RULES, PRINCIPLES AND GOALS: THE INTERPLAY BETWEEN LAW, MORALS AND POLITICS

BY

HANNU TOLONEN

1. FORMULATING THE QUESTION

Taking Rights Seriously, by Ronald Dworkin, was published in 1977. Although this work is now regarded as the starting point for an intensive discussion on rules and principles, the discussion also has other direct, and older, antecedents. For example, John Salmond (whose work was published at the very beginning of this century) saw law as "a body of principles".[1] Another antecedent can be found in social and moral philosophy, for example in the anti-utilitarian approach that appeared at the beginning of this century (this approach is often called deontological; David Ross is regarded as a classic example of its proponents), or in John Rawls' theory of justice. An example of a more distant antecedent is the fundamental ideas of Immanuel Kant on practical reason and ethical universalizability.[2]

[1] John Salmond, *Jurisprudence*, first ed. 1902, seventh ed. 1924, pp. 39 and 61–63. See also Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, Tübingen 1956, *passim*.

[2] David Ross, *The Right and the Good*, Oxford 1930. There seems to be only one reference by Dworkin to the distinction between ways of thinking with a deontological and with a utilitarian orientation (see fn 24). Even so, this distinction is important for him, cf. section 3. In this respect, Dworkin's ideas parallel those of John Rawls (*A Theory of Justice*, Oxford 1972). Both are characteristically thinking in an anti-utilitarian and deontological manner, but the relative weight of these elements varies. Dworkin's point of departure is individual rights and the demand that they be generalised. Rawls' idea is partly parallel: goal-oriented argumentation is limited by institutional factors (regarding the concept of *back-ground institutions*, see Rawls, *op.cit.*, pp. 274–285), and the condition for a goal-orientation is *basic rights* which can no longer be rationalized on a goal-oriented basis (pp. 4–21). Neither would accept the view that goal-oriented justification can be replaced by argumentation based on justice or equity. See also G.H. v.Wright, *The Varieties of Goodness*, London 1972, pp. 22–30 and 40.

In the Anglo-American world, Dworkin's 1967 article "Two Models of Rules" (*University of Chicago Law Review*, pp. 21–29) is often regarded as the starting point for the discussion on rules and principles. Rawls refers to this article in his main work (*op.cit.*, p. 349). Even so, as early as in 1955 Rawls had himself made a similar distinction, between "summary rules" and "practice rules" (*Philosophical Review* 3/1955). Dworkin, in turn, refers to this article (Dworkin, *Taking Rights Seriously*, London 1977, p. 30, 1977a). A common feature in particular lies in the fact that "summary rules" also provide a substantive basis, "give reason". See Hannu Tolonen, Yleisten oppien rakenteesta ja merkityksesta (On the structure and significance of the general doctrine), *Juhlajulkaisu Allan Huttunen*, Turku 1988, p. 191. However, Rawls' distinction has its own special features. Regarding them, see D.H. Hodgson, *Consequences of Utilitarianism*, Oxford 1977, pp. 23–26. See further Immanuel Kant, *Grundlegung zur Metaphysik der Sitten*, Leipzig 1933.

By the beginning of the 1990s, the importance of the discussion on rules and principles had not only become established, it had expanded. In Finland, this discussion has recently led to concrete applications in many different fields of law. In the law of contracts, Juha Pöyhönen has adopted it as his point of departure in his analysis of contract models. In criminal law, we can refer to the doctoral theses by Tapio Lappi-Seppälä and Dan Frände, and in the law of inheritance the same idea can be found in an article by Aulis Aarnio. In the field of legal theory, Robert Alexy, Aulis Aarnio, Neil MacCormick, Alexander Peczenik, Joseph Raz and recently Klaus Günther have presented their views and critique.[3] We can justifiably say that the significance of this problem has grown at the level of both theory and the study of positive law.

Dworkin speaks of principles in the broad and in the narrow sense. In the broad sense, principles include all general directives that are not rules: "Most often I shall use the term 'principle' generically, to refer to the whole set of these standards other than rules." On the other hand, in many important connections Dworkin speaks of principles in the narrow sense. In so doing, he makes a distinction between principles and goals. Goals (or policies) are connected with the promotion of a social objective: "I call a 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of that community..."[4] A principle, in turn, is aimed at the promotion of justice or comparable social morality: "I call a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed

[3] Juha Pöyhönen, *Sopimusoikeuden järjestelmä ja sopimusten sovittelu* (The system of contract law and the adjustment of contracts), Vammala 1988, esp. pp. 3–116; Tapio Lappi-Seppälä, *Rangaistusten määräämisestä I. Teoria ja yleinen osa* ("On Sentencing I. Theory and the general part"), Vammala 1987, pp. 21–28; Dan Frände, *Den straffrättsliga legalitetsprincipen* (The principle of legality in criminal law), Ekenäs 1989, *passim*; Aulis Aarnio, Testamentin tulkintasäännöksistä (On rules for the interpretation of wills), *Juhlajulkaisu Martti Ylöstalo*, Vammala 1987, pp. 11–13. The work by Pöyhönen referred to above contains an extensive analysis of legal theory. A considerable amount has been written about the matter in the literature on legal theory. See Robert Alexy, *Theorie der Grundrechte*, Baden-Baden 1985, pp. 71–158, Aulis Aarnio, *The Rational as Reasonable*, Dordrecht, Holland 1987, pp. 96–97 and *Laintulkinnan teoria* (The theory of the interpretation of the law), Porvoo, Helsinki, Juva 1989, pp. 78–81, Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford 1978, *passim* and *Legal Right and Social Democracy*, Oxford 1982, pp. 126–153, Alexander Peczenik, *Rättsnormer* (Legal norms), Kristianstad 1987, *passim* and Joseph Raz, *Practical Reason and Norms*, London 1975, esp. pp. 49–65. Klaus Günther, *Der Sinn fur Angemessenheit, Anwendungsdiskurse in Moral und Recht*, Frankfurt a.M., 1988, *passim*, esp. pp. 261–276 and 336–340.

[4] Dworkin, 1977a, p. 22 and Is Law A System of Rules, Dworkin (ed.), *The Philosophy of Law*, Oxford 1977, p. 43 (1977b).

desirable, but because it is a requirement of justice or fairness or some other dimension of morality." In a more recent book, Dworkin emphasizes perhaps even more the distinction between argumentation based on goals and on principles.[5] In it, he uses the terms "utilitarian-like" or "cost-efficient" to characterize the goal-oriented approach.

The relationship between the broad and the narrow senses of the concept of "principle" at first appears confusing. At times, Dworkin draws a *parallel* between goals and principles. Frequently, however, it is important for him to *separate* them. Nevertheless, the present author's interpretation is that Dworkin has said something important about the interplay between rules, principles and goals in social policy. Further, it is held here that the idea of the tripartite division between rules, principles and goals is linked to two far-reaching questions in legal theory. In the first, rules are opposed to principles and goals. In the second, goals have a special nature in comparison with rules and principles. Ultimately, these questions deal not only with the relationship between law and morality, but also with the relationship between law and politics. The basic features of both questions will be dealt with in sections 2 and 3.

2. RULES VS. PRINCIPLES AND GOALS: LAW AND MORALITY

> "Sometimes a rule and a principle can play much the same role, and the difference between them is almost a matter of form alone. The first section of the Sherman Act states that every contract in restraint of trade shall be void. The Supreme Court had to make the decision whether this provision should be treated as a rule in its own terms (striking down every contract 'which restrains trade', which almost every contract does) or as a principle, providing a reason for striking down every contract ... This allowed the provision to function *logically* as a rule (whenever a court finds that the restraint is 'unreasonable' it is bound to hold the contract invalid) and *substantially* as a principle (a court must take into account a variety of other principles and policies in determining whether a particular restraint in particular economic circumstances is 'unreasonable')". (Dworkin, 1977a, pp. 27–28 and 1977b, pp. 48–49, emphasis added.)

The question of whether or not there is a "qualitative difference" between rules and principles has become essential. Opinion has been divided. Alexy and Peczenik are among those who answer the question in the affirmative, and MacCormick and Raz among those who answer

[5] Dworkin, *A Matter of Principle*, Harvard 1985, pp. 77 and 79.

in the negative.[6] It is claimed that Dworkin's original position, which has to some extent been criticized unjustifiably, is not based on the idea of an absolute division—although MacCormick has suggested (in the author's opinion incorrectly) that it is.[7]

In fact, another question—that of the basis for such a division—is more important. The discussion on rules versus principles is, to a certain extent, one-sided. It would appear that the conditions for the application of rules and principles alone, when combined with their various conflict situations, are often regarded as the decisive criteria. Alexy's presentation is a clear example of this.[8]

In an earlier article, the present author has tried to show that three different factors form the basis for the distinction between rules and principles. These can be called conditions for recognition (*validity*), conditions for application (*relevance*), and two different *system structures*. A common feature for all the distinguishing criteria is the formal aspect of rules, and the material or value-laden element of principles. Law always contains—more or less—evaluative and discretionary elements that cannot be reduced to unambiguous rules. This also appears to be MacCormick's central idea when (in rejecting an absolute distinction between rules and principles and in criticizing Dworkin) he writes, "To call a norm 'a principle' is thus to imply that it is both relatively general, and of positive value."[9] Further, the present author has sought to specify this evaluative element characteristic of legal principles through the concept of *institutional support*. In addition, he has seen this element as a problem that primarily concerns *legal systematization*. This latter aspect appears in connection with the general doctrines that are part of a legal system.

[6] For a closer analysis, see Tolonen, *op.cit.*, pp. 188–189, esp. fn 37 and 38. We may note in brief that according to Dworkin's original idea, the distinction between rules and principles lies in the characteristic all-or-nothing quality of rules and in the typical dimension of weight assigned to principles. Exceptions can be made to rules, while this is not possible for principles. The qualitative distinction between rules and principles made on this basis is accepted by Alexy (see Alexy, *op.cit.*, pp. 77 ff.) and Peczenik (see Peczenik, *op.cit.*, pp. 52 ff.). Alexy characterizes principles as optimiation imperatives ("Optimierungsgebote") and Peczenik as ideals. MacCormick, in turn, is of the view that despite the general and evaluative nature of principles, no sharp and qualitative distinction can be made between rules and principles (see MacCormick 1978, pp. 155–156). Also Raz is primarily of this view (see Raz, *op.cit.*, pp. 46 and 71, 72 ff.).

[7] MacCormick 1978, pp. 163 ff.

[8] Alexy, *op.cit.*, pp. 72 ff.

[9] MacCormick 1978, p. 152. The idea parallels one presented by Rawls in an earlier article (see fn 2, *supra*). Also Rawls' *summary rules* are norms, the function of which is "to give reason".

In the following, a somewhat different approach to classifying the criteria which separate legal principles from legal rules will be taken, specifically on the basis of the evaluative and discretionary (substantive) aspect typical of the former. In line with this approach, rules differ from principles in three respects.

(a) Recognition conditions (VALIDITY)

We can summarize the difference between rules and principles as follows:

RULES:	PRINCIPLES:
– (formal) *rule of recognition*	– (substantive) significance, value, weight, *dimension of weight, strength* – *institutional support*

Dworkin's basic definition of legal positivism implicitly contains an important characteristic that distinguishes rules from principles. Legal rules are formally recognized in accordance with a criterion that relates to their origin. This criterion has nothing to do with their value or substance: "These special rules can be identified and distinguished by specific criteria, by tests having to do not with their content but with their *pedigree* or manner in which they were adopted or developed."[10] In classical English legal positivism (as exemplified by John Austin), the will of the holder of the sovereign power represented such a formal characteristic. In current legal positivism, the *rule of recognition*, which was originally developed by H.L.A. Hart, serves as the formal criterion.[11] Dworkin pays considerable attention to criticism of this approach. His central conclusion can be summarized as follows: rules are recognized (as being valid) on the basis of formal criteria. For principles, there are no such criteria. Therefore, they are to be recognized on the basis of their content, value or significance.

On the other hand, the substantive and evaluative criterion that is

[10] Dworkin 1977a, p. 17 and 1977b, p. 38.

[11] H.L.A. Hart, *The Concept of Law*, Oxford 1961, pp. 72 ff, esp. p. 107. John Austin, who is criticized by Hart (and Dworkin), defines law as an imperative and as the expression of a sovereign power: "Every law or rule (taken with the largest signification which can be given to the term) *properly* is a command". See Austin, *Jurisprudence I*, London 1885, pp. 96, 98, 100. 169, 178 and 179. "Every positive law, or Law simply and strictly so called, is set by a sovereign person or set by a sovereign body..." (p. 220).

typical of the recognition of a principle cannot be merely the subjective opinion of an individual. The criterion must be more or less *institutionalized*. Accordingly, Dworkin refers in two connections to the concept of *institutional support*.[12] He argues that principles should have institutional support in law, in the *travaux préparatoires* of law, in established social practices (in customary law), and so on. However, the degree of this support cannot be expressed with formal criteria.[13]

(b) Application conditions (RELEVANCE)

As noted above, the current discussion on rules versus principles often considers conditions of the application to be the only distinguishing factor. This distinguishing factor can be summarized as follows:

RULES:	PRINCIPLES:
– applied / not applied, unambiguous, "definitive"	– more or less applicable: weight, value, "dimension of weight (strength)" – appropriate to the circumstances in the (actual) situation

"Dimension of weight" has been seen as one characteristic, and as an unambiguous one. This cannot be so: we must distinguish between the general, abstract validity of a principle, and its application in a concrete decision-making or interpretation situation. These two are conceptually different. The difference between validity and relevance is not made clear by Dworkin. He says, for example, "If two rules conflict, one of them cannot be a valid rule."[14] This idea is misleading, as will be shown below. In the dimension of relevance, the establishment of values often takes place in accordance with the demands of actual situations, i.e. contextually. This is discussed briefly in section 4.1.[15]

[12] Dworkin 1977a, pp. 40 and 64–68.

[13] Cf. Tolonen, *op.cit.*, pp. 187–188.

[14] *Ibid.*, fn 37 and 38. Dworkin 1977a, p. 27.

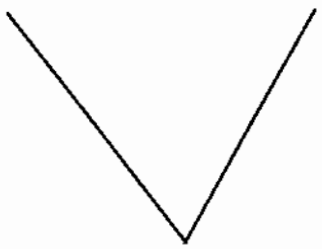
[15] This view can be developed in different directions. Very interesting and far-reaching ideas have been presented by Klaus Günther. He analyses two basic forms of argumentation, justifying (*begründen*) and application (*anwenden*). See Günther, *op.cit.*, *passim.* (Cf. n. 39.) See also Martti Koskenniemi, *From Apology to Utopia*, Helsinki 1989, pp. 147–148, 319–320 and 498 ff., Hannu Tolonen, *Luonto ja legitimaatio* (Nature and Legitimation), Vammala 1984, pp. 127 ff., 184 ff. and 249 ff., Juha-Pekka Rentto, *Prudentia iuris*, Turku 1988, pp. 63 ff and 356 ff., Roberto Unger, *The Critical Legal Studies Movement*, Cambridge, Massachusetts and London 1983, pp. 21 and 93 ff. A more detailed analysis of contextualism is not part of the framework of the present presentation. In respect of Dworkin's ideas, we shall return to this theme in section 4.1.

(c) Conflict situations

The basic idea can be summarized as follows:

RULES:

LAND CODE chapter 1, section 2 — CODE OF INHERITANCE chapter 17, section 3



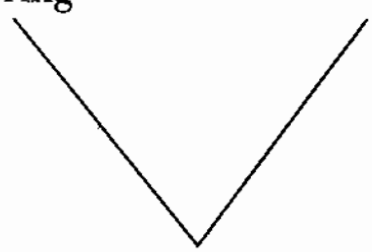
Conflict in an application situation (transfer of a portion of an inheritance containing real estate; the provision in the Code of Inheritance contains a demand for form that differs from that contained in the Land Code provision).

The conflict is to be solved in accordance with formal criteria; in this case, in accordance with the interpretative principle of *lex specialis derogat legi generali*

PRINCIPLES:

(an example in the field of morality)

avoidance of unnecessary suffering — prohibition against killing

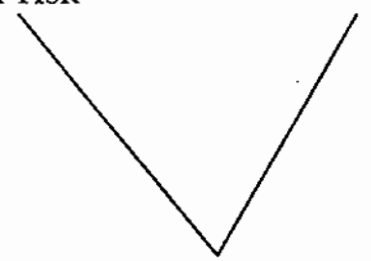


Situation involving the simultaneous application of the principles: the case of mercy-killing

Cannot be solved on the basis of formal criteria. Requires a position on the value and significance of the principles both in general and in the situation at hand.

(an example in the field of law)

the principle of the negotiation risk — the principle of loyalty



Situation involving the simultaneous application of legal principles[16]

This is to be solved along the same lines as the case involving moral principles

[16] On the principles of the negotiation risk and loyalty, see Hannu v. Herzen, *Sopimusneuvottelut* (Contract negotiations), Helsinki 1983, pp. 189 ff, and Lars-Erik Taxell, *Avtalsrättens normer* (The norms of the law of contracts), Åbo 1987, pp. 30 ff.

In the above, "conflict situations" between rules and principles are separated on the basis of the distinguishing criteria. In general, the question has been dealt with directly as one that would involve the conditions for application (in other words, as a case dealt with above under (b)), as has also been done by Dworkin.[17] Thus, the question arises whether one can actually speak of a conflict of principles. It has been said that the scope for their application is ambiguous, and in this sense they only have a *prima facie* nature.[18] This question is perhaps more one of terminology than of substance.

On the other hand, an important substantive question deals with the different basic nature of conflict situations between rules and principles. We meet once again—but in a new connection—the opposition between formal and substantive ("evaluative"). The conflict between rules is solved in accordance with formal criteria regardless of their content, value or "weight". There are three such formal criteria, *lex specialis derogat legi generali*, *lex superior derogat legi inferiori* and *lex posterior derogat legi priori*. The corresponding situation for principles is solved on the basis of the "dimension of weight", i.e. on the basis of the significance and value that they are assigned in respect of one another when applied in practice. It is this aspect that makes legal principles a *parallel* phenomenon alongside moral principles. Their way of acting and their logic closely resemble one another in the manner presented in the summary: in both areas, a case of conflicting principles is solved according to substantive and evaluative criteria.

Even so, law is not the same as morality. Legal principles are *not identical* with moral principles. Dworkin's idea of the inseparability of law and morality must be taken with certain reservations ("... no ultimate distinction can be made between legal and moral standards, as positivism insists").[19] This is because law is *institutional morality*. The evaluative elements that are tied to legal principles are limited and guided by certain institutional conditions. They appear in particular in the concept of institutional support referred to above.

However, one important idea remains from the thesis of the inseparability of law and morality. These institutional conditions can never *totally* be defined with a formal category of rules, as argued by Peczenik and, in

[17] Dworkin 1977a, pp. 24–28 and 1977b, pp. 45–48, Alexy, *op. cit.*, pp. 72 ff. and pp. 77 ff.

[18] Alexy, *op.cit.*, pp. 87 ff, Dworkin, *ibid.*, Aarnio 1989, p. 80.

[19] Dworkin 1977a, p. 46.

part, by Alexy.[20] One important indication of this is the situation where the conflicting principles *lex specialis* and *lex superior* themselves enter into conflict (for example, where the Employment Act and decisions of the Ministry of Labour are in conflict with one another). Legal principles include both an evaluative and an institutional aspect, neither of which can be reduced to the other. This is a far-reaching matter, and its detailed analysis must wait for another connection.

3. GOALS VS. PRINCIPLES AND RULES: POLITICS AND LAW

Following the basic idea presented in section 2, rules as elements of the legal order differ in many respects from principles and goals (i.e. from Dworkin's category of principles in the broad sense). There seems therefore to be no reason to reject Dworkin's basic idea, even though it can be systematized and justified with arguments that go somewhat farther.

However, the situation changes when we examine the second main question in our basic distinction, that of the interplay between goals on one hand and principles and rules on the other (*goals* vs. *principles* and *rules*). Here, the question deals with something other than the problematics of rules and general directives. These two broader aspects have not consistently been kept apart. One reason for this lies in Dworkin's own presentation, which is analyzed below.

The question both in respect of Dworkin and in general, therefore, is as follows: what points of view distinguish goals from other norms (rules and principles)? To some extent, the need for such a distinction is evident. The idea that the legislator makes the most important value choices in society, and that the courts and legal science are bound to these, has in some form become established in our constitutional system. In accordance with this idea, some directives are internal to the legal system (rules and principles) while others are external, "extra-legal" (social goals). Dworkin refers in several connections to this orienting and general distinction. The main purpose in the following is to make this distinction more explicit.

[20] See Peczenik, *op.cit.*, p. 58, Alexy, *op.cit.*, pp. 121–122. Alexy primarily refers to the primacy of rules over principles (in particular in application situations): "Die Antwort kann nur lauten, dass unter dem Gesichtspunkt der Bindung ein Vorrang der Regelbene besteht" (p. 121). Peczenik, in turn, notes "Det följer härav, att den yttersta avvägningsgrunden är en regel, inte någon princip" ("It follows from this that the ultimate basis for judicial assessment is a rule and not a principle").

It is held here that such a distinction is necessary and, in many connections, even unavoidable. Even so, it must be made in a different way and on different grounds than Dworkin's. Here, reliance is in part on the extensive criticism that for example Alexy, MacCormick and Tuori have presented.[21] However, the present view differs from this criticism of Dworkin. It is held that the distinction between goals on one hand and principles and rules on the other pertains to several aspects, and is not fully absolute or "qualitative". The situation is analogous to the distinction between rules and principles.

Dworkin's ideas about the difference between goals and principles (rules) are open to interpretation. This is due in part to the fact that their purpose is to promote not only the analysis of legal theory, but also a certain type of analysis of social morality and social theory. In the view of the present author, Dworkin's work clearly implies various views and ideas. In the following, these will be called *the rights thesis*[22] and the *universalizing thesis*. Dworkin himself does not make such a distinction, and instead of universalizability, he speaks of consistency.

Dworkin's point of departure is clear: he thinks that the difference is important but not absolute. Goals deal with the promotion of economic, political or social objectives, while the essence of principles is the "requirement of justice or fairness or some other dimension of morality". The difference between them may disappear if the substance of a social goal is the fulfillment of a principle or if the goal itself is dressed in the form of a principle, such as in the utilitarian maxim "securing the greatest happiness of the greatest number". Dworkin then presents a somewhat enigmatic idea: "In some contexts the distinctions (i.e. between goals and principles) has uses which are lost if thus collapsed".[23] What are the contexts in which the distinction would be useful? When is it necessary to retain the distinction between goals on one hand and principles and rules on the other?

The first case pertains to the *thesis of individual rights* mentioned above, in other words to Dworkin's idea of "the rights thesis". This thesis can be considered a central and multifaceted idea in Dworkin's theory.

[21] In particular Alexy and MacCormick criticize Dworkin's ideas on the ground that, according to these ideas, principles can be connected only with individual rights but not with social goals. This criticism is justified. However, the point of view here is different. We shall return to this question. See Alexy, *op.cit.*, pp. 98–99 and 118–119, and MacCormick, esp. p. 143.

[22] Dworkin 1977a, pp. 82 ff.

[23] Dworkin 1977a, p. 23 and 1977b, p. 44.

Dworkin's thesis is based on the view that (in addition to rules) principles create rights. These *individual rights*, in turn, form the basis for two different forms of justification, *arguments of principles* and *arguments of policy*:

> "Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals." (Dworkin 1977a, p. 90, also p. 82.)

These sentences may be the core of Dworkin's work, although the same idea appears in different nuances in different connections. The basic position is that rights and principles that create rights become the same as justice or fairness. Their counterpoint is social utility, which appears in the light of utilitarian ethics. In one connection Dworkin distinguishes between "deontological" and "teleological" theories. In general, any objective can belong to the category of goals: the general well-being, the increase of equality and the securing of national defence.[24] The opposite of arguments based on social utility and goals is arguments about individual rights based on principles. The thesis contains something more than the demand for justice and equal treatment. Citizens *have* rights that are independent of the actions of the authorities. These are individual rights that can be distinguished from collective goals. In this way, the difference between the two arguments receives its essence from the opposing pair of concepts, *individual/collective*.

What are these rights? First of all, the legal order guarantees citizens rights in respect of one another, such as the right to physical integrity, freedom and so on. MacCormick has aptly called these "primary rights".[25] Secondly, citizens have rights in respect of the authorities. MacCormick calls these "secondary rights"; Dworkin's term is "institutional rights". An important type of such rights is the inviolability of the citizen's sphere or rights against retroactive legislation. Only an argu-

[24] Dworkin 1977a, pp. 83 and 169. Cf. also supra, fn 2. The category of policies appears as the utilitarian "principle of utility" as the point of departure for Jeremy Bentham's ideas, which can be interpreted and summarized as follows: all social goals can be traced back and rationalized on the basis of one universal goal; this goal is the maximization of utility (*the principle of utility*). See Jeremy Bentham, *The Theory of Legislation*, ed. C.K. Odgen 1950, pp. 1 and 60 and *A Fragment of Government and Introduction to the Principles of Morals and Legislation*, W. Harrison (ed.) 1967, pp. 125–131. See also David Lyons, *The Interest of the Governed. A Study of Bentham's Philosophy of Utility*, Oxford 1973, pp. 23 ff and 69 ff, Hodgson, *op.cit.*, pp. 9 ff, Rawls, *op.cit.*, pp. 29–30, 40 and 122–133.

[25] MacCormick 1982, p. 132.

ment based on a collective goal can justify such legislation. In fact, Dworkin assumes such a case to be conceptually impossible: since the citizen had the right already before the decision of the authority, the latter cannot have the competence to violate that right.

Legally speaking, this idea seems less sophisticated, and the whole thesis of individual rights conceptually ambiguous. We can see the idea in different variations. Its basis and core consists of the assumption that the rights of citizens can be based only on rules and not on social goals. Correspondingly, the activity of the courts (in which these rights are affirmed) is based on rules, and, when rules are lacking (so-called *hard cases*), on principles. The decision of the court is based on arguments that are "arguments of principle" and not "arguments of goal": "judicial decisions in civil cases, even in hard cases like *Spartan Steel*, characteristically *are and should be* generated by principle not policy"; "... judicial decisions in hard cases are characteristically generated by principle not policy"(emphasis added).[26]

This point of view on the activity of the court contains several further arguments. The first is the idea of the separation of powers between the legislator and the court. Decisions that establish or fulfill goals for society belong to the legislator; according to this, the legislator is specifically guided by arguments of policy.[27] The activity of the court, on the other hand, is dominated by the fact that it is bound either by unambiguous rules or by general (perhaps even unformulated) principles; according to this, the activity of the courts typically involves arguments of principle. The point of view regarding the separation of powers expands to become a fundamental insight regarding the nature of decision-making activity. The court is, and should be, *bound by principles*. This point of view regarding decision-making theory is ultimately based on the assumption that the rights of the citizen, which are based on principles, already "exist" before the decision is made. Thus, there is only one possible way in which courts can decide the case. This idea leads to the doctrine of the one right decision, which in Finland has justifiably been criticized by Aarnio.[28] However, in my opinion Dworkin's doctrine of the one right decision, with its idealized Hercules J., moves along a different dimension than normal legal theoretical analysis.

This is due to the third aspect related to individual rights. Dworkin

[26] Dworkin 1977a, pp. 84 and 96–97.
[27] *Ibid*, pp. 82–83.
[28] Aarnio 1987, pp. 161–165 and 1989, pp. 267–271.

sees them as a link between the nature of decision-making activity and the level of political theory. He distinguishes arguments of principle from arguments of policy on the basis of their different distributional character. The former represent the *individuated* political rights (of the individual), the latter *non-individuated* (collective) goals that do not belong to individuals. Because of this third aspect, Dworkin's theory thus appears as a form of liberal political theory. Classical liberal rights of freedom form the core and basis of the legal order. From the point of view of the legal order and legal argumentation, the rights of the individual receive absolute priority over "collective" social goals. Arguments of principle have an absolute priority in the legal order over arguments of policy.

Dworkin's ideas have met with extensive and justified criticism in the literature on legal theory.[29] From the present point of view it is important to locate and specify this criticism. Dworkin's theory does not fail so much in its idea of combining the legal with the political—his ideas on this are in many respects interesting, albeit ambiguous. Instead, the core of the criticism presented here is that the criteria used in the thesis of individual rights do not ultimately succeed in unambiguously differentiating between arguments of principle (rules and principles) and arguments of policy (goals). The distinction made by Dworkin simply does not correspond to reality. This becomes evident in the trend in the legal order that can be called a development towards increased goal-orientation in law. In this connection, reference is made merely to the increasing significance that loose and goal-oriented mechanisms have in the legal order.

Håkan Hydén has examined such legislation in general. He distinguishes as the *external functions* of law self-regulation, intervention and (social) planning, which correspond to various types of norms as *internal functions*, to obligatory norms, discretion norms and goal/means norms.[30] From the present point of view, and within the framework of this classification (which in itself may be problematic) we can take as examples consumer protection legislation or the negotiation mechanism in labour law. In these, we can see the outline of a mechanism that seeks

[29] Aarnio, *ibid.*, Alexy, *op.cit.*, pp. 98 ff, MacCormick, esp. 1982, pp. 126 ff and Kaarlo Tuori, Tavoitteet ja periaatteet modernissa oikeudessa (Goals and Principles in Modern Law), in *Aiheita Weberistä* (Themes on Weber), (ed.) T. Hietaniemi, Jyväskylä 1987, pp. 105–109. Alexy mentions as apposite examples of social goals the improvement of national health, securing the energy supply, and decreasing unemployment.

[30] Håkan Hydén, *Ram eller lag* (Framework or law), Stockholm 1984, pp. 45 ff, esp. p. 65.

to balance different social interests: "The function of law in the intervening connection is to adjust conflicting goals against one another in order to avoid conflicts between different social interests ..."[31] The contents of such intervention legislation and the mechanism resulting from it are social arguments of policy. However, at the same time it doubtless creates rights either for individuals or for interest groups, for example as consumers or as negotiating parties.

It would thus appear evident that Dworkin's distinction between "arguments of principle" and "arguments of policy" is not an absolute one; instead, the two forms of legal argumentation function on different levels. If we were to follow Dworkin's ideas, we would come to paradoxical conclusions. Only the rights of the producer, but not the rights of the consumer would be "rights" subject to arguments of principle; the obligation to enter into negotiations would not be balanced by any type of "right" on the part of the employees. These aspects derive from the political perspective of Dworkin's theory of rights: according to it, the classical liberal rights of freedom are one-sidedly emphasized and constitute the core of the substance of the legal order.

For this reason, the thesis of individual rights is not acceptable as the criterion that distinguishes goals from principles, arguments of policy from arguments of principle. Instead, in many respects it obscures rather than clarifies this distinction. Even so, the distinction is a significant one from the point of view of the legal order (for example, in drawing a line between the activity of the legislator and that of the court). How should the line between principles and goals be drawn? The second criterion used by Dworkin, here termed the *universalizing thesis*, forms a useful point of departure for dealing with this question.

Dworkin himself understands the universalizing thesis to be derived from individual rights. In this presentation, it will be separated from this connection. During recent decades, the idea of universalizability (*Universalierbarkeit*) has been considered to be one characteristic of the rationality of legal argumentation. Neil MacCormick has widely and clearly analyzed it from the point of view of the goal-oriented nature of law. According to MacCormick's basic idea, goal-oriented argumentation (*consequentalist argument*) is unavoidably intertwined with the consistence (coherence) represented by rules and principles: "... in hard cases there is a complex interplay between considerations of principle, consequentalist argument and disputable points of interpretation of

[31] Hydén, *op.cit.*, pp. 53–54, also pp. 70–71 (present author's translation).

established valid rules."[32] From MacCormick's point of view, there is little to add; theoretically, it is clear and illustrates decision-making situations in practice. However, the view of the present author is different, since we are dealing with the question of whether or not we can *distinguish* goals from principles (rules) on the basis of the demand for universalizability. Therefore, this question should be answered in the affirmative, although the distinction is not an absolute one.

Dworkin's terminology differs from that of MacCormick. He writes:

> "The doctrine demands, we might say, articulate consistency. But this demand is relatively weak when policies are in play. Policies are aggregative in their influence on political decisions and it need not be part of responsible strategy for reaching a collective goal that individuals be treated alike ... An argument of principle can supply a justification for a particular decision, under the doctrine of responsibility only if the principle cited can be shown to be consistent with earlier decisions not recanted, and with the decisions that the institution is prepared to make in the hypothetical circumstances." (Dworkin, 1977a, p. 88, also pp. 119–122)

We can see that Dworkin has a clear and logical postulate of universalizability. It deals with legal rules and legal principles, but not with goals—or it deals with them only to a limited degree; "this demand is relatively weak".

Juridical universalizability is a special case of ethical universalizability, in the same way as law is a special form of social morality. The postulate of universalizability remains a central question in both ethical and legal theory. It is connected with the classical problem of justice, where it appears as the demand for equal treatment (in accordance with a certain criterion).[33] In accordance with this last aspect and with the presenta-

[32] MacCormick 1978, p. 156.

[33] Timo Airaksinen, *Moraalifilosofia* (Moral Philosophy), Juva 1987, pp. 67–71 and 77–89, Irma Korte-Karapuu, *Universalization in Ethics*, Turku 1984, *passim*, Jürgen Haberman, Wahrheitstheorien, *Festschrift für W. Schulz*, ed. H. Fahrenback, Pfüllingen 1973, esp. p. 251 and *Moralbewusstsein und kommunikatives Handeln*, Frankfurt 1983, pp. 45, 67 and 131, Hare, *Moral Thinking*, Oxford 1987, pp. 41–42, 87–91 and 107–116. The following presentations may be mentioned from the field of legal theory: MacCormick 1978, pp. 123–128, 271–272 and 1982, pp. 137 ff., Aarnio 1987, p. 198 and 1989, pp. 209–210, Alexy, *A Theory of Legal Argumentation*, Oxford 1989, pp. 66–69, 115–118 and 202–203, Tuori, *Oikeuden rationaalisuus* (The rationality of law), Helsinki 1988, pp. 22 and 144–145. In this article there is no opportunity to analyze the complicated problem of universalizability as such. Klaus Günther (following Hare and Habermas) has made a distinction between the weak (semantical) and the strong ("Moralprinzip" [U]) sense of universalizability. Even this distinction is not unambiguous. I would rather distinguish between the formal (UP^f), material (UP^m) and discoursive (UP^d) meaning of universalizability. This is a matter for later elucidation. See Günther, *op.cit.*, pp. 25–44. See also Martin Kriele, *Recht und praktische Vernunft*, Göttingen 1979, p. 19 ff.

tion of Dworkin cited above, in this presentation the present author defines universalizability as a postulate that states that "cases that are alike in a relevant manner shall be dealt with in an equal way". This definition does not directly assume the demand for equal treatment of a *certain content*.[34] Dworkin's idea mentioned above can be understood as a more exact definition of universalizability from the point of view of court activity.

The distinction between goals and principles (rules) can be determined in accordance with the universalizability postulate, although the distinction is relative, and not absolute and "qualitative".[35] The basic idea holds that the demand for universalizability affects principles (rules) but not goals. The indeterminant nature of the principle (for example the general principle of equity embodied in section 36 of the Finnish Contracts Act) does not in itself prevent the demand for universalizability, which is characteristically legal principles. A legal principle is universally valid within its own (*prima facie*) scope of application. The consistency postulate affects its institutional and more detailed subcriteria, such as the rules created by legal practice for the prerequisites for the adjustment of contracts. On the other hand, the demand for universalizability does not directly affect social goals and their fulfillment (or, to use Dworkin's terminology, only affects them "in a weak sense"). Because of the demand for universilizability, a certain allotment in the annual budget of a public corporation does not require that it be maintained as the same amount from one year to the next.

What should our position be on cases where goal-oriented maxims, in accordance with what has just been said, are built into the legal order? Let us return once again to the interventionist and planning functions

[34] Thus it is implied that the general meaning content of universalizability is identical with the semantical UP-principle (cf. note 33, Günther, *op.cit.*, p. 28). This view can be based on different theories. See Hare, *op.cit.*, p. 40 ff., Chaim Perelman, *The Idea of Justice and the Problem of Argument*, London 1963, pp. 1–60, and Agnes Heller, *Beyond Justice*, Oxford 1987, pp. 24 ff.

[35] There is a certain significant difference between the categories of principles propounded by Alexy and Dworkin. Alexy does not pay attention to this difference. For Dworkin, what is central is "a requirement of justice or fairness or some other dimension of morality". Alexy, in turn, defines principles in a way that renders the difference between principles and goals vague. This is because Alexy defines principles as optimization imperatives, "*Optimierungsgebot*": "... dass etwas in einem relativ auf deu rechtlichen und tatsächlichen Möglichkeiten möglichst hohem Masse realisiert wird. Die Prinzipien sind demnach *Optimierungsgebote*, die dadurch characterisiert sind, dass sie in unterschiedlichen Graden erfüllt werden können ... " See Alexy, *op.cit.*, pp. 75–76. Günther criticizes Alexy (if I understand him correctly) from the same point of view. See Günther, *op.cit.*, pp. 268–269.

of the legal order mentioned above. These functions correspond (in law) to discretionary and goals/means norms. Hydén argues that the balancing of various social interests forms the contents of the interventionist set of norms. Planning, in turn, deals with collective goods ("kollektiva varor") such as the maintenance of health care and education.[36]

From the point of view of the perspective we are now discussing, are these goal-oriented directives goals or principles? Would they fall under "arguments of goals" or "arguments of principle"? The present author considers that the answer cannot ultimately be deduced on the basis of the directives. "The nature" of these maxims cannot determine as such whether or not they are subject to the demand for universalizability characteristic of principles, or whether, like arguments of goal, it remains outside of this postulate. In itself, nothing prevents the goal-oriented mechanisms mentioned by Hydén from being part of the legal order. If so, they are legal norms that are part of the sphere of universalizability. However, institutionally they can also have the position of a social goal; if so, they would remain outside of the universalizability postulate. The position that is taken on this question is in itself an institutional decision. Hydén has presented arguments that support the view that such legislation is part of the legal order. Contrary arguments can rest only on practical and institutional justification. No general positions on this question can be derived from the "nature" or "substance" of the activity itself.

Thus, the difference between goals and principles is important: it concerns the scope of the demand for universalizability in the fields of social directives. On the other hand, the difference is a relative one: we are not able to determine it other than within prevailing institutions. Ultimately, it is a question of an institutional decision on values, and various functions, legislation, legal practice and legal science are involved in this decision (for example, do citizens have the "right" to planning permission, e.g. to build a house, or to a certain level of social welfare). In the opinion of the present author Dworkin is wrong specifically in mystifying these rights as if they should exist prior to institutional structures or decisions.

Traditionally, in connection with the analysis of legal decision-making the opinion has been expressed that this activity ultimately has the nature of social policy. According to this way of thinking, the judge applies his social values in the decision-making situation. In Finland,

[36] Hydén, *op.cit.*, pp. 52 ff and 58 ff, esp. p. 65.

there was discussion related to this in particular during the 1970s. The traditional form of this approach was to be found already during the 1800s as American realism. This school embraces ideas that play down the importance of legal principles and emphasize social values. It was Jerome Frank who first gave voice to the classical slogan, "Conclusion first, rationalization to follow".[37] Such views are not false, but they are definitely one-sided. Argumentation of a social and political nature ("arguments of goal") has a significant effect within law, but only as restricted by certain institutional conditions. Such argumentation is "filtered" into the legal order, to use Dworkin's terminology, through arguments of principle. In so doing and at the same time it substantively *changes* into "arguments of principle" that are subject to the demand for universalizability. The drawing of demarcation lines in each case and in each decision subjected to a decision is, in itself, a significant social and political question.

According to MacCormick, the legal order in the sense described above is a "complex interplay" of rules, principles and goals. The present author's ideas run in the same direction, albeit on a substantively different level; there is a significant difference between goals and principles, as Dworkin argues. However, this fact should not result in the difference being regarded as an absolute one, or to its mystification. Ultimately, the difference is a matter for rational policy in society, and not for the secret intuition of judges regarding legal principles. Legal principles have a central role in the institutionalized evaluative decisions of the legislator and the judge.

An attempt will be made elsewhere to provide a detailed analysis of the view adopted here. Doubtless, the question is closely linked to the fundamental questions of the doctrine of the sources of law. On the other hand, the distinction between principles and goals as well as the dimension of the demand for universalizability may have even closer connections to various fundamental problems in legal decision-making. Reference is made in conclusion to two aspects that are specifically connected with legal decision-making.

(1) The demand for universalizability affects the justification of a decision rather than the search for the decision. Thus, from the point of view of decision-making, what is at issue is the basic distinction between the *context of justification* and the *context of discovery*. This distinction

[37] On this idea of Frank, see Karl Llewellyn, *Jurisprudence, Realism in Theory and Practice*, Chicago 1962, pp. 56 and 102, Helmut Coing, Neue Strömungen in der nordamerikanischen Rechtstheorie, *Archiv f. Rechts- und Sozialphilosophie*, 1949, p. 55.

seems first to be made systematically by Richard Wasserström at the beginning of the 1960s, and in Finland, by Aulis Aarnio.[38] The demand for universilizability meets these different aspects of legal decisions in different ways. There is reason to argue that it specifically affects the context of the justification of the decision, but not its context of discovery. In any case, in a fundamental way it affects the latter to a lesser degree.

(2) The demand for universalizability does not affect the decision in a concrete legal conflict situation so much as the process through which law is created, changed and established. In legal decision-making, there is reason to distinguish between two different dimensions, also in a sense other than the one described above. This is because, in a concrete situation, not only is a decision made on the legal conflict between the parties, but also a position is taken on what legal norms prevail and on their contents. This distinction could be further developed using the concepts of (concrete) *conflict solving* and *norm creating* dimensions. The present author's idea approximates the fundamental difference between *anwenden* and *begründen* recently analyzed by Klaus Günther.[39] Referring only to the main question: from the point of view of the demand for universilizability, the distinction is a key one.

This is because the demand for universalizability is to be found essentially along the latter dimension. This aspect is important from the point of view of the new developmental features of law. Increasingly, so-called self-regulatory mechanisms (for example in labour law and in the protection of consumers, as noted above) are being created in the legal order. From the point of view of the demand for universalizability, this feature is important, because in connection with self-regulatory mechanisms a need has arisen for limiting the dimension of the demand for universalizability. Accordingly, in the mechanisms of reflexive or responsive law, the norm-creating dimension that is subject to universalizability weakens. Thus, the legal decision nears a decision on a concrete conflict. One form in which this appears is the tendency, visible in labour law, to distinguish between "generally suitable" decisions and

[38] Richard Wasserström, *The Judicial Decision*, London 1961, pp. 22–39, and Aarnio, *On Legal Reasoning*, Turku 1977, pp. 43 ff.

[39] The work of Klaus Günther might be summarized in two points. First, there are two distinct forms of argumentative rationality, *Begründung* and *Anwendung*, *Geltung* and *Angemessenheit*. Second, they are irreducible to each other (this goes against what, for example, Albrecht Wellmer, Ernst Tugendhat and Richard Hare would have thought, on the basis of different points of view). See Günther, *op.cit.*, esp. pp. 45–81 and 261–307.

decisions that are "suitable for the parties".[40] In this connection, there is no possibility of dealing with this development.

4. SUMMARY AND BROADER PERSPECTIVES

The basis for the foregoing presentation lies in the discussion of rules and principles. Attempts have been made to analyze this in the light of certain ideas presented by Ronald Dworkin which appear to be ambiguous already at the outset. When examined from a certain perspective, they appear to form a consistent and clear entity. However, this paper has dealt with the interpretation of Dworkin's ideas and their analysis in the light of two broad problems, the relationship between law and morality and the relationship between law and politics.

Despite the interesting nature of Dworkin's ideas, it would seem to be a key task for current legal theory to go beyond them. From this point of view, the thesis of individual rights dealt with above is fundamental. At the moment the thesis and the criticism that has been directed against it is important because, in international co-operation and in domestic law, the problematics of *civil rights* and *basic rights* have become topical in a new way, perhaps making it necessary to interpret Dworkin's thesis of individual rights in a new way. It is not possible to outline new basic rights through a traditional analysis of rights limited to the individual spheres of freedom in classical liberalism.

What has been said above about the interrelationship between law, morality and politics provides a basis for at least three types of conclusions and ideas.

1. *Contextualism*

Dworkin's ideas, which often seem scattered, can be seen in part as a manifestation of the use of concepts that are problem-bound or situation-bound. This is clearly the case in connection with what may be the most important concept, "principle". At least in this respect Dworkin's methodological approach appears, in a positive sense, as a manifestation of systematic contextualism.

The idea of a contextual approach has become topical along with

[40] Martti Kairinen, KKO:n ja TT:n suhteesta (On the relation between the Supreme Court and the Labour Court), *Oikeuskäytäntö oikeuslähteenä*, ed. Marja Pohjonen, Turku 1988, p. 11.

so-called post-modern thinking and philosophy. It is directed against the theoretical search for universal and generally valid structures; from the perspective of this approach, these constructs have fundamentally misrepresented the subject of their inquiry. Thus, one central representative of post-modernism, J.-F. Lyotard, speaks about the "great narratives" of social theories that contain both false information and the falsely legitimized illusion of an overall social context ("le lien social").[41] Dworkin has no direct connection with post-modern contextualism. Instead, both can be seen as distant manifestations of linguistic philosophy and the theory of science and action, which arose on the basis of the later works of Wittgenstein.[42] In a loose sense, however, we can see contextualist features in Dworkin's thinking. Among these would primarily be meaning contents based on different approaches to the category of principles and the systematic criticism of universalizing, goal-oriented theories, such as utilitarianism. On the other hand, there are significant differences between Dworkin and post-modern contextualism.[43] Analysis of these would call for a separate inquiry.

2. *The relative autonomy of law*

As described in the previous section, the concepts used by Dworkin are often conditioned by the point of view under review. Another way to bring together his approach and conclusions is to interpret them as a uniform construct of ideas that deals with the special nature of law. In so doing, we can speak about the *relative autonomy of law*. Such an approach outlines and interprets, from a uniform point of view, the relationship between law and morality, and between law and (social) policy.

[41] Jean-Francois Lyotard, *La condition postmoderne*, pp. 21 ff. and 29 ff. See also Habermas, *The Philosophical Discourse of Modernity*, Massachusetts 1987, p. XIX.

[42] Lyotard himself refers to the concepts of language games and forms of life, which are central to Wittgenstein's later work. He also refers to J.L. Austin's theory of performatives, in which the basic idea lies in different forms of life and institutionalized practices as the foundation for linguistic meaning contents. See Lyotard, *op.cit.*, pp. 19–22.

[43] Cf. Unger, *op.cit.*, esp. pp. 92 ff and *Social Theory: Its Situation and Task*, Cambridge 1987, pp. 87 ff., Koskenniemi, *op.cit.*, pp. 490 ff. See also supra, fn 15. The basic idea of contextualism is to be found in the law of contract. See P.S. Atiyah, *Promises, Morals and Law*, Oxford 1981, pp. 123 ff. Parallel ideas are to be found in modern linguistics. In this connection, mention may be made of the concepts of "context-dependent / context-independent meaning" (Levinson), "implicature" and "co-operative principle" (Grice). See Stephan Levinson, *Pragmatics*, Cambridge 1983, pp. 20 ff, H. Paul Grice, Logic and Conversation, in: *Speech Acts 3, Syntax and Semantics*, Cole and Morgan (eds.), London 1975, pp. 43 ff.

In accordance with what was mentioned in section 2, on one hand law has a moral nature, and on the other it is a phenomenon that affects the particular field of morality. Further in accordance with what was mentioned in section 2, we can call the factor that distinguishes between these two an *institutional criterion*, and the field of life that it sets apart *institutional morality*. There is a corresponding relationship between law and social goals. Doubtless, law (legal norms and legal principles) is, at least in its important respects, a product of social and political goals. Even so, this in no way conflicts with the fact that as a part of the legal order these goals take on completely new features, above all in the form of the universalizability postulate. We can say, therefore, that law is something different from social policy, but that the difference is only relative.

The idea of relative autonomy thus contains a dual emphasis. On one hand we can emphasize that law is *autonomous* both in respect of its object and its analysis. Here, we are faced with the same basic idea that finds its clearest manifestation in Hans Kelsen's doctrine of a pure legal order and legal science based on the autonomy of law.[44] The idea of relative ("contextual") autonomy adopted here is, in some of its details, comparable with Kelsen's basic idea of total autonomy.[45]

Even so, law is not autonomous in the sense intended by Kelsen. Here, when speaking of relative autonomy, the emphasis is on the word *relative*. In the sense mentioned above, law is a moral phenomenon and does not—contrary to what Kelsen thought—form a group of valuations that can unambiguously be distinguished from moral valuations. In a corresponding manner, law depends on social goals: the difference between law and politics is only relative, but nevertheless significant.

[44] Hans Kelsen, *Reine Rechtslehre*, Wien 1960, *passim*. The pure theory of law was already to be recognized in his early work, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatz*, Tübingen 1910. During the 1930s, Kelsen made some essential corrections to his theory. On the development of the pure theory of law, see Seppo Laakso, Puhtaan oikeusopin problematiikka (The problematics of the pure theory of law), *Oikeustiede* XIII/1980, pp. 95–178.

[45] The problematics of Kelsen's pure theory of law can be examined as different shades of the autonomy of law. For Kelsen, the basic idea of autonomy is specified in particular through the static and the dynamic approach. According to this, one could in theory distinguish between four meanings of the autonomy of law. (1) Law, as a coercive system, must be distinguished from other orders in society (*op.cit.*, pp. 25–60). (2) The method and approach of legal science must be distinguished on one hand from sociological political theories, and on the other hand from valuel-aden political theories (*op.cit.*, pp. 1 and 72–114). (3) Law itself regulates the basis on which it is created (*op.cit.*, pp. 146–282). (4) Law itself regulates the criteria for its recognition and application.

3. The doctrine of sources of law

The question of the interrelationship between law, morality and politics is not merely a theoretical problem. It is an important background question in the everyday activity of the courts, the legislator and members of the legal community. From the point of view of the legal order, this aspect comes to the fore in connection with the broader and practical problem. This is the problem of the *doctrine of sources of law* and the *theory of sources of law*. Through it, both the courts and citizens recognize what is law. Through it, they take a position on the question of what fields are protected by law, and in what way law is recognized in each concrete situation.

It is for this reason that, in the present author's view, the doctrine of sources of law is fundamental in particular in the more developed analysis of social goals from the point of view of the legal order. This is because the current and established doctrine of sources of law contains one source for which the institutional universalizability clearly has special features. In the Nordic countries, this source of law has long been called *real argumentation*.[46] On the other hand, the present author's earlier article has dealt in passing with the problem of the extent to which sources of law can in general be classified unambiguously on the basis of their obligatory or binding nature.[47] A new analysis of the doctrine of the sources of law based on these arguments would appear to be necessary. The author hopes to be able to return to it in another connection.

[46] Aarnio 1987, pp. 87–88, 131–134 and 1989, pp. 239–241.
[47] Tolonen 1988, p. 181.