Juristic topics in English legal theory: The 'topical' method of finding and legitimizing premises for the solution of 'hard cases' in the light of English legal theory

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Abstract

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The thesis deals with a theory of legal reasoning, 'juristic topics', which dominated legal discussion in Germany in the nineteen-fifties and sixties. It presents the main characteristics of juristic topics, and their historical and philosophical background.

Moreover, the thesis examines some of the main theories and movements in contemporary English legal theory in order to judge their affinity to the approach of juristic topics. Stress is laid on the process of finding and legitimizing premises for the solution of so-called 'hard cases'.

The thesis comes to the conclusion that besides the different legal traditions in common law and civil law, both juristic topics and English theories about legal reasoning, are concerned with similar problems. Moreover, some of the models about the English judiciary provide answers which can be derived from the same concept of legal rationality as juristic topics.

Juristic topics in English legal theory

The 'topical' method of finding and legitimizing premises for the solution of 'hard cases' in the light of English legal theory

by

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Declaration:

The material contained in the thesis has not previously been submitted for a degree in this or any other university.

1 Introduction

The 'topics' as a kind of reasoning dominated the process of argumentation and reasoning in antiquity. They could also be found in medieval thought. After a period of neglect in which a rather scientific way of reasoning derived from Descartes was prevailing, the topics were revived by Theodor Viehweg. Viehweg declared at a lecture in 1950 that judicial reasoning in modern times proceeds in a 'topical' way. With his thesis, which he summarized in a small book[1], Viehweg set off a controversial discussion among German jurists about the nature of judicial reasoning. It lasted for more than twenty years after which the attention finally shifted to the discussion of theories about 'new hermeneutics'.

In its presentation of juristic topics this thesis will start with a brief outline of the origin of the topics, namely the Topics of Aristotle, and their further development by Cicero (under Chapter 2). Then, we will present the legal reception of the topics by Viehweg and give a summary of the main arguments of the subsequent topics discussion in Germany (under

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[1]Th. Viehweg, Topik und Jurisprudenz, 1st. ed., Munich 1953; 5th. ed., Munich 1974.

Chapter 3). On the basis of this discussion we will offer a wider frame of juristic topics dealing on the one hand with their philosophical background, and, on the other hand, with the (admittedly minor) attention Anglo-American jurists (in contrast to continental jurists) paid to the topical method (under Chapter 4).

From the presentation of juristic topics we will extract three main characteristics which will be employed in the thesis to compare contemporary English legal theory. The first, which is the characteristic of 'problem thinking', used as opposed to 'system thinking', will be treated only briefly in order to indicate its main implications on a comparative basis (under Chapter 5).

The thesis will concentrate on the second characteristic, of finding premises, and on the third characteristic, of legitimizing premises for the solution of a legal problem. With the help of the concept of so-called 'hard cases' in English legal theory we will consider for what kind of cases premises have to be found (under Chapter 6).

Moreover, the descriptive or prescriptive character of legal theories and their influence on legal practice will be clarified (under Chapter 7).

As juristic topics offer a concept of rationality for the legitimation of premises, particularly with regard to the employment of value-judgements in judicial decision-making, this thesis will analyze some of the most representative approaches of English legal theory to the problem of legal rationality in hard cases (under Chapter 8).

Finally, they will be compared to the topical approach, and, as there is no direct reception of the topics in the Anglo-American legal family, we will examine to what extent the underlying philosophical trend has been incorporated into contemporary English legal theory (under Chapter 9).

2 History of the topics

The name 'topics[1]' originates with Aristotle, although it is not clear, whether the idea which it denotes does as well[1]. But there is no doubt that Aristotle shaped the topics as he isolated and formulated the technique or method which might already have been at work in earlier collections of topoi.

This chapter will give an outline of Aristotle's Topics showing the aims of his treatise (under section 2.2) and the means he employs to achieve this aim (under section 2.3). We will then examine the Topics of Cicero to demonstrate that Aristotle's conception of the topics has not been followed but that it was given a different

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[1]The term 'topics' is used to signify the theory or method which is presented subsequently; 'topical' is employed as an adjective to topics; Topics denotes the particular treatise either of Aristotle or Cicero; and topos or topoi (plural) are means of topical reasoning which may be equated with viewpoints until further explanation (under section 2.3).

[1]cf. W. Grimaldi, The Aristotelian Topics (1958) XIV Traditio 4, and Th. Viehweg, Topik und Jurisprudenz, 5th. ed., Munich 1974, p.29 in support of the argument that the topics do not originate with Aristotle; and M. Kriele, Theorie der Rechtsgewinnung, 2nd. ed., Berlin 1976, p.133 for the argument that they do.

emphasis which shaped the further understanding of the topics (under section 2.4).

2.1 Basis of the Aristotelian Topics

In his eight books of Topics Aristotle first distinguishes between dialectical reasoning, which is the concern of his treatise, and apodeictic or demonstrative reasoning.

The latter starts from premises which are 'true' and 'primary', while the former reasons from endoxa, which has been translated as opinions that are generally accepted[1]:

> "Things are 'true' and 'primary' which are believed on the strength not of anything else but of themselves: for in regard to the first principles of science it is improper to ask any further for the why and wherefore of them; each of the first principles should command belief in and by itself. On the other hand, those opinions are 'generally accepted' which are accepted by every one or by the majority or by the philosophers - i.e. by all, or by the majority, or by the most notable and illustrious of them."

The knowledge of metaphysics in antiquity, for example, was regarded as true and primary and beyond question by the Greeks.[1] Another example of demonstrative premises are those which are

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[1]cf. the Oxford edition by W.D. Ross: Aristotle, The works, translated into English under the editorship of W.D. Ross, Vol. 1, Oxford 1926, Topica, (book) I, (ch.) 1, 100a30-100b24.

[1]Cf. Grimaldi, op. cit. supra n.2, p.2.

laid down to build up a logical axiomatic system as it is known in mathematics. On the other hand dialectical reasoning from endoxa is concerned with problems about the nature of justice, goodness, virtue, or reality.[1] The distinction Aristotle makes is one between probable knowledge and certain knowledge. Dialectical reasoning yields only probabilities of truth, while apodeictic reasoning yields full certainty of truth.

For Aristotle the topics are the methodology of dialectics, the area of probable knowledge, just as in his Analytics we are given a methodology for the area of certain knowledge.[2] These two ways of reasoning differ essentially in the nature of their premises, but the way inferences are drawn from premises is much the same for both. This is stated in Aristotle's Analytics:

> "The demonstrative premiss differs from the dialectical, because the demonstrative premiss is the assertion of one of two contradictory statements (the demonstrator does not ask for his premiss, but lays it down), whereas the dialectical premiss depends on the adversary's choice between two contradictories. But this will make no difference to the production of a syllogism in either case; for both the demonstrator and the dialectician argue syllogistically after stating that

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[1] ibid., p.2.

[2] ibid., p.3.

> something does or does not belong to something else."[7]

If one takes, for instance, the demonstrative premise or basic truth[8] that 'every man is in existence' and if it is stated as a minor premise that 'Aristotle is a man', the conclusion is that 'Aristotle is in existence'. If the premise that 'every man is good and sensible' is accepted by means of dialectics, it follows from 'Aristotle is a man' that 'Aristotle is good and sensible'. It may be seen that the syllogism remains the same although the nature of the premises is different. Thus, the statement that 'Aristotle is in existence' was based on certain knowledge, whereas ' Aristotle is good and sensible' belonged to the area of probable knowledge.

Summing up, it may be said that Aristotelian Topics basically deal with reasoning from endoxa, which are opinions held by the majority or the most notable of them.

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[7]Aristotle, op. cit. supra n.3, Analytica Priora I1, 24a21.

[8]As true and primary premises cannot themselves be demonstrated, their originative source is according to Aristotle intuition, so e.g. the knowledge of metaphysics rested in the last resort upon intuition in contrast to generally accepted opinions; cf. Aristotle, op. cit. supra. n.3., Analytica Posteriora II 19, 100b6.

2.2 Uses and aims of the treatise

Aristotle's treatise was meant to serve three purposes: intellectual training, casual encounters, and the philosophical sciences.[9]

Intellectual training was a common practice in antiquity among the philosophers and their disciples. It followed certain rules which can partly be found in Book VIII of the Topics. In an artificial dispute the defender had to put forward a thesis (e.g. a definition of man) while it was the task of the opponent to disprove this thesis. By means of asking questions the opponent tried to force the defender to make concessions which once they had been made, could not be withdrawn. When the opponent managed to disprove the defender's thesis by means of inferring the opposite from the defender's admissions he had won the dispute.[10] In that context the easiest way to force the defender to accept propositions was to base the questions on generally accepted opinions, as it was likely that those opinions would be accepted by the

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[9]Aristotle, op. cit. supra n.3, Top. I2, 101a26.

[10]cf. Kriele, op. cit. supra n.2, p.136 and G. Otte, Zwanzig Jahre Topik-Diskussion: Ertrag und Aufgaben (1970) I Rechtstheorie 183, p.189 on intellectual training.

defender as well. In the last Book of the Topics Aristotle gives further advice on how to formulate questions and how to answer them. These include the concealment of the opponent's plan:

> "Formulate your premiss as though it were a mere illustration: for people admit the more readily a proposition made to serve some other purpose, and not required on its own account. Moreover, do not formulate the very proposition you need to secure, but rather something from which that necessarily follows: for people are more willing to admit the latter, because it is not so clear from this what the result will be, and if the one has been secured, the other has been secured also."[11]

Besides the main purpose of intellectual training, Aristotle considered the Topics to be useful for any intelligent discussion of the innumerable significant problems which face man, and also as an assistant discipline to enlarge where possible the subject of scientific knowledge.[12] For the purposes of intellectual training, casual encounters, and philosophical sciences Aristotelian Topics aim to provide a way to proceed in order to have an intelligent discussion and to talk sense. According to Aristotle dialectical reasoning is dealing with

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[11]Aristotle, op. cit. supra n.3, Top. VIII 1, 156b26.

[12]cf. Grimaldi, op. cit. supra n.2, pp.1ff.

problems.[13] So it is the first task of his Topics to enable one to grasp the problem, i.e. the subject of inquiry, and to examine its material in order to determine it with accuracy. The next step is to develop and enlarge this material to further conclusions. To do this, one must form and secure propositions in order to make them probable and fruitful for the further discussion. As a proposition needs to be accepted by the interlocutor, it is a discursive way of reasoning.[14] If none of the available means is omitted, it may be said that one's grasp of the subject of inquiry is adequate.[15]

2.3 Means of achieving the aim - especially topoi

In the Topics Aristotle restricts the further elucidation of problems and propositions to four predicables: definition, property, genus, and accident.[16]

These constitute the framework within which analysis, criticism, and evaluation of something

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[13]Aristotle, op. cit. supra n.3, Top. I 4, 101b15.

[14]cf. Grimaldi, op. cit. supra n.2, p.3.

[15]Aristotle, op. cit. supra n.3, Top. I 3, 101b9.

[16]ibid., Top. I 4, 101b17.

takes place, for according to Aristotle every proposition and every problem indicates one of the four predicables and it is from these that problems and propositions are formed.

A definition is a phrase signifying a thing's essence, such as "an animal that walks on two feet is the definition of man."[17]

"A property", Aristotle writes, "is a predicate which does not indicate the essence of a thing, but yet belongs to that thing alone, and is predicated convertibly of it. Thus, it is a property of man to be capable of learning grammar."[18]

"A genus is what is predicated in the category of essence of a number of things exhibiting differences in kind."[19] Animal, for instance, is the genus of man.

As not everything can be grasped by those three predicables, an accident is something which belongs to the thing, though it is neither a

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[17]ibid., Top. I 4, 101b30.

[18]ibid., Top. I 5, 102a17.

[19]ibid., Top. I 5, 102a31.

definition nor a property nor a genus.[10] For example the colour of a thing is an accident.

Aristotle's Topics then examine what has to be considered to determine definition, property, genus, and accident of something or whether something has got the quality of one of the predicables. So, for example, the genus of whiteness is that it is a colour, but whiteness itself can be an accident of something else.

This examination is done by so-called topoi which are employed, for example, to give a definition of something, or to determine, for instance, the genus of horse or of man. A clear explanation of the term topos cannot be found in Aristotle's Topics. One has therefore to consult his Rhetoric. Although the Rhetoric serves a different purpose from the Topics,[11] the meaning

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[10]ibid., Top I 5, 102b4.

[11]Rhetoric is the counterpart of dialectics. It must adapt itself to an audience of untrained thinkers who cannot follow a long train of reasoning and it employs persuasive arguments rather than demonstrative ones. According to Aristotle, argumentative persuasion is, nevertheless, a sort of demonstration. (See Aristotle, The works, translated into English under the editorship of W.D. Ross, Vol. XI, Oxford 1924; Rhetorica (book) I (ch.) 1, 1354a1).

of the term topos remains the same in both treatises."

Topoi is translated by 'lines of argument' in the Rhetoric and 'commonplace rules' in the Topics. They may be characterised as ways to classify or group things, or terms, or arguments.

Aristotle distinguishes between general and particular topoi. The general topoi have no special subject-matter and apply equally to all classes of things and science alike, such as analogy, or argumentum e contrario, or argumentum a fortiori." The task of the particular topoi is to increase the understanding of any particular class of things. For instance to characterize a man in comparison with a horse it may be said that a man is a biped," in which case the comparison is a general topos, while 'biped' is a particular topos.

Many of the topoi are 'focal points' for the analysis, criticism, and evaluation of terms

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"cf. Grimaldi, op. cit. supra n.2, p.4 and Viehweg, op. cit. supra n.2, p.23.

"Aristotle, op. cit. supra n.21, Vol XI, Rhet. I 2, 1358a2-30.

"idem., op. cit. supra n.3, Vol. 1, Top. V 1, 129a8.

within the framework of the four predicables and can only be understood with regard to the purpose of intellectual training the Topics was meant to serve. For example concerning the discussion of definitions Aristotle presents us with certain topoi in order to help to proceed and to examine if something has been defined incorrectly:

> "One commonplace rule, then, in regard to obscurity is, See if the meaning intended by the definition involves an ambiguity with any other," or "Another rule is, See if he has used a metaphorical expression, as, for instance, if he has defined knowledge as 'unsupplantable', or the earth as a 'nurse', or temperance as a 'harmony'. For a metaphorical expression is always obscure."[11]

These are the means by which Aristotle aims to enable the disputants to examine the subject under discussion and to form and secure propositions in their arguments and in general to enable anyone to speak intelligently about it.

2.4 Further development of the topics

As it has been stated Aristotle's Topics are concerned with the examination of problems and the formation of propositions for intellectual training and also for the study of the philosophical sciences in the area of probable knowledge.

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[11] ibid., Top. VI 2, 139b19 and 32.

This methodology began to be neglected shortly after Aristotle. Although there were further developments of catalogues of topoi, the topical method was given a different emphasis. This may best be exemplified by the Ciceronian interpretation of the topics, which also shaped the medieval understanding of the topics and which had more influence in history than the Aristotelian Topics.[16]

Cicero wrote his Topics while sailing from Velia to Rhegium as a letter to his friend Trebatius. Trebatius, who was a jurist, had found a copy of Aristotle's Topics in Cicero's library, and had asked Cicero to explain it to him. On his journey to Rhegium Cicero composed the treatise entirely from memory.[17] Although Cicero refers explicitly to Aristotle, there seems to be only slight resemblance to Aristotle's treatise. Cicero does not distinguish between apodeictic reasoning and reasoning from endoxa. His treatise was meant to serve rhetorical purposes rather than an intelligent discussion in the area of probable knowledge. As Trebatius was a Roman

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[16]cf. Viehweg, op. cit. supra n.2, p.25.

[17]Cicero, Topica, translated by H.M. Hubbel, in: The Loeb Classical Library founded by James Loeb, edited by T.E. Page and others, London 1949; Top. I 1-5.

jurisconsult, the Ciceronian Topics are especially concerned with providing arguments for legal procedure and rhetoric. This becomes clear, when Cicero refers to the pleading before court: "Not only whole speeches, but also the several parts of a speech receive help from these topics ... "[10]

At that time jurisconsults were educated as rhetoricians and rhetorical competence was one of the most important skills a jurisconsult had to possess for legal practice. In legal proceedings it was a substantial technique to convert the particular conflict into a rhetorical case by means of distinguishing claim from denial and then factual from legal denial in order to apply arguments from rhetorical schemes to those categories.[11]

Therefore, Cicero's Topics present us with rhetorical invention (ars inveniendi) and a catalogue of topoi that intends to provide all the important aspects of and arguments for the practice of argumentation. This contrasts with Aristotle's Topics which was meant to be a methodology of dialectics.

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[10]ibid., Top. XXVI 97.

[11]cf. Viehweg, op. cit. supra n.2, p.59.

Consequently Cicero does not characterize topoi as focal points or aspects to group and classify things and arguments: rather for him they are the regions or seats of argument, from which the argument can be drawn and where arguments can be found.[10]

According to Cicero arguments may for example be derived from similarity, difference, contraries, adjuncts, antecedents, comparison and other topoi he enumerates. For instance,

> "an argument is based on similarity or analogy in the following manner: If one has received by will the usufruct of a house, and the house has collapsed or is in disrepair, the heir (i.e. the remainder-man) is not bound to restore or repair it, any more than he would have been bound to replace a slave of which the usufruct had been bequeathed, if the slave had died."[11]

After the enumeration and illustration of the topoi Cicero claims that

> "all the topics of argumentation have now been set forth, and it must be understood in the first place that there is no discussion in which there is not at least one topic involved, but that all topics scarcely ever occur in every inquiry, and that some topics are better suited to some inquiries than to others."[12]

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[10]see Cicero, op. cit. supra n.27, Top. II 7-8.

[11]ibid., Top. III 15.

[12]ibid., Top XXI 79.

This illustrates that Cicero was interested in the practical application of topoi as sources of argument with which he provided his friend Trebatius, while he neglected theoretical aspects. Aristotle, on the other hand, was mainly concerned with a theory of dialectical reasoning for the universal examination of problems, which then was meant to serve the practice of intellectual training as well.[11] The objective of providing topoi as a supply of arguments can be found in both Aristotle's and Cicero's treatises, but Aristotle does not employ it as rhetorical invention. Therefore it may be said that Cicero and Aristotle partly make use of the same means but the general conception and the aims the topics were meant to serve are different ones.

Of these two different understandings of topoi and the topics it was the Ciceronian version which passed into medieval thought, where it was part of philosophical discussion.[11] This thesis will not concentrate on medieval topics as they do not contribute to the examination of the topics discussion in Germany.

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[11]cf. Viehweg, op. cit. supra n.2, p.29.

[11]see ibid., p.30.

3 Legal reception of the topics in Germany - especially by Theodor Viehweg

From Cicero's Topics it may be seen that the law has always been a major field of topical reasoning. After a period of neglect, in which a deductive approach, known as conceptual jurisprudence, dominated continental legal thought, Theodor Viehweg was the first writer who explicitly rediscovered the topics and employed them fruitfully in the area of legal reasoning.

In his book 'Topik und Jurisprudenz'[1] based on a lecture he gave in 1950, Viehweg first analyses the topics on the basis of Aristotle and Cicero (see under section 3.1 below) and afterwards examines the Civil Law of antiquity, of the Middle Ages and of modern times with regard of its topical characteristics (see under section 3.2).

However, it will be seen that this analysis is not satisfying, because it is not very precise

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[1]Th. Viehweg, Topik und Jurisprudenz, (1st. ed. 1953), 5th. ed. Munich 1974 (see also the reviews of this book: Max Rheinstein (1954)3 American Journal of Comparative Law 597; H.E. Yntema, Legal Science and Natural Law: a propos of Viehweg, Topik und Jurisprudenz (1960)2 Inter-American Law Review 207; L. Fuller (1965)10 Natural Law Forum 236.

and leaves many open questions which other writers have tried to answer (these are discussed under sections 3.3 and 3.4). An example at the end of this chapter will try to illustrate how the topical method may proceed to solve a particular legal problem (see under section 3.5).

3.1 Viehweg's analysis of the topics

According to Viehweg the topics are in the first place a technique of 'problem thinking' in contrast to one of 'system thinking'.[1] A problem is a question that allows more than one possible answer, so that the topics are inapplicable where there is unanimity about the answer to a question.

It should be stressed that in 'Topik und Jurisprudenz' 'system' means the strict deductive and axiomatic system in contrast to a wider conception of 'system', which may mean nothing but a combination that makes up a whole in a certain sense.[1]

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[1]Viehweg, op. cit. supra n.1, p.31-32.

[1]see M. Kriele, Theorie der Rechtsgewinnung, 2nd. ed., Berlin 1976, p.117 and concerning the different conceptions: Th. Viehweg, Some considerations concerning legal reasoning, in: Law, Reason, and Justice, ed. by Graham Hughes, New York, London 1969; p.266.

In contrast to system thinking, topical thought starts from problems instead of axioms. It is therefore capable of considering all the relevant aspects for the solution of the problem, writes Viehweg, while the system necessarily neglects those aspects and problems which are not contained in it, and therefore cannot be solved sufficiently.[4] When a closed system is meant to cover all the problems which may arise out of particular fact situations there are always certain problems that cannot be solved by the system or that are simply ignored, whereas this does not occur when the thought starts from the problem without restrictions of relevant aspects by an underlying system.

Viehweg directly follows Aristotle in equating topics with problem thinking.[5] However, when it comes to advantages of problem thinking over system thinking, Viehweg does not rely on Aristotle, but on the studies of the philosopher Nicolai Hartmann on Kant.[6] Hartmann contrasts aporetic with systematic reasoning. He accuses systems of denying and falsifying arising

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[4]Viehweg, Topik und Jurisprudenz (supra n.1), p.33.

[5]ibid., p.31.

[6]ibid., p.32.

problems and thus of being a hindrance for their solution. Aporetic reasoning means, according to Hartmann, openness towards every problem that arises. Consequently he approves of inconsistencies in Kant's work and his philosophical system and praises them as an attempt to overcome rigid systems.[1]

According to Viehweg topoi are viewpoints that serve the examination and solution of problems. They must be determined by the problem and have no systematic character. A systematization of topoi changes their intention, because instead of serving the problem they are fettered by a systematic order.

The topoi may be characterized as points of orientation and guidance that help to build up an understanding of a problem and hint at its solution.[2] They usually consist of recurrent viewpoints which have proved to be useful for the examination of problems and which can be listed in catalogues of topoi in an alphabetical order or according to the frequency of their occurrence. This differs from systematization as

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[1]N. Hartmann, Diesseits von Idealismus und Realismus (1924) XXIX Kant - Studien 160.

[2]Viehweg, Topik und Jurisprudenz (supra n.1), p.38 and 41.

catalogues of topoi are not binding. Moreover, the changing situations and problems always demand that new aspects and viewpoints have to be considered as well, so that these catalogues are never complete. The topoi may occur in the form of terms and phrases, such as 'legal certainty' or 'fault-liability'.

In his treatise Viehweg does not present us with a clearer concept of the term topos, but he indicates that his conception of topoi is a very wide one,[9] so that one may say that it contains all the viewpoints which may become somehow relevant for the examination of a problem.

For this purpose of examination Viehweg divides the topical method into two procedures. The first one ('Topik erster Stufe') is an inventive procedure, in which suitable viewpoints are taken up more or less accidentally whereas the second one ('Topik zweiter Stufe') operates with catalogues of topoi, which already provide a repertory of viewpoints for the examination of a problem.[10]

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[9]ibid., p.36.

[10]ibid., p.35.

Furthermore, Viehweg characterizes the topics as a procedure that is seeking for premises. In contrast to a method that can draw long and continuous inferences from a small number of premises, the topics allow only short inferences in order not to deviate from the problem and must therefore always seek for new premises.[11] It is from the topoi that premises are formed for the solution of a problem, but they are not binding upon the court at that stage and can always be replaced by others. Premises have only got binding force and are legitimized when they are accepted by the interlocutor. This is another very important point of Viehweg's analysis of the topics, that the only authority of control and legitimization of premises is the discussion. Viehweg does not specify the kind of discussion he has in mind or whether it is governed by any procedural rules. He believes that the interlocutor usually is a sensible person, and that results of the discussion with references to the opinions of 'the wise' (who are identified with reasonable persons, possessing qualified knowledge in several fields) have further authority and verification in those opinions, but he admits that the result of the discussion and

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[11]ibid., p.40.

thus the premises depend to a high degree on the parties of the discourse.[11]

Concerning this question of legitimization of premises, Viehweg relies on the Topics of Aristotle and their elements of dialectical reasoning and intellectual training, but apart from that Viehweg's analysis of the topics has not much in common with the basis of the Aristotelian Topics. Viehweg's distinction between problem thinking and system thinking is not comparable to the distinction between dialectical and apodeictic reasoning. While the latter differs only in the nature of the premises, the former differs also in the way of drawing inferences from the premises and the whole process of reasoning starts from the problem instead of the axioms. Although the last aspect may be true of Aristotelian Topics as well, the distinction between problem thinking and system thinking was not the concern of Aristotle's Topics.

In emphasizing the constant need to seek for premises Viehweg's conception seems to have a strong resemblance with Cicero's idea of ars inveniendi and rhetorical invention.

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[11]ibid., p.42-43.

In a later essay[11] Viehweg writes explicitly that the 'topical system'[12] is taken from rhetoric. However, in the same essay he speaks about the 'topical system' and the 'classical dialectic system' as the same thing. These inconsistencies in Viehweg's terminology relating to different understandings of the topics may be explained by the fact that he bases his conception of them on Aristotle and Cicero at the same time.

3.2 Viehweg's analysis of the Civil Law

In a further analysis Viehweg comes to the result that legal reasoning in antiquity and in the Middle Ages was a topical method of reasoning. He also argues that this is still true of the Civil Law in modern times.

Viehweg points out that jurisprudence always deals with the question of what is justice and how to find justice in a particular case. It is the task of the legal order, he states, to serve this question of justice with regard to a

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[11] Viehweg, Some considerations concerning legal reasoning, in: Law, Reason, and Justice (supra n.3), p.268.

[12] 'system' in that context is meant to be a combination that makes up a whole in a certain sense.

particular problem.[15] Therefore legal thought must start from the particular problem and proceed just as the problem thinking does, which is the procedure of the topics.[16] Thus, it is a necessity for legal reasoning to be topical, and Viehweg declares that it cannot proceed within a logically closed and consistent system. Even if there was such a system, he claims, one could not dispense with the topics in choosing the axioms, which constitute the system and to which all further propositions can be reduced.[17]

Thus, he concludes, the topics are part of the legal order. He illustrates his analysis with a few examples to specify the points of entry of the topics into legal orders generally.[18] These are: the process of interpretation, which frequently requires the reconciliation of contradictions, and the adjustment of set legal formulations to changing circumstances; the constant need to apply legal rules to cases which do not fall neatly under any existing rule; and, finally, the problems arising from the use of

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[15] see Viehweg, Topik und Jurisprudenz (supra n.1), p.96, but he fails to specify a concept of justice (see also infra under section 4.3).

[16] ibid., p.97.

[17] ibid., p.84.

[18] ibid., p.88-90.

common language with its plenitude of understandings to express legal concepts and propositions.

According to Viehweg the topical nature of legal reasoning leads to the following three consequences or requirements that must be met by the legal order:

First, the structure of the legal order must be determined by the problem.[19] This means that legal thought has always to bear in mind the question of justice and therefore to start from the particular problem with regard to that question, whereas it must not start from any rule of law. The topoi must be orientated to the problem and the premises for its solution must be questioned and adapted continually. Thus, the legal order must always be in motion and kept open to new points of view.[20]

Secondly, the legal elements, such as legal terms and principles, must be orientated specifically to the problem and may only be understood in

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[19] ibid., p.97 and 100-101.

[20] idem., Some considerations concerning legal reasoning, in: Law, Reason, and Justice (supra n.3), p.268.

relation to the problem."[11] A legal term is, for instance, the term 'property', and a legal principle the principle that 'nobody shall profit from his own wrong.' As there is not only one meaning or definition of a legal term that can be employed throughout the whole legal order with the same sense concerning all different sorts of problems, the meaning of legal terms has to be determined by the particular problem. In other words it may be said that legal terms are equivalent to topoi, because they only hint at the solution of a problem."[12]

Thirdly, the understanding of legal terms and principles must therefore follow the particular problem, while other understandings have to be avoided."[13] Legal principles, for instance, tend towards absolute dominance, without limitations of their underlying ideas. As there are many conflicting principles, such as fault-liability and the principle of distribution of losses, or principles of equity, they have to be balanced. This must be done by means of orientation of the principles to the particular problem. In other

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[11] idem., Topik und Jurisprudenz (supra n.1), p.97 and 101-104.

[12] ibid., p.104.

[13] ibid., p.97 and 105-110.

words it may be said again that legal principles, like legal terms, have topoi character.

These are, according to Viehweg, the requirements which the structure of the legal order must fulfil.

From this last issue the question arises whether Viehweg believes that legal reasoning is topical, or whether it is different from the topics but ought to be topical in his opinion. On the one hand the expression 'requirement' and the formulation of his 'requirements' on the legal order seem to imply a demand for a methodology rather than a description of the present status of the process of legal reasoning. On the other hand he explicitly states that the topics are part of the Civil Law and that the legal order cannot dispense with them."[11] On the basis of the latter statements, Viehweg's demands may be considered as an attempt to illuminate the present role of juristic topics and to advertise the need for problem thinking in cases where there are still differing theories of conceptual jurisprudence at work, which try to proceed by means of deduction and system thinking and

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[11] ibid., p.7,14,94.

therefore employ an unsuitable method in his opinion.

3.3 Evaluation of Viehweg's analysis

Viehweg's analysis is rather unsatisfactory as it is not very precise and is in the main written on a very abstract level without concrete illustrations, so that it leaves many questions open.

As he analyses the topics and the Civil Law separately, one does not know exactly which of the elements of his conception of the topics matches with legal thought in the Civil Law. Thus, the question is, whether all the characteristics of the topics apply to their legal reception, the juristic topics, as well.

There is no doubt about the fact and Viehweg lays stress on it, that juristic topics, like the topics in general, are a method of problem thinking. In his analysis of the Civil Law one can also find the process of finding premises which is expressed in the need to question and adopt premises, such as set legal formulations, permanently to changing circumstances and new problems. Furthermore, one may assume that his conception of a topos in his analysis of the

topics is the same for juristic topics, that is to say a very wide one including, for instance, legal terms and principles. But in the analysis of the Civil Law Viehweg does not deal with the question of legitimization or validity of premises in the legal order, whereas in the analysis of the topics in general he relies on the special rule of recognition of the Aristotelian Topics and declares that premises have to be legitimized by the interlocutor. So the question arises whether Viehweg intends to apply this characteristic element of the topics also to juristic topics, or not. If the answer is yes, one must examine the further question of who is in the role of the interlocutor in the legal order, or generally speaking: where do the premises derive their recognition from?

Some authors[11] have interpreted Viehweg's treatise to the effect that premises, i.e. legal rules, principles, and standards, require the legitimization by the interlocutor, and, regardless of what Viehweg intended, many of them

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[11] e.g. U. Diederichsen, Topisches und systematisches Denken in der Jurisprudenz (1966) Neue Juristische Wochenschrift 697 (esp. p.702) and C.W. Canaris, Systemdenken und Systembegriff in der Jurisprudenz, Berlin 1969, p.144.

have dealt with the special rule of recognition of premises as an aspect of juristic topics.[16]

Viehweg himself does not clarify this issue in later publications.[17] There he lays stress on the aspect of problem thinking and the fact that the legal order must be open for new points of view and ought to be in permanent motion, but he neglects the issue of the validity of premises.

One may at least say that Viehweg's treatise remains very vague concerning the point in question. It seems likely that his aim with his fundamental work was the revival of a forgotten model of reasoning and to draw attention again to the remaining potential of the topics after a period of conceptual jurisprudence, but that he did not intend to present us with a complete model of legal reasoning or a thoroughgoing description of the Civil Law in modern times. Viehweg certainly achieved one of his aims; his treatise set off an extensive discussion about the nature of legal reasoning and the law-making process in general.

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[16]this will be expounded in the following section 3.4.

[17]Viehweg, Some considerations concerning legal reasoning, in: Law, Reason, and Justice, (supra n.3), p.268.

3.4 Further development and criticism of juristic topics as a reaction to Viehweg's treatise

This section tries to summarize the main issues raised by the topics discussion in Germany under the three primary characteristics of juristic topics: a) problem thinking opposed to system thinking, b) finding of premises, and c) recognition of premises.[18] But first, we shall examine the reception of juristic topics in the work of another major exponent of the topical method; Josef Esser.

Esser's conception of the topics is not only based on historical examinations of the Topics of Aristotle and Cicero, but also on studies of comparative law.[19] Esser also identifies juristic topics with a method of problem thinking, which proceeds, he states, similarly to Anglo-American case law and judge-made law in general.[20] In his opinion problem thinking and system thinking are

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[18]a similar division of characteristics is made by G. Otte, Zwanzig Jahre Topik-Diskussion: Ertrag und Aufgaben (1970)I Rechtstheorie 183; on p.184; and by B.H. Oppermann, Die Rezeption des nordamerikanischen Rechtsrealismus durch die deutsche Topikdiskussion, unpublished thesis, University of Frankfurt, 1985; p.18.

[19]J. Esser, Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts, 2nd. ed., Tübingen 1964.

[20]ibid., p.52.

not mutually exclusive, but they can both be found in the contemporary legal order and complement each other. As a system is only capable of solving problems that are contained in its premises, it is dependent on extra-systematical or topical principles in order to solve unforeseen problems and in order to enlarge the system.[31] Esser points out that by means of the topics the non-legal or non-positive material becomes processed into legal judgement.[32]

In contrast to Viehweg, for Esser a topos is not any viewpoint worth considering for the examination of a problem, but topoi are arguments, which are raised and supported by the 'common sense'.[33] Therefore they are possible subjects of a consensus in a rhetorical legal argument especially before a court, with or without referring to legal rules and the legal order. Such a consensus (e.g. a settlement) is desirable because the power of persuasion of the consensus is stronger than that of logical and

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[31] idem, Vorverständnis und Methodenwahl in der Rechtsfindung, Frankfurt 1970, p.153 and in Grundsatz und Norm (supra n.29), p.53.

[32] idem, Grundsatz und Norm (supra n.29), p.61.

[33] ibid., p.53; Esser employs the expression the 'common sense' himself in the seventeenth century English meaning as the general sense of mankind, or of a community.

deductive inference.[14] According to Esser the Aristotelian endoxa are formed by consensus. Consequently he identifies these Aristotelian opinions of the wise with public policy and common sense in modern times.[15] Like most writers on the topical method Esser concentrates on the aspect that the topics are a method of problem thinking.

As a characteristic of the topics the element of problem thinking has been introduced for the first time by Viehweg,[16] who considered it to be specific to legal reasoning at the same time. Viehweg was strongly criticised for both points. At first his critics argue that Viehweg confounds problem thinking and the topics unjustly and that this is historically unsound, because neither Aristotle nor Cicero made the distinction between problem and system thinking, but intended different purposes with their treatises.[17] Although Viehweg might have adopted the topics in

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[14]idem., Vorverständnis (supra n.31), p.152.

[15]idem., Grundsatz und Norm (supra n.29), p.53.

[16]Viehweg, Topik und Jurisprudenz (supra n.1), p.31.

[17]cf. Kriele, op. cit. supra n.3, p.117 in n.16 and pp.119ff. and J. Blühdorn, Kritische Bemerkungen zu Theodor Viehwegs Schrift: Topik und Jurisprudenz, (1970)38 Tijdschrift voor Rechtsgeschiedenis 269.

a historically unsound fashion this does not affect his conception of juristic topics simply because he gives it a different emphasis from the traditional topics. Secondly, Viehweg's critics allege that legal thought proceeds systematically, as the legal order makes up a whole instead of consisting of many loose questions and viewpoints without any connection to each other, which is a trait of the topics in their eyes.[18] They claim that a proof of the fact that the legal order is not based on an axiomatic and deductive system does not necessarily lead to the topical method, but rather to an 'open system'. An open system is meant to be a system that allows new scientific knowledge and new basic legal values to enter the system at some point. It is noteworthy that Viehweg also takes an open system as an example of topical procedure and even uses the term 'topical system'.[19] Therefore the differing use of the same terminology lead to several misunderstandings in a sometimes very polemic discussion.

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[18]cf. Diederichsen, op. cit. supra n.25, p.698 and 700; and Canaris, op. cit. supra n.25, p.136.

[19]Viehweg, Some considerations concerning legal reasoning, in: Law, Reason, and Justice (supra n.3), p.268.

Overall the adherents of the topics conceded that the legal order contains systematic aspects as well, while their opponents admitted that legal thought is topical in some situations. However, there was no agreement about the dominance of one of the methods in the legal order. Thus, the debate yielded only differing conclusions about the degree of problem thinking and system thinking in the legal order.

The second major element of juristic topics, the finding of premises, has not proved so controversial. The issue has only been clarified to the point that it has been argued that the fundamental premises for the solution of a problem cannot be created by means of a logical operation, but that they are dependent on intuition, as there are no syllogisms or automatic operations leading to those premises.[10] For the finding of the premises it is said to be the aim of the topics to consider all the relevant viewpoints.[11] The topics try to provide catalogues of topoi which contain lists and registers of important aspects that may be consulted to support the process of finding

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[10]cf. Otte, op. cit. supra n.28, p.185.

[11]cf. G. Struck, Topische Jurisprudenz, Frankfurt 1971, p.7.

premises and to back the intuition."[42] Despite the theoretical discussion about juristic topics, Gerhard Struck is the only jurist who made the attempt to compose a catalogue of material topoi for the use of legal argumentation."[43] He identifies the term topos mainly with the argument itself."[44] Struck's catalogue tries to describe forms of argumentation and gives a list of the most common topoi for legal argumentation, so that his catalogue of topoi substantially follows the tradition of the Ciceronian Topics."[45] Without aiming at completeness, the catalogue enumerates sixty-four topoi, such as the principle that nobody should be condemned unheard (audi alteram partem), equality, practicability, public policy, social security etc.

The third major aspect of juristic topics is the issue of the validity of premises found by means of this procedure. This point was not clearly developed by Viehweg but has been considered by several other authors with different emphases and results.

"cf. Otte, op. cit. supra n.28, p.186.

"Struck, op. cit. supra n.41, p.20-34.

"ibid., p.20.

"idem., Zur Theorie juristischer Argumentation, Berlin 1977, p.62.

In discussing German constitutional law Konrad Hesse,[15] a former judge of the constitutional court, points out the necessity of finding further premises by means of the topics because of the generality of the constitution. But, according to Hesse, legal argument is not free and only certain topoi are admitted. The premises for the solution of a particular problem have to be limited by the wording of the constitution.[17] Thus, instead of the primacy of the problem he advocates the primacy of the wording of the constitution. The text of the constitution is not only a topos hinting at the solution of a problem, but it has binding force and, on the contrary, the topics are means of interpretation of the constitution within its boundaries. Hesse derives this binding force of the wording from the purposes of restriction of power, stabilization, and rationalization of the constitution.[18] He argues that besides its generality and openness a written constitution contains a core of decisions and meanings which must not be questioned once they have been

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[15]K. Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 16th. ed., Heidelberg 1988, p.25.

[17]ibid., p.29.

[18]ibid., p.17.

decided and laid down. Therefore, they are not at the judge's disposal and must not be altered by means of topical reasoning. However, Hesse concedes that the realization and the normative force of the constitution depends on the concrete possibility and probability that the constitutional contents can become reality and on the actual will of the interpreters to realize its contents. This will depends on the other hand on a general consensus about the contents and values which are incorporated in the constitution.[49]

In contrast to Hesse, Horst Ehmke[50] does not intend to restrict the topical method to the boundaries of the constitution, but he supports the primacy of the problem over the wording of the constitution and over a dogmatic system when it fails to contain suitable viewpoints for the solution of a particular problem. Thus, for Ehmke there is no limitation of juristic topics imposed by another authority. He believes that the only source of validity of premises is the consensus among the wise, namely in the first

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[49]ibid., p.12 and 13.

[50]H. Ehmke, Prinzipien der Verfassungsinterpretation (1963)20 Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer 53; at p.55 and 60.

place professors of jurisprudence and judges, and in the second place the whole community as a further control.[91] According to Ehmke these are the authorities which decide whether a premise is persuasive and can therefore be accepted or not. However, he does not illuminate where the wise derive their authority from.

Peter Häberle[92] goes a step further: he states that premises must be legitimized by the wise, and he also extends the role of the interlocutor to all organs of the state, public authorities, citizens and groups - in other words to the general population and every institution. Häberle justifies this view with his understanding of democracy, under which the citizen does not only delegate his power on the election day, but he continually participates in its execution. Accordingly the process of finding premises becomes an open universe of discourse among an open number of interlocutors.

In contrast to this general view concerning the validity of premises in German constitutional law, the issue of the recognition of premises may

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[91] ibid., p.71.

[92] P. Häberle, Die offene Gesellschaft der Verfassungsinterpreten, (1975) Juristenzeitung, 297.

also be regarded from a different angle. Otte,[51] for instance, looks at it from the rhetorical perspective of a party before court. One party must try to obtain the agreement of the other party, or if this is impossible, the premise must be accepted by the judge.

The special rule of recognition of juristic topics has been disputed vehemently. Opponents of the topical method allege that it does not contain any recognition of the valid and effective legal order and that it is the legal system not the interlocutor which legitimizes premises, regardless of the fact that the wise or the community approve of the premises or object to them.[52]

This criticism has been rejected by the adherents of juristic topics. They argue that it is one task of the topics to consider all the relevant aspects which may lead to the solution of a problem and one aspect of the continental law tradition is that the law finding process starts with the wording of statutes and then to use any rational and reasonable argument for the solution

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[51]Otte, op. cit. supra n.28, p.189.

[52]cf. Canaris, op. cit. supra n.25, p.144 and Diederichsen, op. cit. supra n.25, p.702.

of the case.[55] Thus, there is no difference between proponents of the topical method and the traditional theories about this point. Where there is unanimity about the decision of the legislature, it must be respected, as there is no room for the topics in the absence of a problem.[56]

But problems arise, for instance, when the meaning of a statute is ambiguous, or when there is no statute at all. In cases like these the judge has no guidance from the legal system, because the system does not convey binding directives and under a civilian system it cannot produce them itself, so that the judge must derive the recognition of premises from an authority other than the system.[57]

It may be concluded that the reception of the topics for legal purposes by Viehweg has been shaped in different ways. In particular there are many different propositions concerning the question of recognition of premises. They include the view that judges and academics are

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[55]cf. Struck, Topische Jurisprudenz (supra n.41), p.7 and 8.

[56]cf. Esser, Vorverständnis (supra n.31), p.155 and Otte, op. cit. supra n.28, p.189.

[57]cf. Esser, Vorverständnis (supra n.31), p.155.

interlocutors, or the requirement that judges consult the common sense and have recourse to public policy. Another version involves the consent of the general public and community for the recognition of premises.

3.5 An example of topical reasoning

To illustrate the topical procedure the following example[11] tries to show how adherents of juristic topics might solve a particular legal problem.

For the resolution of a case where a car driver injures a pedestrian in a car accident and the pedestrian claims damages the following aspects may be considered as topoi:

At first one will ask if the car driver was at fault, which is a question of culpability . One may also hold the driver liable independent of his fault-liability for faultless causation, because car driving is a dangerous activity. Instead of the driver the owner may be held liable, which is a form of risk-liability. Furthermore, one may keep in view the financial situation of both parties, the driver and the pedestrian, or if they are insured or not, or

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[11] a similar example can be found in: Canaris, op. cit. supra n.25, at p.143.

conversely consider these facts to be irrelevant for a just compensation of the loss. Moreover, one will take any contributory conduct of the injured party into account, and bear in mind that it could have been an inevitable accident or that possibly a third party has caused the accident and must therefore be liable independent of a potential risk-liability of the driver or of the car owner. Additionally, it may be argued that the state has to be liable, because it allows dangerous activities like car driving although it knows that accidents are going to happen.

In this case the topoi are for example culpability or risk-liability which are followed by a short explanation of their contents each time. Besides these topoi others may be consulted, if none of the aforesaid leads to a sufficient solution of the case. This is the stage of topical reasoning where all the relevant aspects are to be considered. From these viewpoints, which are partly differing essentially as they are based on contradicting principles, the final premises for the solution of the case will be taken, but they are not binding unless they are agreed to.

We may now concretize our case to the point that the pedestrian is a jobless man with family who failed to watch out for cars when he crossed the road. The well-situated car driver drove his Rolls Royce at high speed neglecting the speed limit, so that he was unable to stop his car in time. Overall the contributory negligence of the pedestrian amounts to 50%.

For the adherents of system thinking the case has to be solved within the existing legal system that is the only authority from which the judge derives the recognition of premises, regardless of the generally accepted opinions. In a system that is strictly based on the principles of fault-liability and compensation of losses the binding premise would have to be taken from the applicable statutes or precedents which would award the pedestrian damages to the amount of 50% of his loss.

Operating within the same legal order and the same available statutes or precedents the adherents of the topical method would not necessarily arrive at a different result as they consider the statutory provisions and the rules from precedent as strong and persuasive <u>topoi</u>. But besides their power of persuasion there is

no other source such as an underlying legal system that makes them valid, because in the eyes of the adherents of the topics an existing system does not convey authority just because it is a legal system, but because it contains reasonable and persuasive arguments. Concerning the validity of the premises one has to distinguish between two main branches within juristic topics.

From the rhetorical angle one may (as Otte does) regard for example the car driver's offer to pay 50% of the pedestrians loss in order to reach a settlement as a proposition for the solution of the case. If the pedestrian agrees, the premise is accepted, so that the other party is in the role of the interlocutor. If no settlement can be reached between the parties, the judge has the authority to adopt a premise from propositions made by the parties before court and if one party appeals the appeal court is in the role of the interlocutor considering the decision of the first instance judge as a proposition for the solution of the case. However, from the rhetorical angle we do not learn anything about the material contents of the propositions.

For this purpose another version of the topics might be more useful. Regarding the topical

method as an appeal to generally accepted opinions and the common sense the judge may find a more equitable solution for our case by means of relying on the general sense of justice. In contrast to the adherents of system thinking he may consider the available legal rules as not suitable and inadequate for the solution of the case and therefore also take the financial situation of the parties into account. Thus, the premise the judge may choose, shifts the amount of damages to the credit of the pedestrian and reduces his final loss to a sum that he can afford. This premise cannot be legitimized by a system if it is not contained in the system or if the system does not maintain points of entry for a similar solution, which the adherents of juristic topics claim to be topical.

3.6 Summary of the characteristic elements of juristic topics

From the reception of the topics in German legal theory the following main characteristics may be drawn:

Firstly, in contrast to system thinking, the topics are a method of problem thinking which starts from the problem rather than from the rule of law. They serve to consider all relevant aspects of a problem because the viewpoints are

not subject to a restriction imposed by a system of rules. The discussion of juristic topics in Germany concentrated mainly on this characteristic. After the presentation of the topics this thesis will deal with the issue of problem thinking only briefly (in Chapter 5) to indicate a few important aspects of the topics in the area of comparative law.

Secondly, juristic topics enable the finding of premises for the solution of a particular problem by means of catalogues of topoi. These lists of important viewpoints are supposed to support the intuition in the process of finding premises, as this process cannot be systematized and inferred from other axioms.

Thirdly, the special rules of recognition of premises form another trait of the topics. They differ from all other sources of validity , such as axioms, as the premises consist of endoxa that have to be accepted by the interlocutor in a discussion. This point has caused much disagreement and many differing versions of topical reasoning.

The last two issues will be examined in Chapters 6-8 in the light of theories about the English

judiciary. Stress will be laid on the aspect of finding premises for the solution of hard cases and on the question of how far the judge is free concerning the choice of topoi and whether the premises require the recognition of another authority.

4 The background of juristic topics and further models of legal reasoning which draw attention to the topics

Before looking at theories about the English judiciary in the light of the three main characteristics of topical reasoning we will be concerned with the philosophical background of juristic topics and with another model of legal reasoning which draws attention to the topics.

Juristic topics have to be seen as one theory among others of a philosophical trend which forms a reaction against the then-prevailing Cartesian thought. One of the main movements of this kind is Chaim Perelman's 'new rhetoric' which he developed together with Lucie Olbrechts-Tyteca shortly after the publication of Viehweg's monograph and that he extended in numerous articles (see under section 4.1).

Moreover, we will look at Julius Stone's concept of logic and its leeways in the law (under section 4.2), and at the evaluation of juristic topics by Stone and other Anglo-American jurists (under section 4.3). From the fact that the topics have been considered by Anglo-American jurists as well one may see that the legal reception of the topics is not necessarily

restricted to the German or a continental legal system but that it is also applicable to a common law legal order and in general relevant for many kinds of different legal systems. The fact that the idea of a reception of the topics for legal purposes originates with a German jurist may have been caused by the widespread notion of conceptual jurisprudence, otherwise known as legal formalism, in Germany. Although conceptual jurisprudence had ceased to be dominant and had been replaced by a more functional approach (jurisprudence of interests) at the time Viehweg's treatise was published, the idea was still inherent in the modern codes of Western Europe, particularly in the German Civil Code which dates from 1900 and which therefore provoked a counter-movement against conceptual jurisprudence.

4.1 Chaim Perelman and the new rhetoric

Perelman approaches the question of legal reasoning from the perspective of the philosopher and logician.

With his work he aims to make a break with a concept of Cartesian reason and reasoning which has set its mark on Western philosophy for the

last three centuries.[1] Descartes' concept was to take for false everything which was only plausible and to consider rational only demonstration by means of apodeictic proof. According to his model (more geometrico) a rational science cannot be content with more or less probable opinions; it must elaborate a system of necessary propositions which will impose itself on every rational being, concerning which agreement is inevitable. This means that disagreement is a sign of error. This way of reasoning was meant to solve all problems known to man, the solution of which was already possessed by the divine mind.[2]

Perelman seeks to overcome the Cartesian tradition and introduces dialectical reasoning where a result cannot be demonstrated or verified and, especially, where there is disagreement about values. This often occurs in the humanities, such as law and morality, which therefore become subject to argumentation rather than to logical proof.[3] Like Viehweg, Perelman

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[1]Ch. Perelman and L. Olbrechts-Tyteca, The new rhetoric: a treatise on argumentation, Notre Dame, London 1969, p.1.

[2]R. Descartes, A discourse on method, London, New York 1912, pp.3-25 (esp. pp.8,16).

[3]Ch. Perelman, The new rhetoric and the humanities, Dordrecht, Boston, London 1979, p.13.

relies concerning the concept of dialectical reasoning on the Topics and the Rhetoric of Aristotle.[4] But whereas Aristotle's methodology was meant to provide an approximation of the truths and to yield probabilities of the truth, which were determined by the quest for certainty, Perelman makes argumentation the complement of formal logic. He is not interested in certainty, but in joint activity and its rationality. Argumentation does not appeal to a single truth but to the adherence of an audience.[5] For the new rhetoric it is not logic which is prior, but the quality of the audience, which may consist of the single interlocutor, or an elite audience, like judges and politicians, or the universal audience, namely "the whole of mankind, or at least, of all normal, adult persons".[6] It is the audience that decides whether to adopt a perspective or not. The new rhetoric presents us with a method of organising and evaluating experience, because the speaker submits a proposal, that he has to justify, to an audience which examines the proposal introducing its

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[4]which has to be seen in contrast to the understanding of dialectics in the philosophies of Hegel and Marx.

[5]cf. Perelman, The new rhetoric and humanities (supra n.3), p.13-14.

[6]cf. Perelman and Olbrechts-Tyteca, Treatise on argumentation (supra n.1), p.30-34.

knowledge and wisdom during the examination into the discourse. Therefore the new rhetoric is also called a theory of practical reasoning.

Perelman characterizes the way of reasoning in morals as neither deductive nor inductive, but justificative, as

> "in morals absolute preeminence cannot be given either to principles -which would make morals a deductive discipline - or to the particular case - which would make it an inductive discipline. Instead, judgements regarding particulars are compared with principles, and preference is given to one or the other according to a decision that is reached by resorting to the techniques of justification and argumentation."[1]

In contrast to Viehweg, Perelman presents us with a complete theory of argumentation. For the separate disciplines he does not merely apply the general theory selectively to the diverse fields, but he works out specific arguments for each special discussion (law, politics, morality etc).

Perelman's study of the field of justice distinguishes a constant formal element and a varying material element within the complex structure of a concept of justice. The constant formal element is the principle that "like persons be treated alike". To determine what

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[1]Perelman, The new rhetoric and humanities (supra n.3), p.33.

resemblances or differences between human beings are to be regarded as relevant, further slogans are supplemented, for instance: "To each according to his needs", "to each according to his merits", "to each according to his legal entitlement".[6] These are different characteristics (need, merit, etc.) to specify 'likeness'. As there may arise disagreement concerning the characteristics in different situations or subject matters, which will result in different formulae of justice like the above slogans, the formal element of likeness may contain varying material criteria for its application.

In an early essay Perelman takes the view that such disagreements cannot be resolved by means of reasoning, but only with the help of considerations of value which are necessarily arbitrary.[7]

In his later work he changes this view, which is still based on the Cartesian tradition of reason and reasoning, and points out that disagreement

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[6]Ch. Perelman, The idea of justice and the problem of argument, London 1963, p.7.

[7]ibid., p.58 - the essay 'Concerning Justice' (pp.1-60) originally appeared as 'De la justice' in 1945.

over values may also be subject to reasoning in the form of dialectical argumentation. The purpose of this argumentation is to obtain or intensify the adherence of an audience to theses given to them for their approval. For the judge, this audience is made up by the parties, superior courts, and enlightened public opinion.[10] Perelman considers it to be peculiar to the dialectical method that the theses tested and the conclusions adopted are neither obvious nor fanciful, but represent opinions considered, in a given milieu, as the soundest. This aspect of dialectical argumentation, he claims, enables one to regard the interlocutors in this kind of dialogue as not merely expounding their own point of view, but as expressing the 'reasonable' opinion of their society.[11]

Thus, one may say that the judge seeks to appeal to common sense in the meaning of the general sense of a community, when he justifies a decision that is based on value judgements, in order to obtain acceptance of his decision by the audience.

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[10]Ch. Perelman, Justice, law and argument, Dordrecht, Boston, London 1980, p.151.

[11]idem., The idea of justice (supra n.8), p.167.

In comparison with Viehweg one may find that Perelman pays greater attention to the dialectical trait of his theory and therefore to the role of interlocutor and audience, whereas Viehweg also relies on the Ciceronian Topics and identifies topics with a method of problem thinking, which leads him to the aspect of finding premises and the consideration of all the relevant viewpoints.

4.2 Julius Stone's concept of law and logic and the leeways of legal reasoning

After a thorough research of precedent and of the system of stare decisis, Julius Stone comes to the conclusion that the law-finding process cannot dispense with logic.[11] He uses the word logic in the sense of formal logic which is essentially concerned with the possibility of drawing conclusions as inferences from certain kinds of premises.[11]

Stone points out that a legal decision can be made by means of logic when there is only one conclusion of law for a particular case compelled by a precedent that exactly covers the case in

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[11]J. Stone, The province and function of law, Sydney 1946, p .145-146; and Legal system and lawyers' reasonings, London 1964, p.332-333.

[11]idem., Legal system, p.302.

question within the operation of stare decisis. So, if one has the premise (e.g. in a precedent) 'All A is B' and F (the instant fact situation) is like A, the compelled conclusion is that 'F is B'.

But, according to Stone, logic cannot solve every case, because it frequently leaves leeways for judicial choice within the common law system of precedent. A leeway left open by logic may be illustrated as follows:[11] Two syllogisms are available. One has the premise 'All P is X' and the other 'All Q is Y'. F (the instant fact situation) is like P in that both have qualities a and b; but F also differs from P, in that it also has qualities d and e, which P does not have. F is like Q in that both have the qualities d and e, but F also differs from Q because it also has qualities a and b which Q does not have. As there is no syllogism in itself compelled by logic for the solution of the case, the choice between the two offering syllogisms will determine whether the correct conclusion is that 'F is X' or that 'F is Y'.

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[11]Stone, Legal system (supra n.12) gives similar examples on p.299.

The main sources from which, according to Stone, the leeways for judicial choice arise, are the nature of terms used in rules; competing methods of seeking the ratio decidendi of a case; competing versions of the ratio decidendi of a particular case when several judgements are given; and choices arising from the interplay of the above sources.[15] These sources concern only the choice of premises from within the body of existing legal propositions. They indicate cases of disputed law. Further difficulties emerge where there are no propositions available.[16]

Stone's sources of the leeways for judicial choice are particularly aimed at the system of precedent and the rule of stare decisis, but they may be compared with and are also included in the groups of cases which Viehweg's points of entry of the topics into legal orders describe.[17]

Thus, the judicial choice occurs in every legal system, no matter if codified or based on

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[15]Stone, Legal system (supra n.12), p.275.

[16]cf. idem., Precedent and law, Sydney 1985, pp.28-30.

[17]these points include: the process of interpretation, the use of common language etc., see section 3.2 at p.27 and the comparison with notions of hard cases in English legal theory under section 6.6 below at p.121.

precedent. From this the question arises as to which criteria and phenomena determine the choice left open by logic. Stone argues that along with legal propositions, the 'non-legal' materials, such as the question of justice, social phenomena, and public policy, become processed into legal judgement.[18] He acknowledges that for this kind of decision juristic topics and new rhetoric are of importance and that judicial reasoning proceeds topically in those cases.[19]

One may say that concerning the relation between logic and juristic topics in legal operations Stone's position is similar to Perelman's theory in the way that the latter regards dialectical reasoning as complement of formal logic, where a solution or an agreement cannot be reached by means of demonstration. It also coincides with Viehweg's idea that the topics are only of use where there is a problem that allows more than one possible answer.[20] When, according to Stone, a conclusion is compelled by logic, there is only one answer and no problem can arise, so that the topics are inapplicable in such a case.

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[18]Stone, Legal system (supra n.12), p.325-326.

[19]ibid., p.333 and Precedent (supra n.16), pp.100-103.

[20]see under section 3.1 (at p. 20.)

Furthermore, Stone's observation that elements of justice and social life become processed into legal judgement in cases of disputed law by means of juristic topics matches with Josef Esser's analysis of the topics.[11]

4.3 Criticism and weaknesses of the topics in the eyes of Anglo-American jurists

Besides Stone a number of Anglo-American jurists has accepted the role of juristic topics and the new rhetoric to explain decision making.[11] However, they contend that the topics are only capable of explaining decisions after they have been made, so that they convey 'wisdom' only by hindsight, while they are incapable of guiding the judge for a future decision.[11]

The guide the topics were meant to present are catalogues of <u>topoi</u> and the general opinion or the consensus of the wise, but as juristic topics

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[11] see under section 3.4 (at p. 35).

[11] e.g. E. Bodenheimer, A neglected theory of legal reasoning (1969)21 <u>Journal of Legal Education</u> 373 (at pp.381ff.); M.Rheinstein, book review (1954)3 <u>American Journal of Comparative Law</u> 597; H.E. Yntema, Legal science and natural law; apropos of Viehweg, Topik und Jurisprudenz (1960)2 <u>Inter-American Law Review</u> 207.

[11] cf. Stone, <u>Legal system</u> (supra n.12), pp.335-336 and <u>Precedent</u> (supra n.16), pp.104-106; and Rheinstein, op. cit. supra n.22, p.598.

do not provide any method of finding out the relevant topoi and the opinions that are generally accepted or distinguish them from irrelevant topoi and other opinions, this directive for a future decision fails to fulfil its task in the eyes of these critics."[11] Another criticism raised by the German topics debate goes a step further than this: it elucidates not only the difficulties of the topics in discovering generally accepted opinions, but also points out the inability of reaching a decision where there is no consensus in the society at all about controversial questions or values."[12]

Those Anglo-American authors who pay attention to Viehweg's juristic topics and Perelman's new rhetoric do not approve of the means provided by the topics as being useful and sufficient guidance for the judge in his choice of premises. Even where juristic topics and the new rhetoric as a methodology of legal reasoning seem to contain elements of material law concerning the validity of premises (although the role of the

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[11]Bodenheimer, op. cit. supra n.22, at pp.391-394 seems to consider the judge apt enough to find out the relevant topoi and the general opinion.

[12]cf. E.W. Böckenförde, Die Methoden der Verfassungsinterpretation (1976) Neue Juristische Wochenschrift 2089; at p.2094.

interlocutor has never been thoroughly clarified by the adherents of the topics), these elements are not accepted as normative, but only as descriptive.[11]

One may conclude that in addition to the topics debate in Germany, juristic topics and new rhetoric have been acknowledged as a descriptive theory about legal reasoning also in Anglo-American law. But in general it is denied that they fulfil any normative tasks.

Therefore, the guide for a future decision has to be taken from theories about the concept of law and the judicial role, which this thesis will deal with later on (under Chapter 8). Juristic topics as a theory of legal thought do not aim at providing a guide for material justice, but a methodology of legal reasoning. This confirms that the topics are consistent with several different concepts of law, which may determine

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[11]cf. Stone, Legal system (supra n.12), p.336 representing the Common Law system and see also E. Kramer, Topik und Rechtsvergleichung (1969)33 Rabels Zeitschrift für ausländisches und internationales Privatrecht 1 at p.12 and 16 for the same opinion but representing the Civil Law systems. Although Viehweg's treatise makes further normative demands on issues of legal reasoning (i.e. that it must be problem orientated - cf. section 3.2 at p.28-30)this does not affect the lack of normative guidance concerning the question of the validity of rules and the question of justice.

the question of justice, and that they do neither belong to nor are derived from theories like legal positivism or natural law."

"see concerning the openness of the topics M. Kriele, Theorie der Rechtsgewinnung, 2nd. ed., Berlin 1976, p.150; this issue is further discussed under section 9.3 at p.196.

5 Problem thinking in English Law

After the presentation of juristic topics and their historical and philosophical background the thesis will look at English legal theory from the viewpoint of the three main characteristics of juristic topics. As has already been indicated[1] we will not concentrate on the first characteristic of problem thinking as opposed to system thinking in general, but we will only give a brief survey of the main implications connected to this characteristic of juristic topics.

Firstly, we will look at the traditional view of the differences between common law and civil law legal thought which to a certain extent identifies the former with problem thinking and regards the latter as systematical (under section 5.1).

Secondly, we will deal with problem thinking as an attempt to do justice in the particular case in contrast to a concept of justice according to rules, and we will examine whether there are similar trends in common law legal thought (under section 5.2).

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[1] under section 3.6 at p.49.

5.1 The traditional view of legal reasoning in common law and civil law

As has been stated[1] Josef Esser, who is one of the main exponents of juristic topics besides Viehweg, identifies problem thinking with an inductive method of reasoning which proceeds similarly to Anglo-American case law. Moreover, he regards the continental codes as typifying 'closed' legal systems and the common law systems as typifying 'open' legal systems. The same suggestion is made by common law jurists who argue that the common law is more topoi - orientated than the civil law.[1]

This implies that contrary to civilian systems common law legal thought starts from the problem rather than from the rule of law and thus helps to consider all the relevant aspects of a problem or at least more aspects than a civil law legal order.

These statements correspond with the traditional view of the distinction between a civilian system and a common law system as one between

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[1] under section 3.4 at p. 34.

[1] cf. I. Tammelo, On the logical openness of legal orders (1959)8 American Journal of Comparative Law 187, and J. Stone, Legal system and lawyers' reasonings, London 1964 at p.332.

rationalism and empiricism or between deduction and induction. It is alleged that the

> "civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, 'What should we do this time?' and the second asking aloud in the same situation, 'What did we do last time?' The civilian thinks in terms of rights and duties, the common lawyer in terms of remedies."[1]

Reasoning from instances to principles and the courts' method of extracting a rule from past cases is usually referred to as inductive reasoning in contrast to the deductive application of such a rule to the case in hand:

> "The Anglo-American judge starts his process of decision with the individual precedents which counsel for the parties before him have adduced as being most in point. In these precedents he recognises certain 'rules', that is solutions of concrete living problems. He observes how these 'rules' have been limited, extended and refined by other 'precedents' and then constantly keeping the practical problems in the forefront of his mind, gradually draws out of them high-level 'principles' and 'standards' which he uses to make a tentative resolution of the case before him; this solution he then tests for its appropriateness against the background of similar cases and finally arrives at the decision itself ... This inductive way of thinking, based on the particular factual problem of the case, and the intensive treatment of precedents

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[1]T.M. Cooper, The common and the civil law - a Scot's view (1950)63 Harvard Law Review 468 at p.471.

> associated with it are not to be found in continental law, at any rate not to anything like the same extent."[5]

Besides the conventional accounts which speak of the extraction of general rules from precedents some legal writers claim that the kind of reasoning involved in the use of precedents is essentially reasoning from case to case by example: a court decides the present case in the same way as a past case if the latter 'sufficiently' resembles the former in 'relevant' respects, and thus makes use of the past case as a precedent without first extracting from it and formulating any general rule.[6] Hence it is argued that legal reasoning neither proceeds in vertical deductions nor in inductions, but 'horizontally extensive' from instances to instances as "it is a matter of the cumulative effect of several independent premises, not of the repeated transformation of one or two."[7] This analysis comes close to Perelman's account

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[5]K. Zweigert and H. Kötz, An introduction to comparative law, Vol. I, The framework, Amsterdam, New York, Oxford 1977, p.267.

[6]see for the contrast between induction and reasoning by example, H.L.A. Hart, Problems of the philosophy of law, in: Essays in jurisprudence and philosophy, Oxford 1983 (Essay 3, pp.88ff.) at pp.98ff., esp. p.102.

[7]J. Wisdom, Gods, from Proc. Arist. Soc. (1944), extracts reprinted in: Lord Lloyd of Hampstead and M.D.A. Freeman, Lloyd's introduction to jurisprudence, 5th. ed., London 1985, pp.1189ff.

which claims that reasoning in morals is neither deductive nor inductive but justificative.[8]

However, we will not concentrate on the question whether legal reasoning in the common law and in the civil law proceeds deductively, inductively, or in some way which is different from that. What we have presented as the traditional view of the distinction between a civilian and a common law system applies only to a minority of cases because the great majority of contemporary decisions in common law as well as civil law countries is concerned with the interpretation of statutes instead of precedents.[9]

Furthermore, the equation of civil law with system thinking and common law with problem thinking and the inherent differences between both legal families are said to be diminishing more and more. In the subsequent discussion of his thesis Esser also minimizes the difference by pointing out the extent to which the two systems have departed from their respective premises. The interpretations of continental codes, with the help of general clauses, principles of equity

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[8]see under section 4.1 at p. 56.

[9]cf. W. Friedmann, Legal philosophy and judicial lawmaking (1961)61 Columbia Law Review 821, at p.831.

or public policy, and other devices of openness, have moved further and further away from the axiomatic structure of a given precept to the solution of new legal problems. Moreover, in continental law decisions of higher courts often have the same effect as precedents, and, for example, in German law cases are regularly cited and considered in judgements of higher courts, although the search here is not for precedent but for examples.[10]

The common law systems, on the other hand, have proceeded from the decision of legal questions on a case-by-case method conditioned by the earlier predominance of forms of action, to the elaboration of general principles. It also happens quite frequently that a common law court, instead of undertaking a careful comparison of fact situations for purposes of determining the analogous application of a precedent, seizes upon the statement of a formulated rule in a past decision and uses this rule in the case at hand by a process of deductive argumentation.[11] Hence, on the one hand the codified civil law systems

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[10]cf. P.S. Atiyah, Pragmatism and theory in English law, London 1987, at p.30.

[11]cf. E. Bodenheimer, A neglected theory of legal reasoning (1969)21 Journal of Legal Education 373, at p.374, and Hart, op. cit. supra n.6, p.99.

provide means to take extra-systematical considerations into account. On the other hand in the common law system the insistence on following a rule extracted from precedent may threaten to exclude reasoned arguments that might otherwise have been taken into account, which is an effect the codified systems usually have been accused of producing.

Thus, there are not necessarily differences in the degree of problem thinking and system thinking between the two legal families in every case and occasionally they employ very similar techniques in the process of adjudication.[11]

5.2 The conflict between justice according to rules and justice in the particular case

As we have seen in the preceding chapter dealing with the presentation of the topics, the topical procedure is of importance where there is not only one clear and unanimous answer to a question, but where there is a problem that has to be resolved.

The applicability of juristic topics depends to a great extent on the understanding of a problem, and we may distinguish between two versions of

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[11]see in support of this argument, Friedmann, op. cit. supra n.9, pp.828 and 829.

juristic topics which depend on different interpretations of what a problem is.

On the one hand Viehweg equates juristic topics with an unlimited technique of problem thinking. He argues that in order to serve the 'basic aporia' which is the continuous quest for justice in the particular case[11] every case ought to be treated as a problem and resolved by means of topical reasoning. This normative version of juristic topics results in limitless judicial creativity and continuous norm creation, as legal norms and rules are regarded as guidelines, that is as non-binding topoi. On the other hand Viehweg concedes that legal reasoning does not proceed in an entirely topical fashion, but that one may also find logical deductions from available legal propositions in a legal order. This, rather descriptive, account of legal reasoning results in a restricted understanding of a problem. According to this understanding, a problem occurs only where there are no premises available for the solution of a case, so that the topical procedure is only applicable in such hard cases.[12]

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[11]Th. Viehweg, Topik und Jurisprudenz, 5th. ed., Munich 1974, p.96.

[12]see under Chapter 6 below where this issue is examined further.

The differences between problem thinking and system thinking may be clarified further by reference to Hans Kelsen's examination of the issue. Kelsen argues that the principle of binding decisions of concrete cases by general norms that are to be created beforehand by a central legislative organ, represents the principle of a state governed by law, the Rechtsstaat.[11] This system incorporates the principle of legal security, which is legal certainty. He points out that in direct opposition to this system is the one within which no central legislative organ exists at all, but judges and administrative authorities decide individual cases according to their own free discretion. The justification of such a system is the assumption that no case is exactly like any other case, and that therefore the application of general norms, which predetermine the judicial decision or the administrative decree and thus prevent the respective organs from doing justice to the peculiarities of the individual case, may lead to undesirable results. He calls such a system 'free jurisdiction' (freie Rechtsfindung):

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[11]H. Kelsen, Pure theory of law, Berkeley 1967, p.252.

> "Free jurisdiction that guarantees flexibility of the law is often demanded in the name of justice - a justice presupposed to be absolute. 'Just' in this sense is said to be the decision of a concrete case only if it takes into consideration all peculiarities of the case. But since no case is exactly like any other, the application of a general norm to a concrete case can never - so it is said - lead to a just decision. For a general norm necessarily presupposes similar cases, which in reality do not exist. Therefore all law must have individual character only, and the decision of concrete cases must not be bound by general norms."[16]

While the system of free discretion has the advantage of flexibility, it has the disadvantage of lacking legal security and foreseeability of judicial decisions.

However, although the topical method may be capable of solving a case without having recourse to pre-existing general norms, juristic topics do not object to the existence of a central legislative organ, so that they cannot be equated with a system of free jurisdiction. Moreover, the topics would treat the principles of flexibility and legal security as persuasive and strong topoi which have to be weighed. Therefore one may say that treating legal rules as non-binding topoi, the topical approach aims at shifting absolute authority from rules to a more

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[16]ibid., p.252.

flexible treatment of a case without necessarily ignoring the existence of rules.

The topical understanding of legal rules comes close to the claim of some 'rule-sceptics' among the American realists that a case can hardly be determined by legal rules before a court actually decides the case.[17] But American realists only deal with the question of what force norms actually have according to their analysis, whereas the normative account of juristic topics prescribes that rules ought to be treated as topoi. Moreover, realist writers have described judicial decisions as volitional and as being intuited by the 'hunch' which suggests to the judge what is right or wrong for the special cause.[18] In contrast to that juristic topics aim to provide factors of rationality in judicial decision employing the notion of the interlocutor.[19]

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[17]cf. O.W. Holmes, The path of the law (1897)10 Harvard Law Review 457, and J.C. Gray, The nature and sources of the law, New York 1909 at p.101 (sec. 231).

[18]cf. J.C. Hutcheson, The judgement intuitive: the function of the 'hunch' in judicial decision (1929)14 Cornell Law Quarterly 274, at p.285.

[19]see for the further examination of this aspect of juristic topics under Chapter 8.

But as both, the adherents of juristic topics and the American realists, are rule-sceptics, they face the same criticism. It is said that for a system of law without rules to work, the society would have to be very different from modern industrial societies. And such a system would at least require rules which enable persons to determine who the decision-makers of the society are, and which of their activities are to count as decision making:[10]

> "The most devoted American instrumentalist must acknowledge some fixed datum points, some firm rules, if every decision is not to open up all political theory and philosophy for discussion, indeed, if there is to be a rule of law at all. No judge is in the position of being able to redesign the universe; every search for a principle or policy must take for granted certain assumptions which are not, in this case, and on this occasion, up for discussion."[11]

In English law the aspect of problem thinking has often found expression in theories or procedures of equity. According to some interpretations of the history of equity the equitable procedure before the Court of Chancery was such a special procedure where the formal rules of proof used in the royal courts did not apply and in which the Chancellor tried to discover whether, as the

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[10]cf. P.S. Atiyah and R. Summers, Form and substance in Anglo-American law, Oxford 1987, p.70.

[11]ibid., p.71.

petitioner claimed, the defendant had behaved in a way which was contrary to morals and good conscience. Throughout the fifteenth century the Chancellor decided more or less according to his preferences and his discretion. During the sixteenth century equity jurisdiction began to follow the model of the common law and developed rules and doctrines and in the eighteenth century the Court of Chancery was as bound by its decisions as the judges of the common law courts. In order to simplify the law, the common law and the equity procedure were therefore unified in the Judicature Act, 1873."

So what had started in the fourteenth century as an exceptional procedure which was entirely different from the ordinary legal procedure, departed from its origins in the course of history and therefore also from its characteristic of realizing justice in the particular case by means of considering all relevant aspects of that case."

"For an outline of the history of equity see H. Potter and A.K.R. Kiralfy, Historical introduction to English law and its institutions, 4th. ed., London 1958, pp.569ff; and K. Zweigert and H. Kötz, op. cit. supra n.5, pp.196-200.

"see for further theories of equity: R. Wasserstrom, The judicial decision, Stanford, London 1961; Wasserstrom is not an adherent of the equitable procedure but of a so-called 'two-level procedure' of justification which embodies

In contemporary writing the tension between doing justice in the particular case and justice according to rules is sometimes described as the conflict between 'principles and pragmatism'.[11] Atiyah stipulates that a decision on principle, is a decision determined by the 'hortatory' effect which the court wishes its decision to have in the future, whereas a pragmatic decision is a decision designed to achieve justice in the particular circumstances of the case, irrespective of the possible impact of the decision in the future.[11] His thesis is that by 1875 the extent of judicial discretion in the English legal system had reached its lowest ebb, and that the contemporary trend in legal decision-making is one from principles to pragmatism. Atiyah rejects the trend towards pragmatism as incompatible with the survival of

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attributes of both, the procedure of precedent and of equity.

[11]cf. P.S. Atiyah, From principles to pragmatism, Oxford 1978; and see also the criticism of this thesis by J. Stone, From principles to principles (1981)97 Law Quarterly Review 224.

[11]Atiyah, From principles (supra n.24), p.5; however, the term 'pragmatism' is not used homogeneously: R. Dworkin, Law's empire, Cambridge (Mass.) 1986 at p.95 characterizes pragmatism as the theory that claims that judges should not consider themselves to be restrained by past decision, but must decide always in the best interests of the community's future.

any rules and principles and with the generality and universality which the nature of law seems to require, and he argues that this trend towards 'individualized justice' and abandonment of rules undermines the constitutional position and moral authority of the judges and casts doubt upon the legitimacy of the judicial role.[16]

Atiyah's analysis yields the result that contrary to legal reasoning as it was about a century ago there is a contemporary tendency towards problem thinking in English legal thought.

However, his thesis has not been accepted by Stone who regards the issue in question not as a dichotomy of problem thinking and system thinking, or certainty and justice. Instead, he claims that decisions which defy rules applicable to the circumstances of the particular case in order to yield a just result are not generated by pragmatism but by other conflicting (rule-) principles. Thus, according to Stone, the issue in question is a conflict of established (rule-) principles favouring one set of claimants with other (rule-) principles asserted by those

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[16]Atiyah, From principles (supra n.24), pp.29 and 30.

dissatisfied with the status quo."[11] Stone stipulates that (rule-) principles tend, for instance, to embody values espoused by established groups which conflict with other values of other groups which come to wield influence with regard to the future and not only for the particular case at hand.

From this controversy one may conclude that the conflict between justice according to rules and justice in the particular case, which reflects one issue of the topics debate, is also subject of discussion in common law legal theories. Moreover, the presentation of views of the differences between common law and civil law legal thought shows that conventional views consider the common law system to permit the entry of more reasoned arguments and more relevant aspects of a problem than a civil law legal order. More recent accounts, however, claim that the differences are diminishing, and that civil law systems do not allow less problem thinking than the common law.

From this distinction between problem thinking and system thinking in law and a brief indication

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[11]cf. J. Stone, Precedent and law, Sydney 1985, p.245.

of its implications on a comparative basis we will now turn to the discussion of the second and third characteristic of juristic topics, the question of finding and legitimizing premises.

6 The distinction between clear cases and hard cases

In the last chapter we dealt with the first characteristic of juristic topics, the aspect of problem thinking, which contains according to Viehweg a descriptive and a normative account of legal reasoning, and we considered whether there is any affinity with this requirement in the Anglo-American legal family.

In the following chapters we will draw parallels from Viehweg's analysis of the topics and the civil law to theories about the judicial role. This issue concerns the second and third characteristic of juristic topics and it has to be examined in what kind of cases according to English legal theories of the judicial role premises have to be found and how or by reference to which authorities they have to be legitimized.

In this chapter we will deal with the descriptions of clear and hard cases in English legal theory in order to find out which cases are regarded as not being ruled by an applicable premise.

Juristic topics lay stress on the fact that suitable premises must be found for the solution of the case in hand. When there is a legal proposition available and unanimously applicable within a legal system, the law is regarded as clear and unproblematic, so that there is no room for the topics. But when there is more than one possible solution of a case the topics are of importance and believed to be the method at work in order to determine the solution of the problem.

At first sight this distinction seems to coincide with the distinction between clear and hard cases which is usually made by English theorists who deal with the process of legal reasoning (see under section 6.1). However there are many different views about what makes a hard case a hard one and a clear case a clear one. We will examine how these types of cases can be distinguished (under section 6.2), and whether the distinction between easy and hard cases is sustainable (under section 6.3). Moreover, an illustration of the practical effect of these different notions will be given (under section 6.4).

Under section 6.5 it will be seen that the question of whether premises must be found or whether there is an unproblematic premise for the solution of the case does not only give rise to the question of finding and legitimizing premises in a hard case. Both issues, the question of what cases necessitate a new premise and the question of the validity of rules, are interdependent. Thus, the determination of a hard case also depends on the different theories about validity and recognition of rules and on the question whether the legal order is simply a system of rules or whether other legal standards play a role as well.

Finally (under section 6.6), the hard case issue will be compared to the topical method.

6.1 The conventional view

Generally speaking there are three types of cases which come before courts: disputes about facts where the law is clear; disputes about the law where the facts are clear, and disputes about both. A wide notion of clear and hard cases regards all the cases in which the law is disputed as hard ones.[1] According to this wide

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[1]cf. P.S. Atiyah, Judges and Policy (1980)15 Israel Law Review, 346; J. Stone, Precedent and law, Sydney 1985 treats mainly the cases of

view clear or easy cases are cases where the law is clear and indeed often undisputed by the parties involved. In these cases the premises to decide the particular problem are given because there are unambiguous rules from statute or precedent which clearly cover the particular factual problem of the case. Hard cases on the other hand are those in which the law or at least its application is unclear, and where no legal solution clearly imposes itself on the judge from statute, precedent, or other legal standard.

Often the distinction between both kinds of cases is made ex post facto. Instead of supplying a definition of clear and hard cases, some theorists only examine the different treatment of cases and classify them according to the treatment as hard or clear. Harris, for instance, states that the application of law to clear cases is deductive.[1] This observation has also been made by Julius Stone who examined the

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appellate judicial choicemaking as hard cases; the so-called 'fact-skeptics' argue that attention needs to be directed to the activities of trial courts instead of appellate courts, because uncertainty arises primarily from the fact-finding process and the elusiveness of facts (see on fact-skeptics and esp. on Jerome Frank: Lord Lloyd of Hampstead and M.D.A. Freeman, Lloyd's Introduction to Jurisprudence, 5th. ed., London 1985, at p.684.)

[1]J.W. Harris, Law and legal science, Oxford 1979, p.11.

limits of the proper use of logic in the law. But as we learn from Stone this observation only shows that a premise exists for clear cases that can be applied syllogistically, but it does not provide an analysis of when a premise can be called clear so that one can infer from it and when it can be called unclear or non-existent.[1]

Moreover, it has been argued that a theory that employs different methods for the solution of clear and hard cases must not distinguish them ex post facto but also develop a theory in order to determine what a clear and a hard case is. Because before making a decision and engaging in judicial reasoning the judge must be able to say whether the case before him is an easy or a hard one in order to know which kind of reasoning has to be employed. Designating cases as hard or clear by hindsight when the process of adjudication has been completed, it is stated, does not provide any guidance for the solution of hard cases and therefore renders a theory that

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[1]see also P.S. Atiyah, Pragmatism and theory in English law, London 1987, at p.15; J. Stone has provided such an analysis for the operation of precedent and stare decisis, see Precedent and law and Legal system and lawyers' reasonings, London 1964 at p.275, and see above under section 4.2 at p.61.

distinguishes different kinds of reasoning in clear and hard cases useless.[4]

6.2 Notions of how clear and hard cases are distinguishable

It will now be examined what kind of theories there are to distinguish a clear from a hard case. We will therefore introduce another distinction between potentially applicable law and so-called 'gaps' in the law, because the problem of finding a premise for a particular case may arise either from unclear rules or from the fact that no rule governs the particular case. This distinction is primarily based on the notion of law as a system of rules and in the course of the examination we will see whether other legal phenomena such as principles play a role as well. Although there is not always a clear dividing line between a case governed by a potential rule and a no-rule case this differentiation seems to be necessary because theorists distinguish those cases and evaluate them differently.[5]

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[4]cf. A.C. Hutchinson and J.N. Wakefield, a hard look at 'Hard cases': the nightmare of a noble dreamer (1982)2 Oxford Journal of Legal Studies 86 at p.93.

[5]It can also be argued that the distinction between potentially applicable rules and the no-rule case is artificial and that the problem of having an unclear rule is just another case of having no rule at all. This is because in both

6.2.1 Potentially applicable rules

In order to resolve a particular dispute there may be one rule from statute or precedent which unambiguously covers the case. It may also occur that there is doubt about the scope and so about the applicability of a rule, or that there are two or more rules that fit the fact situation, or that there is only a rule available that does not pay tribute to major social changes. Usually those problems are regarded as being inherent in the process of applying legal rules to fact situations.

According to Hans Kelsen every law-applying act is law-creating at the same time.[6] As stated in his Pure Theory of Law a legal order is a dynamic system of norms in which fresh norms are constantly being created on the authority of a

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cases one may say that there is no rule governing a particular problem and in the case of the unclear rule it is only attempted to extend a rule for the application of a case where there is virtually no rule. See for this argument J. Raz, The authority of law, Oxford 1979, Essay 4, pp.53ff, esp. p.77.

[6]H. Kelsen, General theory of law and state, Cambridge, Massachusetts 1945, at p.132 -Kelsen is not an Anglo-American but a continental legal philosopher with considerable influence on English jurists and he also taught at American universities.

basic norm, the Grundnorm.[7] Norms are created in the process of applying some general, or higher, norm which creates a lower norm determined by the higher norm. A judicial decision, for instance, is an act by which a general norm, e.g. a statute, is applied but at the same time an individual norm is created obligating one or both parties to the conflict.[8]

The judicial decision may also create a general norm, because it may have binding force not only for the case at hand but also for other similar cases which the courts may have to decide. The decision can only, however, have the character of a precedent if it is not the application of a pre-existing general norm of substantive law.[9]

As pointed out, a general norm usually creates a lower norm. The general determines the lower norm with regard to the organ and the procedure by which a lower norm is to be created, and with regard to the contents of the lower norm, but as the higher norm cannot bind the act by which it is applied in every direction, there must always be more or less room for discretion. Even the

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[7]ibid., p.113.

[8]ibid., p.133.

[9]ibid., p.149.

most detailed command must leave to the individual who executes the command some discretion. Kelsen gives the following illustration: if the organ A orders organ B to arrest subject C, the organ B must, according to its own discretion, decide when and where and how to carry out the order of arrest - decisions that depend on extraneous circumstances which the ordering organ has not foreseen and to a certain extent cannot foresee.[10] The indefiniteness of the law-applying act may, according to Kelsen, arise from two situations. It can either be intentional, so that the higher norm authorizes the applying organ to determine the procedure of creating the lower norm and the contents of this norm at its own discretion, or it can be unintended and, for example, be a result of linguistic expression which renders the norm ambiguous.[11] Thus, in "all these cases, the law to be applied constitutes only a frame within which several applications are possible, whereby every act is legal, that stays within the frame."[12]

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[10]H. Kelsen, Pure theory of law, Berkeley 1967, at p.349.

[11]ibid., p.350.

[12]ibid., p.351.

Although the courts apply existing rules in which certain consequences are attached to certain conditions, a new premise must, according to Kelsen, be found for the solution of every particular case, because the existence of the individual norm is, in the particular case, first established by the court's act of will.

One may therefore say that, according to the Pure Theory, every application of a rule entails a hard case as each time a lower norm has to be created. Kelsen himself does not employ the expression 'hard case', and in the Pure Theory there is no further differentiation between cases which involve harder or less hard decisions in order to determine what might correspond to the clear case of the conventional view.

In contrast to Kelsen, H.L.A. Hart looks at the phenomenon of hard and clear cases from a linguistic point of view. Legal devices, i.e. precedent or legislation, which are chosen for the communication of standards of behaviour, are expressed in general language. Although they work smoothly over the great mass of ordinary cases, they will at some point prove indeterminate, because of an 'open texture',

writes Hart.[11] He points out that there must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.[12] Besides the vagueness or ambiguity of rules, Hart acknowledges two further traditional sources of the indeterminacy of statutes and precedents: the case when two conflicting rules apply to a given factual situation and rules that are expressly formed in unspecific terms, such as 'reasonable'.[13] An example of the indeterminacy of legal rules would be a hypothetical rule forbidding the taking of a vehicle into a public park. According to Hart the clear cases include the automobile, the bus, the motor-cycle, whereas the application to airplanes, bicycles, or roller skates appears to be more problematic.[14]

Furthermore, Hart specifies three sources of uncertainty which arise from the use of precedent

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[11]H.L.A. Hart, The concept of law, Oxford 1961, at p.124.

[12]idem., Positivism and the separation of law and morals (1958)71 Harvard Law Review 593 at p.607.

[13]idem., Problems of the philosophy of law, in: Essays in jurisprudence and philosophy, Oxford 1983 (Essay 3, pp.88ff.) at p.103.

[14]idem., Positivism (supra n.14), p.607.

in English law. Firstly, there is no single method of determining the rule for which a precedent is an authority. Secondly, there is no authoritative or uniquely correct formulation of any rule to be extracted from cases, and thirdly, the authoritative status of a rule extracted from precedent depends on creative exercise by courts that narrow or widen the rule in the process of 'distinguishing'.[17] Apart from the indeterminacies stated above, Hart does not accept further notions of hard cases which would support 'adequate' and 'satisfactory' decisions against a clearly applicable rule yielding a determinate result, for instance in situations of changing social circumstances.[18]

However, according to Hart, those hard cases form only a minority against the vast majority of clear cases where no doubts are felt about the meaning and applicability of a single legal rule, and where there is general agreement that the cases fall within the scope of a rule.

> "None the less, the life of the law consists to a very large extent in the

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[17]Hart, Concept (supra n.13), p.131 - these sources correlate with Stone's analysis in Legal system (supra n.3), p.275.

[18]cf. Hart, Essays (supra n.15), p.106 where he argues against the realist view that courts always have a choice and are free to decide otherwise than they do.

> guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do not require from them a fresh judgement from case to case."[10]

We can see that, unlike Kelsen, Hart makes a clear distinction between clear and hard cases and between law-applying and law-creation, whereas for Kelsen every judicial decision implies law-creation and every application of a legal rule entails a hard case.

Another positivist, Neil MacCormick, doubts that a clear dividing line between easy and hard cases can be drawn. On his view, clear cases are those in which either no doubt as to interpretation of the rule or classification of facts could conceivably have arisen, or no one thought of raising them, or they were dismissed as artificial or far-fetched by the court.[11] However, he states that in the interpretation of a rule there is a spectrum which ranges from the obviously simple to the highly contestable and that one cannot determine where the clear case ends and the hard one begins.[11]

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[10]Hart, Concept (supra n.13), p.132.

[11]N. MacCormick, Legal reasoning and legal theory, Oxford 1978, at p.199.

[11]ibid., p.198.

In a range of examples of 'clearer' and 'harder' cases of rule interpretation which MacCormick gives, we can recognize the same traditional sources of indeterminacies in statutes and precedents acknowledged by Hart, with the difference that the sharp categorization is missing in MacCormick's theory. This is because he believes that a clear case requires that facts can be proved which are unequivocal instances of an established rule, but as the facts of any case are unique and particular, a typical clear case hardly ever appears, and so one cannot recognise in advance whether a case is hard or clear, whether the available rule fits or further premises have to be found."[11] Thus, although MacCormick's theory seems to occupy the middle ground between Hart and Kelsen at first sight, it turns practically out to be an ex post facto judgement of what a clear and what a hard case is. This approach is open to the criticism that if the distinction can only be made after the decision of the case, it is of no help to the judge during the decision-making process, but only of a general descriptive use."[12]

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[11]cf. ibid., pp.227,228 and Formal justice and the form of legal arguments, from Etudes de Logique Juridique, Vol 6, ed. Perelman, Bruxelles 1976, pp.103ff., esp. p.113.

[12]see the criticism of Hutchinson and Wakefield, op. cit. supra n.4, p.93.

Nevertheless, concerning the scope of potentially hard cases, MacCormick goes an important step further than Hart. He acknowledges that there may be a permanent tension between following the ostensibly obvious meaning, and seeking to establish in particular cases generic rulings which satisfy other desirable aspects of policy and principle."[11] Moreover, he refers to the conflict between settled law and the continuing dynamic process of trying to settle old problems in what now seems a more satisfactory way."[11] Thus, in contrast to Hart, MacCormick obviously accepts as problematic the fact that rules may become unsuitable particularly with changes in social conditions over time and, hence, acknowledges another source of hard cases.

From Hart and MacCormick one may conclude that clear cases are cases where a potentially applicable rule is expressed with sufficient clarity to provide satisfactory guidance for the conduct of individuals, and for the resolution of disputes, whereas in hard cases rules do not provide such guidance.

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[11]MacCormick, Legal reasoning (supra n.20), p.210.

[11]ibid., p.245.

From Kelsen one may conclude that there are no clear cases which enable the law-applying organ to reach a decision without a fresh judgement, but that besides the guidance of rules the law-applier always has to determine the decision to a certain extent at his own discretion.

The question of what is a sufficient guide is controversial and depends also on the concept of validity of rules. This can be seen clearly where a dispute arises as to whether changing social conditions have made a rule obsolete. One side may regard the rule as a sufficient guide while the other regards it as insufficient and thus constituting a hard case.

6.2.2 No available rules

We will now ask whether the situation in which no rule is available at all for the solution of a particular case constitutes a further hard case. This situation where the judge 'runs out of rules' is also known as one of 'gaps' in the law. In contrast to the typical hard case which centres on the existence of some rule, this variety is often neglected in the discussion of

legal reasoning.[16] Hart, for instance, does not pay explicit attention to this kind of case. Traditionally gaps are described as situations where no norms are found covering a particular aspect or aspects, despite the presence of other norms covering a situation, which lead one to expect that the legal order should cover all aspects.[17]

A gap in international law would, for example, be assumed where a treaty provides that the local customary rule is to apply, but there is in actual fact no such rule of local custom.[18] Adherents of the universality of a legal order have denied the existence of gaps in the law arguing that an absence of law could only exist by virtue of the legal order's own will.[19]

A similar rule in a negative sense is proposed by Kelsen. He declares that the legal order cannot

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[16]for this aspect see Hutchinson and Wakefield, op. cit. supra n.4, p.103.

[17]cf. Stone, Legal system (supra n.3), p.188 and I. Tammelo, On the logical openness of legal orders (1959)8 American Journal of Comparative Law 187 at p.192.

[18]the example is taken from Stone, Legal system (supra n.3), p.188.

[19]see for the discussion of this view of Radbruch and others Tammelo, op. cit. supra n.27, pp.191ff.

have any gaps, because if there is no norm which obligates the defendant to the behaviour claimed by the plaintiff, the defendant is free according to positive law, and has not committed any delict by his behaviour. Dismissing the suit the judge applies the negative rule that nobody must be forced to observe conduct to which he is not obliged by law."[10] - "What is not legally prohibited is legally permitted." Thus, in theory these cases are clear cases according to Kelsen, as they can be disposed of by the negative rule.

An illustration of the negative rule may be taken from Malone v. Metropolitan Police Commissioner.[11] In this case the plaintiff was charged with handling stolen property and prosecuted in a Crown Court. The prosecution admitted that there had been interception of the plaintiff's telephone conversations on the authority of the Secretary of State's warrant. The plaintiff claimed that the interception was unlawful and sought relief in the form of a declaration. The claim was based on rights of property, privacy, confidentiality and breach of human rights. The

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[10]cf. Kelsen, General theory (supra n.6), p.147 and Pure theory (supra n.10), p.246.

[11][1979] Ch.344.

court dismissed the claim arguing that there were no such rights in the present law although telephone tapping was a subject "which cries out for legislation".[11] Particularly the argument that as no power to tap telephones had been given by either statute or common law, the tapping was necessarily unlawful, was rejected: "If the tapping of telephones by the Post Office at the request of the police can be carried out without any breach of the law, it does not require any statutory or common law power to justify it: it can lawfully be done simply because there is nothing to make it unlawful."[11]

This judgment virtually endorses Kelsen's negative argument in the United Kingdom context. However, Kelsen acknowledges that the legislator uses the notion of gaps as a fiction in order to achieve more satisfactory, or just, or equitable results. As the legislator realizes the possibility that the general norms he enacts may in some cases lead to unjust or inequitable results, because he cannot foresee all the concrete cases which possibly may occur, he therefore authorizes the law-applying organ not to apply the general norms created by the

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[11]at p.380.

[11]at p.367.

legislator but to create a new norm in case the application of the general norm created by the legislator would have an unsatisfactory result.[10] The difficulty is, as Kelsen states, that the legislator cannot authorize the judge directly to act as a legislator in those cases because it would give too much play to the judge's discretion, since the latter might find the application of the norm created by the legislator inadequate in too many cases. Kelsen thinks that the legislator therefore uses (probably unconsciously) the fiction of gaps in the law because it limits the authorization of the judge to certain cases and has the further psychological effect that the judge is reluctant concerning its use unless it seems to him that rejecting the plaintiff's claim is so evidently unjust that he feels himself compelled to believe such a decision incompatible with the intentions of the legislator.[11] Thus, according to Kelsen, the theory of gaps pretends that the application of the actually valid law is logically impossible in order to authorize the judge to order a sanction which has not been provided by a pre-

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[10]cf. Kelsen, General theory (supra n.6), p.148 and Pure theory (supra n.10), p.248.

[11]idem., General theory (supra n.6), p.148,149 and Pure theory (supra n.10), p.248,249.

existing general norm, because in fact the actually valid law is legally - politically inadequate. As the application of a general norm is according to the Pure Theory normally also a creation of a lower norm and thus constitutes a hard case, the norm which authorizes the judge to detect and fill a gap differs from the majority of general norms only insofar as it authorizes the judge not only to create a new norm but also to abandon the application of another general norm. One may conclude that according to the Pure Theory the no-rule case does not exist as it can be solved applying the so-called negative rule, but Kelsen concedes that this case plays a role in practice.

Adopting a more realistic view of the 'law in action' and a less formalist one than Kelsen, MacCormick points out that the law is not gapless and that there is a continuing dynamic process of trying to settle new problems satisfactorily.[16]

In the same way as MacCormick most of the recent essays on legal reasoning which deal with the no-

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[16] MacCormick, Legal reasoning (supra n.20), p.245,246.

rule cases do accept that there are gaps in the law."

It may be concluded that although the no-rule case is not acknowledged as a problem but at best as a fiction by formalists such as Kelsen it seems that the more recent trends of analytic jurisprudence accept it as a variety of a hard case.

6.3 Arguments that a distinction between clear and hard cases is superfluous

The attempts to distinguish clear from hard cases are primarily made because it is believed that the reasoning in hard cases differs from that in clear cases. The idea is to determine for every case in advance which kind of reasoning is appropriate to adjudicate a dispute. Usually it is believed that reasoning in clear cases proceeds syllogistically from given premises,[11] whereas in hard cases the process of reasoning is described as arbitrary or, as we have seen,[11] as

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[11] cf. J. Bell, Policy arguments in judicial decisions, Oxford 1983, at p.27; Hutchinson and Wakefield, op. cit. supra n.4, p.103; A. Paterson, The Law Lords, London and Basingstoke 1982, at p.128.

[11] cf. Harris, op. cit. supra n.2, p.11; Hart, Essays (supra n.15), p.105,106; Stone, Precedent (supra n.1), p.97.

[11] see under section 4.2 at p. 62.

topical or rhetorical. Several theories which will be examined at a later point prescribe different sorts of guidance in order to prevent an arbitrary decision. This position has been challenged by critics who believe that the kinds of reasoning involved are the same for both hard and easy cases.

Peter Goodrich[40] argues that once it has been admitted (as it has been in fact by the vast majority of lawyers[41]) that extrinsic, political, social and historical forces play a part in the semantic determination of at least some aspects of the normative order, it is difficult to exclude them from other areas and from the clear cases. From this point of view, he claims, the category of clear cases becomes rather unrealistic. He accuses legal formalism of concealing the true nature of the judicial process and offers "for those prepared to look" an example which illustrates that what is clear may become opaque. The example concerns the Viscountess Rhondda's Claim[42] in which the

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[40]P. Goodrich, The rise of legal formalism; or the defences of legal faith (1983)3 Legal Studies 248 at p.264; and in Legal discourse, Basingstoke and London 1987, at p.58.

[41]see as a representative Atiyah, Judges and policy (supra n.1), pp.355ff.

[42](1922)2 AC 339.

Viscountess Rhondda, a peeress in her own right, claimed entitlement to receive, as would any peer, a writ of summons to Parliament. She based her claim on section 1 of the 1919 Sex Disqualification Removal Act which states that: "A person shall not be disqualified by sex or marriage from the exercise of any public function." Counsel for the Viscountess Rhondda argued that the decision was purely a question of law and not a matter of discretion. He alleged that the material words of the Act were plain and unambiguous, and that the Act was clearly covering the case as, but for her sex, the Viscountess Rhondda would have been entitled to receive a writ of summons to Parliament. He also argued that the function of sitting and voting in the House of Lords was foreseen by those who drafted the Act and that it was comprised by the policy of the Act."

The House found against the Viscountess as the right to a writ had never attached to peerages held by a peeress, and the Act was one for removing disqualification but not for creating a novel constitutional right. By her sex the Viscountess was not disqualified from the exercise of the claimed right but she was the

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"at p.342.

holder of a title which did not include this right. "In other words, a peeress in her own right is not a person who has an incident of peerage but is disqualified from exercising it by her sex. She is a person who for her life holds a dignity which does not include the right of a female to exercise that function at all."[44] Therefore a majority by all but four of twenty-six the House of Lords was convinced that the intention of the legislature in dealing with this matter could not be taken to depart from the usage of centuries as the legislature would not have employed "such loose and ambiguous words to carry out so momentous a revolution in the constitution of this House."[45] So the House of Lords did not apply the Act, although, like counsel for Viscountess Rhondda, Goodrich would have classified the case as unambiguously clear.

Goodrich therefore rejects the distinction between clear and hard cases as deceitful, because it suggests that in such clear cases extrinsic aspects are excluded and that reasoning in clear cases proceeds syllogistically.

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[44]Lord Birkenhead at p.363.

[45]at p.375.

From another philosophical angle and somewhat more unprecise than Goodrich, Ronald Dworkin also takes the view that the process of reasoning in clear and hard cases is of the same nature. He argues that judges do not first consider the clear law, and then, when that runs out, set out on a voyage of legislative creation.[46] The judge's method is equally at work in easy and hard cases, but since the answers to the questions in easy cases are obvious, or at least seem to be so, one is not aware that any theory is at work at all.[47] Therefore easy cases are only special instances of hard ones.[48] However, this has never been stated as clearly as this before the publication of Law's empire, and his earlier writings[49] may even suggest the opposite notion, namely that reasoning in hard cases is directed by principles while it proceeds syllogistically in clear cases.[50] Despite his

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[46]R. Dworkin, Taking rights seriously, London 1977, at p.86.

[47]idem., Law's empire, Cambridge, Massachusetts 1986, at p.354.

[48]ibid., p.266.

[49]e.g. Taking rights seriously (supra n.46), at p.24 and 97, and see those cited in Hutchinson and Wakefield, op. cit. supra n.4, p.90,91.

[50]on the basis of this opposite notion Hutchinson and Wakefield (op. cit. supra n.4) have criticized Dworkin's theory, because it lacks a theory about the distinction between hard and easy cases in order to know when the method

view that the method at work is the same for both cases Dworkin makes the distinction between hard and easy cases in his essays, and he seems to take the conventional view in describing them. He writes, for example, that hard cases arise "when no explicit decision or practice requires a decision either way",[11] or when in both law and politics reasonable lawyers disagree about rights,[11] or "when no settled rule dictates a decision either way",[11] so that one can recognize the two types of hard cases, i.e. the rule that gives incomplete, conflicting, or ambiguous guidance, and the no-rule case.

At this point the question arises why Dworkin still distinguishes between clear and hard cases. According to Dworkin's theory there always awaits the judge's discovery some pre-existing law adequate to dispose of the case with superior claims over competing alternatives, which might also be regarded as implicit in the body of existing positive law, to be best fitted to it. Thus, the law is a 'seamless web' and there is

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for hard cases is appropriate and when not, but the criticism has been deprived of its strength since Dworkin's clarification of the issue.

[11]Dworkin, Taking rights (supra n.46), p.XII.

[11]ibid., p.XIV.

[11]ibid., p.83.

always one right answer to every legal problem."[11] But while only a superhuman judge, whom Dworkin calls Hercules, is able to find the answer employing the means prescribed by Dworkin, the present-day judge with his limited power of discernment cannot always find the existing law and the right principles when the conventional legal material does not provide guidance. Hence, objectively the law is never incomplete or indeterminate, and the law never runs out for the cases the judge has to decide, so that every case can be resolved by the same means. But subjectively the legal material may be unclear and for the individual lawyer there are clear and hard cases. According to Dworkin the judge does and ought[12] to resolve those cases employing the same method, but as he is imperfect some cases which coincide with the cases where no rules or only unclear rules are available are classified as hard cases, because they raise difficulties for the judge in finding the right answer.

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[11] cf. ibid., p.115 and: No right answer? in: Law, morality and society, ed. by P. Hacker and J. Raz, Oxford 1977, pp.58ff. at p.84.

[12] for a criticism of Dworkin's normative and descriptive account at the same time and the fact that he confounds both in his theory, see St. Guest, book review (1988)104 Law Quarterly Review 155; Hutchinson and Wakefield, op. cit. supra n.4, p.87; Atiyah, Judges and policy (supra n.1), p.351.

We may therefore consider Dworkin's notion of clear and hard cases from the judge's subjective point of view as equivalent to the conventional view, and note the difference that he considers the reasoning in both cases to be the same. At a later point we will examine what Dworkin advises the judge to do when he faces a hard case where lawyers disagree and where the conventional legal material does not provide guidance.

6.4 Illustration of the different notions

In order to illustrate the different notions of easy and hard cases we will consider the United States case of Riggs v. Palmer[11] which is very suitable for this purpose.

In 1880, Francis Palmer made a will in which, after giving two small legacies to his daughters, he left his residuary estate to his grandson, Elmer. The residuary estate included considerable personal property and the farm on which Elmer Palmer and his grandfather lived. In 1882, the grandfather remarried and Elmer Palmer, in order to prevent the making of a new will in favour of his grandfather's second wife, murdered

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[11] 115 NY 506 (1889) (Court of Appeals of New York), for an account of the case see also Hutchinson and Wakefield, op. cit. supra n.4, p.95, and Dworkin, Taking rights (supra n.46), p.23.

his grandfather by poisoning him. The two daughters, Mrs Riggs and Mrs Preston, brought an action to prevent Elmer Palmer from enjoying the disposition made in his favour. The issue for resolution was whether the statutory rule requiring that effect be given to testamentary intentions expressed in a valid will ought to be applied. At first instance the court decided in Elmer Palmer's favour and applied the rule. On appeal, counsel for the daughters had two principal arguments: that since a will is revocable until death, Elmer Palmer, by murdering his grandfather, had deprived him of this right, and that, as a matter of statutory interpretation, it could not have been the legislators' intention that this rule should be applied in such extraordinary circumstances. Counsel for Elmer Palmer argued simply that this was a case in which the words of the statute should receive their plain and ordinary meaning. Also, as Elmer Palmer had been imprisoned for the murder of his grandfather, to be deprived of his legacy would be to punish him twice for the same act.

Counsel for both the appellants and the respondent agreed that there was a potentially applicable rule. They both regarded the rule as

the starting point of their arguments. While the appellants argued that the rule should not apply, the respondent argued that the rule should apply.

Although there was a potentially applicable rule the law was disputed by the parties with regard to the 'suitability' of the rule. According to wide versions of clear and hard cases disagreement between the parties about the law is sufficient in itself to constitute a hard case,[11] but most theories require the determination by the judge, or objective criteria rather than claims of the parties.

The case was decided against Elmer Palmer on the grounds that the general language of the statute could be neglected in favour of general fundamental maxims of the common law which control all laws and which have their foundation in universal law administered in all civilized countries. The maxim that no one shall take advantage of his own wrong was seen to be one of those.

However, in a dissenting judgement Mr Justice Gray felt himself bound by the rigid rules of the

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[11]cf. Atiyah, Judges and policy (supra n.1), p.346.

statute. He did not see any room for the exercise of an equitable jurisdiction by the court as the facts fully complied with the rule. In his opinion the majority judgement may indeed be based on principles of equity and of natural justice, but they only suggest sufficient reason for the enactment of laws to meet such cases.

This latter view characterizes Riggs v. Palmer as an easy case because a rule is applicable and dispositive of the case. Similarly H.L.A. Hart would have classified the case as a clear one and, although it would be a hard case in Kelsenian terms, the Pure Theory would have come to the same result.

On the other hand one may see from the majority judgement that a clear case can easily become a hard one, namely when the applicable rule does not yield a satisfactory or equitable result. This observation has already been made and explained (though not appreciated) by Kelsen's Pure Theory, and it confirms Goodrich's point of view which rejects the distinction. MacCormick certainly would have characterized the case as a hard one dominated by the tension between following the ostensibly obvious meaning, and seeking to establish in a particular case a

generic ruling which satisfies other desirable aspects of policy and principle. Moreover, Dworkin also lists Riggs v. Palmer as an example of a hard case.[11]

6.5 Evaluation of the hard case issue

The preceding outline of notions of easy and hard cases does not deal with every single view of how a clear or hard case may be characterized, but it represents the main arguments and lines of the discussion. Moreover, not every theory that prescribes criteria of legal validity lays down its own idea of a hard case or distinguishes clear cases from cases in which the judge is left without a guide.

At this point an attempt will be made to sum up the different conceptions of a hard case. Therefore the widest range of notions will be taken into account, because when theorists disagree about the classification of cases (e.g. the no-rule case) as hard or clear, those cases are obviously controversial and therefore, in the widest sense, hard cases. Only, for instance, the concept of law as a system of rules transforms the no-rule case into an easy case

[11]Dworkin, Taking rights (supra n.46), p.23.

arguing that the negative rule applies which states that there is no obligation.

In terms of juristic topics one may summarize the hard case notions in English legal theory as follows. Firstly, premises have to be found for cases in which a potentially applicable rule from statute or precedent is intentionally or unintentionally vague or ambiguous because of the use of language which is inevitably open-textured. A stricter version of this point, favoured by Kelsen and to a certain extent by MacCormick, demands a new premise for every particular fact situation.

Secondly, the conflict between two or more rules requires the preference for one, or the reconciliation of them in a new premise. As sub-groups of the first and the second issue one may regard a further need to find premises arising from the use of precedent, namely from competing methods of determining a rule from precedent, or competing versions of an extracted rule.

Thirdly, there may be a potentially applicable rule, but it is no longer felt to be suitable particularly with changes in social conditions over time, so that it seems more satisfactory to

establish another premise in neglect of the existing rule.

And fourthly, the cases of so-called gaps in the law, where no rule appears to cover a new situation, necessitate the creation of premises in order to fill the gap. The last two cases are not acknowledged as hard cases by formalist conceptions of the legal order. This is the result of the interdependence between the hard case issue and theories about the validity of legal phenomena.

In the end there remains some doubt about the usefulness of the distinction between hard cases and easy cases. Usually hard cases are distinguished from clear cases in order to choose the appropriate type of reasoning for the resolution of the case. However, when the question is to find out whether a rule is still suitable under changed social conditions, or whether there is a gap in the law which has to be filled or not, the distinction cannot be made in advance by means of examining the indeterminacies of a rule, e.g. under linguistic aspects. Even at this stage extrinsic factors and values have to be considered, and the distinction between clear and hard case depends on the pre-

understanding of the judge who will always have one eye on the outcome of the litigation before he starts to employ a certain type of reasoning in order to dispose of the case. Thus, the determination of a case as hard or easy belongs to the actual process of reasoning, and so every case becomes a potentially hard one, because the outcome of a rule-application might be incompatible with notions of justice, or policy, or principle in changing social conditions.

The argument that every case is a potentially hard one requires a realistic understanding of norms and their validity. Identifying a case as a hard one according to the suitability of the outcome of a rule-application implies that a hard case can also be analyzed where the law provides a solution for the case and where legal rules are applicable and dispositive of the case. Hence, the judge's power to abandon legal rules and to make a free decision in every case and not only in cases where the law does not provide a decision is a prerequisite for the argument that every case is a potentially hard one.

The assumption that every case is a hard one in the sense that the judge scrutinizes every rule anew concerning its remaining applicability does

not, of course, match the realities of the justification process."[11] The judge does not and cannot reconsider every authority, and where he disregards an obvious authority this may not be accepted by the legal audience and his action may be criticized as illegitimate by the legal profession, legal writers, and by higher courts. But, nevertheless, it may be seen from the Viscountess Rhondda's Claim and Riggs v. Palmer that even the reconsideration of the plain meaning of statutes is not unlikely. It may depend to a large extent on the consensus among the legal audience, but, as we have already stated, this is a very vague concept and the determination of its scope seems as difficult as the classification of cases as clear and hard, so that one can only categorize cases as appearing harder or less hard, or more or less difficult to decide. It is not possible to decide in advance whether a case is clear or hard and then choose the appropriate type of reasoning, as the decision whether a case is hard or clear is part of the process of legal reasoning and therefore cannot be made independent of this process. Although the classification of a case as clear or hard does not provide any guidance for the judge

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[11] this is pointed out by Bell, op. cit. supra n.37, at p.25.

concerning the kind of reasoning that is involved in advance, it may be of value with regard to the subsequent analysis of decisions as it may make apparent the kinds of cases for which premises have to be found and the sources from which disputes about the law arise.

This, of course, does not render theories about the judicial role in hard cases useless. They may be regarded as determining for every case in general how far rules should be accepted as guidance and to which authorities the judge must refer when, according to his view, a legal rule ceases to be a sufficient guide.

6.6 The topical method and hard cases

As we have already stated the topical method is only of importance where there is a problem, and that there is no room for the topics where the law is unproblematic and undisputed. However, we are not told exactly what a problem is, and indeed none of the adherents of juristic topics analyses in depth the kinds of cases for which the topical method is meant to be of use. In order to elucidate these issues it seems to be helpful to have recourse to the discussion of clear and hard cases in the Anglo-American legal family.

Usually a problem is referred to by the adherents of the topics as a situation which is not treated unanimously and where there is no consensus among an unspecified number of interlocutors. Obviously the topical method implies a very wide notion of a problem as theoretically, one can always find more than one possible solution for a case and particularly in the continental legal families legal theorists have produced a variety of different approaches to a plenitude of particular situations. Consequently Viehweg prescribes in his normative account of juristic topics that every single case ought to be treated as a problem and resolved by means of problem thinking. This approach also includes the notion that theoretically every case is a hard case suggesting that the judge will always have to scrutinize the legal rules with regard to the suitability of the outcome of a rule-application. We have already stated that in practice the judge cannot and does not reconsider every authority. As the courts do not treat every case as a problem Viehweg analyses the points of entry of juristic topics into the legal order.[11] These points indicate the cases which are actually regarded as posing problems in practice and

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[11]see under section 3.2 at p.27.

where, according to Viehweg, the legal system cannot dispense with the topics. Viehweg's points of entry correlate strikingly with the summary of characteristics of the hard case notion in English legal theory which we gave in the previous section.

The first characteristic - the vague or ambiguous rules as a consequence of the open texture of language - coincides with Viehweg's entry-point arising from the use of common language with its plenitude of understandings to express legal concepts and propositions; the second and third characteristics - conflicting rules and anachronistic rules - correspond to the process of interpretation which frequently requires the reconciliation of contradictions, and the adjustment of set legal formulations to changing circumstances; and the fourth point - gaps in the law - may correlate with the constant need to apply legal rules within a legal system to new cases which do not fall under any existing rule.

Moreover, we may note that the recognition of the third situation as a hard case by a number of English theorists implies that the judge is able to and may disregard legal rules in favour of a suitable decision of the case at hand. This

position is comparable to the topical approach to legal material and legal rules, which regards rules as mere guidelines that are persuasive but not as such binding in the process of finding and legitimizing premises. As this view contrasts with the formalist conception of some positivists who classify the situation in question as an easy case solvable within a system of rules, one may at this point note again that juristic topics contain an anti-formalist element which stems from their opposition to ideas of conceptual jurisprudence in Germany.[61]

One may conclude that the situations which Viehweg isolates as the points of entry of the topical method into the legal order are similar to the notion of hard cases in English legal theories. These are the cases where, according to Viehweg, legal reasoning inevitably proceeds topically. Additionally, he claims that the process of reasoning ought to be topical for all cases and that it must not be fettered by a system of rules and by syllogistic reasoning.

In the next chapters we will examine how theories about the role of the judiciary treat the process

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[61]see for an evaluation of the new rhetoric's attack upon formalist conceptions, Goodrich, Legal discourse (supra n.40), pp.112ff.

of reasoning particularly in hard cases, and whether they claim to be normative or descriptive theories.

7 Problems concerning the classification of role models

Before analysing models of the judicial role with regard to their different notions of a hard case we will try to clarify to what extent these models may be regarded as having descriptive content or as having normative content. It will be seen that it is difficult to make a clear distinction between both accounts (under section 7.1).

We will then give a brief survey of tendencies in studies dealing with judicial reasoning in hard cases which claim to be empirical as opposed to doctrinal. As we cannot follow these studies in depth we will rely on their basic findings, which indicate that no theory guiding the decisions of the judiciary is employed consistently throughout the legal process (under section 7.2).

At the end of the chapter we will introduce the case of Spartan Steel and Alloys Ltd. v. Martin and Co. (under section 7.3) for the purpose of examining the theories which are offered by a number of jurists in order to describe the judicial process and also to prescribe reasoning in hard cases. Spartan Steel is usually regarded

as a typical example of a hard case and therefore suitable for the purpose of examining how different legal theorists would supposedly apply their conceptions in practice.

7.1 Descriptive or prescriptive theories?

One of the difficulties in dealing with models of the judicial role is to find out whether theorists allege that legal reasoning in hard cases actually proceeds in the way they describe or whether they propose that it ought to follow their conception of the process of reasoning.

We have already seen that Viehweg's treatise is prescriptive with reference to its call for a problem-orientated method of legal reasoning, whereas it is descriptive concerning its analysis of the civil law showing the already existing points of entry of juristic topics into the legal order. If one consults the essays of legal theorists concerning their intention to provide a descriptive or a normative theory one does not always get a clear answer.[1]

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[1]H.E. Yntema, Legal science and natural law: apropos of Viehweg, Topik und Jurisprudenz (1960)2 Inter-American Law Review 207, at 208 states that it would "seem that the distinction in question between scientific description and normative prescription turns upon the mood in which statements are made".

Kelsen's Pure Theory of Law is meant to give a scientific description of positive law.[1] Hart characterizes his concept of law as a description of legal thought rather than a criticism of law or legal policy.[2] MacCormick, on the other hand, claims that his conclusions present a normative and a descriptive account of norms actually operative within the systems under his study.[3] Dworkin also aims at providing a description of and a prescription for the structure of the institution of adjudication.[4] However, we are not told where the descriptive aspects end and the normative account starts, which causes a confusion between both aspects.[5] Dworkin's theory is only one example of such confusion.[6]

Moreover, different descriptions of the process of legal reasoning yield different results

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[1]H. Kelsen, Pure theory of law, Berkeley 1967, p.1.

[2]H.L.A. Hart, The concept of law, Oxford 1961, p.V.

[3]N. MacCormick, Legal reasoning and legal theory, Oxford 1978, p.13 and 129.

[4]R. Dworkin, Taking rights seriously, London 1977, p.90 and 123.

[5]cf. A. Hutchinson and J. Wakefield, A hard look at 'Hard cases': the nightmare of a noble dreamer (1982)2 Oxford Journal of Legal Studies 86 at p.87.

[6]cf. H.L.A. Hart, Essays in jurisprudence and philosophy, Oxford 1983, p.103.

according to the preferred conception of a legal order. We have already dealt with the difficulties of determining cases of settled and unsettled law and arrived at the conclusion that there is no uniform definition of a hard case. In some cases (e.g. in Riggs v. Palmer) one theory acknowledges and another denies, that there is a hard case, and they would resolve it in different ways leading to different decisions. As the different descriptions yield different results one may say that some of them must either be wrong, or that the judicial process is inconsistent so that they fit some of the cases but are not able to describe all of them.[8] Alternatively, they turn out to be normative, prescribing standards of adjudication where several theories disagree about the true nature of judicial reasoning.

The latter point is related with the issue of the normative force of descriptions. It is said that the descriptive theorist needs the assistance of a general normative theory in developing sufficiently differentiated concepts.[9] The pre-conceptions of the theorist himself are regarded

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[8] see under section 7.2.

[9] cf. J. Finnis, Natural law and natural rights, Oxford 1980, at pp.6-16 who relies on Max Weber's methodology of social sciences.

as an indispensable and decisive component in the selection or formation of any concepts for use in description of such aspects of human affairs as law or legal order. Although descriptive theorists might seek to identify law on the basis of non-evaluative characteristics only, they do evaluate available data from their viewpoint of what is important and significant when they select the information which influences the outcome of the description. Thus, differences in description derive from differences of opinion amongst the theorists, about what is important and significant in the field of data and experience which they have collected.[10] An example may be taken from MacCormick.[11] He admits that the descriptive account of his theory offers falsifiable hypotheses, but he requires a mass of available evidence before he accepts that they are false, because he treats a small number of counter-examples as "instances of bad arguments" and as "cases deviant from actually operative norms", rather than evaluating them as a falsification or modification of his description.

One may conclude that a descriptive theory can be regarded as having normative content inherent in

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[10]ibid., p.9.

[11]MacCormick, op. cit. supra n.4, p.13.

the theorist's viewpoints or values which influence his selection of concepts to use in describing law.

However, we will see later that many descriptions of legal reasoning end with the finding that judges have a choice and make discretionary decisions in hard cases, without stating to what kind of arguments judges refer in such a case. In contrast the point of interest for our inquiry is exactly the question of where the judges take premises from in a hard case, and what normative guides theories of adjudication offer.

7.2 No consistent theory in practice

In order to demonstrate that descriptive theories of law only contribute aspects to a phenomenology of law and adjudication but never contain a complete or even true description of the law, we will outline tendencies in recent analyses of the judicial process which claim to be purely empirical as opposed to doctrinal. The claim can be confirmed in so far as they do not attempt to establish further theories of law and adjudication, but they only state whether their findings match one theory rather than another or whether they contain elements of several theories.

Many academic lawyers[12] and a number of practising lawyers[13] seem to acknowledge that the courts do not only declare the law but that they actually make it or at least participate occasionally in making the law. It is said that in cases of unsettled law judges make discretionary decisions referring to arguments supported by common sense, principles, and public policy,[14] and that their role in those cases may best be described as that of the interstitial legislator.[15] However, practising lawyers only seem to concede taking this active role concerning the field of common law rule-creation whereas they appear to be reluctant to admit the same active role concerning statutory interpretation.[16] This view

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[12]see e.g. P.S. Atiyah, Judges and policy (1980)15 Israel Law Review 346 at p.348; R. Stevens, Law and politics, London 1979; A. Paterson, The Law Lords, London and Basingstoke 1982; J. Bell, Policy arguments in judicial decisions, Oxford 1983.

[13]see e.g. Sir A.T. (now Lord) Denning, The changing law, London 1953; Lord Reid, The judge as law maker (1972)12 Journal of the Society of Public Teachers of Law 22; Lord Edmund-Davies, Judicial activism (1975)28 Current Legal Problems 1.

[14]Lord Reid, op. cit. supra n.13, p.25.

[15]cf. Atiyah, op. cit. supra n.12, p.348; Bell, op. cit. supra n.12, p.244 - the variations of the interstitial legislator model will be examined under section 8.1.

[16]cf. e.g. Lord Reid, op. cit. supra n.13, p.27.

may derive from the fact that common law rules provide more sources for hard cases than statutory rules do because the extent of indeterminacies is, as we have stated, greater in the field of precedent than it is for statutory rules. Moreover, judges may feel it more legitimate to develop and change the common law than to interfere with parliamentary legislation. But this description of the courts merely applying the law when they interpret statutes rather than making it in those cases has become increasingly challenged as unrealistic by academics.[17] Besides the increased readiness among the judiciary to accept that the courts make law, they also express it more openly in their judgements in the last decades of judicial decision-making than they did before.[18]

Nevertheless, the majority still argues that judicial creativity is confined to hard cases,[19] and as R. Stevens writes, "the idea that the House (of Lords) makes law only in 'hard cases'

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[17]cf. J.A.G. Griffith, The politics of the judiciary, 3rd. ed., Glasgow 1985, pp.181-192 and Bell, op. cit. supra n.12, at p.92.

[18]cf. Stevens, op. cit. supra n.12, pp.614ff., esp. p.620.

[19]so for example Bell, op. cit. supra n.12, p.24.

will not die easily".[10] The fact, which we have pointed out earlier, that the notion of hard cases has been continuously extended by theorists and that a clear dividing line between easy and hard cases has vanished might also be explained as a consequence of the lawyer's reluctance to admit that the judiciary's creativity is not only restricted to hard cases.

However, these are only tendencies taken from empirical studies of the judiciary. From Alan Paterson's research,[11] for which he interviewed most of the Law Lords, one may see that there cannot be a uniform description of the legal process as different Law Lords have different views about adjudication and different attitudes towards the treatment of hard cases.[12] Such disagreements are apparent for instance on a question which mirrors the Dworkin/Hart debate, namely whether there is always one correct solution to a House of Lords case on the basis of the existing legal rules and principles, or whether there are some cases where the Law Lords

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[10]Stevens, op. cit. supra n.12, p.625.

[11]The Law Lords, op. cit. supra n.12.

[12]a requirement of Paterson's research is that the Law Lords also act according to what they state, which has been doubted to a certain extent by Griffith, op. cit. supra n.17, at p.186.

have a choice about which way the law is to develop. The answers to this question were divided. Though the majority of those interviewed by Paterson said that there was a choice in each case or in most of the cases, some Law Lords argued that in every or nearly every case one solution was more in accordance with the law than any other decision.[11] Furthermore, Paterson points out that the Law Lords disagree as to the existence of particular guidelines and as to their weight in particular cases.[12] Moreover, in the process of adjudication some judges are said to be more creative than others.[13]

From the different attitudes among judges which can lead to different results in the same particular case, one may conclude that there is not one theory which consistently describes and guides the decisions of the judiciary in practice, but several theories mirror the process of adjudication from different angles.[14]

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[11]cf. Paterson, op. cit. supra n.12, pp.190-195.

[12]ibid., p.198.

[13]cf. Stevens, op. cit. supra n.12, p.578.

[14]see for the argument that legal practice suffers from a lack of theory, P.S. Atiyah, Pragmatism and theory in English law, London 1987, pp.143ff. esp. p.159.

7.3 Introduction of a case

In order to provide an illustration to which we can refer in the examination of the role models we will at this point introduce the case of Spartan Steel and Alloys Ltd. v. Martin and Co.[11]

In the course of carrying out road works Martin's employees negligently damaged and put out of action a power cable which supplied Spartan Steel. As a consequence, Spartan Steel had to halt its operation until the cable had been repaired. Spartan Steel claimed damages in respect of three items of loss: the depreciation of value of the metal which was in the smelting process and which they had to damage in order to prevent injury to their furnace; the loss of profits they would have made on the sale of that metal; and the loss of profits from those melts that would have taken place in the normal course of business during the period the furnace was inoperative. The court at first instance held that the defendants were liable for all of these losses. On appeal counsel for Martin conceded that they were liable for the first two items of loss, but argued that they were not liable for the third item as it was pure economic loss as a consequence of damage to another's property, but

[11] [1973]1 QB 27.

not consequential on any physical loss of the plaintiff. They alleged on the authority of Cattle v. Stockton Waterworks Co.,[18] which was approved in SCM (United Kingdom) Ltd. v. W.J. Whittal and Son Ltd.,[19] that it was therefore too remote to be recovered. Counsel for Spartan Steel argued that such economic loss ought to be recoverable if it was reasonably foreseeable, as it was in this case. By a majority, the Court of Appeal held that the plaintiffs were entitled to the first two items of loss only.

In his judgement, Lord Denning considered that the issue of liability could not be resolved alone by the classification under the headings of the duty owed to the plaintiff or of the remoteness of the damages claimed. He therefore discarded those tests and preferred to "consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable, or not".[20] He offered various reasons in favour of not awarding damages for economic loss independent of the physical damage in this case. Firstly, he considered the position of the statutory undertakers which

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[18](1875) LR 10 QB 453.

[19][1971] 1 QB 337.

[20]at p.37.

supply electricity, gas, or water. They were not liable for causing economic loss alone and he therefore suggested to adopt a similar policy in regard to contractors. The risk of economic loss was run by everyone and should be suffered by the whole community rather than by the person interrupting the supplies. Against the hazards of a breakdown in the supply of power or water either precautions were taken by effecting an insurance, or the economic loss was made up "by doing more work next day".[11] He also argued that the claims of purely financial loss were too difficult to control and that in deserving cases of physical damage recovery was provided, so that there was no need to allow damages for purely economic loss in the case at hand.

Lawton L.J. came to the same result but for different reasons. He considered the law as settled since Cattle v. Stockton Waterworks and any doubts there may have been about the recovery of consequential financial damage as reconsidered and settled in SCM. He conceded that differences existed between different types of cases of economic loss and that they had arisen because of the policy of the law, but it was not up to the

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[11] at p.38.

courts to determine a consistent policy for all cases."[12]

In a dissenting judgement Edmund Davies L.J. contested the view that there was a general rule that financial loss in the absence of physical damage was irrecoverable. To support this argument he referred to Hedley Byrne v. Heller[13] and other cases where economic loss was allowed independent of physical damage. He argued that the issue of financial loss was one of the duty of care owed to the injured party and one of remoteness, and that loss should be recovered where it was foreseeable and a direct consequence of the act concerned. On this basis of liability he regarded the necessary requirements as fulfilled in the case at hand because a breach of the duty of care had been admitted and the economic loss was a foreseeable and direct consequence of the defendants' admitted negligence. He rejected the policy arguments put forward by Lord Denning as factors not determinant of legal principle."[14]

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[12]at p.49.

[13][1964] AC 465.

[14]at p.45.

In academic writings the Spartan Steel case is usually regarded as a typical example of a hard case,[15] and from the judgement one can see that all three judges proposed to resolve the case in different ways. In addition to the discussion of the issue of hard cases one may analyze the judgements as follows: Lord Denning regarded the available rules dealing with purely economic loss as insufficient for the resolution of the case at hand and reconsidered them by means of employing contemporary policy arguments. He arrived at the restatement of the old rule but supplied it with a contemporary justification.[16] Similarly to Lord Denning, courts often refer to policy arguments in order to resolve cases of unsettled law.

In an analysis of the duty of care in negligence Symmons reaches the conclusion that "the term 'policy' in the sphere of negligence can seemingly comprehend all relevant extra-legal considerations, including the interests of

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[15]cf. Bell, op. cit. supra n.12, p.57; Dworkin, op. cit. supra n.5, p.83; N. MacCormick, Legal right and social democracy, Oxford 1982, p.132; Hutchinson and Wakefield, op. cit. supra n.6, p.101.

[16]cf. Bell, op. cit. supra n.12, p.59.

parties involved and the courts themselves."[17] This observation correlates with one of the traits of the topical method. The topics draw attention to the fact that no argument should be excluded by a system of rules from the process of finding premises for the solution of a particular case, and problem thinking requires the openness of the adjudicative process to all kinds of arguments. It has been argued that it is the task of jurisprudence to find a method which does not render policy decisions inconsistent and uncontrollable but which makes apparent the policy considerations on which the decision is, or ought to be, based.[18] However, the notion of the interlocutor or the audience which is provided by the theory of juristic topics has not been recognised as a sufficient means to this effect, and in the next chapter we will examine whether role models of the English judiciary provide such guidance.

In contrast to Lord Denning, Lawton L.J. felt himself bound by the old rule in Cattle and SCM and considered it as unambiguously applicable to

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[17]C.R. Symmons, The duty of care in negligence: recently expressed policy elements (1971)34 Modern Law Review 394 and 528, at p.400.

[18]M. Rheinstein, book review on Viehweg's Topik und Jurisprudenz (1954)3 American Journal of Comparative Law 597, at p.598.

the case at hand. As he was opposed to a reconsideration of the rule, and regarded the law as settled, one may say that Spartan Steel was a clear case in his eyes.[11]

Edmund Davies L.J. did not regard the rule in Cattle and SCM as unambiguously applicable but for him this rule was in conflict with the rule in Hedley Byrne v. Heller. He aimed at reconciling both rules by means of referring to the more general requirements of foreseeability and directness which were inherent in both rules.

In the next chapter we will try to examine how a number of legal theorists would supposedly treat the Spartan Steel case.

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[11]see for this argument Hutchinson and Wakefield, op. cit. supra n.6, p.102.

8 The resolution of hard cases according to models of the judicial role

Having analyzed English legal theories under the angle of the first two characteristics of juristic topics, namely the aspect of problem thinking (under Chapter 5) and the kinds of cases for which premises have to be found (under Chapter 6), we will at this point turn to the third characteristic, that is to say the question of how or by reference to which authorities premises have to be legitimized.

According to the topical method every sensible argument may be considered in the process of finding premises and the premise which is finally adopted for the solution of a particular case has to be legitimized by the interlocutor or the audience.

In this chapter it will be examined in how far the judge is free or restricted in the process of adopting premises for hard cases according to theories about the English judiciary. The discussion will be subdivided into theories which claim that the judge has a creative role and that he makes law in hard cases (under section 8.1), and theories stipulating that to a great extent

the judge finds and declares the law (under section 8.2).

The subsequent examination will serve the final analysis (under Chapter 9) of the affinity of the theories under discussion to the topical approach to the problem.

8.1 Interstitial legislator model

The following theories discussed in this section have in common the assertion that in hard cases the judge must act like a legislator. It is his task to make new law in those cases, and to refuse to innovate is as much a legislative act as any decision.[1]

However, in this section we will only deal with theories which apply to the hard case issue and claim that the judge must legislate 'interstitially'. We leave apart those branches of American realism which reduce the law to that which the courts lay down.[2] According to those 'pragmatic instrumentalists' the judge has always a choice and is free to decide, no matter how

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[1] cf. P.S. Atiyah, Judges and policy (1980)15 Israel Law Review 346 at p.348.

[2] cf. O.W. Holmes, The path of the law (1897)10 Harvard Law Review 457, and J.C. Gray, The nature and sources of the law, New York 1909 at p.101 (sec.231).

clear the case is. Thus, vested with seemingly limitless judicial creativity the judge does not only legislate interstitially, but the lawmaking authority as a whole is transferred from the legislator to the judge.[1] However, connected to this observation that the judge is unfettered by a system of rules is the refusal to spell out the direction in which he ought to develop the law, so that those conceptions would not provide any guidance for the resolution of hard cases.

Similarly, we will not take into account the work of critical legal scholars who, building on the work of legal realists, have developed an extensive array of arguments concluding that law is radically indeterminate, incoherent, and contradictory. If those arguments are valid, they may raise serious doubts about the possibility of legitimate, nonarbitrary legal systems and adjudicative procedures.[1]

The interstitial legislator model, in contrast, recognises that judges are subject to limitations which do not affect legislators. For this model

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[1]cf. W. Friedmann, Legal philosophy and judicial lawmaking (1961)61 Columbia Law Review 821 at p.822.

[1]see for a recent account and criticism of this thesis K. Kress, Legal indeterminacy (1989)77 California Law Review 283.

the question arises as to what these limitations are. Do they only consist of the legal rules and is the judge free when these run out, or is he obliged to refer to certain kinds of reasons and arguments? Should the judge legislate as though he himself were the legislator, or should he legislate as he thinks the actual legislature would legislate, or should he give effect to a consensus of values in the community at large?

8.1.1 The complete freedom to decide

According to Kelsen's Pure Theory of Law a judicial decision usually creates an individual norm whereas the act of the legislator creates a general norm. The act by which the individual norm of judicial decision is created is usually predetermined by general norms of formal and material law.[5] As for the judge every case is a hard one both, the judge and the legislator create law, but the legislator is much freer in creating law then the judge, because the constraint exercised by the constitution upon the legislator is not as strong as the constraint exercised for instance by a statute upon the judge who has to apply this statute.[6]

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[5]H. Kelsen, Pure theory of law, Berkeley 1967 at p.242.

[6]ibid., p.353.

However, there are two exceptions to the usual case that a court's decision creates an individual norm applying a general norm.

Firstly, courts may be authorized to create not only individual norms within the framework of the general norms created by the legislative organ but also individual norms outside this framework. For instance, in cases of gaps[7] where the court considers the lack of a general norm as unjust or inequitable, that is, 'unsatisfactory', it may create an individual legal norm whose content is in no way predetermined by a general legal norm created by legislation or custom.[8] In this case the judge applies the norm which authorizes the court to create new law. The court-created individual norm which is valid only for the single, present case, is, according to Kelsen, justifiable only as application of a non-positive, general norm which the court considers desirable and which the positive legislator failed to create. In such a case, Kelsen stipulates, the discretion of the court is as unlimited as that which the constitution

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[7]see also the discussion above under section 6.2.2 at pp. 99ff.

[8]Kelsen, op. cit. supra n.5, p.244.

ordinarily allows the legislator in creating general legal norms.[9]

The second exception is the authorization of the court to create general legal norms in the form of precedential decisions.[10] In those cases the legislative function is decentralized so that the courts compete with the legislative organ established by the constitution.[11]

In the usual case where courts apply a general norm, the establishment of the individual norm, so far as it takes place within the framework of the legal norm to be applied, is free, that is, within the discretion of the judge.[12] It is not an act of cognition but an act of will by which the law-applying organ chooses between the possibilities shown by cognitive interpretation. Thus, every time a decision is made, there has been a choice, an arbitrary choice, since it stems directly or indirectly from the will and

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[9]ibid., p.244.

[10]see also under section 6.2.1 at p.91.

[11]Kelsen, op. cit. supra n.5, p.251.

[12]ibid., p.354.

not from reason, as, according to Kelsen, human reason does not choose.[13]

The judge's decision is legitimized by another norm authorizing the judicial decision and the validity of this norm can be derived from other rules which can finally be traced back to the basic norm. As has been stated,[14] according to the Pure Theory every case is a hard case and so the judge must make law in every case with the specification that if he is authorized to fill a gap his discretion is less limited than it is in other cases. However, Kelsen refuses to indicate the direction in which the law-making process should go and whether the decision should be made on the basis of hunch, or natural law commands, or other requirements,[15] so that the Pure Theory provides no guidance for the judge in the actual application of the law.[16] Additionally it has to be said that Kelsen expressly disclaimed

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[13]see for this aspect A. Wilson, The imperative fallacy in Kelsen's theory (1981)44 Modern Law Review 270, at p.279.

[14]see under section 6.2.1 at p. 93.

[15]cf. Friedmann, op. cit. supra n.3, p.822.

[16]cf. R.W.M. Dias, Jurisprudence, 4th. ed., London 1976, p.510.

providing guidance in the form of value considerations of one sort or another.[17]

In contrast to Kelsen we learn from Hart that a discretionary decision in hard cases is not necessarily arbitrary or irrational.[18] He claims that:

> "cases for decision do not arise in a vacuum but in the course of the operation of a working body of rules, an operation in which a multiplicity of diverse considerations are continuously recognized as good reasons for a decision. These include a wide variety of individual and social interests, social and political aims, and standards of morality and justice; and they may be formulated in general terms as principles, policies and standards."[19]

Similarly, other studies of rules and rule-guided choices yield the result that decisions ideally rest in the last resort upon deference to preferred weighings between rival purposes and policies although, it is admitted that in numerous instances there may be none to defer to.[20]

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[17]Kelsen, op. cit. supra n.5, p.1.

[18]H.L.A. Hart, The concept of law, Oxford 1961, p.124 and Problems of the philosophy of law, in: Essays in jurisprudence and philosophy, Oxford 1983 (Essay 3, pp.88ff.) at p.106.

[19]idem., Essays (supra n.18), p.107.

[20]cf. G. Gottlieb, The logic of choice, London 1968, p .172.

However, those discussions leave open questions about the foundations of preferred weighings, and the only conclusion drawn is that the criticism which makes decisions sound in hard cases is some concept of what the law ought to be.[11] But further implications as to the rationality of a decision are not made and, thus, left to the discretion of the judge, who is free to decide hard cases according to his choice.

Returning to the case of Spartan Steel and Alloys Ltd. v. Martin and Co. we are confronted with the question as to what rule or doctrine among rival possibilities governs the case. No statute applies to the matter in hand, and according to our analysis there are precedents and legal doctrines which lead into opposite directions. For positivists such as Kelsen or Hart the judge's decision in a hard case is necessarily norm-creating, since it involves answering the question 'what is to be the governing rule for such a case?' As there is no uniquely correct answer all three judgements given in Spartan Steel are within the permissible bound of judicial discretion, and, according to the theories presented in this section, the opposite

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[11]cf. H.L.A. Hart, Positivism and the separation of law and morals (1958)71 Harvard Law Review 593, at p.608.

outcome would have been as legitimate as the actual result.

8.1.2 Freedom of choice within bounds

Hart's indication that the decision-making process in hard cases may not be arbitrary has been further elaborated by Raz and MacCormick who are, unlike Hart, concerned with questions of the limits of the court's discretion in cases of unsettled law.

Raz claims that judicial discretion is not arbitrary judgement and that courts are never allowed to act arbitrarily, but that they are legally bound to act as they think is best according to their beliefs and values.[11] Thus, each judge is entitled to follow different reasons but he must believe that they are the best, because an arbitrary judgement like tossing a coin, for instance, would be a violation of a legal duty. Raz derives the thesis that in their law-making judges do rely and should rely on their own moral judgement from the circumstances under which the courts operate. Those circumstances impose certain moral requirements

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[11]J. Raz, Legal principles and the limits of law (1972)81 Yale Law Journal 823 at p.847.

on them which do not apply to legislators."[11] Raz characterizes those circumstances as the fact that much of judicial law-making concerns filling in gaps within existing legal frameworks, and modifying rules while preserving the main part of their rationale through distinguishing. Moreover, most law-making decisions are concerned with extending existing doctrines adjusting them to gradually changing conditions, so that existing principles limit the range of considerations taken into account."[12]

However, Raz does not specify this thesis which, therefore, remains very vague. Particularly the argument that the judge's own moral judgement confines the court's discretion to certain limits which do not apply to legislators may contain an empirical truth, but it does not lead much further concerning the determination of bounds to judicial choice-making in hard cases.

Such constraints have been expressed in a more concrete form by MacCormick who stipulates that judicial decisions ought to consist of arguments

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[11] idem., Law and value in adjudication, in: The authority of law, Oxford 1979, (Essay 10, pp.180ff), at pp.199 and 200.

[12] ibid., p.200 and Legal principles (supra n.22), p.846.

of consequences, of coherence, and of consistency.

The requirement of consistency means that no ruling can be acceptable which contradicts any previously established rule of law which is binding for that court.[11] Furthermore, a ruling must be coherent with the rest of the system, which is an attempt to secure a value-coherence within the legal system and to delimit the field within which judicial law-making is legitimate.[12] To be coherent a judgement must be shown to be supported by relevant principles of the system, for example by means of deriving it from the existing body of the law by analogical reasoning. The principles which authorize the ruling and secure the coherence of the legal system can, according to MacCormick, on the one hand be found in the broad statements of general norms by previous judges and doctrinal writers. On the other hand they are made by 'making sense' of the rules and precedents showing that there is some value which is advanced by adherence to the rules

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[11]D.N. MacCormick, Legal reasoning and legal theory, Oxford 1978, Ch. VIII, pp.195ff. and Legal right and social democracy, Oxford 1982, at p.137.

[12]idem., Legal reasoning (supra n.25), p.153 and Legal right (supra n.25), p.137.

in question.[17] Finally, MacCormick argues, consequentialist arguments do normally and should come into play where various alternative rulings are open to the judge, because they are all in coherence with the legal system.[18] The evaluation of consequences comprises such concepts as justice, common sense, or public policy. At this level of argument the judge is free in making up his mind one way or another by reference to his conception of justice, common sense, or public policy.[19]

Thus, MacCormick refuses to accept criteria providing a basis whereby one can judge one concept as better than another, so that within the bounds of consistency and coherence the judge is free to evaluate which consequences are decisive for the solution of a hard case.

In Spartan Steel both rulings for and against the plaintiff could be made consistently with the pre-established rules, and also adequately supported by principles. Spartan Steel whose supply of power was cut off could have appealed

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[17] idem., Legal right (supra n.25), p.137.

[18] idem., Legal reasoning (supra n.25), Ch. VI, pp.129ff. and Legal right (supra n.25), p.138.

[19] idem., Legal right (supra n.25), p.139.

to the general principle that everyone ought to take reasonable care to avoid inflicting foreseeable harm on others. Consequently, the defendants should be held liable for such harm as is caused by failure to take reasonable care. Whereas the contractor could have adduced principles which have been enunciated as restricting the possible range of liability for negligent acts, particularly the principle that the duty of care is owed only to those upon whom one's acts may foreseeably inflict physical harm.[10] Thus, according to the theories treated in this section, the judge would be free to make up his mind on the basis of the possible consequences of the outcome of the litigation in the manner Lord Denning dealt with the case.

8.1.3 Goals as guidelines

The consideration of the consequences of a decision leads to the question whether these ought to be based on goals or on rights. A requirement is right-based when generated by a concern for some individual interest and goal-based when propagated by the desire to further

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[10] see for the elaboration of those principles, MacCormick, Legal right (supra n.25), p.138.

something taken to be of interest to the community as a whole.[11]

Goal reasons derive their force from predicted decisional effects that purportedly serve good social goals.[12] Good social goals are, for example, 'general safety', 'public health', 'community welfare' such as decent housing standards, or 'promotion of family harmony'. Goal reasons are future-regarding and very persuasive as they implicate such values as safety, health, peace, environment, or voter participation.

One type of goal reasons are utilitarian goals which are defined by reference to the greatest happiness of the greatest number of people. Although utilitarian goals are still referred to by the judiciary and also regarded as worth pursuing and legitimate in judicial decisions,[13]

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[11]cf. Lord Lloyd of Hampstead and M.D.A. Freeman, Lloyd's introduction to jurisprudence, 5th. ed., London 1985, p.433.

[12]cf. R. Summers, Two types of substantive reasons: the core of a theory of common-law justification (1978)63 Cornell Law Review 707 at p.717.

[13]cf. K. Greenawalt, Discretion and judicial decision: the elusive quest for the fetters that bind the judge (1975)75 Columbia Law Review 359 at p.393; Kress, op. cit. supra n.4, p.283; Summers, op. cit. supra n.32, p.751.

Hart, stipulates that there is a growing unpopularity of utilitarianism and a transition in moral, political, and legal philosophy from the faith that the truth must lie with the maximization of average general welfare to a new belief in a doctrine of basic human rights.[11] The legitimacy of goal reasons and particularly of utilitarianism faces two main objections. Firstly, it is argued that goal-based theories necessarily sacrifice the individual to the common good, and, secondly, that judges without being elected, must not weigh goals as those call for the exercise of the democratic will which is a legislative function.[12]

However, hardly anyone adheres to the exclusive consideration of social goals in order to justify a decision. They are often regarded as one type of reason employed in the justification process, so that the evaluation of goal reasons does not exclude the consideration of rights.[13] Thus, social goals may serve as one type in a typology of potentially relevant reasons which can help a judge as a guide for the grasp and evaluation of

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[11]cf. Hart, Between utility and rights in: Essays (supra n.18), Essay 9, pp.198ff.

[12]ibid., p.202; and R. Dworkin, Taking rights seriously, London 1977, pp.94ff.

[13]cf. Summers, op. cit. supra n.32, p.751.

consequentialist arguments in hard cases. How much force such arguments have in the particular case and against other arguments depends on the evaluation of the judge.

With regard to the expectations of the outcome of Spartan Steel one may argue that a ruling in favour of the recovery of economic loss would result in a flood of claims for economic loss concerning figures which are incalculable for the defendants. This would be too extensive and too catastrophic for the economic development to be acceptable. Instead, one may stipulate that the firm, of which the production has been interrupted by the defendant, can calculate the losses involved more easily and therefore also compensate for the disruptions more easily. Thus, the loss of the plaintiff may be regarded as less severe for the economic development because economic prosperity as a whole will be served better when people try to make up the economic loss by doing more work next day. Lord Denning supported this community attitude as a good social goal arguing that, "This is a healthy attitude which the law ought to encourage."[11]

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[11]in: Spartan Steel and Alloys Ltd. v. Martin and Co. [1973]1 QB 27, at p.38.

8.1.4 Consensus as guideline

Another model argues that while in clear cases the law determines the result, the judge ought to rely on the community consensus in hard cases as an objective factor to reduce arbitrariness. Instead of deciding according to his own beliefs and values the judge ought to give effect to those values which most conform to the consensus of values in the community at large.[11]

For this operation, Lord Devlin, who is one of the main exponents of this view, distinguishes between three categories of cases: cases in which the view of the public is all one way; subject-matters on which the public holds differing views; and cases in which the public is indifferent. For the first category of cases he welcomes judicial activism and law-making in the common law, but not in statute law, in order to put the consensus into the law. With regard to statute law Lord Devlin claims that judges must not do anything but interpret and apply the statute by means of abstract logic, because it must be presumed that Parliament has on the

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[11]cf. Lord Devlin, The judge, Oxford 1981, Ch. 1 and see also for the role of lobbies, pressure and minority groups etc. in a society and their contribution to judicial policy-making, P. Weiler, Two models of judicial decision-making (1968)46 Canadian Bar Review 406.

subject it is dealing with said all that it wanted to say. As an illustration for the first category Lord Devlin gives the case of a man who wants to recover damages from a friend who has given bed and breakfast to his deserting wife. In such a case, he argues, the judiciary would give effect to the community consensus and reject the claim for damages. In highly controversial cases, such as mercy-killing, he stipulates that the judiciary ought to refrain from creativity and leave the decision to the legislator. For the third category, which forms the majority of cases, Lord Devlin assumes that when the public is indifferent on a subject it is willing to leave the decision to the judges, provided that "they do it in the traditional way", which means in accordance with precedent.[11] However, he does not indicate in which direction judicial activism in hard cases of this category should go.

The legitimation of the consensus model lies in arguments about the nature of adjudication and about the place of the judiciary in a democracy. Lord Devlin regards the role of the judge as one of an independent arbitrator. In order to be accepted as such by all the parties to a dispute he must not take sides on controversial issues.

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[11]Lord Devlin, op. cit. supra n.38, p.9-11.

He must be impartial or at least give the appearance of impartiality required of an adjudicator. The judicial function is merely to keep the legal standards in step with the current consensus.[10] The legislator, in contrast, is not bound by these limitations and may also introduce controversial statutes without an existing consensus in society because the legislature is legitimated by election. As the judges are not elected representatives their decisions have to be legitimized by the law in clear cases or by content in hard cases. Once the judge steps beyond consensus in a hard case there is no legitimation of the decision and judicial-lawmaking becomes undemocratic.

The consensus model faces three main points of criticism. The first concerns the ability of the judge to be aware of current attitudes in the community and to seek them out.[11]

The second major criticism questions the notions of impartiality and neutrality of the judge. Griffith in particular stipulates that judges have by their education and training and the

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[10]ibid., p.1.

[11]see for a comparison the similar criticism of the topical approach under section 4.3 at p.64.

pursuit of their profession as barristers, acquired a strikingly homogeneous collection of attitudes, beliefs and principles which is necessarily conservative."[41] Moreover, he claims that the judicial function is to support the institutions of government as established by law. Therefore, fulfilling their task in this political structure they cannot be politically neutral, and thus, the notion of impartiality is only a myth."[42] This criticism also affects the employment of utilitarian goals discussed in the previous section. Griffith does not claim that judges act in their own interest or in the interest of their class, but their interpretation of what is in the public interest and therefore politically desirable is, according to his analysis, determined by their views and positions which are necessarily conservative and not impartial."[43] However, besides destroying the myth of neutrality Griffith does not provide a prescription for the solution of hard cases.

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[41]J.A.G. Griffith, The politics of the judiciary, 3rd. ed., Glasgow 1985, p.198 and 225, this issue is also admitted by Lord Devlin, op. cit. supra n.38, at p.15.

[42]Griffith, op. cit. supra n.42, pp.195 and 235.

[43]ibid., pp.222-223.

Finally, the consensus model leaves unanswered the question of how the judge ought to decide in a controversial case that comes before court. The decision cannot always be left for the legislature, and when the court has to decide a hard case where there is neither a consensus available nor a clear status quo of public opinion which has prevailed until the issue became controversial, one may assume that the judge seeks for the decision with the greatest possible support in society. However, it shows that the judge cannot always escape political or social controversy.

According to Lord Devlin's view the issue in Spartan Steel would be considered as a subject on which the public is indifferent. In such cases the consensus model does not provide any guidance, so that the judge is free to decide subject to the requirement to "do it in the traditional way".

8.2 Natural law theories and rights model

As we have seen there is always a degree of discretion for the judge in hard cases according to the interstitial legislator model of adjudication. The different notions vary from stipulating the arbitrariness of the decision and

the complete freedom of choice, over notions of consistency and coherence of rules and values, to the advice to employ certain kinds of arguments or to incorporate certain community values and views. Despite these guidelines and however strict they are one may conclude that according to the interstitial legislator model there is always a field where the judge is free concerning the evaluation of arguments or consequences and where there is no compelling substantive authority to refer to. This may lead to the somewhat resigned view of Harris[11] that in hard cases the judge remains confronted with the fearsome burden of choice relying on some 'mix' of models of legal rationality.[12]

Different notions of rationality and legitimation of judicial decisions in hard cases can be found among adherents of theories which provide stricter guidance than the interstitial legislator model and less or no freedom to decide. Such theories are either based on natural law theories following an objective legal

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[11]J.W. Harris, Unger's critique of formalism in legal reasoning: Hero, Hercules, and Humdrum (1989)52 Modern Law Review 42, at pp.55-57 and 62.

[12]see for his four models of legal rationality, Harris, Law and legal science, Oxford 1979, pp.132ff.

order or on theories about discoverable rights of the contesting parties. However, only a few natural law theorists provide a theory of adjudication which deals with the consequences of their approach for the particular decision.[11]

In the following sections we will briefly indicate the unpopular belief of the declaratory theory (under section 8.2.1) as background to contemporary theories which allow the judge a more or lesser degree of discretion within the bounds of an objective moral order (under section 8.2.2) or which offer rights as guidelines in order to determine one right answer with reference to principles of the 'critical cultural community' (under section 8.2.3).

8.2.1 No freedom to decide

The declaratory theory of law is usually associated with Blackstone who adhered to the classical natural law doctrine that the positive law derives its binding force from natural law which is willed by God and discoverable by

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[11] e.g. J. Finnis, Natural law and natural rights, Oxford 1980 does not explain the applicability of his approach in the concrete case.

reason."[48] Thus, the judge does not make the law but he merely finds it and declares it like a 'living oracle'. However, the declaratory theory is not necessarily determined by a divine or metaphysical origin. It may also be based on notions such as that there are principles of nature which are immanent in any community. In any case judicial decisions are regarded as direct applications of existing law or deductions from some existing principles, and the decision depends on the ability of the judge to find the law. The declaratory theory has fallen into disrepute through the criticism of Bentham and other positivists.[49] However, we will see at a later point that there are noticeable similarities between this model and Dworkin's rights thesis.

We cannot demonstrate the result of such a theory in the Spartan Steel case. However, one can say that according to the declaratory theory only one decision can be accepted as being in accordance with the existing law, and dissenting opinions

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[48]W. Blackstone, Commentaries on the laws of England, Vol. I; reprint of the first edition of 1765, London 1966, Introduction, section II.

[49]nevertheless, Atiyah, op. cit. supra n.1, p.347 argues that the declaratory theory is still frequently 'invoked' by the English judiciary, particularly in pronouncements on the bench.

can only occur as disagreements about what the law is but not about what it ought to be, because they can only arise from the different skills and capacities of the judges to find the law. In particular, Lord Denning's judgement that the decision was a matter of policy would be unacceptable for adherents of the declaratory theory.

8.2.2 Freedom within the bounds of an objective moral order

Natural law theories do not necessarily imply that every single decision is predetermined by an existing order as the declaratory theory claims. According to some natural law concepts courts can have discretion to resolve a hard case in different ways within the guidelines and limitations of an order that can be discovered.

Such a 'most moderate'[50] form of a natural law theory which has as its fundamental tenet an affirmation of the role of human reason has been developed by Lon Fuller. However, as Fuller never sought to develop a general theory of the nature, kinds, and limits of legal reasoning, the

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[50]cf. L. Fuller, Anatomy of the law, New York, Washington, London 1968, p.116.

implications of his conception remain very vague."

Fuller argues that a sharp distinction between legal and 'extra-legal' materials cannot be maintained, and that courts often decide on moral reasons." For instance, if a statute is unclear or becomes out of date Fuller claims that one ought to refer to the objective purpose of the statute." Fuller states that when rules are treated in terms of their purposes, 'is' and 'ought' inevitably get mixed. This process involves replacing the legislator's original intent with a new objective intent which depends on the interpreter's notion of what purpose the rule ought to serve.

However, Fuller argues that one must not overstate the role rationality can play in human affairs, and that often borderline cases can, with equal rationality or irrationality, be decided either way:"

"cf. R. Summers, Lon L. Fuller, London 1984, p.114.

"Fuller, The law in quest of itself, Boston 1940, p.136.

"idem., Positivism and fidelity to law - a reply to Professor Hart (1958)71 Harvard Law Review 630 at pp.669ff.

"idem., Anatomy (supra n.50), p.116.

> "So on a large scale when courts seem to be choosing among various recognized 'sources of law' - precedent, business custom, learned treatises, received conceptions of morality - the really determinative choice may simply be: Which rule is best? Which rule most closely respects the facts of men's social existence and tends most to promote an effective and satisfactory life in common?"[15]

Fuller, nevertheless, refers to some objective criteria in connection with the 'relevant considerations' that can be discovered. He calls them 'principles of sound social architecture'[16] which are "external criteria, found in the conditions required for successful group living",[17] and which furnish some standard against which the rightness of a decision should be measured. We are not told precisely what these principles which lie in the 'nature of things' are, and Fuller designates only one such principle of substantive natural law, namely communication as an essential of social ordering.[18] Thus, in hard cases judges must discover and respect the inner order and integrity of such basic forms of social ordering as contract, legislation, and adjudication

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[15]idem., Reason and fiat in case law (1946)59 Harvard Law Review 376 at p.381.

[16]idem., Anatomy (supra n.50), p.116.

[17]idem., Reason and fiat (supra n.55), p.379.

[18]idem., The morality of law, New Haven and London 1964, p.186.

itself. Judges who fail to do this will make unsound decisions.

One may conclude that, according to Fuller, the judge has considerable freedom to decide hard cases within the bounds of the nature of things which provide a (very vague) scale of 'relative rationality'.[59]

The conception of social ordering has been elaborated further and provided with a theory of adjudication by Beyleveld and Brownsword who stipulate that conceiving social ordering in terms of practical reason presupposes moral reason.[60] They define moral reason in terms of Gewirth's 'moral absolutism' claiming that anyone who acts is committed to a supreme moral principle specifying absolute human rights.[61] This objective and absolute rather than relative principle is referred to as the 'Principle of Generic Consistency (the PGC)'. It states that one should act in accord with the generic rights of one's recipients as well as oneself.[62] Generic

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[59]idem., Anatomy (supra n.50), p.117.

[60]D. Beyleveld and R. Brownsword, Law as a moral judgement, London 1986, p.126.

[61]ibid., p.129.

[62]ibid., p.133.

rights are the rights to freedom and well-being, and every agent must hold these rights because they are the necessary conditions of his acting."[11] From this it follows that:

> "Every agent, on pain of contradicting his status as an agent and hence of irrationality, must accept the PGC as governing all his interpersonal actions. The PGC is a principle to which every agent is logically committed, irrespective of his purposes, of what he actually happens to think is good or right (in either moral or amoral senses), simply by conceiving of himself as a prospective agent with purposes. It is thus the principle against which the moral status of all action is to be judged. All actions are morally obligatory which, given the circumstances, are required by the PGC. All actions are morally wrong if they contradict the PGC; and all actions are morally optional if they are neither required by, nor contradict what is required by, the PGC."[12]

For the adjudicative process this means that the participants attempt sincerely and seriously to produce the correct legal-moral determination of the issue as dictated by the PGC.[13] In order to be valid, however, a decision need not necessarily be the right one, but it must be 'rationally defensible' in accordance with the

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[11] A. Gewirth, Human rights, Chicago 1982, p.20.

[12] Beyleveld and Brownsword, op. cit. supra n.60, p.133.

[13] ibid., p.390.

PGC, which requires reasonable competence and a serious attempt to apply the PGC.[66] Thus, in contrast to Dworkin's superhuman judge, Hercules, the concept of a judge according to Beyleveld and Brownsword is one where the judge attempts to emulate Hercules.[67] The judge must apply the PGC as a guiding moral principle equally for easy and hard cases,[68] which implies that he is authorized to reject 'unjust' rules, namely rules not in compliance with the PGC.[69]

Beyleveld and Brownsword assert that the PGC can resolve directly the problem of which actions are optional, or obligatory, or prohibited, but it cannot resolve directly the problem of which of optional, but incompatible, behaviour is to be pursued. In order to resolve such conflicts the PGC delegates authority. Thus, title to decide what is optional, or obligatory, or prohibited is not title to invent what falls into these categories. It is only title to attempt to find the right answer to these questions. Whereas title to decide which of two or more optional courses of behaviour is to be made obligatory is

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[66] ibid., pp.386 and 387.

[67] ibid., p.436, note 27.

[68] ibid., p.436.

[69] ibid., p.439.

'strong discretion', because there is no right answer, deducible from the PGC, to the question of which is to be pursued.[70] This does not mean that the judge is free to posit any rule whatsoever, but he is free within the options left open by the PGC.

Returning to our example we must examine how to decide Spartan Steel in accordance with the PGC. This confronts us with difficulties in an economic loss case like Spartan Steel because one cannot easily reduce the issue in question to the generic rights of freedom and well-being, and derive a concrete solution from an abstract principle belonging to the family of egalitarian principles, such as 'Love Thy Neighbours as Thyself'; 'Treat others as you would have them treat you', or Kant's Categorical Imperative - 'Act only on that maxim through which you can at the same time will that it should become a universal law.'[71]

However, one may say that arguments such as the risk of fictitious claims and expensive litigation, or the difficulties of disproving the alleged cause and effect which were made by Lord

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[70]ibid., p.179.

[71]cf. ibid., p.141.

Denning would not be in accordance with the PGC, as they are not related to the generic rights of the parties, but rather refer to their enforceability and the efficiency of the courts and the judicial machinery. Whereas arguments of the kind that the consequences of a successful economic loss claim may spell disaster for the negligent party, so that it should be suffered by the whole community (which was also put forward by Lord Denning) seem to be more in accordance with the generic rights of a recipient. In any case one can say that the decision is rationally defensible insofar as the judges in Spartan Steel sincerely and seriously believed to be in line with the PGC."[11]

8.2.3 Rights as guidelines

According to Dworkin's rights thesis judges do and ought to decide hard cases[12] according to the rights of the contesting parties."[13] In contrast to goals which are taken to be of interest to the community as a whole, rights are generated by a

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[11]cf. the discussion of Dockers' Labour Club and Institute Ltd. v. Race Relations Board (1976) in: Beyleveld and Brownsword, op. cit. supra n.60, pp.404-406.

[12]as we have pointed out above under section 6.3 at p.109clear and hard cases are according to Dworkin decided in the same fashion.

[13]Dworkin, Taking rights (supra n.35), pp.90ff.

concern for some individual interest. So, for example, the right to freedom of speech and, most important, the right to equal treatment and respect. According to Dworkin, rights are generated by principles whereas goals are generated by policies.[15] He claims that judges are not expected to consider policies and weigh utilitarian goals about the collective welfare when deciding points of unestablished law. Value-judgements of this kind are for the legislature and executive alone, but not for courts which consist of a non-elected body of judges. Their function is to protect and enforce rights. Deciding according to policies instead, is in effect legislating retroactively. Therefore, rights are also characterized as past-regarding or present-regarding, and goals as future-regarding.[16]

Moreover, Dworkin takes rights to be 'trumps' which individuals hold over decisions of policy.[17] They can outplay arguments based on the collective welfare and protect minority groups against majority action and pressure. While

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[15]ibid., p.90.

[16]cf. Summers, Substantive reasons (supra n.32), p.721.

[17]R. Dworkin, Law's empire, Cambridge, Mass. 1986, p.223.

elected representative bodies determine what is good for the community as a whole, allowing judges to decide cases according to collective welfare considerations would jeopardize the protection by means of rights.

The legal rights of the parties which coincide with what the law is in the particular dispute are ascertainable by applying principles belonging to the theory of political morality which provides the best justification for the settled institutional materials. Thus, rights are discoverable from the body of existing law according to notions of 'law as integrity' and 'institutional fit'. This means that principles may be decisive in some cases, but not in others, depending on their weight. One such principle is, for example, that 'no person shall profit from his own wrong.' These principles cannot be explained by reference to formal source-orientated criteria of validity, and Dworkin refuses to accept such a rule of recognition."[11]

> "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural

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[11]R. Sartorius, Individual conduct and social norms, Encino and Belmont 1975, pp.181-210 has developed a theory which is very similar to Dworkin's rights thesis, but he seeks to identify the relevant principles by something quite like Hart's ultimate rule of recognition.

> due process that provide the best constructive interpretation of the community's legal practice",[79] and integrity "demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation."[80]

This also authorizes the judge to treat some of the settled law as mistaken.[81] Thus, Dworkin does not stipulate that rights exist objectively being generated by an objective order of values. Instead rights are created by people who have the responsibility to fit the particular judgements on which they act into a coherent program of action.[82]

In hard cases, Dworkin's theory requires the judge to work out a coherent political morality which justifies the rules and principles of law. This 'institutional morality', which is presupposed by the law and institutions of the community, is then applied to the resolution of the case.

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[79]Dworkin, Law's empire (supra n.77), p.225.

[80]ibid., p.219.

[81]idem., Taking rights (supra n.35), pp.118-123.

[82]ibid., p.160.

Problems arise when both parties before the court have rights and when these rights conflict. In such a case the judge has to weigh rights and to decide which one 'pulls strongest'. However strong the rights of each party are, according to Dworkin there is always one right answer[11] to every problem, and the correct legal answer is the one which provides the closest fit with existing rules and the whole existing body of law. Of course, only Hercules can find this answer, but ordinary judges ought to try to find it. Thus, judges do not have 'strong' discretion, such that there is no binding material in play, in what they decide, but they only have discretion in a 'weak' sense to judge what the law comes to."[12] Consequently judges do not and must not legislate. Dworkin's attack on (strong) discretion and his assertion that the law is a seamless web have usually been interpreted as being reminiscent of the discredited declaratory theory as according to

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[11]ibid., pp.104 and 115 and in: No right answer?, in: Law, morality, and society, ed. by P. Hacker and J. Raz, Oxford 1977, pp.58ff., at p.84.

[12]idem., Taking rights (supra n.35), pp.68ff.

both models judges should merely act on what they think the law already is.[84]

The main objection to Dworkin's rights thesis concerns the weakness of its descriptive account. It has been argued that judges actually do decide according to policies and not only according to principles.[85] However, this criticism does not affect the normative account of Dworkin's theory.[86]

Furthermore, it has been argued that Hercules is unreal and thus can never exist, so that the rights thesis does not provide much guidance for the ordinary every-day judge.[87] Moreover, critics

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[84]cf. Hart, Essays (supra n.18), p.154; Lord Lloyd of Hampstead and M.D.A. Freeman, op. cit. supra n.31, p.1129; A. Hutchinson and J. Wakefield, A hard look at 'Hard cases': the nightmare of a noble dreamer (1982)2 Oxford Journal of Legal Studies 86, at p.90; but Dworkin seems to refute this interpretation in Law's empire (supra n.77), at p.225: "So law as integrity rejects as unhelpful the ancient question whether judges find or invent law; we understand legal reasoning, it suggests, only by seeing the sense in which they do both and neither."

[85]cf. Beyleveld and Brownsword, op. cit. supra n.60, p.428; Atiyah, op. cit. supra n.1, p.351; J. Bell, Policy arguments in judicial decisions, Oxford 1983.

[86]cf. Beyleveld and Brownsword, op. cit. supra n.60, p.430.

[87]cf. Harris, Unger's critique (supra n.45), p.63.

claim that it is perfectly possible to construct, as MacCormick has done, a positivist theory of law and adjudication which incorporates principles and notions of coherence and consistency without denying the existence of gaps in the law.[89]

Finally, although they have been regarded as one important type of reasons in judicial decision, the exclusive consideration of rights has been rejected, because it only takes the facts of the particular case into account, whereas it neglects general facts of social causality, and does not provide any 'calculational rationality' such as an economic cost-benefit analysis of a decision.[90]

Dworkin claims that a case like Spartan Steel ought to be decided according to principles and not on policy grounds which had been favoured by Lord Denning in his judgement.[91] Hence, one has to ask what rights do the parties involved have? Either the plaintiff or the defendant has a right to be granted a decision in his favour. Spartan Steel can appeal to the principle that everyone

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[89]cf. Lord Lloyd of Hampstead and Freeman, op. cit. supra n.31, p.413.

[90]cf. Summers, Substantive reasons (supra n.32), p.765.

[91]Dworkin, Taking rights (supra n.35), p.84.

ought to take reasonable care to avoid inflicting foreseeable harm on others, and to be held liable for such harm as is caused by failure to take reasonable care, so that one may say that Spartan Steel has a right not to be harmed and if this is violated a right to damages. Martin, on the other hand, can adduce principles which have been enunciated as restricting the possible range of liability for negligent acts, particularly the principle that the duty of care is owed only to those upon whom one's acts may foreseeably inflict physical harm. Thus, Martin has a right to free action as long as he does not interfere physically with well-being and property of others and therefore he has a right to be absolved from liability. As those rights conflict, they must be weighed. Dworkin assumes that there is always one right which outweighs the other, so that one right can be upheld in preference to the other. It is the judge's task to find out which of the underlying principles pulls stronger according to the community's institutional morality.

9 Comparison with the topical method

Under Chapter 6 we have examined the different notions of hard cases in English legal theory and concluded that they coincide strikingly with what Viehweg called 'points of entry' of the topics into the legal order. At this point we will give a brief restatement of the topical approach to the resolution of such cases in order to compare it with the English models of the judicial role.

According to juristic topics the judge is free in his choice of arguments for the resolution of a hard case as long as the argument is orientated to the problem and useful for its solution. He ought to be guided by catalogues of topoi which support the intuition for the finding of premises, so that he is not dependent on the hunch. In order to rationalize the process of reasoning and to legitimize the decision the final premises have to be adopted by the interlocutor.

This very vague notion of an interlocutor or a legal audience can on the one hand be interpreted as referring to the discursive process of adjudication before court and to the parties

which are involved. On the other hand it may comprise the consensus among the wise, such as judges, jurists etc., or require a general consensus in the community. As the community or legal audience contributes to the judicial decision introducing their views and knowledge into legal discourse, the topics and new rhetoric are called theories of practical reasoning. They assert that, besides empirical proof and logical deduction, legal discourse can be rational by means of such a practical application of reason.

In the following sections we will look at the English models of the judicial role with reference to which arguments they admit for the resolution of hard cases (under section 9.1) and how the decision is legitimized (under section 9.2). Moreover, we will examine the affinity of juristic topics to legal positivism and natural law theories, and consider to what extent they initiated contemporary trends in analytical jurisprudence (under section 9.3).

9.1 Limitation of topoi

In a recent essay Joseph Raz distinguishes between a deliberative and an executive stage of

practical reasoning.[1] In the deliberative stage the question what is to be done is open to argument based on all sorts of considerations, and it is often dominated by reasons of a moral character. So long as the argument is free the executive stage has not been reached. At the executive stage deliberation is excluded and only authoritative positivist considerations are admitted. For instance, when we are considering whether 'to do X' should be an obligation, we are at the deliberative phase of practical reasoning. Once an authoritative decision is taken that 'to do X' is obligatory, further deliberation is excluded. According to Raz courts are guided by considerations belonging to both stages and usually decisions are not made on a 'pure' deliberative or executive stage.[2] In cases where the law is settled courts act as law-appliers employing authoritative and positivist considerations on the executive stage, whereas, according to Raz's analysis, they act as law-makers in cases of unsettled law.

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[1]J. Raz, The problem about the nature of law (1982)3 Contemporary Philosophy 107, at pp.119ff.

[2]ibid., p.121; - a similar analysis has been made by P.S. Atiyah, Judges and policy (1980)15 Israel Law Review 346, at p.353; "Administrative, and political and judicial decision-making all involve similar limited terms of reference."

This distinction between deliberative and executive stages which according to Raz underlies all personal actions as well as social organization corresponds with the topical method. When there is no problem because a case can be solved by means of syllogistic reasoning from existing legal propositions there is hardly deliberation and the case can easily be solved on the executive stage. However, in cases where there is a problem the deliberative stage is dominant and may be equated with topical reasoning. Every argument has to be considered and there is no limitation of topoi until the premises are accepted by the interlocutor. However, according to one version of the interlocutor consideration on the deliberative stage may already be restricted to arguments which are supported by a community consensus. This arises because according to this version the community does not directly participate in the evaluation and choice of premises (e.g. in form of opinion polls), rather the community attitude must be respected by those who choose the premises from the available topoi.

Some theorists such as Kelsen and Hart do not provide a concept of rationality for decisions in hard cases. There is no limitation of arguments

and the judge is free in his decision. Decisions beyond the guidance of rules are regarded as consisting of arbitrary value-judgements. Juristic topics and particularly the new rhetoric reject this notion of arbitrariness in favour of a rational decision.

According to MacCormick legal argument in hard cases ought to be value-coherent. Thus, it must not contradict other values of the legal order which may be expressed in underlying principles and which can be derived from these principles by means of analogical reasoning. The topical approach treats legal principles and analogical reasoning as topoi that should be considered among others. Moreover, value-coherence may be a strong and persuasive topos, but juristic topics do not require value-coherence within a legal system, because it is the primacy of the problem which determines topical argument in the first place.

Furthermore, adherents of the topics would regard both goals and rights as topoi. But as they do not provide a political theory for the justification of decisions, there is no restriction of arguments to either goals or rights. On the contrary the topics try to

provide a typology of possible arguments for legal decision.

As an illustration for such a typology of potentially relevant reasons, and, hence, an illustration for a kind of catalogue of topoi, one may consider Robert Summers' essay: 'Two types of substantive reasons'.[1] Summers aims to 'locate substantive reasons' and the 'place of substantive reasons' within the justification process.[2] He therefore distinguishes between different kinds of reasons, such as 'authority reasons' and 'interpretational reasons', in order to concentrate on 'substantive reasons' which he considers to be the most important of all reasons in common-law cases. He characterizes substantive reasons as reasons that derive their justificatory force from moral, economic, political, institutional or other social considerations.[3] In contrast to that, authority reasons consist primarily of appeals to precedent, statutes, and other authorities, such as treatises, or law review articles. Having made this distinction Summers examines the

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[1]R. Summers, Two types of substantive reasons: the core of a theory of common-law justification (1978)63 Cornell Law Review 707.

[2]ibid., p.714.

[3]ibid., p.716.

construction, evaluation, and legitimacy of substantive reasons, such as 'goal reasons', 'rightness reasons', and 'institutional reasons'. Summers' terminology is not compelling and the opposites goal reasons and rightness reasons could have been labelled with other pairs of terms such as 'forward-looking' and 'backward looking' or 'morality-regarding' and 'welfare-regarding'.[6] These terms may be characterized as topoi which are employed in order to examine the types of reasons that are involved in the process of justifying a judicial decision. Furthermore, the examination is assisted by other topoi, such as definitions, further categorizations (e.g. of goal reasons into 'nonrightness-regarding' and 'rightness-regarding'), comparisons to each other, and numerous examples. Summers' essay is explicitly addressed to judges in order to provide a comprehensive theory of justification, a field in which realist theorists have "let the judges down".[7]

Summers' typology of reasons is not normative and the reasons which are finally adopted to support a decision depend on the evaluation of the judge and his judgement as to the persuasiveness of

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[6]ibid., p.718, n.35.

[7]ibid., p.711.

reasons and their weight against each other (e.g. the weight of a particular social goal). In order to make such a judgement a judge must possess the proficiency to evaluate each element of a potential reason proposed by counsel, fellow judges, law clerks etc.[8] Thus, Summers' essay aims at the same purpose as a catalogue of topoi, namely to back the judge's intuition and to provide relevant viewpoints for the judicial decision.

As far as the rationality of the judicial decision is concerned the consensus model of adjudication is similar to the version of the topical approach which aims to incorporate the whole community into the audience.[9] According to both notions legal argument is restricted to the community consensus. However, as maintained by the consensus model this restriction applies only to the politically controversial cases, whereas according to the topical version every hard case requires the approval of the audience. Neither theory gives an answer to the questions of how judges should discover the relevant community consensus and of how they should decide when there is no consensus at hand.

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[8] ibid., p.743.

[9] see under section 3.4 at pp. 39ff.

Instead of limiting legal argument in hard cases by conceptions of value-coherence or community consensus Fuller lays stress on another notion. He believes that the argument should be orientated to the nature of things. His view is that "when courts seem to be choosing among various recognized 'sources of law' ... the really determinative choice may simply be: Which rule is best? Which rule most clearly respects the facts of men's social existence and tends most to promote an effective and satisfactory life in common."[10] This comes close to Viehweg's idea of how to find justice in a particular case. However, the angle is a different one. While topical argument is orientated to the particular problem, Fuller intends to orientate argument to the nature of things. Both notions may comprise corresponding as well as differing topoi. However, because of the vagueness of the conceptions one cannot determine similarities and differences of the substance of arguments which both notions may favour.

In contrast to that, according to Gewirth and to Beyleveld and Brownsword, the available topoi

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[10]Fuller, Reason and fiat in case law (1946)59 Harvard Law Review 376 at p.381.

must be orientated to and restricted by the Principle of Generic Consistency. Courts have the choice between several topoi when they decide cases in which two or more optional courses of behaviour are incompatible as these problems cannot be resolved directly by reference to the PGC. On the other hand the generic rights of an agent and recipient do not leave a choice of topoi concerning the determination of actions which are morally obligatory or morally wrong.

Finally, the view of the declaratory theory and of Dworkin's rights thesis that there is always one right answer to a legal problem, and the idea of free legal argument are mutually exclusive. When they have no (strong) discretion judges always decide in terms of Raz's analysis on the executive stage as they are not supposed to incorporate their own considerations and values into the process of reasoning. Thus, according to the rights thesis judges do not have a choice of topoi and topical reasoning is excluded.

9.2 Legitimation of the decision

Traditionally, the legitimacy of judicial decisions in hard cases can be traced back to a rule of recognition or to rules of natural law.

According to Kelsen, for instance, the judge is authorized to make a discretionary decision by a rule which determines the decision-making organ. This norm originates with the application of a constitutional provision which in turn may have been created on the authority of an earlier constitution, the validity of which can, in the end, be traced back to the Grundnorm.

Natural law theories, on the other hand, often derive the legitimacy of a decision from an existing objective order of values. This order may be of transcendental origin, such as Blackstone's declaratory theory, or consist of a supreme moral principle such as Gewirth's moral absolutism.

Hence, legal theories traditionally legitimize judicial decision-making without paying tribute to a participation of the community which is affected by the decision-making process.

Juristic topics and the new rhetoric propose a different concept of rationality particularly concerning value-judgements in hard cases. Value-judgements are no longer regarded as arbitrary or as determined by an objective order, but they are at the community's disposal or at

the disposal of the parties before court. Their participation is a requirement for the legitimacy of a decision in a hard case. The judgement must be accepted by the audience in order to be legitimate.

Even apart from the topical approach and the new rhetoric one may observe a change in contemporary legal doctrine which pays increasingly attention to the idea that legal decisions derive their legitimacy from an acceptance by the whole community and that this fact must be taken into account by the judiciary.

As an illustration one may take MacCormick's conceptions of a rule of recognition.[11] He believes that what constitutes criteria of recognition for a legal system is shared acceptance by the judges of that system that their duty is to apply rules identified by reference to them. Judges are judges because there are rules that make them so, and those rules are rules of law because the judges recognize them as such. However, courts are not institutions endowed with legitimacy by their own say so. "They are institutions established

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[11]N. MacCormick, Legal reasoning and legal theory, Oxford 1978, pp.54-55.

(however informally or formally) by a wider community from which they derive their legitimacy and authority as determiners of controversies."[12]

But MacCormick does not derive from this the view that in controversial cases the judge must directly give effect to the community consensus or abstain from a decision in order not to loose his legitimacy as an independent arbiter. Nevertheless one can find a similar notion in MacCormick's discussion of consequentialist arguments. He argues that in hard cases the judge ought to take the common sense into account which he characterizes as "implying the sort of rough contemporary consensus on social values".[13] This is reminiscent of the position of Josef Esser, one of the main exponents of juristic topics who adheres to the same view.[14]

One may also identify this tendency of taking community values of some sort directly or indirectly into account in Dworkin's rights

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[12]ibid., p.55; J. Raz, The concept of a legal system, 2nd. ed., Oxford 1980, at p.199 is more reluctant than MacCormick: "Hence only the behaviour of the officials and not the behaviour of the population as a whole determines whether the rule of recognition exists."

[13]MacCormick, Legal reasoning (supra n.11), p.149.

[14]see under section 3.4 at p. 34.

thesis. According to Dworkin judicial decisions in a hard case should be legitimized by reference to the rights people have. These are derived from principles which give effect to the 'critical cultural morality' of a community. As we have already seen[15] this is a set of rational moral beliefs which may plausibly be attributed to the community as norms which might be employed in an attempt to justify the existing rules and institutions by means of constructing a theory of political morality. Although this theory does not incorporate a community attitude directly, it gives effect to their values indirectly by considering principles which embody community values.

These examples from contemporary legal theory represent a tendency in legal reasoning towards rationalizing judicial decision in hard cases by reference to the community as an audience which must accept the decision. This tendency has been reintroduced into legal reasoning by juristic topics and the new rhetoric.

9.3 Juristic topics between positivism and natural law

[15] see under section 8.2.3 at p. 178.

At an earlier point[16] it was stated that juristic topics are open towards several different concepts of law and that they neither belong to nor derive from positivist or natural law theories. In this section this statement will be explained and it will be shown that the topics are incompatible with many traits of legal positivism and indifferent towards most characteristics of natural law.

In order to grasp the various meanings of legal positivism we refer to Hart's enumeration of its main implications:[17] 1) Laws are commands. 2) There is no necessary connection between law and morals, between law as it is actually laid down and as it ought to be. 3) The analysis of legal concepts is worth pursuing, but distinct from sociological and historical inquiries, and from critical evaluation. 4) A legal system is a closed logical system in which correct decisions can be deduced logically from predetermined rules without reference to social aims, policy or morality. 5) Moral judgements cannot be established or defended, as statements of fact can, by rational argument, evidence, or proof.

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[16]under section 4.3 at p. 65.

[17]H.L.A. Hart, Positivism and the separation of law and morals (1958)71 Harvard Law Review 593, at p.601, n.25.

The last of the five meanings of legal positivism has already been considered in the preceding section and the different notion of rationality employed by juristic topics with regard to value-judgements has been stated. Moreover, it has been established that the topics object to the idea of a closed logical system of law and similar notions of conceptual jurisprudence. Furthermore, a theory of law as commands is incompatible with the view that statutes and other legal rules are non-binding topoi. The view that legal rules are mere guidelines also makes a clear distinction between the law as it is actually laid down and as it ought to be impossible.

Thus, one may conclude that juristic topics reject many of the traditional traits of legal positivism.

In order to examine the affinity of the topics to different meanings of natural law one may refer to five characteristics identified by Dias:[18] 1) The contention of ideals which guide legal development and administration. 2) A basic moral

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[18]R.W.M. Dias, Jurisprudence, 4th. ed., London 1976, p.653.

quality in law which prevents a total separation of the 'is' from the 'ought'. 3) The method of discovering perfect law. 4) The content of perfect law deducible by reason. 5) The conditions sine quibus non for the existence of law.

Juristic topics do not adhere to an objective order of moral values, so that there is no affinity to conceptions of perfect law and the methods of its discovery. In Perelman's, but not Viehweg's, theory one can find the notion of a constant formal element that 'like persons be treated alike'[19] whereas 'likeness' must be specified with the help of considerations of value. This constant formal element may be regarded as an ideal of natural law origin. As far as juristic topics are concerned the only similarity to natural law theories stems from the fact that the topical method does not distinguish between the law as it is and as it ought to be. As we have already shown this leads to an affinity between the topical approach and Fuller's 'most moderate' form of natural law, but as it is not a major characteristic of topical reasoning it does not turn the topics into a method of natural law.

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[19]see under section 4.1 at p. 56.

Using Robert Summers' terminology one may characterize juristic topics as a method of substantive reasoning in contrast to formal reasoning, which lays stress on arguments of substance instead of appealing to authority reasons.[20] An authority reason consists, for example, of an appeal to precedent. According to juristic topics, however, precedent only constitutes a strong and persuasive topos because of the substantive reasons behind the precedent and because of the applicability of further substantive reasons that support the doctrine of precedent.

Juristic topics and the new rhetoric have reintroduced a kind of reasoning into the legal discourse which is opposed to the Cartesian tradition of scientific reasoning and justification by means of deduction. Instead, stress is laid on the idea of practical reasoning.[21] The term practical reasoning comprises several different meanings and conceptions and its most general definition would

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[20]cf. Summers, op. cit. supra n.3, p.724.

[21]see under section 4.1 at p. 56.

be the notion of giving reasons for action[12] in order to justify the action and avoid arbitrariness where deduction is not possible. Thus, it is the aim of theories of practical reasoning to exclude, for example, actions or decisions on psychological grounds such as will.

In the work of MacCormick, Raz, and Finnis one can find more or less precise conceptions of practical reason and discourse which in a broad sense correspond to the notions of legal rationality of juristic topics and the new rhetoric. The idea of practical reasoning has been incorporated in theories of both positivists and natural lawyers.

According to MacCormick practical reason as a focal issue for the philosophy of law grows out of the concern for questions about the possibility of and the limits on legal knowledge.[13] From this one may draw the parallel to juristic topics which claim that topical reasoning starts where certain legal knowledge in form of logical deduction from premises contained

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[12]cf. D. Beyleveld and R. Brownsword, Law as a moral judgement, London 1986, p.124.

[13]N. MacCormick, Contemporary legal philosophy (1983)10 Journal of Law and Society 1, at p.14.

in a legal system ends. Moreover, MacCormick stipulates that practical reasoning implies that there is no single determinate solution uniquely right or reasonable for hard cases, but that there may be equally reasonable views between which choices must be made in specialised procedures of discourse.[14] He points out that practical reasoning in such procedures has necessarily a social context.[15] The role of reason is addressed, for instance, when social change takes place by means of the adjustment and correction and analogical development of an inherited system of rules. In such cases appeal to practical reasons must be made and the reasons offered must be judged by their soundness and weight.[16] This corresponds with the topical method which requires the consideration of all relevant viewpoints for the solution of hard cases and their evaluation and legitimation by the legal audience.

Raz's pursuit of reasons for action is intended to direct attention to the kinds of reasons which are addressed when justifying a decision and which are inherent in a concept of law and legal

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[14] ibid., p.8.

[15] ibid., p.13.

[16] ibid., pp.12-13.

norms.[17] This constitutes a break in legal thought as such reasons for action were usually regarded as external and subject to social pressure once a rule had been established[18] whereas Raz distinguishes between rules or obligations to act and reasons for action.[19] His distinction between what has already been decided and what reasons there are for deciding one way or the other causes problems that are as yet not settled and does not establish a theory of judicial reasoning. However, it is comparable with one of the basic findings of juristic topics concerning the question of where topical thought starts.[20]

According to Finnis' concept of natural law practical reasonableness is one of several basic forms of human good. It comprises the capacity of bringing one's own intelligence to bear effectively on the problems of choosing one's actions and life-style and shaping one's own

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[17]see mainly: J. Raz, Practical reason and norms, London 1975.

[18]cf. H.L.A. Hart, The concept of law, Oxford 1961, pp.85-88.

[19]Raz, op. cit. supra n.27, pp.53-58; see also MacCormick's evaluation of Raz in: Contemporary legal philosophy (supra n.23), p.5 and 6.

[20]see the discussion of this issue under section 9.1 above at pp. 184-186.

character.[31] A basic requirement for practical reasonableness is that a person is both free and responsible, so that he has the choice between commitment to concentration upon one value and commitment to others, and between one project and another. In order to make such a choice one basic form of the good of practical reasonableness is not to leave out of account any good reason for the guidance of one's commitments and the selection of one's projects.[32] Consequently, Finnis claims that practical reasonableness involves a coherent plan of life, no arbitrary preferences amongst values, and no arbitrary preferences amongst persons.[33] According to Finnis law is a primary requirement of the common good and thus a requirement of practical reasonableness. Legal rules and adjudicative institutions are directed to resolve reasonably any of the community's co-ordination problems for the common good of that community, according to a manner and form itself adapted to that common good, e.g. by features of specificity and minimisation of arbitrariness.[34] Hence,

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[31]J. Finnis, Natural law and natural rights, Oxford 1980, p.88.

[32]ibid., p.100.

[33]ibid., pp.103-108.

[34]ibid., pp.276-277.

Finnis stipulates that legal reasoning partly complies with the requirements of the basic good of practical reasonableness.

From the idea of practical reasonableness and its effect on legal reasoning the similarities to topical reasoning become obvious. Particularly, the notions to consider every reasonable argument and to rationalize value-judgements in order to minimize arbitrariness in legal procedures are equivalent in both theories.

In this section it has been shown that the topics reject many of the traditional traits of legal positivism and that they are indifferent towards most characteristics of natural law. More recent trends in analytical jurisprudence seem to supersede the strict difference between legal positivism and natural law[11] incorporating the idea of practical reason and discourse which is also inherent in the topical method and the new rhetoric.

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[11]cf. N. MacCormick, Natural law reconsidered (1981)1 Oxford Journal of Legal Studies 99, at pp.107ff., and Contemporary legal philosophy (supra n.23), p.8.

10 Conclusion

From the presentation of juristic topics we learn that there were two versions of the topics in antiquity. The Aristotelian Topics were mainly concerned with a theory of dialectical reasoning for the universal examination of problems, i.e. reasoning from generally accepted opinions (endoxa), whereas Cicero's interpretation of Aristotle's Topics resulted in a version which supports the process of argumentation by means of rhetorical invention.

Viehweg's legal reception incorporates both versions of the topics. While the aspect of problem thinking which prescribes that all peculiarities of a particular case ought to be considered has more in common with Ciceronian rhetorical invention, the concept of legal rationality of the topical approach seems to follow Aristotelian dialectical reasoning. From the topics discussion in Germany one may draw three main characteristics. Firstly, the topics are a method of problem thinking as opposed to system thinking. They intend to consider all relevant viewpoints for the solution of a particular case. Secondly, they are a method of

finding premises by means of catalogues of topoi, and, thirdly, they provide a concept of legal rationality. This concept of the interlocutor in a discussion takes into account the views of the community which is affected by the decision-making process.

The topics discussion has to be looked at on the background of a counter-movement against Cartesian thought. One of the main theories of this counter-movement is Perelman's new rhetoric. This movement argues that rational decisions can also be achieved in cases where the solution cannot be demonstrated syllogistically by means of logical proof. Thus, decisions which yield plausible or probable results are not necessarily false or arbitrary, but they may produce rational results as well.

Conventional views of the differences between common law and civil law legal thought identify the former to a certain extent with problem thinking and regard the latter as systematical. More recent accounts, however, claim that the differences are diminishing, and that civil law systems do not take less arguments into account than the common law. Moreover, the conflict between justice according to rules and justice in

the particular case, which reflects one issue of the topics discussion, is also subject of discussion in common law legal theories.

Concerning the second characteristic of juristic topics, the examination of the hard case notions in English legal theory, which broadly coincide with Viehweg's points of entry of the topics into a legal order, shows the kinds of cases for which a further concept of rationality is needed, because deduction from existing premises is impossible in these cases. The sources of hard cases are vague or ambiguous rules as a result of the use of common language; the conflict of rules, and anachronistic rules, and gaps in the law.

For the solution of such hard cases there is no theory which is employed consistently throughout the practice of English courts, and different judges have different views about adjudication and the treatment of hard cases. English legal theories describe and prescribe methods for the resolution of hard cases and thus contribute to a phenomenology of law and the process of adjudication.

Concerning the third characteristic of juristic topics, i.e. the question of legitimation and rationality in hard cases, models of the English judicial role vary from concepts which leave the judge the complete freedom to decide to theories which do not allow any discretion. On the one hand there are conceptions which do not deal with legal decisions beyond the guidance of rules and refuse to spell out notions of rationality in hard cases. On the other hand, there are views which intend to bind the court's decision to an objective order of values from which the right solution can be deduced in most cases.

In the Anglo-American legal family there is no reception of the topics which is equivalent to the legal reception in continental and particularly German law. However, the trend towards another form of legal rationality besides the dichotomy of true and false, or logical deduction and arbitrary decision also finds expression in English legal theory. At least some theories incorporate the approval of the interlocutor or the consensus among the legal audience into their concept of rationality in some way or another. This may be embodied in notions about a rough contemporary consensus on social values, or in a majority opinion, or by

reference to basic values of the community which are not at the disposal of the opinion of the day.

This tendency in contemporary legal theory seems to supersede the Cartesian tradition of reasoning, which is inherent in Kelsen's refusal to spell out notions of rationality in hard cases. Instead, stress is laid on the idea of practical reasoning which aims at providing analysis of and guidance for the reasoning involved in the resolution of hard cases.

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