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On Law and Reason

Preface by Jaap C. Hage

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14) A statute cannot have effect in the past.

Not even this maxim, interpreted in the most natural way, expresses any logical necessity. If a statute has been enacted today it can be used tomorrow in order to judge actions which were concluded yesterday. In this sense, the statute has effect in the past. There is no logical inconsistency in such a retroactive norm. A retroactive norm is, however, immoral, since it can cause a person unpredictable loss. Only when interpreted in a superficial manner, unduly influenced by the literal sense of the words "to have effect in the past", the maxim expresses logical necessity, since not even a Swedish statute can literally change the past.

Regarded as norms, the discussed maxims provide a moral support for statutory interpretation which thus helps the law to avoid injustice connected with retroactive norms, norms demanding the impossible etc. To regard the maxims as analytical propositions is less plausible but one can argue that the very possibility of it indicates that it would be unreasonable to refute them.

7.2.2 Literal Interpretation

Literal interpretation is a clarificatory description of the content of the statute in accordance with the ordinary, general or legal, linguistic usage. Literal interpretation is not corrective, not even supplementary. It merely establishes the meaning of the statutory provision in the light of its wording. The chief contribution of literal interpretation is to assure fixity of the law. One can discover the linguistic content of a statutory text by studying the following data:

- legal definitions and other explanations contained in the text itself, regarding the meaning of words and expressions which occur in the text;
- dictionaries, results of linguistic research etc.;
- the ways in which words and expressions occurring in the text have been used in other connections, i.e. in other legal sources, in technical legal usage, in everyday speech, etc.;
- stylistic qualities and peculiarities in the statutory text or even in other texts which have been written by people who have exerted great influence on the legislative work.

Literal interpretation thus does not improve or change the literal content of the statute. However, one often supplements it with a recourse to some reasoning norms, justifiable by recourse to the idea that the statute should be as perfect means of affecting people as possible. These norms thus express the so-called goal-rationality which is a principle of rational practical discourse (cf. section 4.3.3 supra). *Inter alia*, the following norms belong to this category:

15) One must not interpret the same words or expressions occurring in different parts of the same statute in different ways unless strong reasons for such an interpretation exist (cf. Wróblewski 1959, 247 ff.).

Cf. Alexy's rationality rule 1.4. (in section 4.3.2 supra).

If the statute is a perfect means of affecting people, it does not contain words whose interpretation shifts from one part of it to another. Moreover, such an interpretation would be *ceteris-paribus* incompatible with generality (which is a criterion of coherence, cf. section 4.1.4 supra).

> This idea of uniform interpretation was expressed, e.g., in the pronouncement of the Council on Legislation on the concept "business activities" in the Liability for Damages Act (cf. Govt. Bill 1972:5, p. 635).

Sometimes, however, strong reasons justify a shifting interpretation. The penal-law term "resistance", e.g., was not construed uniformly even in the same statute.

> But the lawmaker found the shifting interpretation to be unsatisfactory. This fact affected the new formulation of Ch. 8 sec. 5 of the Swedish Criminal Code.

In any case, it is doubtful whether a more radical reasoning norm is justifiable, demanding that one must not interpret differently the same words or expressions occurring in *different* statutes. Such a requirement is surely *not* justifiable if the statutes belong to different parts of the legal system. In this case, generality must yield to other criteria of coherence, and perhaps to other reasons. For example, the Swedish word "tomt" ("plot of land") has one meaning in real-estate law and another in penal law. Even purely descriptive words without any conventional or technical content may be interpreted in penal law in another way than i private law; the Swedish word "samlag" ("sexual intercourse") is construed in penal law in a way which differs from the construction in the Code on Parents and Children.

16) If different words or expressions are used in the same statute, one should assume that they relate to different situations, unless strong reasons for assuming the opposite exist (cf. Wróblewski 1959, 247 ff. n. 119).

If the statute is a perfect means of affecting people, it is not formulated in a misleading manner.

In fact, however, some statutes are *not* perfect. In secs. 6 and 45 of the Insurance Contracts Act we find the words "the occurrence of the insurance case or the extent of damage", whereas in a similar context in sec. 121 of the same statute we find the words "the occurrence or extent of the insurance case". There are strong reasons for assuming that this divergence is not relevant.

17) One must not interpret a statutory provision in such a way that some parts of the provision prove to be unnecessary (cf. Wróblewski 1959, 248).

If the statute is a means perfectly fitting the goal of affecting people, it contains only words actually contributing to fulfilment of this goal.

18) One must not interpret words and expressions occurring in the statute in conflict with ordinary linguistic usage unless strong reasons for such an interpretation exist.
19) If, however, it has previously been established that a word or an expression has a technical meaning incompatible with everyday language, one should inter-

pret that word or expression as having such a special meaning, without reference to everyday language (cf. Wróblewski 1959, 245–6).

If the statute is a perfect means of affecting people, it must be intelligible. One thus must pay attention to the everyday language. But strong reasons may exist, justifying introduction of technical terms, thus making the language more precise.

7.2.3 Systematic Interpretation

Systematic interpretation of statutes includes *inter alia* the following arguments:

1) the use of a statutory provision for interpreting another such provision;
2) interpretation influenced by the systematic of the statute;
3) interpretation influenced by another type of conceptual analysis;
4) interpretation influenced by other legal-dogmatic theories.

I10) When interpreting a statutory provision one must pay attention to other provisions which

a) are necessary in order to make the answer to the considered legal question more complete;
b) deal with cases relevantly resembling those the interpreted provision regulates;
c) in any other way contribute to understanding of the interpreted provision.

The following examples elucidate this reasoning norm:

a) In order to be able to apply a penal provision one must also pay regard to other statutory norms which answer the question how criminal responsibility is affected by, e.g., mental illness or other grounds for diminished responsibility.
b) Frequently an old statute is interpreted in a way adapted to new enactments which regulate similar questions. In this manner the remaining rules in the Commercial Code of 1734 can by means of interpretation be adapted to Contracts Act, Sale of Goods Act, end so on.
c) Various expressions in statutes often form a kind of hierarchy. Cf., e.g., the following expressions from the Sale of Goods Act: “immediately” (secs. 27, 32, 52), “as soon as it can be done” (sec. 6), “without unreasonable delay” (secs. 26, 27, 31, 32, 40, 52, 60), and “within a reasonable time” (secs. 26 and 31). Owing to the fact that these expressions are construed in connection with one another, we see, e.g., that the expression “within a reasonable time” refers to a longer period than “without unreasonable delay” (cf. Hellner 1969, 136–7).

The so-called “corresponding application of law” is another example. A certain statutory provision, e.g. Ch. 8 sec. 13 of the Criminal Code, is applicable to certain

cases (e.g. theft, larceny etc.). Another statutory provision, e.g. Ch. 9 sec. 12 of the Criminal Code, states, however, that the first provision is also to be applied to other cases (e.g. deception, blackmail, etc.). In this way the first provision, in addition to its ordinary area of application, acquires another, secondary area. In some cases, such an extension requires a modification. Cf., e.g., Sec. 1 para 2. of the Sale of Goods Act which reads as follows: "The provisions of this act concerning purchase shall where applicable also regulate barter." The "inapplicable" parts of this statute contain, for example, rules on the fixing of the purchase price (secs. 5–8).

When paying attention to the relation of the considered provision to other ones, the interpreter obviously utilises the latter as premises. Already this fact makes the interpretation more coherent than it would be had one merely considered one provision; cf. section 4.1.3 supra as regards the number of premises as a criterion of coherence. Moreover, such an interpretation avoids violation of the other provisions. As always, obedience to rules promotes predictability of decisions. Finally, the interpretation assures that coherent reasons which probably support the other provisions are not ignored.

I11) When interpreting a statutory provision one may pay attention to

a) the title of the statute and
b) the membership of the interpreted provision in a certain part of the legal system, a certain statute and a particular part of that statute.

> Ch. 3 sec. 9 of the Criminal Code reads as follows: "If anyone from gross carelessness exposes another person to mortal danger or danger of severe bodily injury or serious illness, he shall be sentenced for *causing danger to another person* to a fine or to imprisonment for not more than two years." In connection with this provision there arose the question whether for the arising of responsibility it must be required that a concrete, specified person or group of persons was exposed to danger. The question could be supposed to have been answered in the affirmative since in the Criminal Code the offence has been placed among offences *against individuals*. A number of authors have, however, rejected this interpretation, proffering both substantial reasons and analogies with other provisions.

This kind of interpretation assumes that the established classification and distribution of legal norms into different subsets reflects essential differences between them. This is perhaps analogous to the criterion of coherence requiring a distribution of the totality of human knowledge into different fields, each characterised by some premises with a special status; cf. sections 2.7.5, 3.2.4 and 4.1.3 supra.

I12) When interpreting a statutory provision one may pay attention to conceptual analysis, *inter alia* to logical relations between concepts and to their role in theories, normative systems and the life in general.

Cf., e.g., section 4.4.6 supra on the role of concepts, and the example given in section of 3.1.3 supra, concerning analysis of the concept of adequate causation in torts. See also the remarks made above about a hierarchy of concepts in the Sale of Goods Act and, finally the complex case in torts, NJA 1976 p. 458. To be sure, in the latter case the majority of the Supreme Court included distinct circumstances, relevant for liability, into an unanalysed evaluation of negligence. But Justice Nordenson

performed an extensive and subtle analysis, making sophisticated distinctions between negligence, adequate causation and purpose of protection.
Logical consistency is, as stated above, a precondition of coherence. Properties of concepts affect also coherence of theories, cf. section 4.1.4 supra.

I13) When interpreting a statutory provision one may pay attention to theories formulated in legal dogmatics.

Since value of these theories depends on coherence, this reasoning norm demands in effect that the interpretation is as coherent as possible.

The following example, elaborated by *Aulis Aarnio*, elucidates the role of such theories. Under a long period, legal dogmatics utilised a theory, T1, which regarded ownership as a resembling a substance. At a certain moment, all the aspects of ownership could belong to one and only one physical or juridical person. Even if several persons were co-owners of the same thing, each had all the aspects of ownership, albeit with regard to a part of the thing only, identified either physically or ideally, e.g. in percent. A sale thus resulted in a instantaneous transfer of ownership as a totality: first the seller and then the buyer was a full owner. The only problem to discuss was the precise determination of the moment of this instantaneous and total transfer. This theory determined interpretation of all statutory provisions of transfer of ownership, including some provisions of inheritance law (cf. Ch. 18 of the Swedish Decedents' Estate Code). On the other hand, according to a newer Scandinavian theory of ownership, T2, to be owner of a thing is the same as to be legally protected against certain other persons. Many kinds of protection exist. It is thus possible to be owner in some respects but not in others. This fact makes it possible for the newer theory to contemplate new cases, unthinkable in the light of the old one. One can now interpret transfer of ownership as a process, extended in time, in which one person successively acquires more and more aspects of ownership. At a certain moment, a buyer or an heir can thus already be owners in one respect, while other aspects of ownership still are ascribed to the seller or the death estate. One may consider the new theory, T2, as better than the old one, T1, because its vocabulary permits more distinctions (cf. Aarnio 1984, 46 ff.) and the new distinctions which it introduces reflect distinct evaluation of cases, provided that this evaluation is supported by highly coherent reasons.

Different kinds of systematic interpretation of statutes affect each other. Construction of a statutory provision depends at the same time on interpretation of other such provisions, systematic of the statute, conceptual analysis and theories formulated in legal dogmatics. A preliminary and vague understanding of connections between various provisions and their place in the legal system together with some conceptual analysis may thus influence theories of ownership. These affect a deeper understanding of the place of the interpreted provision in the legal system and a deeper analysis of the relevant concepts. One can, e.g., argue in favour of a thesis concerning the connections between various provisions by showing that this thesis is supported by (coherent with) some theory formulated in legal dogmatics. On the other hand, one can argue in favour of the theory by showing that it is supported by the thesis concerning the connections. If there is no satisfactory coherence, one can modify each of the components. One may thus modify and mutually adapt

various forms of systematic interpretation in order to achieve a balance, resembling the "reflective equilibrium". In this connection, one may also speak about the so-called *hermeneutical circle* (cf. section 3.2.1 supra). Cf. section 4.1.3 supra on reciprocal relationships as a criterion of coherence.

All this hangs together, interpretation of statutory provisions, systematic of the statute, conceptual analysis and theories formulated in legal dogmatics. Various juristic theses support each other. Legal reasoning - and the legal system itself - thus gains coherence and hence rationality. Besides, the systematic interpretation generates concepts enabling one to treat relevantly similar cases alike. In this way, one fulfils another criterion of coherence, that is, generality.

7.3 Reduction, Restrictive Interpretation, Extensive Interpretation and Creation of New Norms

The area of application of a legal norm, established as a result of legal reasoning, often differs from the area established by most natural linguistic, non-juristic reading of the norm. One can thus say, what follows:

Both reduction and restrictive interpretation result in the fact that the definitive area of application of a rule, established with the use of different interpretatory methods, is narrower that the area established with the use of literal interpretation alone.

Both creation of a more general new norm (*inter alia* through statutory analogy) and extensive interpretation result in the fact that the definitive area of application of a rule, established with the use of different interpretatory methods, is wider that the area established with the use of literal interpretation.

To exemplify these terms, let me invent the following rule: "All chess players are qualified for membership in the club". One may then state, what follows:

1. By literal interpretation one would construe the rule to include all persons who sometimes play chess and no others.
2. By restrictive interpretation of this rule, one might, e.g., eliminate people who sometimes play chess but have no official rating, granted by the national chess association and indicating their strength as chess players. Restrictive interpretation thus restricts the area of application of the rule to its linguistically uncontroversial core, that is, to cases certainly covered by the rule. It eliminates all cases which perhaps belong perhaps do not belong to the area of application of the rule, and thus constitute a "periphery" in relation to this area. Such a restrictivity may appear somewhat strange, since a person sometimes playing chess with his friends would not be called a chess player. But it is linguistically possible to perform this interpretation and preserve the term "chess player" only for officially recognised players.
3. A reduction, however, would be more radical and perhaps eliminate everybody but grand masters. Reduction thus eliminates not only the "periphery" but also a part of the linguistically uncontroversial core of the area of application of the rule. Such a radical restrictivity contradicts the ordinary language. It is linguistically unthinkable to hold that the term "chess player" means the same as "grand

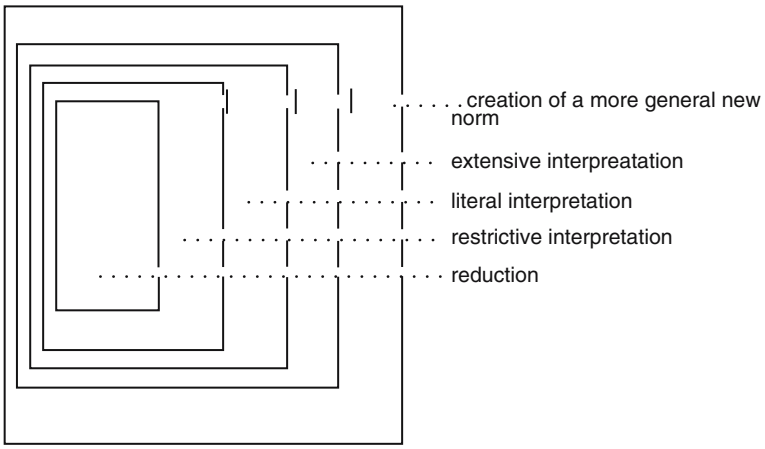
master". Reasons for the reduction are not linguistic but concern, e.g., the extremely high ambition of the club.

Reduction eliminates a part of the core of the application-area of the norm. It thus replaces the norm in question with another one having a smaller area of application. This new norm is contentually similar to and argumentatively connected with the old one.

4. By extensive interpretation one would probably construe the discussed rule to include all persons knowing chess rules, regardless whether they have played even a single chess game. Extensive interpretation thus embraces not only the core but also all "periphery" of the area of application of the rule. Such a generosity is perhaps somewhat strange but it is linguistically possible to regard all persons knowing chess rules as chess players.
5. Finally, one may create a new norm, perhaps admitting bridge players, as well. The area of application of the discussed rule is thus extended beyond its linguistically possible "periphery". It is linguistically impossible to call bridge "chess". The most frequent method to create a more general norm is a conclusion by analogy, cf. section 7.4 infra.

In some cases one goes beyond the reduction and *eliminates* the whole rule, cf. section 1.2.7 supra on *desuetudo*. A chess club can, e.g., successively change its character. At first, one admits bridge players, too. Then one eliminates everybody but very good players, regardless whether they play chess or bridge. Finally, all the chess players leave the club which thus becomes a high-level bridge club. Someone perhaps remembers the rule "All chess players are qualified for membership in the club" but nobody takes it seriously. One can then create a new norm, but this new norm is *not* argumentatively connected with the old one. Neither must it resemble the old one.

The distinctions between reduction, restrictive interpretation, literal interpretation, extensive interpretation and creation of a more general new norm are based on the result of interpretation, that is, depend on how extensive the final area of application of the rule is. It is not relevant what methods are applied to obtain the result. The following picture elucidates the distinctions:



One can regard literal, extensive and restrictive construction as three kinds of *precise interpretation* of the statutory provision. Reduction and creation of a more general norm are, on the other hand, kinds of *corrective* interpretation; cf. section 7.1.1 supra.

> Creation of a more general new norm (*inter alia* through statutory analogy), unlike extensive interpretation, exceeds the linguistically acceptable periphery of the area of application of the norm in question. Some writers (e.g., Ross 1958, 149) reject this distinction. In judicial practice and in legal writing, however, one can find several examples of creating new norms by analogy which is generally considered to be more radical than mere extensive interpretation. Moreover, in penal law, e.g., courts may reason from analogy to a much lesser extent than by extensive interpretation. Should a court disregard the difference between them, it may unjustifiably begin to use analogy in cases where extensive interpretation is allowed (cf. Peczenik 1971, 334 ff.).
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> Besides, *all* the discussed distinctions are vague. Strictly speaking, one must distinguish between 1) what everybody in all situations recognises as the core of the area of application of the norm; 2) what at least some people sometimes recognise as the core and sometimes as a part of the periphery; 3) what everybody in all situations recognises as a part of the periphery; 4) what at least some people sometimes recognise as a part of the periphery and sometimes as belonging to the "outside area"; and 5) what everybody in all situations recognises as a part of the "outside area".
>
> Reduction thus eliminates not only the "periphery" but also a part of the linguistically uncontroversial core of the area of application of the rule. Restrictive interpretation covers whole core, eliminates whole periphery and covers an indeterminate part of the area which perhaps belongs to the core perhaps to the periphery. Literal interpretation covers whole core and an indeterminate part of the periphery. Extensive interpretation embraces whole core, whole uncontroversial periphery and an indeterminate part of the area which perhaps belongs to the periphery perhaps to the outside area. Finally, a creation of a more general new norm results in an application-area which covers all this and, in addition to it, certainly extends beyond the periphery.
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> Of course, these distinctions are vague, too. One cannot state precisely, e.g., what certainly belongs to the periphery and what perhaps belong to the periphery perhaps to the core.

The picture may be further complicated. For instance, an interpretation may be restrictive in one extent and simultaneously extensive in another. One may even combine a reduction with a creation of a new more general norm by analogy. The rule "All chess players are qualified for membership in the club" may thus be applied to grand masters in chess and outstanding bridge players, while less successful chess players are eliminated. The elimination of the latter is a reduction, while the inclusion of the bridge masters is a creation of a more general new norm.

Whereas literal interpretation mostly promotes fixity of the law and thus predictability of legal reasoning, all the other forms of interpretation promote, first of all, coherence and discursive rationality.

The choice between the discussed forms of interpretation depends on weighing and balancing of various substantive reasons and authority reasons. Such a choice presupposes jumps and leads to a transformation of the law, cf. sections 2.7, 3.2, 5.9.5 and 7.1.2 supra. Yet, it can fulfil the rationality demands, discussed in chapters 3 and 4 supra.

7.4 Conclusion by Analogy

7.4.1 Introductory Remarks on Statutory Analogy

By "statutory analogy" I mean that one applies a statutory rule to a case which, viewed from the ordinary linguistic angle, is included in neither the core nor the periphery of the application area of the statute in question, but resembles the cases covered by this statute in essential respects.

This definition is based both on the result of interpretation, that is, a radical extension of the area of application of the rule, and the method applied to obtain the result, namely proffering essential similarity of cases. A use of similarity argument which does *not* extend the linguistically possible area of application of a statute (*analogia intra legem*, cf., e.g., Nowacki 1966, 45 ff., Heller 1961, 87 ff.).

Consequently, the relation of statutory analogy is not reflexive, since the set of cases regulated by a norm is not analogous to itself. Neither is it transitive: a case, C_1, can be analogous to those regulated by the norm in question, another case, C_2, analogous to C_1, and yet C_2 need not be analogous to the regulated cases. Finally, the relation of analogy can be symmetrical or not: when C_1 is analogous to C_2, the latter can but need not be analogous to the former (cf. Frändberg 1973, 150–1, though the author writes about analogy of norms, not cases).

Let me give some examples of statutory analogy. In the case NJA 1981 p. 1050, a businessman left account material to a person who promised to take care of his bookkeeping. The Supreme Court stated that this person has no right of lien on this material, that is, no right to keep it as security for his fee. The Court pointed out, what follows: "A creditor has a right of lien in many cases… Since a long time, a craftsman has possessed such a right… In the juristic literature, one expressed the view that this right can by analogy be granted to a lessee, a commission-agent, a freight-conveyor or another person who on the basis of a contract obtained a possession of another person's property… (But on the other hand,) if a businessman has left his account material to an accountant or another person, he can obviously have a very strong need to get it back soon… Social reasons also support the conclusion that a businessman should freely use his account material… Consequently, a right of lien on account material seems to be inappropriate and one should not consider to introduce it by analogy to the above-mentioned rules…"

Another example is this. Chapter 7 of the Code on Parents and Children contains some rules on maintenance allowance for children. The general invalidity conditions, formulated in chapter 3 of the Contracts Act, are applicable only to the law of property and do not directly concern family law. In the case NJA 1936 p. 598, however, "the grounds for" (that is, analogy to) sec. 29 of Contracts Act were proffered as the reason to invalidate a contract concerning maintenance allowance for children.

The following example is more complex. Section 1 of the Cooperative Apartments Act defines the right to a cooperative apartment as concerning "house or a part of house". In practice, however, this right is extended to cover not only a one-family house but also the attached plot of land. A reason for this is analogy to

Ch. 12 sec. 1 Real Estate Code, stipulating that a *tenancy* agreement can also cover a plot of land (Bernitz *et al*. 1985, 84).

The following, logically correct, inference is thus a part of the legal argument *ex analogia*:

Premise 1:	If the fact F or another fact, relevantly similar to F, occurs, then obtaining of G is obligatory
Premise 2:	H is relevantly similar to F
Conclusion:	If H occurs, then obtaining of G is obligatory

Since this inference assumes *relevance*, it differs from Alexy's rationality rule J.16 (section 4.3.4 supra). An estimation of relevant resemblance often implies weighing and balancing of various reasons and counter-arguments; cf. sections 2.4.3 and 5.4.3 supra.

7.4.2 The Origin and Justification of Statutory Analogy

An estimation of relevant resemblance can include many different things. In some cases, it involves three steps. The first step is to establish that persons, things, documents, rights, duties, circumstances concerning space and time, etc., which occur in case C bear a resemblance to the circumstances in the cases regulated by statutory provision L. The second step is a prediction, based on these similarities, that an application of provision L to case C will produce relevantly similar social effects to those produced in cases which are regulated by this provision. The third step is to conclude that case C thus should be treated similarly to cases regulated by L.

The use of statutory analogy depends on weighing and balancing of various substantive reasons and authority reasons. Such a weighing presupposes jumps and leads to a transformation of the law, cf. sections 2.7, 3.2, 5.8.5 and 7.1.2 supra. Yet, it can fulfil the rationality demands, discussed in chapter 3 supra.

The traditional origin of statutory analogy is that a so-called gap occurs in the statute; cf. section 1.2.3 supra. If the gap can be discovered in a value-free manner, then the law is not sufficiently fixed. If an evaluative reasoning shows that there is a gap in the statute, then the statute is not satisfactorily rational.

In both cases, statutory analogy can be justified by the principle "like should be treated alike" and thus by considerations of justice and universalisability; the latter is a criterion of coherence, cf. section 4.1.4 supra.

7.4.3 Law-Analogy and Legal Induction

One should not confuse statutory analogy and another mode of reasoning called "law-analogy" or "legal induction". (Slightly oversimplifying the matter, let me

regard the two latter terms as synonymous.) Law-analogy requires fulfilment of the following conditions:

1. A general norm, G, is justifiable on the basis of the resemblance between a number of established rules, r_1–r_n, thus regarded as special cases of G.
2. A case, C, lies outside of the linguistically natural area of application of these rules, r_1–r_n.
3. On the other hand, the general norm, G, covers C; in other words, C shows relevant similarities to cases regulated by the less general rules, r_1–r_n.
4. One adjudicates case C in accordance with G.

> Let me give an example. The so-called Scandinavian doctrine of wrongfulness (literally "unlawfulness"; cf. Hellner 1985, 48) formulated the following general norm: One should not be criminally responsible nor liable in torts, or one's responsibility should at least be restricted, if one's action was not wrongful, that is, if its positive results were more important than the risks it caused. This general norm is justifiable on the basis of such defences, restricting or eliminating liability, as duty, emergency, authorisation, contributory negligence of the victim, consent of the victim, the fact that the victim takes particular risks etc. These defences are merely special cases of the lack of wrongfulness. Assume, e.g., that A violently turned B out of the meeting he disturbed. The court found that B's provocative behaviour justified the conclusion that A should not be criminally responsible (cf. NJA 1915 p. 511). One may add that A's action caused more good than harm. One may also say that circumstances of the action to some extent resemble duty or emergency etc. In other words, one can support elimination of responsibility either with the general norm of wrongfulness, or with a series of statutory analogies.
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> Cf. NJA 1962 p. 31. A credit report agency gave some clients a false information that a person, B, had been involved in illegal business. B demanded compensation for libel. The agency claimed that, in order to fulfil its useful function, it must be permitted to make mistakes. The Supreme Court, however, found the agency liable. (As a consequence of a subsequent legislation, cf. sec. 20 of the Credit Report Act, the case has only an academic importance.)

Law-analogy can be justified in the same way as statutory analogy, i.e., by the principle "like should be treated alike" and thus by considerations of justice and universalisability; the latter is a criterion of coherence.

7.4.4 Argumentum e contrario

When deciding to reason by analogy, one can follow another legal mode of reasoning, the so-called *argumentum e contrario*. One must make a distinction between a weak and a strong *argumentum e contrario*.

Assume that a statutory provision or another legal norm, L, regulates some cases in a certain way. By virtue of weak *argumentum e contrario*, N is not a sufficient reason to conclude that a similar case, C, covered by neither the core nor periphery of the linguistically acceptable application-area of this norm, should be treated in this way. The following example elucidates this situation:

Premise: rule N	All chess players are qualified for membership in the club
Conclusion	N is no sufficient reason to conclude whether or not bridge players are qualified for membership in the club

By virtue of strong *argumentum e contrario*, (similar) cases covered by neither the core nor periphery of the linguistically acceptable application-area of this norm, should *not* be treated in the way stipulated by the norm. *Qui dicit de uno negat de altero*. The following example elucidates this mode of reasoning:

Premise: rule N	All chess players are qualified for membership in the club
Conclusion	Bridge players are not qualified for membership in the club

The following, logically correct, inference is a part of the strong *argumentum e contrario* (cf. Alexy's rationality rule (J.15), in section 4.3.4 supra):

Premise:	Obtaining of the situation G is obligatory only if the fact C takes place
Conclusion:	If the fact C does not occur, obtaining of G is not obligatory

The evaluative part of the reasoning concerns the question whether or not the premise should contain the word "only".

As stated before, the use of analogy can be justified by principle "like should be treated alike". *Argumentum e contrario*, on the other hand, is justifiable the demand that the law should be respected. Since this demand is further supported by the value of fixity of the law and predictability of legal decisions, one may say that the choice between the use of analogy and *argumentum e contrario* is to be determined by weighing and balancing of two aspects of *legal certainty* (cf. section 1.4.1), that is, predictability and other moral considerations.

7.4.5 The Choice Between Analogy and Argumentum e contrario

The fact that one must make a *choice* between the use of analogy and *argumentum e contrario*, apparently supports the following objection: These "maxims of interpretation are not actual rules, but implements of a technique which - within certain limits - enables the judge to reach the conclusion he finds desirable in the circumstances, and at the same time to uphold the fiction that he is only adhering to the statute and objective principles of interpretation" (Ross 1958, 154).

The word "fiction" indicates that the judge has hidden "real" reasons the "fiction" is supposed to conceal. However, the crucial question is "whether the reasons given do or do not provide a well-founded and legally valid justification of the decision… Thus, if the reasons given are well-founded and valid it does not matter whether they are judge's 'real' reasons. If, again, the reasons are not well-founded or not legally valid it equally does not matter whether they are judge's 'real' reasons. In either case, the reasons actually given will be judged on their own merits" (Bergholtz 1987, 441; cf. 421 ff.).

To answer the question whether statutory analogy and *argumentum e contrario* are well-founded reasons, I would like to emphasise the words "within limits" and the word "only", and endorse *Schmidt's* opinion (1957, 195) that "(t)he old technique relies upon the principle that the judge should never create norms which are altogether new but should seek his guidance in rules which have already been recognised for other situations." More precisely: Statutory analogy and *argumentum e contrario* are no rules but argument forms, each supported by a different set of reasoning norms and other *principles* which a judge has to weigh and balance. They enable the judge to reach the conclusion which is justifiable in the circumstances.

The following reasoning norms help one to make a choice between the use of analogy and *argumentum e contrario*:

A1) If an action is not explicitly forbidden by a statute or another established source of law, one should consider it as permitted by the interpreted valid law, unless strong reasons for assuming the opposite exist.

In other words, one should, as a rule, interpret prohibitions *e contrario*, not by analogy. This is a liberal norm. It states that only a relatively fixed law may contain justifiable prohibitions.

> The well-known maxim "everything which is not forbidden is permitted" is vague, *inter alia* because one must make a distinction between weak and strong permission. A weak permission of an action is the same as the fact that *no legal norm exists* which states that it is forbidden. A strong permission of an action, on the other hand, is the same as the fact that *there exists* a legal norm which states that it is permitted. If the mentioned maxim refers to weak permission, it is a logical tautology merely stating "If an action is not forbidden, it is not forbidden". If it refers to a strong permission, one should not interpret it, e.g., as follows: If an action is not explicitly forbidden by a statute, it is explicitly permitted by it. This statement is simply a false theoretical proposition. A reasonable interpretation of the maxim must thus be more complex. The reasoning norm A1 is one of such reasonable interpretations.

A2) Only relevant similarities between cases constitute a sufficient reason for conclusion by analogy.

A3) One should not construe provisions establishing time limits by analogy. Neither should one construe them extensively, unless particularly strong reasons for assuming the opposite exist.

When, e.g., Ch. 9 sec. 1 of the Parents and Children Code says that "a person under eighteen years of age… is a minor" this means - without the least doubt - that people older than this are of full age. In this context it would be strange to reason extensively or analogically and to draw the conclusion that some eighteen-year-old people are minors because they resemble seventeen-year-olds (cf. Ross 1958, 150).

The following considerations may justify this norm. *Ratio legis* of the time limits is to assure fixity of the law, whereas analogy and extensive interpretation tend to lower fixity.

A4) One should not construe provisions establishing sufficient conditions for not following a general norm extensively or by analogy, unless strong reasons for assuming the opposite exist.

Sec. 32 of the Contracts Act reads, as follows: "A person who had made a declaration of will which, owing to an error in writing or some other mistake on his part, has been given another content than that intended, shall not be bound by the contents of the declaration of will where the person to whom the declaration is addressed realised or ought to have realised the mistake." One must interpret this enactment with the use of *argumentum e contrario* (not analogically); it would be strange to conclude that the person making the declaration of will is bound by its contents if the other party neither realised nor ought to have realised the mistake. (According to a pronouncement in the *travaux préparatoires* of the Act, 1914 p. 140, the latter interpretation is possible but only in special cases; cf. Schmidt 1960, 184).

One can argue similarly in the following example. In the Real Estate Code, Ch. 4 sec. 3 it is laid down that a provision not included in the purchase document is invalid if it implies that (1) completion or existence of the acquisition is subject to conditions, (2) the vendor shall not carry such responsibility as is referred to in sec. 21, (3) the buyer's right to transfer the real-estate property or to apply for a mortgage or to transfer a right in the property will be restricted. Here, too, it seems strange to have recourse to analogy and to draw the conclusion that such a provision concerning the purchase of real-estate property will be invalid even if it does not fulfil the conditions stated in 1–3 (cf. Hessler 1970, 24). The example elucidates also the following reasoning norm:

A5) Only very strong reasons can justify a use of analogy leading to the conclusion that an error exists in the text of the statute.

A6) One should not construe provisions constituting exceptions from a general norm extensively or by analogy, unless strong reasons for assuming the opposite exist.

This well-known norm, *exceptiones non sunt extendendae*, more general than A4, is subject to some controversies in the juristic literature (cf., e.g., Engisch 1968, 147 ff.).

One expects the law to be fixed. Full freedom to consider it erroneous would diminish fixity.

A7) Not all reasons justifying extensive interpretation of a statute are strong enough to also justify reasoning by analogy.

A8) One should construe provisions imposing burdens or restrictions on a person restrictively, unless very strong reasons for assuming the opposite exist (*odia sunt restringenda*).

Consequently, one should not construe such provisions extensively or by analogy.

This liberal norm states that only a relatively fixed law may justifiably impose burdens and restrictions.

Two special cases of A8 are of the greatest importance:

a) The so-called principle of legality in penal law demands that no action should be regarded as a crime without statutory support and no penalty may be imposed without a statutory provision (*nullum crimen sine lege, nulla poena sine lege*). This is a classical requirement of legal certainty, eliminating unforeseeable punishment (cf., e.g., Thornstedt 1960, 213 ff.).

Cf. Ch. 2 sec. 10 para. 1 of the Swedish constitution (*Regeringsformen*): No penalty or another penal sanction may be imposed for an action without a provision in a statute which was valid when the crime was committed.

According to Ch. 8 sec. 1 of the Criminal Code, a person should be sentenced for theft if he "takes what belongs to another". It is thus theft for one to come into possession of a valuable trade secret by unlawfully taking an already existing copy of a drawing. But to come into possession of the secret by copying the drawing, on the other hand, is no theft; copying is no "taking". One pays no regard to the fact that the difference between taking the existing copy, and the action of copying it, is not important from the victim's point of view (cf. Beckman et al. 1970, 280).

In some cases, however, the Swedish Supreme Court applied criminal sanctions analogically. In such cases, fixity and predictability had to yield for other moral reasons. The latter must, of course, be justifiable in a highly coherent manner.

The Tax Crime Act, Sec. 2, stipulates penalty for one who omits to declare his income and thus causes the fact that too low tax is imposed on him. In the case NJA 1978 p. 452, the Supreme Court applied this provision by analogy to convict a person who had omitted to declare his income with the consequence that no tax at all was imposed on him. The Court admitted that the decision contradicted the wording of the statute but corresponded to *travaux préparatoires* and the purpose of the statute.

In the case NJA 1959 p. 254, two men left a radioactive iridium isotope unguarded at their working site. They were sentenced for "causing general danger through spreading poison or… suchlike" (Ch. 19 sec. 7 of the Penal Code then in force, cf. now Ch. 13 sec. 7 of the Criminal Code). To *leave* the stuff unguarded was judged as analogous to *spreading* it.

In NJA 1956 C 187, a person threatened a cashier with a pistol that later turned out to be a toy and thus got some money. The Swedish Supreme Court decided that such an act constituted a robbery. The decision was based on analogy between a real danger and an action which the victim considers to constitute a danger.

In NJA 1954 p. 464, a man who made withdrawal from his account was sentenced for unlawful disposal, since he realised that the amount had been credited to the account by a mistake. This action was judged as analogous to unlawful disposal of what one has in one's possession (Ch. 22 sec. 4 of the Penal Code then in force, cf. now Ch. 10 sec. 4 of the Criminal Code). Literally, however, the defendant has never had the possession of the money.

The descriptions of offences in the Criminal Code are in general concerned with positive actions. They are also applied analogically to omission to act. According to Ch. 3 sec. 1 of the Criminal Code "a person who deprives another person of his life" shall be convicted of murder. This enactment would, however, be applied analogically to certain omission cases. If a person having the task of pumping air to a diver under water ceased pumping with intent to kill, and the diver was suffocated, he must be sentenced for murder.

b. In taxation law, the principle *nullum tributum sine lege* justifies the conclusion that one should apply analogy with restraint if it leads to increased taxation (cf. Welinder 1975, vol. 2, 242–3).

On the other hand, conclusion by analogy has priority before *argumentum e contrario* in private law. Private law, connected with a sphere in which an individual may make relatively free decisions. In this sphere, only the limits of freedom,

constituting the rules of the "game", must be highly fixed, even this causes some decrease of rationality. Other kind of legal rules must be, first of all, justifiable in a highly coherent manner.

A9) A statutory provision should be applied analogously to cases not covered by its literal content, if another provision states that they relevantly resemble those which are thus covered (cf. Hult 1952, 51).

According to Ch. 17 sec. 2 of the Decedent's Estate Code, a descendant cannot in principle validly waive his right to his lawful inheritance portion. The provision is applicable by analogy to adoptive children as well, since the statute has otherwise in various respects equated them with descendants.

A10) One may utilise *argumentum e contrario* only in exceptional cases, when interpreting rules based on precedents.

This reasoning norm has an indirect relevance in statutory interpretation, because the latter may be supported by a rule which itself is based on precedents.

The reasoning norm A10 is applicable to rules based on the the content of precedent decisions but it does not affect relatively rare cases in which statutory interpretation receives support from *argumentum e contrario* based on a general rule, explicitly stated by the court which decided the precedent case.

A10 is supported by the following reasons. A rule based on a precedent has another character than a statutory rule. The latter contains general terms, *prima-facie* establishing not only the sphere it covers but also the outer sphere it does not cover. On the other hand, the precedent decision does not establish any limit for the sphere of application of the rule it supports. The point of using a decision as a precedent is to obtain a pattern for analogous cases, and thus to facilitate creation of a general legal rule, not to settle the precise scope of the general rule. In spite of this, the practice of following precedents contributes not only to coherence of the legal system (since generality is a criterion of coherence) but also to fixity of the law. Though the rule, based on a precedent, has vague sphere of application, it gives the interpreter some information he would not have had he merely performed a pure moral reasoning. One thus knows at least two things: that the general rule in question covers the precedent case and that it is to be extended to analogous cases.

The case in question may from one point of view resemble cases which are regulated by a statutory rule and at the same time, from another point of view, resemble other cases which are regulated by another statutory rule. If statutory analogy is acceptable, i.e. *argumentum e contrario* is not, one thus encounters the problem of *which* analogy one should choose.

Consider again NJA 1950 p. 650, section 7.1.2 supra, where the decision has been regarded as a choice between analogies.

Another example (made obsolete by a statute in force since 1988) concerns the question who owns property which has been acquired during the cohabitation resembling marriage (cf. Bengtsson 1969). If one does not find it right to regard the parties separately, with the consequence that the partner who has bought an object will be owner of it, one can make a choice between the following analogies:

a. One can treat the case as analogous to corresponding cases in marriage and decide it according to rules in the Marriage Code.

b. One can also treat this case as resembling purchases made for a commercial partnership; the purchase would be considered to have been made for the account of both parties and the right of co-ownership would therefore exist.

When making choice between different analogies one takes into account considerations similar to those obtaining in the choice between analogy and *argumentum e contrario*.

The reasoning norms A1–A10 make the choice between the use of analogy and *argumentum e contrario* relatively fixed and thus *ceteris-paribus* restrict arbitrariness of the choice. They thus provide some support for the acts of weighing and balancing between coherence (which implies *inter alia* generality and thus contributes to justice) and, on the other hand, fixity of the law and predictability of legal decisions. This support makes the choice more *rational*.

7.4.6 Argumentum a fortiori

The following reasoning norms express two form of *argumentum a fortiori*:

A11) If the statute allows one to do more, then it also permits one to do less (*argumentum a maiori ad minus*).
A12) If the statute forbids one to do less, then it also forbids one to do more (*argumentum a minori ad maius*).

Argumentum a fortiori is an amplified reasoning by analogy. One concludes that a case should be treated similarly to another one. The reason is not only that the cases are similar but also that the latter deserves this treatment in a still higher degree then the former.

Sometimes one derives the conclusion concerning the relation "more-less" from "value-free" premises, analytical or empirical. A deaf and dumb person, e.g., is more handicapped than a dumb (and not deaf) one.

> The classical example is this. Premise: it is forbidden for two persons to ride one the same bicycle. Conclusion: it is forbidden for three persons to ride one the same bicycle (cf., e.g., Koch and Rüssmann 1982, 259).

> Cf. the Polish case SN IV CR 1079/55. From the premise that deaf and dumb persons may carry out a legal act before a notary public, the Polish Supreme Court drew the conclusion that a dumb (and not deaf) person was even more entitled to do so (Peczenik 1962, 143).

Usually, however, the relation "more-less" is based on a value judgment, either expressed in some sources of the law or "free". For example, a decision having come into force is "more" than a decision not yet have done so.

> The Polish case SN III CR 458/57 constitutes another example. From the premise that, after a decision has come into force, a person declared incapacitated in that decision may himself - not only through a guardian - in certain circumstances apply for the decision to be revoked, the Polish Supreme Court drew the conclusion that the person declared incapacitated is even more entitled to apply for the revocation before the decision has come into force (Peczenik 1962, 144).

In such cases, the interpreter formulates a *principle* and concludes that the case to be decided fulfils it to a higher degree than the ones covered by the statute.

Argumentum a fortiori may lead to questionable results. One can regard publishing of secret information as "something more" than the revealing it to friends. But in Sweden, as a consequence of the Freedom of the Press Act (cf. Ch. 7 sec. 3), an official publishing in some circumstances secret information in print is not criminally responsible; the same official, however, would be prosecuted for revealing the information to his friends (cf. Ch. 20 sec. 3 para. 2 of the Criminal Code).

The principle deciding what is "more" and what "less" thus competes with other principles, that is, other value judgments. When weighing and balancing them, one takes into account considerations similar to those relevant as regards other types of reasoning by analogy.

Argumentum a fortiori thus contributes to coherence of legal reasoning. This is even clearer than in other cases of analogy. Everything which makes a reasoning by analogy to contribute to coherence is applicable to the reasoning *a fortiori*. Besides, the latter has its own merits because, instead of statements of similarity between cases, one uses stronger comparative statements ("more" and "less"). The fact one does not apply a statutory rule to relevantly similar cases collides with the requirement of generality. The fact that one does not apply the rule to cases which even *more* deserve the application collides not only with this requirement but also with the principle stating what is more and what is less. The latter has its own coherent justification. When this is ignored, the degree of coherence must *prima-facie* decrease.

7.5 Teleological Construction of Statutes

7.5.1 The Basic Structure

Teleological construction of a statute is its interpretation in view of its purpose. According to Alexy, its basic structure is, the following (cf. J.5 in section 4.3.4 supra; cf. Koch and Rüssmann 1982, 259):

Premise 1:	Obtaining of the situation Z is prescribed
Premise 2:	If one had not do H, then Z would not be obtained
Conclusion:	One should do H

One may argue that the step from these two premises to the conclusion is not purely logical. To assure the logical character of the step, one needs the following additional premise:

If

1. obtaining of the situation Z is prescribed; and
2. if one had not do H, then Z would not be obtained; *then* one should do H.

The following inference is thus purely logical:

Premise 1:	Obtaining of the situation Z is prescribed
Premise 2:	If one had not do H, then Z would not be obtained
Premise 3:	*If* 1) obtaining of the situation Z is prescribed; and 2) if one had not do H, then Z would not be obtained; *then* one should do H
Conclusion:	One should do H

If so, then premises 1 and 2 alone merely support the conclusion but not logically entail it. The goal-reasoning is then a special case of S-rationality.

On the other hand, one can also argue that the step from premises 1 and 2 to the conclusion is purely logical, at least if one follows von *Wright's* advice (1963, 167) and enlarges the province of logic.

The latter view, implying that premise 3 is a logical statement, is perhaps more intuitive, since the goal-reasoning seems to be a formal one rather than substantive.

Regardless which view one assumes, the goal-reasoning does not constitute any separate kind of rationality (a "goal-rationality"), side by side with *L*ogical and *S*upportive rationality. It is only a special case of the former or of the latter. Still less justified is the view that all rationality is the same as "goal-rationality".

See also Alexy's principle of goal rationality, section 4.3.3 supra.

7.5.2 Subjective and Objective Teleological Interpretation of Statutes

Sometimes - though not often - a statutory provision states precisely that obtaining the situation Z is prescribed. Usually, however, a statutory provision is formulated in a non-teleological manner. It merely *supports* the conclusion that Z is prescribed. The conclusion does not follow from the provision alone but from a set, including the provision together with some other reasonable premises. Yet, one may state that the provision is a means to fulfil the goal Z. One may thus express the point of teleological construction of a statutory provision, as follows.

Premise 1:	The provision, L, is a means to fulfil the goal, Z
Premise 2:	If one had not interpreted L as containing the rule R, then Z would not be obtained
Conclusion:	One should interpret L as containing the rule R

It is natural to pay attention to the purpose of the statute. The statute consists of norms and the point of a norm is incomprehensible without a thought of a will or a purpose it expresses, cf. section 2.2.1 supra.

As stated above, the purpose of the statute (*ratio legis*) as regards *hard* cases differs from the will of the persons that participated in the process of legislation. Neither the *ratio* nor the proposed construction of statutes follow logically from the description of this will alone. The conclusion about the *ratio* is only derivable from a complex set of premises including some which are reasonable, although neither certain nor taken for granted within the legal paradigm, cf. section 6.6.2 supra.

In other words, the step from the text of the statute and data concerning the will of its "authors" to the *ratio legis* is a *jump*.

One may thus make a distinction between a subjective- and an objective-teleological construction of statutes. The former is based on the will of persons participating in legislation, or on *travaux préparatoires*. The subjective-teleological construction has thus the following two forms:

I

Premise 1:	The "legislator" regards the provision, L, as a means to fulfil the goal, Z
Premise 2:	If one had not interpreted L as containing the rule R, then Z would not be obtained
Conclusion:	One should interpret L as containing the rule R

II

Premise 1:	According to the *travaux pré paratoires*, the provision, L, is a means to fulfil the goal, Z
Premise 2:	If one had not interpreted L as containing the rule R, then Z would not be obtained
Conclusion:	One should interpret L as containing the rule R

One may express the objective-teleological construction of statutes, as follows. (See also Alexy 1989, 198 ff.).

Premise 1:	According to an interpretation, supported by various juristic substantive and authority reasons, the provision, L, is a means to fulfil the goal, Z
Premise 2:	If one had not interpreted L as containing the rule R, then Z would not be obtained
Conclusion:	One should interpret L as containing the rule R

7.5.3 Radical Teleological Interpretation of Statutes

In this connection, the following questions occur: 1) Do any other construction methods have priority before teleological construction of statutes?, and 2) What interpretative problems should one solve with support of teleological construction of statutes?

The classical answer to the first question assumes that teleological construction of statutes is a last resort. It is to be applied after one failed to remove vagueness of the interpreted provision, in spite of having used the literal, logical, systematic and historical methods. The *radical teleological* approach claims, on the other hand, that the teleological method is applicable since the very beginning of the interpretatory process.

The classical answer to the second question assumes that one should use the teleological construction of statutes only when aiming at reduction or creation of a more general new norm, not when performing a restrictive or extensive interpretation. The *radical teleological* approach claims, on the other hand, that the teleological method is applicable to all kinds of interpretatory problems.

The radically teleological construction of statutes is a product of the evolution of legal method at the end of 19th and the beginning of 20th century. According to *Rudolf von Ihering*, the content of the legal system reflects the individual and common interests of people. Statutory interpretation should be teleological, i.e. should pay regard to legally-protected interests, concerning not only material goods but also honour, love, liberty, education, religion, art and science. Ihering saw, however, limitations of the teleological method. He thus refused to use the term "purpose of law" in definitions of juridical concepts, in the systematic of the penal code and in categorisation of private-law rights.

According to *Francois Gény*, who created the "free scientific research" of the law, the text of the statute must be taken into account when it is clear. Otherwise the interpreter should with the support of other sources of the law try to establish the value judgments which formed the basis of the statute. Where these sources give no answer, the judge may make a free interpretation, influenced by an assessment of interests, by conceptions of justice, and by considerations of social utility.

Eugen Ehrlich's "free-law school" followed Gény. But Ehrlich's pupils, among them *Hermann Kantorowicz*, expressed the following, more radical views. On all questions where the answer does not clearly appear from the text of the statute, the judge has no reason to conform to such sources as the *travaux préparatoires*. He is free to reject the value judgments which formed the basis of the statute, and he may decide the case in accordance with his own evaluation of interests which are protected by the statute. The judge's freedom to thus follow his own judgments, feelings and even intuition is restricted only where it is a matter of construing various organisational and procedural rules.

The *Interessenjurisprudenz*, founded by *Philipp von Heck*, was more cautious than the free-law-school. The interpreter should not rely upon his own will or feelings but on research concerning interests and their evaluation in accordance with the values on which the statute is based. Where different interpretatory alternatives lead to a protection of different interests, judges should rely on the legislator's ideology and values accepted by him, in so far as these can be read from the statute. Secondarily they should rely on their own analysis of different interests. It is not sufficient to take into account the purpose of the statute. It is true that the purpose of the statute was the protection of certain interests. These "winning" interests, however, collided with others which lost the battle for legal protection but could nevertheless influence the formation of the statute e.g. the question of the extent to which the "winning" interests obtained legal protection. Thus the interpreter should take into account the struggle occurring in the community between different interests. Only where scientific analysis of different interests is not sufficient to find an unambiguous interpretation may the judge rely on his intuition.

In the USA, a related theory has been developed by *Roscoe Pound*. The function of the legal order consists in social engineering, comprising an acknowledgment of certain individual, public and social interests; a determination of the limits within which these interests are to be recognised and protected by the law; and a protection of recognised interests within thus determined limits. In this connection, Pound has developed a number of rules of interpretation which should be used in private law.

Rules on the ownership and the majority of commercial-law rules should be interpreted with the use of precise arguments based on the sources of the law, since such an interpretation will protect the rule of law which is an important social interest. On the other hand, indemnity rules should be construed freely according to the interpreter's evaluation of colliding interests.

7.5.4 Teleological Interpretation of Statutes According to Ekelöf. Introductory Remarks

The teleological construction of statutes in Sweden is associated above all with the name of *Per Olof Ekelöf*. A summary of his views is as follows. In ordinary cases, judges and jurists should follow the vague meaning the statute has according to the ordinary linguistic usage. In "special" (uncertain, untypical, hard) cases, the interpreter ought not to perform linguistic analysis of the statute, nor feel oneself to be bound by the *travaux préparatoires*.

> At the same time, Ekelöf regards precedents as more important as the *travaux préparatoires* (cf., e.g., 1958, 87 and 93 ff.). For Ekelöf a precedent is a source of the law side by side with the statute; the *travaux préparatoires*, on the other hand, are not. But it is not entirely clear to me how it is possible to justify this priority order where Swedish law is concerned.

Instead, one should consider the purpose of the enactment in question. One must establish this purpose of the statute by reference to its effects (its "total result", "actual function", or "practical function") in *ordinary* cases (cf. Ekelöf 1958, 84 ff. and 105 ff.; 1951, 23 and 28–9). Ekelöf thus recommends the following chain.

1. Statutory construction in ordinary cases takes place through linguistically natural interpretation.
2. This statutory construction affects the outcome of ordinary cases.
3. The outcome of these cases leads to certain effects in the community.
4. Some of the actual effects of the interpretation of the law in ordinary cases constitute the purpose of the statute, i.e. the effects the statute ought to have.
5. The purpose of the statute, in its turn, is determinative in the construction of the statute in "special" cases.

> By the way, the method has an American counterpart, Cf. Hart and Sacks 1958, 1153: "an expectation that interpreters of the statute would resolve cases of doubtful application by an effort to discern the purpose behind the instances of clear applicability (and inapplicability) and to arrive at conclusions consistent both with this purpose and these instances". But when determining "the purpose behind the instances of clear applicability", Hart and Sacks assume a different priority order of reasons than Ekelöf: The linguistic sense of the statute is relevantly less important for them (although certainly not totally irrelevant).

> Ekelöf gives the following example (1958, 110 ff.). Ch. 45 sec. 5 para. 1 of the Code of Judicial Procedure reads as follows: "An indictment once made may not be changed. The prosecutor may, however, extend the indictment against the same defendant to include another offence if the court, having regard to the police inquiry and other circumstances, finds this appropriate."

Let us now assume that several persons are being prosecuted for having jointly committed a number of burglaries. One of them is prosecuted only for participation in one burglary. However, immediately before the trial, the prosecutor alters the indictment in such a way that this person is no longer prosecuted for this burglary but instead for participation in one of the other burglaries. The accused confesses to the offence, and there is also other evidence of this. Is such a change in the indictment permissible? The literal formulation of the statute provides no support for this conclusion. It is permissible only to "extend", not to change the indictment. Ekelöf's method, however, leads to a different conclusion. He first asks to what effects the provision leads in ordinary cases. Somebody is prosecuted for one crime and later for another in addition. Both offences are dealt with in the same trial. Everybody involved saves the time, money and trouble which would ensue from two trials. Ekelöf finds that such a saving must be regarded as the purpose of the statute. Finally, he reverts to the "special" case mentioned above and states that even where a person is prosecuted in the given circumstances for one crime *instead* of another, this will also lead to the same saving. The conclusion is that the change in the indictment must be regarded as permissible in this case.

7.5.5 Teleological Interpretation of Statutes According to Ekelöf. The Problem of Preciseness

Ekelöf's method has three advantages.

1. It pays attention to the purpose of the statute. Indeed, "(a)ny judicial opinion… which finds a plain meaning in a statute without consideration of its purpose… is deserving nothing but contempt" (Hart and Sacks 1958, 1157).
2. It results in similar treatment of ordinary and "special" cases, thus promoting justice, generality and hence coherence of reasoning. In this manner, a person deciding an actual case must refer to a whole set of hypothetical cases. This kind of considerations is commonly recognised as very important within legal reasoning.
3. It supports decisions in "special" cases with sophisticated reasons. In consequence, it conforms to the demand of *S*upportive rationality and thus coherence.

The method is reasonable and one ought to use it in *some* cases. However, in consequence of the following problems, it should merely supplement, *not supersede*, other methods of statutory construction.

First of all, the method is *not more precise* than other methods of statutory construction. In other words, it does not to a higher degree assure the required predictability of legal reasoning and fixity of the law. Uncertainty thus occurs when one attempts to precisely answer the questions, a) What cases are ordinary?, b) What are the results of the method in the ordinary cases?, and c) What is the purpose of the statute?

a. What cases are ordinary and what are "special"? Special are not only such cases as fall outside of the letter of the law but also cases which are clearly covered by this "letter" but which seldom occur or are connected with "such special circumstances that a mechanical application of the statute can be regarded as militating against its purpose" (Ekelöf 1958, 84). Ordinary are, on the other hand, those cases which are of great importance or are for some other reason so striking that the drafters of the statute could not have avoided taking note of them. Moreover, due to social change occurring after the statute has been enacted, some cases can become ordinary though the drafters never thought of them. Consequently, when making the distinction between ordinary and "special" cases, one must rely on an evaluative weighing of various vague criteria.

   Ross (1953, 171 n. 2) has thus held that it is not possible to establish which cases are "certain" and which are "special" before the purpose of the statute has been determined.

   This difficulty to make a precise distinction between ordinary and "special" cases occurs, e.g., when one has to interpret *general clauses*. For example, sec. 36 of the Contracts Act gives the courts possibility to modify or set aside a contractual stipulation, "if it is undue (unreasonable) with regard to the content of the contract, circumstances of its origin, subsequent circumstances and other circumstances". Assume now that a standard contract prepared by a big company, dominating the market, contains a certain arbitration clause. A rather unexperienced businessman signs the contract. Later, he claims that the clause is to be set aside. The clause may be considered to be unreasonable. But is the case ordinary or "special"? The wording of the statute does not answer this question. The answer requires a *moral reasoning*. Some guidelines for this are included in the *travaux préparatoires* (Government Bill 1975/76:81, 118 ff., cf. section 6.6.7 supra). These guidelines helped the courts to make a number of decisions, cf., e.g., NJA 1979 p. 666 (section 1.2.2 supra).

b. What are the effects of the use of Ekelöf's method in the ordinary cases? It may be supposed that such knowledge could be obtained through a sociological investigation, but this can be difficult to perform. Most probably, Ekelöf sometimes relies on the actual, sociologically established effects and sometimes on the hypothetical, foreseen effects (cf. Thornstedt 1960, 229 ff.). But how can one test a hypothesis about the latter?

c. But to establish the purpose of the statute is still more difficult (cf. id.). Ekelöf considers only some of the actual effects of the application of the statute in ordinary cases to be identical with the effects that the statute ought to have, i. e. its purpose. Let me analyse an example. On Swedish roads certain speed limits are in force. What are their effects? Well, the first is that the number of traffic accidents in Sweden has diminished somewhat. Another is that the number of drivers who obey traffic rules has declined even more. A third is that Swedish drivers venturing onto German *Autobahn*, where no speed limit apply, often drive badly because they are unused to fast driving. The sole purpose of speed limits, however, is clearly to reduce the number of road accidents in Sweden. It follows that the purpose of the statute includes only effects which, according to the interpreter's judgment attributed to the lawmaker, are good. Ekelöf has explicitly admitted that the interpreter must rely on his own

"good judgment". But who can know for sure what effects of, e.g., a complex tax legislation are good and what bad?

The general clause in the sec. 2 of the Tax Evasion Act of 1980 (changed in 1983) stipulates what follows:

"When making the tax assessment, one should not pay attention to a transaction performed by the taxpayer…, if

1. the transaction… is included in a procedure that gives the taxpayer a not irrelevant taxation advantage,
2. the advantage, in view of the circumstances, can be regarded as having been the main reason for the procedure and
3. the tax assessment based on this procedure would contradict the grounds of the legislation."

But what does contradict the grounds of the legislation? Assume that A transferred a number of houses to a company he totally owned and then sold shares in this company to a third party. In this way, A obtained a taxation advantage in comparison with a hypothetical situation in which he directly sold the houses. This procedure was judged as not contradicting the grounds of the legislation (cf. the case RÅ 83 1:35). On the other hand, the Supreme Administrative Court found that the following procedure *was* contradicting these "grounds": A death estate was divided in such a way that the widow received a farm. Then she sold it to the heirs who in this manner obtained a taxation advantage (cf. the case RÅ 84 1:92). What support can the interpreter find for making such distinctions? He may pay attention to the *travaux préparatoires*, "general structure of statutes" and "their purpose" (Government Bill 1980/81:17, pp. 26 and 197; Government Bill 1982/83:84, p. 19.) The *travaux préparatoires*, however, not always give the required information. "General structure of statutes" and "their purpose" can be found with help of Ekelöf's method. But then, one must be able to judge whether or not this general clause causes the same effects in this case as in the ordinary cases. What are then "the same effects"? This expression refers probably to abstract and complex matters only an advanced law-and-economics study can describe, such as a certain relation of taxation to one's capacity to pay. To make Ekelöf's method applicable to the tax evasion clause, one must thus discuss complex and profound problems.

Different problems connected with teleological interpretation of statutes hang together and affect each other. Ekelöf's method to establish the purpose of a statutory provision depends on the distinction between ordinary and "special" cases. At the same time, this distinction requires a recourse to the purpose of the provision. The interpreter reasons in a "spiral". Cf. the remark in section 7.3 supra on the so-called hermeneutical circle.

A preliminary and vague determination of ordinary cases thus influences the establishing of the purpose of the statutory provision. The latter affects a deeper understanding of the distinction between ordinary and "special" cases. This results in a deeper understanding of the purpose. One may thus modify and mutually adapt various premises of teleological interpretation in order to achieve a balance, resembling the "reflective equilibrium" (cf. section 3.2.1 supra). Such a balance occurs in many other interpretative contexts as well. It is nothing special for Ekelöf's method.

In this connection, one must also consider our remarks on jumps in legal reasoning, cf. sections 2.7, 3.2 and 5.8.5 supra.