REASONS FOR DIFFERENCES OF OPINION ON QUESTIONS OF LAW: AN ANALYSIS OF DISSENTING OPINIONS IN THE NORWEGIAN SUPREME COURT

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I. APPROACH TO THE PROBLEM

The process of judicial decision-making can be studied from different points of view. In legal philosophy discussion has, for example, been directed to the question of how great a part principles of logic play in the judicial process, as compared with considerations of expediency and equity. The historian can study legal development as a reflection of social conditions and ideological trends through the ages. Sociologists and political scientists have focused their attention upon the possible effect on judicial decisions of class loyalties and political opinions.

Such approaches to the problem will not be followed here. This study has sprung from an interest in the doctrine of the sources of law. Expositions of this doctrine deal with the various sources of law and their respective importance. We are told of the principles for statutory interpretation, of extensive, analogical, and restrictive interpretation, of the significance of the legislative history, customs and precedents, considerations of public policy, and other factors; but we are seldom or never told anything *precise* about what relative importance individual factors have when they compete with one another by pointing to different results if regarded separately. When studying theoretical expositions of the doctrine of the sources of law, one can therefore easily be left with the impression that everything is veiled in obscurity.

Since it is so difficult to indicate definite norms governing the relative importance of the individual elements of the sources of law, one is struck by the possibility that uncertainty in this field might often be a basic cause of differences of opinion as regards the solution of questions of law. In an attempt to shed some light on this subject the authors have undertaken an analysis of all the dissenting opinions delivered in the Norwegian Supreme Court during the five-year period 1961–65. It was natural to take the Supreme Court decisions as the starting point, since the highest

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court to such a great extent charts the course to be followed by inferior courts, administrative authorities, and legal scholars. The judgments of the Norwegian Supreme Court consist of individual and usually rather comprehensive opinions of the judges, given orally at public sittings. If there is unanimity, the first-voting judge explains the grounds for his conclusion and the subsequent judges normally declare themselves to agree "in the essence and in the conclusion". Sometimes, however, they find reason to explain their own position more thoroughly, even though they agree in the conclusion. In this essay only decisions in which there is dissent as regards the final result are reckoned as dissenting opinions, not those which merely differ as regards the grounds for the judgment. The system of public voting was introduced in Norway in 1863, and makes the decisions of the court more attractive material for analysis than, for example, the Supreme Court decisions of the other Scandinavian countries, where a more formal style of drafting prevails. It may be mentioned that the Court has seventeen judges, but only five judges sit on each case. Normally two divisions of the court will be sitting simultaneously, but all judges serve in both divisions according to a system of rotation. In special cases, for example when the question arises whether a statute should be disallowed on constitutional grounds, a plenary session of the Court is held, i.e. all seventeen judges attend.

The limitation of the material to Supreme Court decisions carries with it a corresponding limitation in the range of the conclusions that can be drawn. It is possible—indeed probable—that within a collegiate body engaged in daily cooperation, such as the Supreme Court, a greater consensus of opinion will arise as to which factors shall be accorded weight and how they are to be balanced against one another than is to be found in the legal profession as a whole. It may be the case that there are typical differences between the theoretician's and the practitioner's method of reasoning, or that greater reciprocal differences are to be found between legal writers than between judges. It is also conceivable that there might be certain differences between the method of reasoning of a Supreme Court judge and that of a judge of an inferior court. Our investigation can offer no answer to such questions. To what extent the results are representative of periods other than the one investigated must also remain an open question.

The inquiry is limited to dissents on *questions of law*. The Norwegian Supreme Court decides matters of evidence as well as

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matters of law, with the exception, however, that in criminal cases the Court is bound by the evaluation of the evidence made by the inferior court. In what follows, dissents as regards interpretation of evidence are not dealt with. But dissents with regard to questions of which of the parties should carry the burden of proof and of what strength of evidence he should be required to produce have been included, since these questions are true matters of law. It should be mentioned, too, that purely discretionary decisions, for example as regards the assessment of a penalty, are excluded. Finally, the subject is limited to the application of the law as it stands. Differences of opinion as to what the rule *ought* to be only come within the discussion to the extent that the argumentation has a bearing upon the decision of the Court.

II. A MODEL FOR JUDICIAL DECISION-MAKING

In making the analysis a simple model covering the relationship between the doctrine of the sources of law and judicial decision-making has been employed.

(1) We have before us in the first place all that can be called the *sources of law material* or the *elements of sources of law,* such as legislation, legislative history, precedents, customs, public opinion, and everything else that can conceivably be considered when a question of law falls to be decided. This is, so to speak, the raw material in the process.

(2) Next we have the *doctrine of the sources of law, or the principles for the application of law,* i.e. the principles governing what is to be recognized as sources of law and what weight the individual element of the sources of law should be accorded when it competes with other elements.

(3) Finally, we have the finished product, *the legal rule.* This emerges when the relevant elements of the sources of law are processed and evaluated in accordance with the principles relating to the doctrine of the sources of law.

If judge A and judge B differ as to what rule must be laid down as the law, the reason may be that they have different views as to the *existence* or *content* of one or more elements of the sources of law (step 1 in the model). They may, for example,

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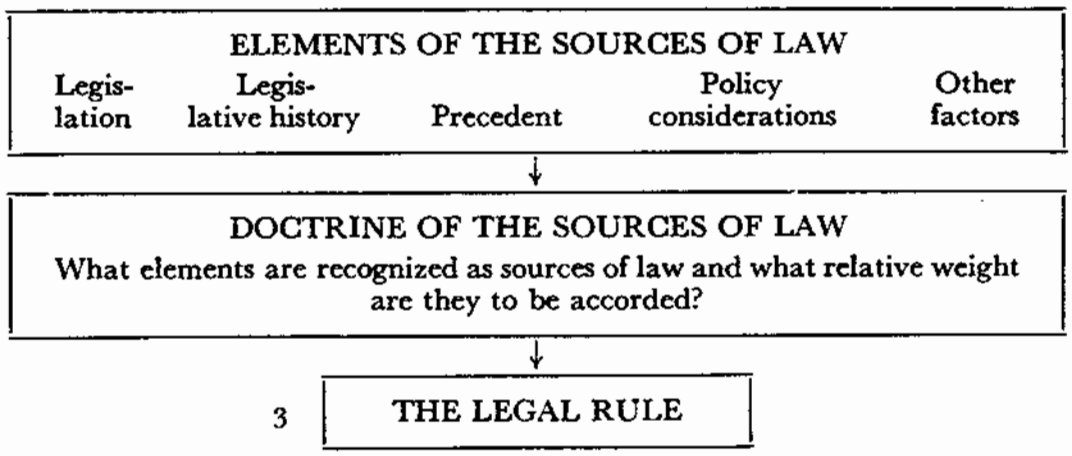
Table 1. *Model I*



differ in their understanding of a former judgment of the Supreme Court. But the difference of opinion may also extend to the question of which elements are legally relevant or what relative weight the different elements are to be accorded when they indicate different results (step 2 in the model). Only the last-mentioned types of difference of opinion concern the doctrine of the sources of law; in this investigation they are placed under the common designation "dissent as to the sources of law". We can, for example, envisage a situation where A and B agree that the wording of the Act does not offer any definite solution and that considerations of public policy must be decisive, but A is of the opinion that consequently rule *x* must be applied, while B prefers rule *y*. In this case they differ as to the solution, but the basic cause of their difference of opinion is not to be found at the sources-of-law level. The position is different if they both agree that the wording of the Act leads to the adoption of rule *x*, and considerations of public policy to the adoption of rule *y*, but A is of the opinion that the wording of the Act must be conclusive, while B prefers to tip the balance in favour of the considerations of public policy. This is a difference of opinion as to the relative weight to be accorded to the different elements in the sources of law.[1]

One or two explanatory comments on the model may be appropriate. "Statute law" is generally set apart as one of the sources

[1] The assumption is that they are agreed not only as to *the direction to which* the individual element of the sources of law is pointing but also as to *how strongly* it does so; see *infra*, section VI.

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of law, while the legislative history and considerations of public policy are regarded simply as means of defining the contents of a statute. In this investigation we have preferred to place legislation, i.e. its literal contents in its ordinary verbal meaning, on the same level in our diagrammatic representation as other factors that can be conclusive as regards the solution.

As elements in the sources of law we also include factors which do not occur to the judge in the shape of external facts, but are more or less a product of his own capacity to reflect and evaluate, for example, his opinion of what effects one or another solution of a question of law will have and how he personally evaluates these effects. These two considerations fall jointly under the designation "policy considerations". We here accord the expression a wide meaning, such that it refers in general to the judge's view of what would be a desirable result. It is roughly equivalent to what Ross calls "pragmatic factors".[2]

In the model the doctrine of the sources of law is presented as a datum; what basis it has in itself does not come within our purview. The model does not, therefore, express any decided view as to whether the doctrine of the sources of law remains independent of the elements of the sources of law of the type placed on the first step of the model. In actual fact it is largely the same sorts of elements that are decisive for the evolution of the doctrine of the sources of law. Nevertheless, there is one essential difference. Nowadays statute law is the predominant source of law in most legal fields. But since statute law and its legislative history rarely say anything about the general principles for the application of law, one must, when dealing with the doctrine of the sources of law, turn first and foremost to the actual practice of the courts as embodied in precedents. The problems of legal logic that in this instance arise—for example, "How can precedents conclusively decide what weight is to be accorded to precedents?"—need not concern us in this connection, since we are aiming at a purely descriptive investigation of the Supreme Court's activity.

An analysis based on the publicly delivered reasons for a decision is naturally subject to severe limitations. The judge will often proceed directly from the relevant elements of the sources of law to the concrete legal rule without formulating the principles governing the application of the sources of law which form the basis of his decision, or he will content himself with a very vague formulation. In such cases it may be difficult to judge whether

[2] Alf Ross, *On Law and Justice*, London 1958, p. 151.

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a difference in the result is linked to step (1) or to step (2) in the model. Nor can one assume as a matter of course that the principles governing the application of the sources of law which are *formulated* are identical with those *actually applied*. Not that the judges deliberately say something different from what they mean; that, of course, rarely happens. We do not put forward the extremist conception that the reasons given for a judgment are a sort of façade legitimizing a result that the judge has decided on for other reasons. But the principles formulated in connection with a concrete case tend to be coloured by it, and in another case it may happen that the same judge would feel that the principle was not applicable. For example, in the case of the Norwegian Supreme Court judgments there are to be found many declarations to the effect that the accused must be given the benefit of any doubt as to the interpretation of a penal provision, or that a statutory provision empowering administrative authorities to interfere with citizens' rights must be strictly interpreted in accordance with its wording, while at the same time there are also to be found a number of decisions which—without expressly departing from the principles mentioned—do *not* allow the accused to have the benefit of the doubt as to the interpretation or do *not* interpret an empowering provision strictly in accordance with its wording.

In this connection it is also important to clarify the interrelationship between facts at issue and the application of law in the case at bar. When a court adopts a legal maxim, this always occurs in relation to a definite fact. The application of law is thereby linked to the wealth of nuances that the facts at issue may imply, but which practically speaking cannot be described in detail. The study of a judgment will therefore hardly enable one to grasp fully the whole content of a case, and the application of law may appear to the reader of wider scope than the judge intended it to be.

What facts are made the basis of the legal decision depends upon what evidence is brought before the court and the court's assessment of these facts of evidence in the light of common experience.[3] It can, however, be envisaged that even the facts pre-

[3] For the sake of simplicity we disregard the application of legal rules which takes place when the court rejects a piece of evidence offered, e.g. a written statement of evidence that the law does not allow to be presented in documentary form. (Compared with English law and American law, Norwegian law has very little in the way of rules of evidence.) We also disregard the rules as to the burden of proof.

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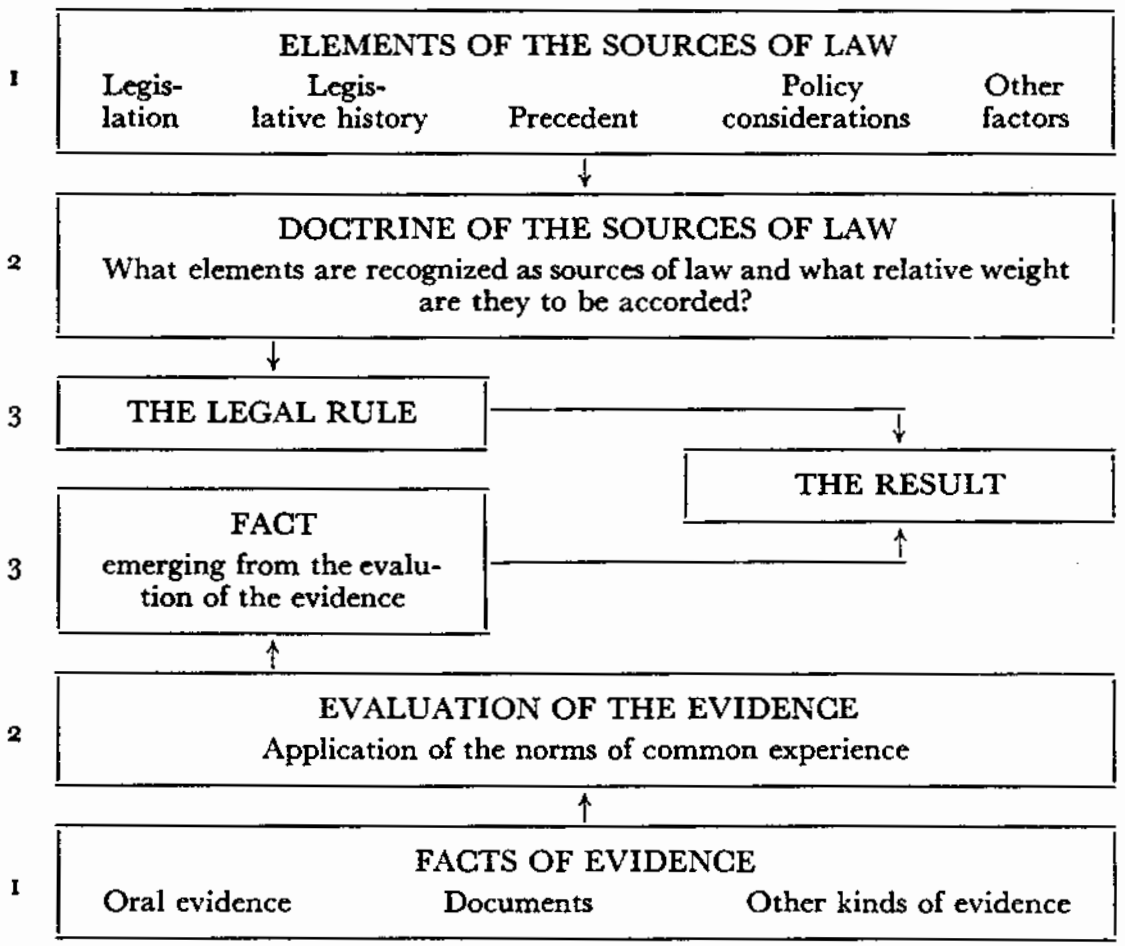
Table 2 *Model II*



sented in the judgment may be influenced by the result that is chosen. One cannot avoid noticing that there sometimes occurs a certain dislocation or twisting of the facts in that the judge, in stating his reasons, specially emphasizes those factual elements of the case that best support the result he has arrived at after an evaluation of *all* the circumstances. It is thereby possible that the facts in their "purified" or "harmonized" form no longer make it necessary to take a stand on a doubtful question, such as, for example, the balance to be struck between conflicting elements of sources of law.

As regards criminal cases, however, the Norwegian Supreme Court will in accordance with the present appeal system in Norway be bound by the inferior court's account of the facts appertaining to the question of guilt. With the reservation arising from this, the whole process of decision-making can be illustrated by model II, which is an extension of model I.

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Table 3. Supreme Court decisions delivered with dissent 1961-65.

Source of disagreement	Type of case			
	Criminal case	Private-law case	Public-law case	Total
Assessment of penalty or meting out of damages	76	1	1	78
Questions of law	22	20	32	74
Fact (Herein is included disagreement as to the interpretation of contracts, and of judicial findings of fact, etc. Disagreement as to whether the act was negligent is also included.)	10	51	9	70
Total	108	72	42	222

III. ANALYSIS OF THE MATERIAL

During the years 1961–65, the Norwegian Supreme Court decided 514 civil cases and 1,003 criminal cases, in all 1,517 cases. This gives an average of about 100 civil cases and 200 criminal cases a year.

Dissenting opinions occurred in 114 civil cases and 108 criminal cases, in all 222 cases, giving an average of 23 civil cases and 22 criminal cases a year. Plainly, there was a greater proportion of dissenting judgments in civil cases than in criminal cases—23 per cent and 11 per cent respectively. This may be due to, *inter alia,* the rules as to which cases may be appealed to the Supreme Court. In criminal cases there is also not the same economic risk attached to an appeal as exists in civil cases, a factor which leads to a wider use of the facilities for appeal.

Of the total number of dissenting opinions, however, the majority fall outside the scope of the inquiry because the dissent relates either to fact or to the assessment of a penalty, or to the meting out of damages. Under the heading of fact in Table 3 we have for our purposes been obliged also to include discretionary decisions as to whether the act was negligent, etc., and likewise the interpretation of contracts, wills, and other legal documents,

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together with the interpretation of the inferior court's findings of fact in criminal cases. Factual and legal elements are so closely interwoven in these cases that differences of opinion cannot be divided into clear categories. A survey of the whole material is given in Table 3. The civil cases in this table are divided into two categories: private-law cases and public-law cases.

In all, 74 decisions fell within the scope of the analysis, being divided into 20 decisions in private-law cases, 32 in public-law cases, and 22 in criminal cases. Cases in which disagreement occurred as to both fact and the application of law have been classified as relating to questions of law, but the classification may, in this instance, sometimes appear doubtful.

In analysing the contents of the decisions, an attempt has been made to relate the argumentation to categories that are generally discussed within the doctrine of the sources of law, and we have sought to maintain the above-mentioned distinction between differences of opinion as to what result the individual elements of the sources of law indicate when regarded separately (step 1 in the model), and differences of opinion as to what weight the different elements are to be accorded (step 2 in the model). The different elements of the sources of law have in the final arrangement been reduced to five categories: the wording of the statute, the legislative history, former precedents, considerations of public policy, and the comprehensive heading "other factors". In the fields not covered by statute law, the first two categories are not relevant. In the original scheme of analysis, other categories were introduced; thus "custom" and "the principles governing conflicting statutes" were put into special categories. But, since the numbers falling within the various categories were so small, we found it more practical to resort to the rough classification now mentioned.

A presentation of the main results is given in Table 4.

As can be seen from Table 4, it proved that in 39 out of the 74 dissenting opinions, i.e. in about half the total, it was not possible on the basis of the reasons given to establish the root of the dissent so as to be able to classify it for our purposes. These unclear decisions can, generally speaking, be divided into two groups. One group consists of the cases in which the majority, the minority or both the majority and the minority of the Court content themselves with declaring their opinions as to how the law stands without giving any reasons why this is so. In these instances an analysis of the basis of the dissent is naturally precluded.

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Table 4. Supreme Court decisions containing dissents on questions of law 1961–65.

Sources of disagreement	Type of case			
	Criminal case	Private-law case	Public-law case	Total
Existence or contents of elements of sources of law	6	5	14	25
Relative weight accorded to the elements of the sources of law	5	5	0	10
Unclear disagreement on questions of law	11	10	18	39
Total no. of cases	22	20	32	74

As an example one may mention the case reported in 1965 N.Rt. 1215. The question involved was of the liability of a municipality to pay compensation because the municipal health board had prohibited the establishment of a large poultry farm in close proximity to two neighbouring properties. Various procedural errors had been committed; *inter alia,* the poultry farmer had not been given a hearing in the first instance. But the majority rejected the claim for compensation because they did not find it probable that the error had affected the result. The dissenting judge held that there was a rule applicable to decisions by administrative authorities that a prohibition of vital consequence for the person affected by it cannot be upheld if it is to be assumed that the failure to give notice to the person concerned *may have* affected the decision, which he considered to be the case in this instance. Thus there appears to be a difference of opinion as regards the significance of procedural errors on the part of administrative authorities, but it is not possible to say whether this difference of opinion is due to a different interpretation of the relevant case law or to other circumstances.

In the second group the situation is that the majority and the minority accord weight in their argumentation to different factors without expressly stating whether they disagree with what has been said on the other side. The reasoning points perhaps in the direction of two or more possible bases for dissent, but a definite classification is not possible.

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As an example one may mention the case reported in 1961 N.Rt. 117. As a result of the regulation of the watercourses in Numedal, the usual winter route over the ice in Norefjord was jeopardized. The firm Nore Forbruksforening, which had sales depots on the east side of Norefjord, claimed damages for the losses it suffered because its regular customers on the west side of the fjord could no longer cross over on the ice during the winter. The majority of the Supreme Court rejected the claim upon the grounds that there was no statutory basis for it, nor did it fall within the principles relating to expropriation laid down by the courts. One judge expressed himself in favour of awarding damages, though without really contradicting the reasoning of the majority. He also referred to case law, but essentially to decisions *other* than those mentioned by the majority.

There remain 35 judgments in which the reason for the dissent can be classified with more or less certainty. These were subjected to more detailed analysis. The great majority relate to statutory interpretation. Only five of the judgments concerned the application of law in fields not covered by statute law. How to draw the dividing line must, moreover, sometimes remain doubtful. As an example may be mentioned a claim for damages against a municipality because the executive committee in refusing to grant an exemption had taken into consideration matters that lay outside the purpose of the Act (1965 N.Rt. 712). In this instance the question involved both application of a non-statutory rule in Norwegian administrative law concerning the extent of the courts' right to quash an administrative decision and what matters the administrative authorities were entitled to take into consideration under the relevant statute. We have assigned the judgment to statutory interpretation.

In 25 out of 35 cases the disagreement related to one or more elements of the sources of law, while in 10 cases the dissent concerned the question of their relative weight under the doctrine of the sources of law.

The individual elements of the sources of law to which the disagreement related in the 25 cases in the first group are set out in Table 5, which also shows where the opinion in question is to be found.

It will be noted that the total number of reasons for dissent is greater than the number of decisions. It is often the case that the majority and the minority of the Court disagree upon several points in the argumentation. They may disagree not only on what is the natural construction to be put on the wording of a statute

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Table 5. Supreme Court decisions containing a dissent as to the existence or contents of elements of the sources of law 1961–65.

Element of the source of law	Type of case			
	Criminal case	Private-law case	Public-law case	Total no. of cases
Wording of the statute	61/348, 61/353 61/1350, 63/677		61/98, 64/636 64/654, 65/347 65/363	9
Legislative history	61/1350		61/98, 61/371 61/530, 64/34 64/484, 64/636	7
Precedent	62/527 64/1215	63/1219 64/474	64/654	5
Policy considerations	62/527	62/1223 63/580 64/474 64/1310	62/909 64/256 65/347 65/712	9
Other factors (purpose of the act, custom, public opinion, etc.)	61/1350 63/677		61/146 62/909 63/271, 65/712	6
Total no. of cases	10	6	20	36

but also on what is required by considerations of public policy, how the legislative history is to be interpreted, and what conclusion is to be drawn from former decisions. As was mentioned above in another connection, it is probable that the result at which a judge arrives colours his view as regards the individual steps in his grounds for judgment. As soon as he has adopted a certain standpoint, the formulation of the reasons for his decision is no longer an impartial and uncommitted review of the individual factors. The standpoint he has adopted has to be supported by convincing reasons, and since it is human nature to find what one wishes to find, there will be a natural tendency for whatever tends to support the result to be brought to the forefront and accorded significance, while whatever tends in the opposite direction is likely to be thrust into the background.

When there has been disagreement on several points in the grounds for judgment we have not attempted to evaluate which point or points have been of most importance, but we have been

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rather strict in our requirements for the inclusion of a disagreement in the table. Thus there are a number of decisions in the material which have been included in only one of the categories, but which probably also contain disagreement on other elements of the sources of law.

IV. THE INDIVIDUAL ELEMENTS OF THE SOURCES OF LAW TAKEN SEPARATELY

In order to give a little substance to the statistical information presented in Table 5, we shall in this section make some comments on the individual elements of the sources of law.

The wording of the statute. A difference of opinion as to the natural construction to be put upon the wording of a statute in accordance with the ordinary meaning of the words has been recorded as the basis of the dissent in 9 cases. Either the majority and the minority are each of the opinion that they can justify their separate results from the wording of the statute, or one section is of the opinion that the wording of the statute is clear and provides a firm basis, while the other section finds that the wording of the statute is ambiguous and therefore seeks a basis in other factors. In neither instance can one be certain that the verbal interpretation is independent of an evaluation of the result. A verbal interpretation of a statutory provision does not simply consist of a comparative assessment of the possible interpretations from a philological angle. The meaning of an expression or of a sentence is always coloured by its context, and there will probably be a tendency to choose intuitively the construction that one feels will give the most sensible result. In some of the judicial decisions analysed one can more or less certainly infer from the reasoning that such an evaluation has influenced the choice of the verbal construction.

> As an example may be mentioned the case reported in 1961 N.Rt. 98. The case involved an interpretation of sec. 3 of the Telegraph and Telephone Systems Act of June 9, 1903, relating to the subscriber's obligation to make land on his property freely available for setting up the poles needed for connection to the telephone system. The question was whether this also applied when the poles carried other telephone wires as well. The judge first to vote, who was also the spokesman for the majority of the court, declared that it might

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appear unreasonable that a subscriber should be obliged to make land on his property freely available for a chain of poles that carried not only his own line but a number of others as well. "I cannot, however, find that this is sufficient reason in the present case to set aside the construction of the Act which its wording, supported by its legislative history, in my opinion requires. As far as I can see, during the drafting of the Act full attention was given to this aspect of the matter, but other circumstances were considered to be of greater weight."

One judge (Hiorthøy) arrived, as the majority of the Court of Appeals had done, at a different result. He found that the wording of the Act offered justification for both opinions but that it was most natural to give to the expression "connection to the telephone system" a different meaning from that given by the majority, especially because, from a common-sense point of view, it did not seem reasonable that the individual happening to own the land should be burdened with expenses over and above those arising from the installation of the single line required by his own subscription. As a supplementary argument the dissenting judge submitted that a statutory provision which in pursuit of general social goals lays special burdens on an individual ought to be strictly interpreted. He also interpreted the legislative material rather differently from the majority. He found that it presented an unusually varied and confused picture and therefore could not be accorded any essential weight in the interpretation of the statutory provision concerned.

Legislative history. In the interpretation of recent enactments, the legislative history is one of the factors most frequently called in aid. In a number of dissenting opinions selected for close examination the legislative history is interpreted differently by the majority and by the minority, e.g. in such a way that one section makes use of statements in the legislative history to support its result, while the other section is of the opinion that the legislative history does not offer any guidance for the construction of the statute. The case reported in 1961 N.Rt. 98 (recapitulated above) affords such an example.

Another thought-provoking example is to be found in 1961 N.Rt. 530, where the majority of the Supreme Court, on the basis of conclusions as to the intention of the legislators drawn from the legislative history, found that a certain Act must be strictly interpreted. This conclusion was disowned by the legislators themselves: the decision led to a legislative amendment (Act of June 14, 1963, no. 10) in order to rule out the solution that the Supreme Court had laid down.

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Precedent. In a number of cases the majority and the minority draw different conclusions from former judicial decisions. This may be due to a difference of opinion as to what was decided in earlier cases or how closely the earlier cases accord with the case in question.

> As an instance in which the difference of opinion is clearly evident, one may mention the case reported in 1964 N.Rt. 474. During a fire in an outbuilding which housed a welding workshop, an acetylene container standing just outside the workshop exploded. A spectator who was standing 100 metres away from the fire was fatally injured by a fragment of the container. His widow sued the owner of the workshop and claimed damages for loss of support. The fire had not occurred in the workshop or in connection with the work there. It was agreed that there was no question of negligence. The majority (three judges) found that there was also no basis on which to found strict liability. Such a liability would, in their opinion, entail an extension of the rules formerly laid down. The minority (two judges), on the other hand, were of the opinion that liability in the case in question was not an extension of the rules previously established in Norwegian law as to strict liability for dangerous activities; it amounted to an application of accepted principles to a new field, namely regular use of acetylene containers in industrial activity. The majority and the minority, however, also took different views of the practical justification of the liability. The majority declared that the deceased, being a voluntary spectator, took upon himself the risk of any injury the fire might cause him. The minority, on the other hand, declared that the operator ought to bear the risk of keeping and using acetylene rather than should the person who chanced to be injured by the accident.

Policy considerations. It is generally assumed that policy considerations—the expression being here given a wide meaning, so that it stands for an evaluation of the merits of the result—play an important part both in statutory interpretation and in the application of law in fields not covered by statute law. One could thus expect that disagreement as to what policy considerations require would be responsible for a great number of dissenting judgments —all the more so as in this instance it is a question both of uncertain assumptions as to the effect of the one or the other alternative and of a subjective standard of values.

There are fewer decisions than one would expect in which this factor stands clearly revealed. And when it does appear it is practically always in the simple form that the result the judge in question supports is characterized as more reasonable than its

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opposite. More complex reasoning as to what effects the one or the other solution of the question of law will have is not put forward.

As already indicated in the discussion of difference of opinion as to the literal contents of a statute, it is probable that different views as to what will be the best result exert a greater influence than appears from the grounds for judgment. There is particular reason for believing that different evaluations of the result play a significant part in the considerable group of cases in which it is not possible by means of an analysis of the grounds for judgment to arrive at the decisive factors.

Other factors. Of other factors it is especially "the purpose of the statute" or "the intention of the legislature" which is called in aid. When such expressions are not based on the legislative history of the statutes, they seem, as a rule, to be rather a formulation of the result the judge in question has arrived at than an independent factor. See, for example, the case reported in 1965, N.Rt. 607 (recapitulated below in Section V).

V. THE RELATIVE WEIGHT ACCORDED TO THE DIFFERENT ELEMENTS OF THE SOURCES OF LAW

While the previous section deals with the individual elements, in this section we shall discuss the differences of opinion relating to the doctrine of the sources of law which have been revealed. They fall naturally into a number of groups as presented in Table 6.

The wording of the statute—policy considerations

One of the classical questions in the doctrine of the sources of law is what weight is to be accorded to the wording of the statute when balanced against the desire to come to a reasonable and appropriate result. There is scarcely any doubt that attitudes in this respect vary, ranging from a "positivistic" approach with a marked adherence to the words of the law to a rather free style of interpretation. Differences of this type have also been revealed in our material.

The case reported in 1965 N.Rt. 607, offers us a clear example. A. had submitted to a paternity decree, relying on information given by the child's mother. Later on, in fact, the parties mar-

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Table 6. Supreme Court decisions containing dissents as to the doctrine of the sources of law 1961–65.

The disagreement concerned the relative weight to be accorded to:	Type of case			
	Criminal case	Private-law case	Public-law case	Total no. of cases
the wording of the statute — policy considerations	63/405 65/333 65/565	62/369 65/507		5
the wording of the statute — the legislative history	61/212			1
the wording of the statute — precedent	65/890			1
precedent — policy considerations		62/1145		1
custom — other elements		63/370 65/544		2
Total no. of cases	5	5		10

ried, obviously in order to legitimize the child, but they did not live together. A short time after the wedding ceremony A. learnt that the child's mother had, at the relevant period, had sexual intercourse with a number of other men. He brought proceedings for the annulment of the paternity decree; the marriage was also dissolved. It was clear that the case should be decided in accordance with the Legitimacy of Children Act of December 21, 1956, since the child must be regarded as having been born in wedlock. In case the husband wants to disavow paternity it is, under sec. 2 of the Act, not sufficient for him to establish that the child's mother had sexual intercourse with another man at the time in question; there is a further condition that "it must be apparent that the other man is the father". The Supreme Court was unanimous that this condition had not been fulfilled, since upon the evidence before the court it was a quite open question who was the father.

The majority (three judges) found this conclusive and were of the opinion that A. could not disavow paternity. The minority (Leivestad with the support of Bendiksby) arrived at a different result. Leivestad declared that he found it so unreasonable to

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apply these rules to the case in question that he could not assume that it would be in accordance with the intention of the legislature. He admitted that he could not find any positive support in the wording of the statute or in the legislative history for a modification of the proof required by sec. 2; he assumed that this was because the sort of case now in question had not occurred to anyone. In other words: the wording of the statute covered the case, but the minority found the result so unreasonable that they thought the provision ought not to be applied. Since the minority was of the opinion that the legislators had not considered the question, the reference to "the intention of the legislators" can only mean what the legislators *ought to* or *would have* intended if the question had been the subject of deliberation. The division of opinion was further sharpened by one of the judges supporting the majority (Anker), who stated: "No matter what one may think of the reasonableness of the result, one cannot, in my opinion, arrive at any other solution when one takes the wording of the statute as a basis. I find it untenable to disregard the wording of the statute because of an assumed opinion as to the intention of the legislators. We are dealing with a recent statute, drafted in the normal way, and the case we have to decide clearly falls within the wording of the statute and within the scope of the general discussion in the legislative history, even though a concrete example covering the details occurring in the present instance is not specifically mentioned."

Less clear is the classification of the basis of the dissent in a case referred to in 1965 N.Rt. 565. It concerns the interpretation of subsec. 5, as it then stood, of sec. 35 of the Conscription Act, to the effect that no penalty shall be imposed for refusal to undergo compulsory military service if the conscript's attitude is found to be based on "the circumstance that it would be in conflict with his serious convictions to perform military service of any description". The case in question concerned a medical student who was unwilling to serve in the Norwegian forces but had declared himself willing to serve in the United Nations forces.

The question thus was: Could he invoke the rule as to the exemption from punishment of a person who could not perform "military service of any description" without its conflicting with his serious convictions? The majority answered in the negative. Such a solution, declared Mr. Justice Stabel, who delivered his opinion first, would be "clearly incompatible with the wording of the statute", and he continued: "I can take no other view than that it also

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conflicts with the Act's natural purpose." Mr. Justice Bendiksby, dissenting, was of the opinion that the Act could not, on this point, be interpreted strictly in accordance with its wording. He assumed that it was only service in national armed forces that the expression in the Act "military service of any description", was aimed at, not service in international armed forces of the type the defendant had in mind. Such forces would have quite different tasks and purposes from those of national military forces.

It seems probable that an inclination to interpret statutory texts liberally contributed to the dissent. (In this connection one notes that Mr. Justice Bendiksby belonged to the minority in the case 1965 N.Rt. 607 just mentioned above.) But one cannot be certain. It is conceivable that the difference between the majority and the minority in 1965 N.Rt. 565 lies in a different evaluation of the result, in that the dissenting judge reacted more strongly than the majority to the violation of the objector's conscience, and that the majority would also have overstepped the wording of the statute if they had shared this evaluation. The reasons given by the two sides are not presented in so precise a form that one can reach a definite conclusion.

It is difficult on the basis of the material available to assess the individual judges by the yardstick of a more liberal or a more strict approach with regard to the construction of a statutory text. There are not many dissenting opinions, and the more or less markedly liberal approach is combined with other factors in the individual case. In French legal literature the judge Magnaud, President of the Court of Château-Thierry, became a legendary figure around the turn of the century by consistently deciding according to his own sense of justice, without regard to the wording of the statute or to established practice.[4] The Court of Appeals and the legal writers did not approve of Magnaud's methods, but he attained considerable popularity. By his critics he was designated "le phénomène Magnaud", by his admirers "le bon juge". The judge of the Norwegian Supreme Court who seems to come nearest to this type of judge is Mr. Justice Leivestad. A noted example is the judgment in 1965 N.Rt. 607, recapitulated above. Another example is to be found in 1963 N.Rt. 405.

[4] Gény, *Méthode d'interprétation et sources en droit privé positif*, 2nd ed. Paris 1932, vol. II. pp. 287–307. The popularity of President Magnaud may be due mainly to the sympathy for the poor and wretched that characterized his decisions.

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The wording of the statute—the legislative history

The traditional question in the doctrine of the sources of law concerning what weight—if any—should be accorded to the legislative history when balanced against the wording of the statute has arisen clearly in only one of the decisions analysed, but, on the other hand, it has taken a very interesting form.

The case involves a conviction for an infringement of the Charlatanry Act, 1961 N.Rt. 212. The accused was a dental technician who under the provisions of the Dental Practitioners Act was authorized to insert and fit false teeth on dentures. The charge concerned an infringement of the prohibition in sec. 2 of the Charlatanry Act against misleading advertisements by reason of an announcement he had published. The provision in question only applies to "a person who treats sick persons", and the vital point in the case was whether one could say that the accused in the course of his activities treated sick persons. The customers for whom he made dentures were persons whose teeth had fallen out or been extracted and whose gums had thereafter healed up. The question was thus whether the mere fact that a person lacks teeth is enough for him to be described as a sick person, a view which was maintained by the National Health Bureau. On previous occasions the accused had been fined and had received a warning from the public prosecutor on the basis of a similar interpretation of the Act.

The majority of the Supreme Court was of the opinion that the accused's activity did not include "treating sick persons". Mr. Justice Heiberg, delivering his opinion first, stated, *inter alia:*

> Even though the range of the expression used in the Act is not in all respects quite clear, I cannot see that it is compatible with its language to apply the Act to an activity of inserting and fitting false teeth on a dental plate, in a case in which no state of sickness occurs.
>
> The prosecution has referred to certain statements in the legislative history which may indicate that it was assumed that a case such as the present one would fall within the scope of the Act. I cannot, however, allow this any decisive weight against the wording of the Act, which, in my opinion, leaves no room for such a construction. Nor, in my view, is it a sufficient basis for an opposite result that the health authorities have in practice maintained a different opinion.

Two judges (Leivestad with the support of Eckhoff) dissented. Mr. Justice Leivestad agreed that it was doubtful whether the

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accused's activity fell within the scope of the expression "treating sick persons" in the ordinary meaning of the words. However, he found that, in interpreting this expression, it must be the right course to accord essential weight to what had been the intention of the legislators. A provision was involved which was addressed not to the general public but to individuals who wished regularly to engage in a certain activity as a means of livelihood. Dentistry had for ages been considered a form of treating the sick. Fitting teeth on a denture was also a branch of dentistry. Mr. Justice Leivestad added: "The opinion that was clearly expressed in the legislative material of both the Dental Practitioners Act and the Charlatanry Act had, I assume, also previously been known to the circles concerned in this instance. Action has also previously been taken against dental mechanics who have advertised in a way that has been assumed to conflict with sec. 2 of the Charlatanry Act."

There seems to be a certain difference between the majority and the minority as to the use of the legislative history. The majority takes a far more reserved view than does the minority as to what one can infer from it. But first and foremost the dissent is probably based on a difference of opinion in a question arising from the doctrine of the sources of law: To what extent can the intention of the legislators, in so far as it appears from the legislative history, be employed to supplement the wording of the statute in a criminal case? The judges' evaluation of the result—whether the activity of the accused *ought* to be punishable—was not mentioned either by the majority or by the minority, but one may certainly assume that it played a part, and it is conceivable that there may have been nuances between the majority's and the minority's views in this respect. It is difficult to believe that Mr. Justice Leivestad with his "free-law school" approach would have allowed the legislative history the same weight if he had been out of sympathy with the result.

Precedent—policy considerations

With regard to precedents, also, there can be varying degrees of a strict, "positivistic" approach and of a free, evaluating approach. It is easy to suppose that a judge who accords his evaluation of the result considerable weight when balanced against the wording of a statute has a corresponding attitude as regards former decisions. The material is, however, too scanty for one to be able to confirm or invalidate any hypothesis in this direction. An in-

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teresting decision relating to the significance of precedents is to be found in the judgment of the Court sitting *en banc,* reported in 1962 N.Rt. 1145. The case concerned the interpretation of a rule in the Allodial Title Act of 1821 relating to an eldest son's right to recover the family farm at a fixed value after it has been conveyed to an unrelated purchaser or to a more remote kinsman. The question was whether the three-year time limit set by the Act for such a recovery began to run from the time when the son had permitted his mother and her husband by a second marriage, who had no allodial rights, to occupy the farm. This question had been answered in the affirmative in a former judgment of the Supreme Court in 1876 (1877 N.Rt. 73). If one applied this judgment, the right to recover would have been time-barred.

The majority (10 judges) found that the former precedent should not be followed. The judge who delivered his opinion first declared that the whole scheme in sec. 16 of the Act aimed at providing an appropriate system which would preserve the family title and that of the person most nearly entitled, and the title was not lost even if the farm should for a time be occupied by a parent and/or a step-parent having no allodial title. A requirement that the person who had an allodial title must establish his right within a fixed time limit would possibly lead to unfortunate and shocking results which would conflict with the intention of sec. 16 of the Act. As regards the consequences affecting those persons who might have adapted themselves to the law laid down in the former decision, he did not find them to be of such substance that they weighed especially heavily against a departure from that decision.

The minority (7 judges), on the other hand, found the decision of 1876 to be conclusive. It had stood unassailed for nearly 90 years. The fact that the question had never been brought before the Supreme Court during all that time indicated that the rule laid down had been established not only in theory but also in legal practice. Indeed the legislators had acted on this view when enacting an amendment to the Allodial Title Act in 1947. (This latter point was also alluded to by the majority in their judgment, without being accorded decisive weight.)

The decision of the majority in this case is a fresh example of the tendency of the Supreme Court in plenary session to depart from former precedents, a tendency that Professor Augdahl has commented upon in a strongly critical fashion.[5] One might, to be

[5] Augdahl, *Rettskilder,* 2nd ed. Oslo 1961, pp. 224 ff.

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sure, raise the question whether the dissent was due to a difference in the approach to precedents, or whether it was really due to a different evaluation of the result, i.e. to the fact that the minority did not to the same degree as the majority find the result of the former decision unfortunate and shocking. The latter explanation, however, seems unlikely in this case. Dissent had also arisen in the court of first instance, and the president of that court had arrived at the same result that the minority in the Supreme Court later reached. He declared that he agreed it was unreasonable that the son should lose his allodial title because he had been more considerate than the Act required, and had therefore delayed taking the farm from his mother and stepfather. It was not, however, anything unique that the rules of the Allodial Title Act could lead to unreasonable results, and if the rule established by the decision of 1876 were to be altered that would, in his opinion, require a statutory amendment. The spokesman for the minority in the Supreme Court (Helgesen) commenced his opinion with a statement that he had arrived at the same result as the president of the county court, and that he could adopt the latter's reasoning in all essentials. One can assume that he thereby included the president's evaluation of the reasonableness of the result. It appears, therefore, that we are confronted with a fairly clear example of a difference of opinion as to what significance ought to be accorded to a precedent as compared with a desire to arrive at a reasonable result. The conclusion is not, however, certain. Even if there was unanimity among the judges that the result arrived at by the majority was in itself the most reasonable one, the judges adhering to the majority could have had a *stronger* feeling to this effect than that was harboured by those adhering to the minority.

Custom. A difference of opinion as to what weight should be accorded to a custom is the basis of the dissents in 1963 N.Rt. 370, and 1965 N.Rt. 544. In both cases the question was whether the population of a parish could exercise hunting and fishing rights in accordance with the rules relating to established custom or immemorial usage. In neither of the two cases does there appear to have been any disagreement worth mentioning between the majority and the minority as to what usage had actually been exercised. The basis for the disagreement must therefore be sought at the legal (sources of law) level. But the judges do not support their solutions by referring to an established doctrine relating to customary law or immemorial usage. It is rather the case that the

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decision is arrived at directly on the basis of the surrounding circumstances and the feeling of justice of the judge concerned. Characteristic of this is the reasoning of the spokesman for the majority, Mr. Justice Bendiksby, in the 1963 case. After describing in detail how net fishing by persons without special fishing rights had developed under cover of the estate owner's laches, and had acquired a definite and stable form through practice over a very long period, he concluded: "A state of affairs that has been established in this way and to this extent, ought not to and cannot be abolished."

VI. CONCLUSIONS

If, in conclusion, we attempt to strike a balance as to what we have got out of the material, there are several items that stand out.

First, that clear dissents as to the content of the rules of law occur in only a small number of the cases dealt with by the Supreme Court. Unanimous decisions predominate, and when dissents do occur, the great majority of them relate to differences of opinion as to evaluation of the evidence, the fixing of a penalty, and other discretionary decisions of mixed law and fact.

Secondly, it has proved possible to reveal certain differences of opinion, of the type concerned with the doctrine of the sources of law, e.g. as to the significance of policy considerations when balanced against the wording of the statute or former decisions (the degree of free interpretation approach). But all in all it is only in a very modest number of cases that we have been in a position to trace disagreement back to the doctrine of the sources of law—10 cases in a body of material comprising altogether 1,517 decisions (of which 222 included dissents). And even in these few cases the conclusion, as is evident from the foregoing analysis, is not always certain. This is a consequence of the lack of precision to be found in language. The wording of the statute can *more or less strongly* beckon in a certain direction, and the same is the case with legislative history, policy considerations, precedent, and other factors. We mentioned in our introduction, as an example of disagreement of a type concerned with the doctrine of sources of law, the case in which judge A and judge B agree that the

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wording of the statute beckons in the direction of rule *x*, and considerations of public policy in the direction of rule *y*, and A is of the opinion that the wording of the statute must be conclusive, while B allows the policy considerations to predominate. There is, however, a possibility that the reason for their arriving at different results is that A finds the wording of the statute *more definite* and policy considerations *rather weaker* than B does, without these shades of opinion becoming apparent in the formulation of his grounds for the decision. One cannot therefore say with *certainty* that the dissent is related to the doctrine of the sources of law.

We began with the question whether uncertainty rooted in the doctrine of the sources of law is an important cause of differences of opinion relating to questions of law. The inquiry provides a certain basis for a negative answer. It appears to be the case that even though the principles of the doctrine of the sources of law are difficult to formulate precisely, in practice a considerable degree of agreement about them is to be found.

One cannot, of course, conclude that the agreement is so great as would appear from a mere balancing of the 10 cases with dissents as to the doctrine of the sources of law against the total of 1,517 cases. In a great number of these cases no possibility of dissent as to the doctrine of the sources of law presented itself. This includes all the cases in which there was only a dispute as to the facts at issue; and practically speaking it also includes cases in which there is only a question of fixing a penalty.

Furthermore, we must make one important reservation. We cannot assume that the 10 cases we have found are the only ones in which a dissent has its basis in the doctrine of the sources of law. Differences of opinion relating to that doctrine may lie hidden in decisions that we have had to classify under another heading, e.g. under "fact" or "unclear dissent as to a question of law". Sometimes one can have a more or less strong feeling of an underlying dissent as to the doctrine of the sources of law, but it is not possible to say anything certain about it or to estimate how often it occurs.

The strongest impression we are left with is how difficult it is to specify and then to classify the reason for the relevant disagreement as to a legal question. We have mentioned several reasons for this: that the judge in his opinion often does not give any reason for his choice of the legal rule, that the majority (or the minority) often avoids taking up a definite standpoint as regards

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the argumentation presented by the other section, that the lack of precision to be found in language limits the possibilities of clearly revealing the basis of the difference of opinion. But it may be the case that the greatest difficulty lies deeper, i.e. in the very nature of the process of motivation occurring in the judge's mind during the hearing of a complicated case. While the case is being unfolded before him, through the presentation of evidence and the pleading as regards fact and law, the basis for his choice of a result is gradually being fashioned, probably often without his consciously drawing any sharp dividing line between factors that are legally relevant and factors that are not. Sometimes he arrives at a clear standpoint very soon; in other cases he may sway back and forth in a state of extreme doubt right up to the moment of delivering his opinion. What we have called the doctrine of the sources of law or the principles for the application of law always plays a part in this process, though not in the form of definite norms from which the rules of law can be deduced, but rather as a set of more or less vague attitudes formed first during the judge's legal education and later through reading, discussions, and personal deliberation. And if the judge when giving his reasons for his opinion were to make an heroic attempt at reducing this complicated motivation process to the application of simple and clear principles, would this not then necessarily be more of a retrospective rationalization than a realistic description of an actual process of motivation?

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