick and Weinberger might call themselves "rationalistic non-cognitivists" (MacCormick's introduction to MacCormick and Weinberger 1986, 8–9).

I am prepared to accept most of these ideas, with two significant exceptions.

1. Certainly, one must agree with MacCormick and Weinberger that practical conclusions often follow from a mixed set of premises, including both theoretical and practical statements. One must also emphatically agree with MacCormick's insight that the requirement of coherence helps one to make a choice between thus justified practical conclusions. But one must also recognise the theoretical meaning of practical statements, implying, among other things, the following. The language alone makes some facts *prima-facie* ought- and good-making in a weak sense. The culture makes some facts *prima-facie* ought- and good-making in a strong sense (section 2.3 supra). Recognition of these limits of arbitrariness as regards the choice of practical premises must increase the degree of rationality of legal reasoning and, consequently, the degree of fixity of the law.
2. It is not certain that a value-free definition of law is the best one. To be sure, it may contribute in some cases to fixity of law. Yet, when the enacted system of norms is as immoral as Pol Pot's "law", other moral considerations may prevail and they may force one not to regard this system as valid law. Indeed, such a "system of law" would probably *not* conform to the postulate of fixity. The lawgivers not bound by moral constraints and the subjects not bound by loyalty to the system would rather create chaos than stable order.

5.3.4 Limitations of Classical Theories of Valid Law

A study of classical theories of valid law leaves the reader in despair. One gets an impression that the theories destroyed each other.

Legal Positivism is superior from the ontological point of view and from the point of view of fixity of the law. The Natural Law theory claims that some correspondence of a normative system to the natural law is necessary for legal validity of the system. Only a very complex ontology admits existence of so intricate and indeterminate entities as natural law. Moreover, the indeterminacy is hardly compatible with the postulate of fixity of the law. Legal Positivism, regarding all positive law as valid, thus has the following advantages. (1) From the point of view of an ordinary lawyer, the ontology of Legal Positivism is highly plausible. He regards positive law as real but cannot imagine any natural law. To be sure, the ontology of Legal Positivism is also complex, but it is simpler than that of the Natural Law. (2) Independence of positive law from the obscure idea of natural law also tends to contribute to the postulate of fixity of the former. These advantages weigh more than the fact that the separation of law and morality forces a positivist to recognise legal validity of extremely immoral orders, which would possess a low degree of fixity.

However, the answer of Legal Positivism to the normative question, Why ought one to obey the law?, is less convincing. A positivist tries to answer the question, Why ought one to obey the law?, without mentioning either morality or the natural law. Instead, he bases legal validity on the *Grundnorm*, the rule of recognition or the like. But in this way, nothing more is said than "one ought to obey the law because we lawyers have a disposition to believe that one ought to obey the law" (cf. sections 5.3.1 and 5.3.2 supra). If one wants to check whether this legal belief is right or not, one must rely on ones subjective judgment, concerning weighing and balancing of different normative systems (cf. section 5.3.3). Positivist theories do not contribute very much to rationality of this judgment. Neither do they contribute much to rationality of interpretation of valid law.

In brief, only the Natural Law theory answers the normative question, thus claiming that one ought to obey valid legal norms because they belong to a normative system to some extent corresponding to the natural law. Moreover, Natural Law is also expected to give important help to an interpreted of enacted norms. But Natural Law theories face insuperable difficulties when attempting at stating precisely the content of the Natural Law, regardless whether one seeks support of religious, analytical or empirical theses. No doubt, human nature creates limits for the content of valid law. But the limits are flexible. They are not the same as correspondence between positive law and a contentually characterised system of "natural law".

One thus needs a "third theory of law" (Mackie's term applied to Dworkin's theory; 1977b, 3), providing for a reasonable middle way between Legal Positivism and Natural-Law theories. In my opinion, the theory of *prima-facie* and all-things-considered morality (cf. sections 2.3 and 2.4 supra), together with the discussion of rationality of legal reasoning (cf. Chapters 3 and 4 supra), greatly facilitates construction of such a theory.

5.4 More About Law and Morality

5.4.1 Prima-facie *Law and its Relation to* Prima-facie *Morality*

The Starting Point: Evaluative Interpretation in the Law

The starting point is this. I have already described the great role a value-laden interpretation actually plays in the practice of legal reasoning. This practice is by no means surprising. One can find the following support for the conclusion that the law ought to be interpreted, and that such an interpretation ought to constitute a weighing and balancing of the socially established (*prima-facie*) law and substantive moral *prima-facie* principles. If the mission of the lawyer had consisted in merely following the wording of the established law, he could easily become a servant of an unjust legislator. But if the mission of the lawyer only consisted in performing a free moral discourse, such a discourse could easily result in chaos. It is improbable that a free moral discourse would lead to consensus. Although the legal reasoning, too, is ultimately dependent upon feelings and will, I have already pointed out that it is relatively more certain than the moral one. One can perform a highly rational - and hence intersubjectively controllable - reasoning that supports one's weighing of the established law and substantive moral principles. For this reason, chaos is not the only alternative to blind obedience. In brief, a good lawyer can and must find the middle way between Scylla of anarchism and Charybdis of servility.

Legal certainty thus demands a division of labour between the legislator and the courts: The latter have to use interpretation to correct the meaning of the law.
In this context, one can repeat the points made in Section 1.4.1 supra. The legislator cannot predict in advance or acceptably regulate all cases that can occur in future practice. The evaluations to be done in legal practice, among other things concerning the question whether a decision of a given kind is just, are easier to make in concrete cases, not *in abstracto*. Historical evolution of the method of legal reasoning has adapted it to the purpose of weighing and balancing of the wording of the law and moral demands. The judge has a far greater practical experience in applying this method to concrete cases than any legislative agency can have.

The First Consequence: The *Prima-facie* Character of the Socially Established Law

The great role of value-laden interpretation in legal reasoning makes the following thesis plausible. The socially established law, stated in such sources as statutes, precedents, *travaux préparatoires* etc., has a *prima-facie* character. The liberties, duties, claims etc., explicitly stated in the socially established law are merely *prima-facie* legal ones, since other considerations may justify the contrary conclusion concerning legal duties, claims etc.

The thesis that the socially established law has a *prima-facie* character must be interpreted in the light of our discussion of legal paradigms, research cores and

presupposed premises (cf. sections 3.3.3 and 3.3.5 supra). The jurists and lawyers thus take for granted some statements, jointly constituting the legal paradigm or, in other words, the juristic theory core. This core thus includes some fundamental moral statements, commonly accepted by both lawyers and people who make moral judgments. Furthermore, it includes the assumption that legal reasoning is supported by valid law. It also contains fundamental juristic views on the authority of the sources of the law and legal reasoning-norms. Finally, it includes some fundamental evaluative views, first of all concerning legal certainty and justice. If one wishes to perform a *legal* reasoning, one cannot at the same time put in question an extensive part of this theory core. The content of these core assumptions of the law implies that one cannot simultaneously doubt an extensive part of the set of norms, expressed in valid statutes, precedents and other important sources of the law. Yet, one can doubt each presupposition of this kind and each legal norm separately. But doubt needs justification. To justify such doubt, one must rely upon other reasons. In brief, the established legal presuppositions and norms have a *prima-facie* character: They constitute *prima-facie* reasons, to be weighed and balanced against other reasons.

These *prima-facie* reasons are first-order ones, for performance of a certain action, H, and/or second-order ones. The latter demand *prima-facie* an exclusion of *prima-facie* first-order reasons, e.g., for doing H. All things considered, such a second-order reason may justify in some cases not doing what ought to be done on the balance of first-order reasons. For example, a legal provision, prohibiting immigration, may justify my action of not helping poor Poles to establish themselves in Sweden.

Within the contextually sufficient legal justification, that is, within the legal paradigm, legal reasons of both kinds are immune from some doubts. Such a reason thus is immune from the claim that its character of a *prima-facie* reason should be re-examined with a view to possible revision on every occasion to which it applies. For instance, a lawyer may not continually doubt validity of each statutory provision. But it is *not* immune from the claim that it must give priority to other *prima-facie* reasons, if these are sufficiently powerful. Nor is it immune from the claim to possible revision within a deep justification, outside of the legal paradigm.

> By the way, this view is a paraphrase of *Joseph Raz's* theory of exclusionary reasons in the law. I cannot tell whether he would accept this paraphrase. In any case, he has claimed the following: An exclusionary reason is a second-order reason for disregarding a first-order one. "Directly", it is a reason for excluding another reason, R, for performing an action, H. "Indirectly, it weakens the case for" doing H. An exclusionary reason "never justifies abandoning one's autonomy, that is, one's right and duty to act on one's judgment of what ought to be done, all things considered." But it may justify in some cases "not doing what ought to be done on the balance of first-order reasons". An exclusionary reason "is immune from the claim that it should be re-examined with a view to possible revision on every occasion to which it applies" (Raz 1979, pp. 18, 27 and 33).

In brief, legal interpretation is creative and value-laden. "Interpretation" in the law is not a mere interpretation *sensu stricto*, establishing the linguistic (lexical or contextual) sense of a legal text. It includes something more, i.e., an improvement of the law, its adaptation to critical morality. Such an improvement is a common practice in "hard" cases. In the light of this practice, the enacted law is merely *prima-facie*, and the improved law is all-things-considered.

To be sure, one may criticise this theory of a *prima-facie* character of the established law. A critic may assume that, given *any* interpretation of a text expressing a legal rule, there arises the *independent* question whether the rule is *prima-facie* or all-things-considered. In particular, he may admit that interpretation of legal rules can lead to a meaning opposite to the literal meaning and still deny the *prima-facie* character of the rules. The reason is that the law *claims* for its duties and liberties a definitive status, not a merely a *prima-facie* one.

The critic may then present the following alternatives:

1. The established law overrides morality. The fact that other considerations can justify a contrary conclusion implies the moral invalidity of these considerations, not the *prima-facie* character of the law.
2. The established law is a valid system of norms, which can be incompatible with valid morality. The "corrective interpretation" of the established law is in this view no improvement of the law but a creation of *moral* rules. These can be morally valid or not. If valid, they have a *moral* all-things-considered quality but may be incompatible with the all-things-considered law.

Both versions of the objection imply a contradiction between what the law claims to be and what the law must be in view of the practice of its corrective (moral, value-laden) interpretation. To resolve this contradiction, I give priority to the practice. The critic does the opposite, but why?

An additional argument answers the second version. Even if one recognises the distinction between the legal and moral all-things-considered, cf. section 5.4.5 *infra*, one cannot consistently say that they are logically incompatible with each other. The concept of "*all*-things-considered" excludes such a possibility. "All things" are *all* things which ought to guide one's action, nothing less. The expression "all things considered" means that *all* practically relevant things have been considered, explicitly or implicitly. It follows that one can merely *think* about incompatible normative systems, but one cannot simultaneously *act* in accordance with them. And the "all-things-considered" norms are precisely the norms which ought to govern one's action.

The Second Consequence: The General Prima-facie Moral Obligation to Obey the Law

Moreover, there exists a general *prima-facie* moral obligation to obey the law. More precisely:

(1) If the *prima-facie* law explicitly contains, implies or otherwise supports the conclusion that A has a certain *legal* duty, claim, competence or right to a holding, then A has a *moral prima-facie* duty, claim, competence or right of the same content.

This is an *inclusion-thesis* concerning the relationship between the legal and moral *prima-facie*: The *prima-facie* law is thus a part of the *prima-facie* morality.

This view differs both from legalist theories, stating that one has a definitive (not merely *prima facie*) obligation to obey the law; cf., e.g., Oakeshott 1983, 117 ff. It also differs from purely moralist theories, denying any obligation to follow the law whatever; cf., e.g. Wolff 1971, 60 ff.

I will return to justification of this inclusion thesis. At this place, it is sufficient to repeat the central point. There exists a general *prima-facie* moral obligation to obey the law because general disobedience would create chaos. This would be the case, even if everybody followed moral considerations. It is improbable that a free moral discourse would lead to so much consensus as obedience to the reasonably interpreted law. It is more probable that it would result in chaos.

To be sure, one may imagine some counter-examples. Assume, e.g., that a Nazi law explicitly contains the provision that the police have a legal duty to kill anybody who is a Jew. Have then the police also the *moral prima-facie* duty to kill Jews? Paradoxically but truly, the answer is "yes!". The very fact that this deeply immoral provision belongs to the socially established law converts it, by definition, into a *meaningful prima-facie* moral reason which is, of course, easy to override by means other moral *prima-facie* reasons. This is the case unless one denies that the Nazi "law" is a legal system at all. To be sure, one *may* deny it for moral reasons, but the immorality must then systematically underlie the total system, including its technical provision of private law etc. One immoral provision, or one systematically immoral branch of the system is not enough; see infra.

But the moral duty etc. to follow the law is merely a *prima-facie* one. The step from it to the conclusion about a corresponding all-things-considered moral duty etc. presupposes at least an additional premise, expressing an act of *weighing and balancing* of the legal source in question and other considerations. By introducing the institution of legal order, the society thus can restrict, yet not entirely eliminate the necessity of weighing and balancing.

5.4.2 The Justification of the Relation Between the Law and Prima-facie Moral Norms. Why Ought One to Follow the Law?

A Some Reasons Supporting the General *Prima-facie* Moral Obligation to Obey the Law

One may propose the following justification of these relations between the law and *prima-facie* moral duties, claims etc.

1. Moral reasoning is relatively uncertain, as a result of its ultimate dependence upon feelings and will.

To be sure, the connections between moral statements and, on the other hand, various theoretical statements about morally relevant facts, that is, ought-, good-, and right-making facts restrict the arbitrariness of moral reasoning. In the established

moral language, a theoretical statement about some good-making facts thus implies a value-statement (and, consequently, a principle) stating that a certain person, action, event, object etc. is *prima-facie* good in the weak sense of "*prima-facie*". This means that it is natural in view of the language to proffer such facts as moral reasons. A theoretical statement about such facts also implies that it is reasonable to state that a person, object etc. is *prima-facie* good in a strong sense. In other words, our culture compels one to consider these facts in one's act of moral weighing and balancing of considerations. Consequently, one can proffer these facts as (insufficient but meaningful) reasons for the conclusion that it is *all-things-considered* good. Moreover, since this value statement is a reason for action, theoretical statements about "good-making" facts also are (indirect) reasons for action. Several moral theories are thus admissible, formulating or implying various definitions of or at least criteria for a good action etc.

Yet, the connections between moral statements and ought-making, good-making, claim-making and other morally relevant facts do not entirely eliminate arbitrariness of moral reasoning. Morally relevant facts imply only *prima-facie* duties, competences etc., not all-things-considered ones. The step to the latter involves weighing and balancing. In other words: Morality consists, first of all, of principles that one must weigh and balance against each other. Mutually incompatible moral statements can thus simultaneously possess support of both moral principles and morally relevant facts. Different persons may agree what principles and facts are relevant to the moral question under consideration, yet disagree as regards weighing and balancing of them.

The law, on the other hand, is more fixed. The legislator compares the weight of several morally relevant facts and moral principles and thus creates some more or less exact rules, telling one what to do. The courts deciding individual cases create relatively precise premises supporting general legal norms. Moreover, the traditional legal method (the legal paradigm) imposes restrictions on legal reasoning. In particular, it contains certain fundamental assumptions concerning authority of the sources of law and some traditional reasoning-norms, telling one how to interpret statutes, precedents etc.; cf. section 3.3.3 supra.

As stated in section 3.1.1 supra, fixity makes the law, *ceteris paribus*, less arbitrary than morality. To be sure, an unjust but rigid law can be both highly arbitrary and highly fixed. But fixity of the law and predictability of legal decisions has a moral value. *If* a result of legal reasoning in a particular case is not worse from the point of view of other moral values, then it is, all things considered, less arbitrary, than a result of a purely moral reasoning would be.

Within legal reasoning, one thus gains access to a *more extensive set of premises*, supporting one's practical conclusions. Only in so-called hard cases, not in routine cases, must one complete such a set of established legal premises with a freely created norm- or value-statement. Only in hard cases is such a free act necessary to perform an act of weighing, in order to state precisely whether a given legal rule applies or not.

2. A morally objectionable *chaos* would thus occur in a modern society, if it no longer possessed a legal order, that is a normative system which is highly fixed and public. As stated above, such a system has, *inter alia*, the following properties:

(a) it consists of several levels, higher norms deciding how the lower are to be created; (b) it claims to be complete, sovereign and in possession of the monopoly of using force; and (c) it is to a great extent obeyed by people and applied by authorities. It is thus morally better to have a society possessing a legal order which *in some cases* leads to morally wrong decisions than to force individual persons to rely upon own moral judgments in all cases.

3. Still stronger reasons support one's duty to obey the law in a *democratic* society. The authority of the democratically created laws is, *inter alia* supported by the majority principle. The latter is an approximation of a calculus of human preferences, itself approximating the idea of the morally good; cf. Section 1.4.2 supra.

B Morality 1 and Morality 2

Somehow paradoxically, one can thus say that moral reasons call for obeying the law, instead of solely obeying morality.

In this context, one may perhaps distinguish between two kinds of moral considerations, and thus between "morality 1" and "morality 2". Morality 1 contains some general principles, e.g. "one ought not to denunciate one's neighbour for the authorities". Morality 2 determines the compromise between these principles and the law. It thus may support the following conclusion "one may in some cases denunciate one's neighbour for the authorities, since a statute demands this"; this conclusion is right only if the value of obedience to the law weighs more than the principle under consideration.

Only morality 2, not morality 1, establishes all-things-considered, not merely *prima-facie*, duties and values. In morality 1, one disregards the law. The law is a morally relevant factor. How can one then say that one considered *all* morally relevant things?

C Clarification: More Than An Obligation Not To Set Bad Examples

The central point of the theory presented above is this:

> There exists a general *prima-facie* moral obligation to obey the law because general disobedience would create chaos.

In other words: I have a *prima-facie* moral obligation to obey the law, because chaos would occur if *all people in all cases violated all applicable laws*. To justify this obligation, one needs the following universal premise:

> I have a *prima-facie* moral obligation to act in such a way that my action could be repeated by everybody without creating morally wrong consequences.

This premise is a consequence of universalisable character of morality, cf. sections 2.5.2 and 4.1.1 supra.

This justification does not require hypotheses about causal connections between my action and actions of other persons. Consequently, the theory developed above

should not be confused with another one, easy to criticise. According to this theory, which I do *not* advocate,

> there exists a general *prima-facie* moral obligation to obey the law *because* each act of disobedience would set bad examples and thus increase probability of chaos.

This thesis has been criticised in the following key passage by Joseph Raz: "Some philosophers… tried to show that… (d)isobedience, even to a bad law, … sets an example and inclines other people to disobey… Hence one has an obligation to obey." But, "though the argument applies in many cases it fails to apply to many others. There are offences which when committed by certain people or in certain circumstances do actually revolt people and strengthen the law-abiding inclinations in the population… Moreover, in many cases it is practically certain in advance that the offence, if committed, will remain undetected. Such offences do not set any example whatsoever. Hence the argument from setting a bad example fails to apply to many instances of possible offences" (Raz 1979, 237–8). However, Raz's criticism does not affect my theory, which says nothing about causal consequences of setting bad examples.

D. An Objection: No *Prima-facie* Obligation to Obey Immoral Laws

A critic may object that only *some*, not all, legal provisions create *prima-facie* moral duties. He may give the following set of examples. (1) One has a *prima-facie* moral duty to obey, e.g., a rule forbidding parking cars in the middle of a frequently used road, since violation of this rule would invariably create chaos. (2) In some but not all cases, a driver has a *prima-facie* moral duty to obey a red-light stop signal. A violation would often create chaos but would have no morally significant effects on an empty road. (3) One has no *prima-facie* moral duty to obey, e.g., a legal rule which stipulates that some contracts must be concluded in a written form. This rule is "morally neutral". (4) Finally, one has a *prima-facie* moral duty to disobey a Nazi rule, forbidding Jews to marry "Arians". This rule is *prima-facie* immoral.

> He may add that the collision between this Nazi rule and a corresponding *prima-facie* moral principle of equality is total, in the sense that no instance of obeying the Nazi rule is consistent with equality. This is different from collisions of moral *prima-facie* principles which are always partial, never total. Moreover, the Nazi provision can never win the game of weighing and balancing, performed in order to determine all-things-considered duties. The critic may thus find it meaningless to assign a *prima-facie* moral character to such a provision.
>
> Yet, this *prima-facie* moral duty has the following point. To conclude that the Nazi provision never wins the competition with moral counter-arguments, one must perform an act of weighing. In this act of weighing, the Nazi provision must be taken seriously. After the weighing is performed, not before, one concludes that the provision has lost the competition.

Unlike such a critic, I have assumed a *prima-facie* moral duty to follow any law, regardless its content. The content matters very much, but only as regards all-things-considered moral duties, not the *prima-facie* ones. All things considered, one ought not to follow some Nazi rules, but *prima-facie* one ought to do it.

This interpretation of the vague expression "a *prima-facie* moral duty" has the following consequences: An act of weighing and balancing is necessary to determine all-things-considered moral duties. It may also be necessary to determine whether a certain normative order as a whole is or is not valid law. It thus would not be valid law, if it is so extremely immoral that it creates chaos, not order. Neither would it be valid law if the order it creates is worse than chaos; cf. section 5.8.2 *infra*. But an act of weighing is not necessary to establish a *prima-facie* moral duty to follow provisions which already have been recognised as legally valid. Such a provision may, indeed, create a bad order, or even chaos. But one still has a *prima-facie* moral duty to follow it, since it belongs to a system which totally, as a whole, produces order and this order is better than chaos.

The critic, on the other hand, must always perform two acts of weighing: the first in order to establish whether a legal rule is *prima-facie* morally binding, the second to ascertain whether it is all-things-considered morally binding.

> In this manner, I admit two kinds of relatively certain points of departure, taken for granted when one performs an act of moral weighing: The first kind consists of relatively certain knowledge of what particular types of action etc. are *prima-facie* morally obligatory. The second consists of a highly abstract knowledge of what types of normative orders are legally valid and thus *prima-facie* morally binding. To admit so abstract points of departure is coherent with the assumptions made in the section 3.3.4 supra.

E A Consequence: Extremely Immoral Normative System is No Valid Law

The critic may insist that the *prima-facie* moral obligation to obey a rule always depends on a content of the rule. He thus finds it strange to assume that a mere authority has a moral significance. On the other hand, I claim that once a provision is legally binding, it is also *prima-facie* to be obeyed in the moral sense, regardless its content. Yet, this assumption becomes less strange, if one admits that legal validity of a normative system as a whole is not entirely independent of its content. I will argue in section 5.8.2 infra that an extremely immoral normative system is not legally valid. This view eliminates the most striking counter-examples, directed against the discussed inclusion thesis; e.g., provisions of a Pol-Pot "law" did not create *prima-facie* moral duties, because they were no valid law at all.

Due to vagueness of all involved terms, such as "moral", "*prima-facie*", and "valid law", the critic can now make a choice between several possibilities. Among other things, he may choose one of the following two alternatives.

1. He may refute the assumption that an extremely immoral normative system is not legally valid. That is, he may recognise only purely descriptive criteria of legal validity. The expression "valid law" is sufficiently fuzzy to permit such an interpretation.

In this case, one may reply that even if such a "value-free" definition of valid law is assumed, one may still insist that any norm belonging to any system of valid law ought *prima-facie* to be observed in a weak but clearly moral sense of the "ought".

Indeed, one may even insist that fulfilment of each particular criterion of legal validity (cf. sections 5.8.1 and 5.8.2) gives a normative system a (still weaker) *prima-facie* moral obligatoriness.

2. On the other hand, even if the critic accepts the premise that a legal order as a whole is *prima-facie* morally binding, he may reply that I make an illicit step. He thus may insist that this premise merely implies that each legal provision probably ought *prima-facie* to be obeyed (in the moral sense of the "ought"). He would still deny that the stronger conclusion follows, that is, that each such provision is *prima-facie* morally binding.

However, this objection is unclear, since it presupposes the notion "probably ought to be obeyed". It is not clear what this notion means in the present context.

5.4.3 Weighing Legal Rules

A greater degree of fixity in the law is connected with the fact that the law often replaces moral principles with *rules*. This restricts the need of weighing and balancing. However, not only principles but also legal *rules* require weighing against other considerations. Indeed, *all* socially established legal norms, expressed in the sources of the law, have a merely *prima facie* character. The step from *prima-facie* legal rules to the all-things-considered obligations, freedoms, claims etc. involves weighing and balancing (cf. sections 5.4.1 and 2.4.4 supra). In other words, it involves a value-laden legal reasoning.

For that reason, one may doubt whether legal rules actually make the normative system sufficiently fixed. Yet, the doubt is unjustified. The main advantage of legal rules is the fact that they create "*easy*" cases. In easy (routine) cases, one ought to follow socially established legal rules without any necessity of weighing and balancing. An act of weighing and balancing is then necessary only in order to ascertain whether the case under adjudication is an easy one or not. Only if the case is not easy but "hard", must one perform a value-laden legal reasoning, that is, an act of weighing and balancing. One the other had, no cases of application of *principles* are easy. All such cases are hard in this sense. One must always pay attention to more then one principle and perform an act of weighing and balancing. The point of the law is to create routine (easy) cases, though not to make all cases easy.

5.4.4 All-Things-Considered Law as Interpreted Law

In this connection, one may also speak about all-things-considered *legal* duties, claims etc.

The socially established law explicitly contains some *prima-facie* legal norm-statements. Within the legal reasoning, such a *prima-facie* legal norm-statement

strongly supports the conclusion that one has an all-things-considered legal duty, freedom, claim, competence etc. On the other hand, some other *prima-facie* legal norm-statements or moral statements may support different conclusions. One needs weighing and balancing of various *prima-facie* legal and moral statements. The all-things-considered law is a result of this weighing. It is a result of *interpretation* of the *prima-facie* law.

The word "all-things-considered" implies that one would recognise the norm-statement in question as legally binding, if one had a complete information about all legally relevant circumstances. If a legal norm-statement has all-things-considered character, then it is reasonable to assume that it also has definitive character. When recognising definitive character of such an all-things-considered legal norm-statement, one declares that one no longer is prepared to pay attention to reasons which justify the contrary conclusion concerning *legal* duties, claims etc. Indeed, what reasons can it be, if all things had already been considered?

Of course, interpretation may also result in another *prima-facie* rule. But a decision to apply a legal rule to a concrete case is *definitive*, and in this sense no longer *prima-facie*. The decision leads to an action, and an action cannot be *prima-facie*. An optimally justified decision must thus have the all-things-considered character. The all-things-considered law is an idealisation. In practice, nobody can consider all things. But the more the interpreted law approximates the all-things-considered law, the better the interpretation.

A special problem occurs because a legal discourse may be defined as not considering some things. Certainly, the judge ought not to consider reasons for and against the assumption that the constitution of the country is valid law, cf. section 3.3.5 supra.

The all-things-considered law is thus a product of an optimal interpretation which

a) considers all things which are relevant within the legal discourse; and
b) takes for granted all things which are constitutive for the legal discourse.

The very concept "valid law" is ambiguous. It refers not only to socially established, *prima-facie* law but also to all-things-considered, that is, *optimally interpreted law*.

As regards legal interpretation and its result, the interpreted law, one may state the following.

1. Interpretation of the socially established law is and ought to be permeated by moral evaluations, performed by the interpreter.
2. At the same time, the lawyers presuppose that the result of the interpretation, that is, the interpreted law, needs support of reasons and thus must be rational in the sense developed in chapter 3 supra.
3. Influenced by value judgments, legal interpretation can cause a new understanding of the law and a change of legal practice.
4. Still, the result of interpretation is frequently called valid law. In this sense, one can regard some "unwritten" norms concerning remoteness of damage (section 3.1) as valid law, although one needs interpretation to state precisely their content.

5.4.5 The Relation Between the All-Things-Considered Legal Norms and All-Things-Considered Moral Norms

One may now consider an *inclusion-thesis* concerning the relationship between the *legal* all-things-considered and the *moral* all-things-considered:

(2) If a person, A, has a legal all-things-considered duty, liberty, claim etc., concerning an action, H, then he also has a moral all-things-considered duty, liberty, claim etc. of the same content.

The all-things-considered law, that is, the optimally interpreted law, is thus a part of the all-things-considered morality.

Certainly, one may try to avoid this conclusion by the following argument. Both legal and moral all-things-considered duties, liberties, claims etc. are determined by a weighing and balancing of morality 1 (which disregards the law) against the socially established law, but the *result* of this weighing still is different within morality 2 than within the law itself. The reason for this dualism can consist in the different weight the social practice of legislation and adjudication has within these two systems. One could say something like this. A weighing of a Nazi provision, unfairly differentiating Jews, against moral considerations would lead to a total elimination of it from morality 2 but merely to a restrictive interpretation within the law itself. However, such a distinction would create a moral predicament for any person applying or interpreting the Nazi law. How ought he to act? If all-things-considered law and morality 2 are different things, which one ought he to follow? Such a dualism would contradict the point of the law which is to facilitate decision making, not to create insoluble predicaments. On the other hand, the inclusion thesis fits this point very well. The Nazi provision is a *prima-facie* moral reason. Its weighing against other *prima-facie* moral reasons may lead to its restrictive interpretation or total elimination. In the first case, there is a moral and reasonable interpretation of the provision, and the interpretation constitutes an all-things-considered moral and legal norm. In the second case, there is no such interpretation. The all-things-considered moral norm would then be the same as it would have been had the provision not existed. And there would be *no* all-things-considered legal norm of this content at all.

To be sure, one may utter a *definitive* legal norm of this content. One may thus proclaim that one endorses this norm as definitively binding in a legal sense, and is not prepared to discuss it. But such a norm would not be correct. It would be based on an unjustified act of political power, not on reason.

The inclusion of all-things-considered law in all-things-considered morality is, however, no matter of identity, for the following reasons:

1. If a person has no legal all-things-considered duty, liberty, claim etc. of a certain content, he can still have a moral all-things-considered duty, liberty, claim etc. of the same content.
2. If a person has a legal all-things-considered duty, claim etc. of a certain content, and, consequently, a moral all-things-considered duty, claim etc. of the same

content, the identity concerns only the content, not the reasons which ought to be explicitly proffered in order to support it. The same content thus receives a legal support within the legal reasoning and a different support within a moral reasoning. If the latter is complete, it must include the former. On the other hand, some moral reasons may be omitted in an explicit legal argumentation. It is the case even if the argumentation is optimal. An optimal legal argumentation does not require an explicit support of all morally relevant reasons, though it certainly requires an *implicit* support of all of them.

3. Following *Aarnio*, one may also emphasise the fact that legal premises, supporting a conclusion, are often more precise, concise and easier to formulate than the non-legal ones. Assume, e.g., that the court has an all-things-considered legal duty to ignore oral contracts concerning the sale of real estate. The main legal reason for this duty is, of course, that the law imposes a written form of such contracts. Now, one *may* support this duty by substantive moral reasons. But to justify such a moral duty, independently from the law, one must adopt a broad view of the society as a whole, and thus speculate about the immoral consequences of uncertainty concerning ownership of real estate, allegedly resulting from recognition of such oral contracts etc. Such substantive considerations may be appropriate in legal reasoning, as well, but not even the optimal legal justification must contain so much of them as a free moral justification.

This distinction is much more profound than the trivial thesis that explicitly provided reasons in the law are not identical with explicitly provided reasons in moral justification. Explicitly provided reasons may be irrelevant for a theory of moral and legal reasoning, and merely relevant for a sociological study of the rhetorical techniques employed by jurists. But the distinction concerns something else, that is, the reasons that *should* be proffered in the special form of justification called legal. The background assumption here is that of plurality of types of practical justification. Legal justification is a *special* case of moral justification. This relation is parallel to the relation between general common-sense cognitive considerations and a specialised science. Each science makes initial assumptions, justifiable only within a broader form of deliberation. The profound question of the justificatory force of specialised sciences and discourses is perhaps the most difficult philosophical problem of all, which unfortunately remains unsolved.

5.4.6 Gaps In Interpreted Law. Legal Interpretation and Moral Criticism

The socially established (*prima-facie*) law constitutes *prima-facie* moral reasons. One has a *prima-facie* duty to follow the established law. But there is a limit. This *prima-facie* duty must be weighed against other moral *prima-facie* reasons. One has no *all-things-considered* duty to follow and unjust legal norm.

> Unjust law can be enacted not only in a totalitarian state but also in a democratic one. The democratic legislation process is fallible. The law does not always reflect the opinion of the majority. Moreover, a law reflecting the opinion of a momentary majority can have so grave disadvantages that the majority would have changed its views, if it more carefully thought about the problem. The right is not what most people happen to think but what they would think had they thought rationally (cf., e.g., Tranöy 1985, 385 ff.)
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> This conception of law, morality and rationality implies that an individual ought to adopt a critical attitude towards the law. He may criticise a particular decision, a number of legal norms or the legal system as a whole.

One can perform such a criticism within the framework of legal reasoning ("*de lege lata*") or outside of it, thus adopting the so-called "legally-political" point of view ("*de lege ferenda*"). Already the former permits a lawyer to reduce injustice of law. A person who applies the established law may thus weigh its literal content against other *prima-facie* moral reasons. But when the immoral law is clear, a legal interpreter cannot do much. Weighing does not lead to any result at all. It is then impossible to formulate a norm which simultaneously would fulfil two necessary conditions of legal interpretation, that is, 1) would have a strong support of socially established legal norms and, 2) would have a sufficient support of *prima-facie* moral norms. In such a case, an all-things-considered legal norm simply does not exist. As soon one pays attention to the established law, one must disregard morality and *vice versa*. No *all-things-considered* legal norm at all can be based on the socially established legal norm in question. Consequently, no definitive legal norm one adopts can be correct. There is a gap in the law, not merely in the *prima-facie* law, socially established (cf. section 1.2.3 supra) but in the interpreted, all-things-considered law.

On the other hand, one can criticise any law in the "legally-political" manner. A legal interpretation of an immoral provision may be impossible, its moral criticism is always possible. Yet, even in the latter case, one's thinking must partly resemble that of a lawyer. One must thus support the criticism with both established (legal) authority reasons and moral (substantive) reasons. The difference consists in the fact that the relative weight of the latter increases at the expense of the former.

5.4.7 The Right to Resist Oppression

In some cases, not even the "legally-political" criticism is morally sufficient and one may or ought to pass to *non-verbal resistance*. Let me distinguish between the following forms of such a resistance.

1. *Silent resistance*. Silent resistance is practically efficient and morally acceptable, *inter alia* when the law too deeply affects the *private sphere* of an individual, including his family life, property etc. One can also find reasons to silently disobey norms that for *incomprehensible reasons* regulate thousands of everyday trivialities. If, e.g., no legal parking exists close to one's office, one parks the car illegally at a big square which until recently used to serve as a parking.

But a single individual can easily misjudge the moral reasons against obeying the law. Only if acting openly, one can learn for sure whether others are ready to accept one's views.

2. *Demonstrative "civil" disobedience*. In some cases, one can consider public and collective (but nonviolent) disobedience. The controversial question in many such cases concerns *political issues*, e.g., environment, economy, taxes, warfare etc. In this way, e.g., Mohandas Gandhi organised resistance against British salt monopoly in India. Conscripts may thus desert from an unjust war. Taxpayers may return tax-forms. Voters may boycott undemocratic general elections, etc. (cf. examples quoted by Bay 1968, 45 ff.).

Civil disobedience presupposes that the state is to some extent democratic. If one, on the other hand, has to do with such a regime as in Eastern Europe, this form of resistance is less promising. A military deserter, e.g., would be punished severely. An environment protection activist would lose his job, etc. If one in this situation wishes to resist unjust laws, one may choose either silent disobedience or - in extreme cases - violent revolution.

3. *Violent revolution*. Violent revolution causes always some degree of chaos. I have already concluded that order is *prima facie* better than chaos. But if order is so repulsive as Hitler's or Pol Pot's, it loses this moral justification. (At the same time, it loses the character of valid law, cf. section 5.8.2 infra). In such a situation, one can find sufficient reasons for using weapons.

Non-verbal resistance, even in its mildest forms, is a serious thing. One must thus carefully consider conditions of its justified use. Two conditions have general applicability. (1) Moral reasons for resistance must weigh clearly more than counter-arguments. (2) Verbal reasoning must lack any prospect of success (cf., e.g., Rawls 1971, 373).

1. *Prevalence of moral reasons for disobedience*. As stated above, one has a *prima facie* duty to obey the law. Strong moral counter-arguments may outweigh this duty. Non-verbal resistance, however, is justified only if consequences of obeying the bad laws are in the long run *clearly* worse than the negative consequences disobedience always causes. Young people lacking any prospect to rent an apartment may perhaps occupy empty houses, but they ought not to throw Molotov cocktails.
2. *Inefficiency of reasoning*. Non-verbal resistance is justifiable only if verbal reasoning lacks any prospect of success.

The role of reasoning hangs together with the above-mentioned *prima facie* character of the duty to obey the law. In most hard cases, only a free debate can generate reasons, sufficient for answering the question what (if any) interpretation of the legal norm in question is all-things-considered, not only *prima facie*, justifiable and thus morally binding one's action. If an individual participating in such a debate finds that *no* interpretation is thus justifiable, he may demand a legislative change. But if the debate is impossible, an individual has no possibility of resistance

but a non-verbal action, creating accomplished facts. If he then finds the law unjust, he may in some cases disobey it.

Reasoning may be impossible, e.g., due to the following factors.

a) Censorship and other legal *prohibitions*. It was, e.g., a futile enterprise to criticise Pol Pot's "laws". One would be shot for this. Non-verbal resistance was the only choice.
b) *Opinion monopoly in mass media*. Opinion monopoly in mass media can eliminate any effective criticism. Assume that a statute is enacted in order to permit sale of weapons, otherwise forbidden, to a certain aggressive and undemocratic state. Assume, furthermore, that the press, entirely controlled by the friends of this state, suppresses information about its actual nature. In such a case, a critic may consider spectacular measures to prevent delivery.
c) *Incapacity of the addressee to consider the reasoning*. Non-verbal resistance is also justifiable if the addressee of the criticism lacks capacity to seriously consider it when making decisions. Of course, it is not enough that one failed to convince the authorities. But the reason of the failure may consist in the fact that the authorities possess ideological means to define away criticism (cf., e.g., Tranöy 1985, 395–396). In a deeply religious society, e.g., a liberal may be regarded as a pagan whose reasons for the freedom of religion are not to be considered. The discursive community breaks down and splits into isolated parts or "forms of life". Non-verbal resistance is the only way to be heard.

One thus must pay attention to these conditions when considering non-verbal resistance and making a choice between its different kinds and forms. Some authors have formulated other conditions, too, e.g., have regarded non-verbal resistance as justified only if compatible with the principles of the state governed by the law (*Rechtsstaat*). Cf., e.g., Dreier 1981, 201; Singer 1974, 64 ff. Singer admits some exceptions from this restriction. One may interpret such conditions as a special case in the following sense. If they are not fulfilled, the requirement of prevalence of moral reasons for disobedience is not fulfilled either. Besides, these conditions tend to be vague. One needs weighing of various criteria of democracy to be able to tell, e.g., what is and what is not compatible with the principles of the state governed by the law.

The degree of prevalence of moral reasons for disobedience and the gravity of the obstacles to argue decide jointly how strong resistance is to be chosen. But in consequence to the *prima facie* duty to obey the law, the person performing an act of non-verbal resistance has *the burden of argumentation*. He must be able to justify his action. Other members of the society have no duty to try to persuade him that reasoning is better than accomplished facts (cf. Dreier 1981, 199). Among other things, he must argue for the conclusion that verbal reasoning is futile. In some cases, one may regard this duty to argue as fulfilled, when the critic used all possible legal means to fight the unjust law and failed.

The critic, resorting to non-verbal resistance, must thus have access to two sets of reasons, one for the conclusion that the law is unjust, and another for the conclusion that reasoning is futile. This is no contradiction. To be sure, it would be irrational