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Legal Reasoning and Interpretation of Justice

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§1. Preliminary Remarks — My Basic View of Legal Reasoning

Legal reasoning is a network of reasons for legal decisions. This network is a complex one: a composite, multilayered, open, and purposive network in which both normative and non-normative propositions are logically connected. This is the essence of my basic view of legal reasoning⁽¹⁾.

Legal reasoning is structured in such a way that not only statutory rules, but also non-statutory practical principles constitute its premises in complying with deductive, teleological, or mixed logical forms. There are also a variety of conditions for applying these rules and principles, which depend to a large extent on the identification of facts in a case. Further, these rules and principles presuppose certain principles at a higher level, which determine the applicability of the lower rules and principles. These higher principles can be supported by even higher principles, which creates a composite and multilayered whole of legal reasoning. This network of legal reasoning becomes a concrete legal justification when it is constructed according to a certain general understanding of the problem at hand, a justificatory purpose, and the identification of a particular case. Thus legal reasoning always has some openness, and is subject to revision to the extent that the understanding, purpose and identification can change.

Next, it is the result of a certain generative process that legal reasoning is established as a complex network of justificatory reasons. Namely, some

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abstract meta-principle should regulate the production of, and determine the structure and configuration of the reasons. If this is so, we have to recognize that a particular network of legal reasoning is generated by a certain dynamic which places a variety of propositions according to this meta-principle.

Generally speaking, reasoning is a variation of thinking as a process of problem-solving. Thinking as problem-solving is understood as a purposive trial-and-error process by which an answer is found by breaking a problem into a set of sub-problems, and finding answers to these sub-problems. In this sense, legal reasoning is a form of justification which utilizes linguistic devices to attain a certain normative objective. In justification, there works a strong negative feedback between the linguistic construction and the normative objective, because justification is strongly related to our evaluation and decision-making. This means that there are pivotal propositions in reasoning which fix the fundamental points to which other propositions are consistently connected. The entire process of legal reasoning is regulated by some goal-oriented meta-principle. But, this meta-principle itself is just a formal one, and does not have its own normative implications.

In addition, legal reasoning is also interpretive. Generally speaking, interpretation is the understanding of text by giving a particular meaning to the text from a certain perspective. Interpretation encompasses human perception and human thinking, and in particular includes the understanding of language and law. When we interpret text, there always works a variety of interpretive hypotheses which are somehow related to our evaluations. Legal interpretation is a kind of interpretation which articulates the meaning of laws and makes the requirements of law concrete, via a variety of hypotheses.

It has been said that legal interpretation tries to capture the meaning of statutory rules and connect the major premises to the minor premises of judicial syllogisms. However, as I have stated above, a variety of interpretive considerations are used in the entire reasoning process: the applicability of statutory rules, the identifiability of facts of the case, the relevancy of argument forms, the applicability of general principles, the adequacy of the conclusion, and the congruence of all these considerations. All of the interpretive conditions

support each other. And, these interpretive conditions authorize legal decisions according to the regulative idea of law⁽²⁾.

I believe this view of legal reasoning is basically correct, though it does have a few limitations.

First, this view tends to grasp the structure of legal reasoning exclusively from a linear standpoint. It focuses solely on a monological structure of legal reasoning. However, a more important problem to be addressed is to find the structure of multidimensional evaluative considerations which at a deeper level produce such a monological construction of reasoning.

Second, this view is not sufficient to capture the structure of evaluative considerations in legal reasoning. What we have to pay attention to here is not the surface structure of reasoning, but rather the balancing structure of evaluation at a deeper level, though, of course, this is not an easy task.

Third, we should not forget the procedural aspect of legal reasoning. In actual judicial decision-making, there are a variety of procedural limitations or requirements such as the necessity of incomplete judgements, elliptical arguments, or issue squeezing⁽³⁾.

In this essay, I will be dealing with the first two problems. The latter one, in particular, is important, because as we clarify it we can also better understand the first problem of multidimensional evaluation.

§2. The Structure of Evaluation for Justificatory Reasons

In order to understand the very structure of evaluation, we should first realize the logical configuration of higher justificatory reasons and their evaluations. This is important because legal decision-making is possible only when there is a relative comparison at a deeper level of the conflicting reasons in each litigant's legal claim in a case. The conflicting reasons of both litigants are regarded as prima facie adequate. If one litigant's claim is apparently inadequate, there arises no problem of relative comparison of conflicting reasons.

The most popular way to make a relative comparison of reasons is the so-

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called interest-balancing method⁽⁴⁾. This method involves analyzing the interests of litigants to decide on an overriding interest. But this method has some serious problems; the criteria of the relevancy of interests to be considered, and also the criteria for selecting an overriding interest are not clearly stated. This suggests that the interest-balancing method needs some evaluative judgements as its prerequisites. However, this is not so important from the viewpoint of our present legal knowledge. Rather, the problem to be pursued is to determine what kind of evaluative judgements we need to perform interest-balancing.

This is a really complex problem, thus it is not so clear how we can tackle it. We have to find the evaluative judgements gradually by trial-and-error; constructing hypotheses, and examining and revising these. I think in a way that the criteria for relative comparisons of conflicting reasons is determined by a value-theoretical ranking among relevant evaluative claims. Of course, I will not deal with the values per se. What I seek to do here is to explicate the evaluative criteria in our ordinary legal reasoning. When I talk about values, I take them in the form of such evaluative criteria, and try to articulate their contents. I think we should not grasp values as having a certain hypostatic existence; values are to be understood as a set of propositions which are the logical basis of evaluative judgements.

Now, formally speaking, the relative comparison of conflicting reasons will be considered in the following way. Let us assume that there are two sets of conflicting reasons, A and B. In this case, the final judgement is given on the basis of higher reasons which can adjudicate the conflicting values presented in A and B. Let us call this higher adjudicative criteria α . Then the conflict of values between A and B can be resolved by the higher value in α . When α resolves conflicting reasons, there are two cases; α supports either A or B (Case 1 below), or α gives some advantage to one over the other (Case 2 below).

$$\begin{array}{l} \text{A vs. B} \quad 1 \quad \alpha > A, \quad \sim B \quad \text{or} \quad \alpha > B, \quad \sim A \\ \quad \quad \quad 2 \quad \alpha > A > B \quad \quad \text{or} \quad \alpha > B > A \end{array}$$

Incidentally, we should be aware that there are two possible views of this relative comparison: that this kind of ordering of values is absolute, or that it is tentative according to cases. This means that each pattern of justification has two versions; an absolute one and a tentative one.

Further, in the same way as above, we can understand the forms of higher comparisons of justificatory reasons, which include the justifications stated above. Let us assume that P and Q are conflicting sets of higher reasons which include the first-order justifications, such as (E, F, G) and (L, M, N) respectively. Then, the pattern of this higher-order adjudication by the criteria α' will be the following. (Case 3 is similar to Case 1, and Case 4 to Case 2.)

$$\begin{array}{l}
 P(E,F,G) \text{ vs. } Q(L,M,N) \quad 3 \quad \alpha' > P, \sim Q \quad \text{or} \quad \alpha' > Q, \sim P \\
 \quad \quad \quad \quad \quad \quad \quad 4 \quad \alpha' > P > Q \quad \text{or} \quad \alpha' > Q > P
 \end{array}$$

Of course, in an actual legal judgement, these kinds of comparisons are axed at a *certain level*. *This level depends on the recognition of concrete problems*⁽⁵⁾.

As for the logical relationship between these value considerations and the concrete form of legal reasoning, I think about it as the following. First, the evaluative comparison of reasons determines the baseline judgement which give a comprehensive starting point for considering a case. Then, the baseline judgement determines the perspective through which relevant statutes, precedents, fact identifications, and other related legal materials are connected consistently and ranked adequately with each other. Once the content of this entire justification is determined, the reasoning is constructed in a logically suitable form. Needless to say, the general logical forms for legal reasoning are the ones I summarized in the previous section. In a nutshell, legal reasoning is determined by and relative to a comparison of values and the ultimate criteria for this comparison. Now I will turn my attention to the nature of these ultimate criteria.

§3. The Significance of Interpretation of Values

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The consideration of justificatory reasons is carried out with reference to higher-order evaluative criteria. The next problem is to determine what kind of significance these higher values have and how they work. However, in probing this problem, I will not deal with the enforceability of these higher values.

Generally speaking, when it is necessary to adjudicate among divergent values, there are two aspects to the evaluation of values: internal evaluation and external evaluation.

Regarding a precise way of performing this adjudication, let us introduce first the concept of value-aspects. Value-aspects are sub-divisions of one value, which together make the coherent whole of value claim. To illustrate, when something legal about the importance of privacy is claimed, the claim can be developed as a mix of some sub-values such as negative freedom, self-determination, governmental neutrality, due process, social desirability, and the importance of some argument forms. These sub-values which together support the importance of privacy in the claim are the value-aspects of privacy. Incidentally, I will represent value-aspects of V as $Vn^{(6)}$.

Then, internal evaluation is concerned with the direct comparison of the significance of values and with the determination of a relative ranking of values based on certain higher criteria. The higher criteria put the divergent value-aspects in order and create a certain priority configuration among them. For example, let us take Case 1 or 2 analyzed in the previous section. When the higher criteria α make an internal evaluation between A and B in favor of, say, A, the working of α is as the following: α picks out the deontological value-aspects A_i to give pivotal weights to them, and accordingly reduces weights from the deontological value-aspects B_i . In particular, the latter reduction is carried out by revising the meaning of B_i , or by attaching some auxiliary hypotheses to change the significance of B_i .

On the other hand, external evaluation is consequential in the following way. Let us assume that there are three groups X, Y, and Z in society with different views regarding some consequential value-aspects A_e : X are in favor of A_e , Z are against A_e , and Y are indifferent to A_e . In this situation, we can assume that the population is divided as the following: 1/6 in group X, 1/6 in group Z, and

$2/3$ in group $Y^{(7)}$. If A_e is an important value for X and their satisfaction valence for A_e is S , the satisfaction valence of A_e for Z is $-S$. Then Y have a "deciding vote", and if the satisfaction valence of A_e for Y is more than zero, it is desirable for the entire society to realize A_e . To be more precise, if A_e is important for Y as well as for X , the total satisfaction valence of A_e is $5S$ ($=S+4S$). This means that regardless of Z 's satisfaction valence (which is less than S), the realization of A is desirable for the entire society. Also, a similar external evaluation can be made for B_e , and the results of the two external evaluations will be compared each other to confirm which has greater benefits between A_e and B_e . Thus, to generalize, if we assume that there are some consequential value-aspects to be externally evaluated in two conflicting values such as A and B , that their satisfaction valences respectively are S and S' , and that the valences represent the support respectively from groups X and Z in society, then the problem of whether A or B will be supported is determined by the satisfaction valence of each value for the middle group Y . In this respect, the working of α is to single out the most desirable consequences for some value-aspects between A_e and B_e .

The ultimate evaluative decision for justificatory reasons is made by integrating the internal and external evaluations, because each value has its internal significance and external consequences. Thus the adjudicative problem for two conflicting values such as A and B is first and foremost the problem of internal and external evaluations (according to the criteria α_i and α_e respectively), and then finally the problem of integrating these two evaluations according to a comprehensive criteria ω . There can be two results in this ultimate evaluation: (1) when the result of internal evaluation for A and B coincides with the result of the external evaluation for them, α_i coincides with α_e , which is expressed by ω , or (2) when the results of the two evaluations do not coincide, the content of ω supports either α_i or α_e . In this second case, ω determines whether we should give more weight to the internal evaluations for A and B or to the external evaluations for A and B .

Let us add something about the relationship between the criteria ω and the criteria α described above. As was analyzed in the previous section, α are

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adjudicative criteria for the resolution of the conflict between A and B. Also, the integration of internal and external evaluations is aimed at constructing the criteria α . Thus, the criteria ω for integrating the two evaluations form the core content of α . In other words, α is an expression of ω . And, if we are in a situation in which α' is used as in Case 3 or 4 above, α' becomes an expression of ω . In addition, let us also note that α or α' is a context-relative expression of ω , which I will explain in the next section⁽⁸⁾.

Now, how can the criteria ω be determined? Here we should distinguish between two problems: the internal viewpoint problem and the external viewpoint problem. The former is the problem of explicating ω 's content, and the latter is determining the possibility and mode of existence of ω in our evaluative practice. But, the internal viewpoint problem is most relevant here, thus I will concentrate on it.

I believe the internal viewpoint problem to be the problem of interpretation of values⁽⁹⁾. Interpretation of values is an application of interpretive activity which philosophical hermeneutics explores as the interpretation of text. Interpretation in this sense is the continuous interaction among text-readings. Since interpretation constitutes our thinking, the subject and object cannot be naively assumed to be independent units of our thinking. The subject and object converge with each other through interpretive interaction. When we read text, we have already utilized a preunderstanding of it. This is the so-called hermeneutic circle; while a preunderstanding is articulated by being applied to a concrete text, text is assimilated to a preunderstanding, and this assimilation makes a new preunderstanding and furthers the process of interpretation. The meaning of text is clarified in this interpretive spiral. This is a basic condition in our thinking.

From this perspective, in our evaluative practice, interpretation of values is an articulation of values as text. It is not the selection of values as the object of understanding, but a reflective explication of basic societal values in our evaluative judgements. In this sense, the articulation of values is one and the same activity as interpretation. Interpretation of values necessarily presupposes the identification of the values in our practice, and clarifies them through the

case at hand. Interpretation of values is also a construction of societal values which we obey in our practice. We continually articulate the content of societal values which develop the relevant practice, and simultaneously form it.

Since values in society grow through the process of adjudication of conflicting values, and interpretation is also an aspect of the tradition-making process which gives a certain density to the values in question, basic societal values can become more developed through our interpretive activities. Since the modern era, our society has been cultivating political values such as freedom, equality, and fraternity, legal values such as rights, public welfare, and order, and ethical values such as autonomy, benevolence, and friendship. We learn and utilize these values tacitly in our evaluative activities. However, in divergent aspects of our life, naive understandings of values are problematic and can only be grasped more fully by the fragmentation and conflict of values. In this respect, interpretation of values attains its proper significance.

It is a rational activity to try to investigate the complex structure and relationship of these values, and adequately explicate the configuration of these values. By these activities, we try to make our way toward ordering the values. Interpretation of values is not just accepting and affirming the status quo, but involves critically examining and reconstructing values. It is a progressive activity which pursues a more adequate conception of values. It pursues a new vision of our society, with a critical understanding of the significance of societal values and an awareness of the tension between ideals and reality⁽¹⁰⁾.

Also interpretation of values is related to the necessity of the regulative idea of law in so far as interpretation of values works for the establishment of the value order in human society. Law is not merely rules or other standards for human behavior. Law is also the axis of the configuration of divergent societal values. We should understand law in this general sense, and, in this respect, law should be grasped as the abstract idea of social order⁽¹¹⁾.

In addition, such a critical understanding of values is related to the natural conflict in human society. However, we should be aware that the basis of an understanding of values does not lie in the very fact of natural conflict. Fact is contra-value a state of affairs, and, to that extent, the so-called naturalistic

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fallacy that “values cannot be derived from facts” is valid. If an ultimate basis is required for some practice or tradition of society, it is invalid for the basis to be grasped as some moral fact that is the propositional foundation of justification. Rather, the source of values lies in our internal moral responsiveness or sensibility, especially in a basic value judgement which forms a fundamental premise in the internal logical form within this responsiveness. This premise simply presupposes practice or tradition. To put it more exactly, to give a further justification of values by pointing to a certain fact means not that the fact is direct supporting evidence of the value, but only that we regard the fact as an important part of the relevant presupposition of the value judgement⁽¹²⁾.

From this analysis, we can say that legal reasoning and judgement are ultimately determined relative to an interpretation of values. Thus, our problem of constructing materially valid legal reasoning leads to a construction of the best interpretive theory of basic societal value, that is, justice.

§4. Justice as Interpretive Value

Why is justice relevant to legal reasoning?

In exploring the structure of legal reasoning, we have confirmed that there are always basic evaluative criteria for constructing legal judgements, which are analyzed as the criteria ω . The important thing here is the working of ω . To resolve the conflict of values between A and B, the ultimate criteria ω have to endorse a certain societal value. Let us assume that there are a number of societal values from within the context of our social system. They will be societal values such as freedom, equality, public welfare, efficiency or due process. When ω endorse a certain societal value, one value from the stock of values, or a certain mix of them will be chosen to produce an evaluative basis of the entire reasoning. Then, what kind of value can come in to fill this role of ω ? In other words, what kind of value can we rely on to produce such a configuration of societal values? I believe it is justice, because in our evaluative practice we always require justice for the resolution of a variety of social

conflicts. Justice is in nature a pervasive value for human order⁽¹³⁾. Therefore justice is the most basic determinant of a system of societal values, and thus of legal reasoning.

In this sense, the structure and content of legal reasoning is generally determined by justice. And, in turn, the structure and content of justice is explicated by a certain interpretive theory. There are many possible interpretive theories of justice, and the correctness of interpretive theory is likely to be contested. Interpretive theories of justice should be developed as candidates for a better vision of law. Those candidates are examined in the practice of law, in which judges, lawyers, academics and other citizens participate together. I have my own interpretive theory of justice, but I will not deal with it in this essay⁽¹⁴⁾. Instead, I will discuss some general characteristics of the interpretive theory of justice.

First, an interpretive theory of justice must be adjudicative. Different litigants make claims based on their own understandings of law and justice. To solve the conflict between them, legal reasoning has to take a third viewpoint and give a rational justification for the decision. The interpretive theory of justice becomes the basis of this third viewpoint. In this respect, the interpretive theory of justice has to have the following characteristics in addition to such theoretical requirements as intelligibility and consistency: (1) it needs to solve the conflict between evaluative claims by giving sufficient reasons; (2) it needs to have a certain relevancy or reference (formally and substantively) to *existing legal institutions in society, especially by giving a certain context-relative articulation of the abstract content of justice (for example, in the form of expression α for ω)*⁽¹⁵⁾; and (3) it needs to be realistic, that is, it needs to further the desired consequences without ignoring any relevant facts.

Second, values explicated by an interpretive theory of justice are not ranked in a hierarchy. There are divergent and competing values in our evaluative practice, and there is no fixed ordering for them. Which value is overriding depends on concrete cases. Thus an interpretive theory of justice gives the possible configurations of values in the form of a “heterarchy”, which depicts the overriding value based on the weights of values depending on the context⁽¹⁶⁾.

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However, this does not mean that a certain analytical understanding of this “heterarchy” is impossible. If we can understand the working of the “heterarchy” itself, we must be able to articulate a coherent view of that working.

Third, an interpretive theory of justice needs to be distinguished from the so-called practical reason or prudence. It is sometimes said that in order to adjudicate among competing values, practical reason or virtuous prudence is necessary instead of some dogmatic theory. And this reason or prudence, it is claimed, includes loyalty to the law, impartiality, independence, truthfulness to the facts, elasticity, humbleness, courage, sharpness, intelligibility, sense of balance, power of decision-making, and the like⁽¹⁷⁾. Of course, these virtues are very important for not only all lawyers, but also ordinary citizens. But, they have to be distinguished from an interpretive theory of justice. Because their contexts are different. From a statistical viewpoint, a person who has more of these virtues will tend to develop better theories. However, virtues are certain “hexis” which is independent of value theories as logical contents. In justification, we always need a logical basis.

Then, what do we do in interpreting justice? Justice is a value text embedded in our social practice. When we interpret justice, it is articulated as an abstract construction which governs our evaluative judgements. This can imply that values are deeply rooted in our social life. But, as I suggested at the beginning of this essay, we do not need to hypostatize values as Platonic entities. We only need to grasp them as necessary logical determinants of our evaluative thinking. In this sense, justice is an element which forms the ultimate basis of every justification. Without having a certain interpretation of justice, we cannot make any evaluative decisions. All legal decision-making is logically generated from it directly or indirectly⁽¹⁸⁾. Thus our ultimate task in understanding legal reasoning is to try to arrive at the best interpretation of justice abstractly and concretely. However, this will have to be pursued more in another essay.

§5. Additional Remarks — On the Aims of My Extended View of Legal Reasoning

Having stated my extended view of legal reasoning, I will add some remarks about the aims of my thinking⁽¹⁹⁾. I will cover the following three points; (1) the significance of my extended view to the methodological debates in recent civil law theory, (2) the relationship of the interpretive theory of justice to concrete legal techniques, and (3) the significance of the emphasis on the importance of justice in legal reasoning.

Regarding the significance of my extended view to the methodological debates in recent civil law theory, I contend that my extended view becomes a pragmatic prerequisite for a dialogical pursuit of value-consensus for legal decisions. I recognize that the introduction of a dialogical perspective in a theory of legal reasoning, especially in the field of civil law theory today, is innovative and important⁽²⁰⁾. Evaluative decisions are to be done not by soliloquical intuitions but by cooperative deliberations. We need to make a mutual enterprise for establishing an adequate public order in this age of fragmentation of world-views and life-styles. In such a context, legal problems are also to be solved by a discussion among divergent opinions. No standpoint is privileged by itself. However, I would like to emphasize that this recognition itself is not enough to capture what a theory of legal reasoning should make clear.

Generally speaking, cooperative deliberation of values in a form of dialogue is itself only a method of developing or examining of evaluative hypotheses. Dialogue is a procedural route for evaluative decisions, but not a substantive material for them⁽²¹⁾. The substantive material for evaluative decision is given by a certain set of well-reasoned justifications. Thus, as a prerequisite for our dialogue of values, we need to understand what kind of justificatory reasons we can use to make relevant decisions. My extended view of legal reasoning is to be regarded as giving such an understanding for constructing justifications before a certain dialogue in law.

In §2., I discussed the problem-context and the required structure of a certain set of legal reasoning. There I developed a theoretical understanding of the circumstance of legal reasoning which is supposed to resolve the conflict between the two legal claims. Calling this set of legal reasoning (which is the third claim for the resolution) R, I analyzed the internal logical structure of R.

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Also, in §3, I went one step further to explicate a deeper structure of evaluation and its necessary relationship to the interpretation of values within R. Then, this analysis led to, in §4., a discussion of the importance of an interpretive theory of justice in determining the substantive core of R. All I have done in these sections is to explicate a formal precondition of R as a candidate for subsequent examining process of dialogue.

Of course, there can be divergent R's for the resolution. And among these R's, a deliberative dialogue is performed to single out the best one. But the important thing here is that all R's should have certain internal structure and then can enter the dialogue as candidates for the resolution. This perspective includes a certain criticism of recent dialogical theory of legal reasoning. From my standpoint, although it is a better view than other existing views, two important issues remain unaddressed; the conditions of candidate hypotheses, and the contents of procedural constraints to produce the adequate outcome. I think that the more we notice the importance of dialogical perspective, the more we need to consider these two points. Although I dealt with the first issue in this essay, I will not enter into the second one⁽²²⁾.

Next, let us look at the relationship of the interpretive theory of justice to concrete legal techniques. In the field of positive law, one needs to grasp legally relevant points in a variety of factual data in order to solve the concrete legal problems at hand. For example, to give some legal protection from high interest to a debtor, one might pay attention to, say, a debtor's miserable situation or social security of entire transactions. For a resolution under a certain law, such as interest restriction law, those spot considerations might be sufficient to justify the decision. Then, the question is; what kind of relationship exists between those considerations and the interpretive theory of justice situated as the ultimate axis of legal reasoning. For a person whose main concern is to solve the concrete legal problems in a particular case, the spot considerations will be felt to be the basis of legal reasoning⁽²³⁾. However, this is not really the case. The reality is, as I see it, that the spot considerations themselves are only intermediate switches which are logically backed by higher evaluative considerations.

Recall that I have referred to the context-relativity of the interpretation of justice in §4.⁽²⁴⁾ Here, to clarify the matter, we should distinguish three levels in the relationship between the particular spot considerations and the interpretation of justice in the reasoning R; the level of abstract articulation of justice, the level of context-relative articulation of justice, and the level of particular spot considerations under a certain positive law. According to this distinction, we can say that the spot considerations for a particular case is logically implied by a certain abstract interpretation of justice via its context-relative articulation.

Finally, let us look at the significance of the emphasis on the importance of justice in legal reasoning. The problem here is this. The context-relative articulation of justice plays a very important role for concrete legal decisions because, as I have said, it connects an abstract understanding of justice to the particular considerations in a case at hand. However, in this context-relative domain, we have to be aware that very complex factors work to make the abstract justice concrete. In other words, in giving context-relative articulations to the abstract justice, we need to elucidate and utilize a variety of supplementary visions for persons, their relationships, and society. If so, it might be thought that the main basis of legal reasoning is not an abstract theory of justice but a variety of socio-political visions⁽²⁵⁾. And, to continue in this vein, we should not confine our attention to the value of justice, but rather should look at a broader picture of socio-political possibilities for legal order.

This question depicts the limits of value-theoretical perspective for understanding of legal reasoning developed in this essay. And, frankly speaking, I am not quite sure now to respond to this. Even if my perspective and socio-political perspective are not different in substance, the angle of each perspective is very different; while my perspective presupposes a certain type of existence of values which can have complex and broad contents, a socio-political perspective will reject such a quasi-metaphysical flavor in theory and replace it with a more experiential analyses. I think determining which perspective is better is an interpretive problem; which perspective can better explicate the structure and content of our evaluative practice in law?

Note

I believe values play very important roles in human actions and thinking. Our actions and thinking are always guided by values. Of course, very often, we are prejudiced by subjective understandings of values, and this is a deep cause of human conflicts. Also, human society is constructed through divergent interactions among people. The dynamics of society is very difficult to grasp. Thus, one might often feel that the more important task for us is to understand this complexity, and not abstract values. However, the starting-point or core of this complex situation lies in values⁽²⁶⁾. The importance of values for us is invariant, and for the very same reason, we have to understand and develop values. It is worthwhile to pursue the structure and content of them.

But, to give a sufficient defense for my perspective, I will have to develop further a theory of the workings of values in society. Still, adequate consideration of such a hard problem will require a great deal more time.

[POSTSCRIPT] This essay is a revised and extended version of my short essay entitled "Hôteki Suiron, Handan, Kachikaishaku" [Legal Reasoning, Judgement, and Interpretation of Values] published in "Hôritsu Ekisupât Shisutemu no Kaihatsukenkyû Hôkokusho" [The Report of the Research Project of Legal Expert System] edited by Hajime Yoshino in 1997. Also, this essay is a result of my own research on the deep logic of legal interpretation conducted under the support of the 1997 Ministry of Education Science Research Fund (Jûten Ryôiki Kenkyû No.05208101). For the preparation of this essay, I would like to thank Prof. Hajime Yoshino at Meijigakuin University and Prof. Yoshiyuki Matsumura at Hokkaido University for their support for my research project. And I would also like to thank Mr. Ronald Surine and Dr. Andrew Pardieck, both at Hokkaido University, for their support and advice. In particular, I owe a great deal to Mr. Surine for his help in editing this essay. Let me add that I received a lot of stimulation on this essay's theme from a series of workshops on legal thinking in civil law which were conducted by Prof. Nobuhisa Segawa and others at Hokkaido University from 1996 to 1997. I am indebted in particular for the earnest interest of Prof. Segawa and Prof. Katsumi Yoshida in my research. Also, I am indebted for a variety of

suggestions from Prof. Seimei Hayashida in the joint seminar on recent trends in American legal thinking. Finally, this essay is dedicated to Prof. Joji Atsuya, who will retire from our faculty in March 1998, in appreciation of his interest in problems of justice and markets.

[Notes]

- (1) The following passages are partly adapted from my book, *Kaishaku to Hōshikō* [Interpretation and Legal Thinking] (Nihon Hyōronsha, 1996) ch.1, p.16ff.
- (2) On the relationship between the regulative idea of law and higher evaluative considerations, see below, p. 322f.
- (3) E.g. Cass Sunstein, *Legal Reasoning and Political Conflict* (Oxford U.P., 1996) ch.2
- (4) For an excellent outlook on the interest-balancing method in civil law, see Nobuhisa Segawa, "Minpō no Kaishaku" [Legal Interpretation in Civil Law] (in: *Minpō Kōza*, Bekkan 1, Yūhikaku, 1990) p.53ff.
- (5) When Robert Alexy tries to analyze the structure of evaluative considerations, he seems to be just thinking about the tentative version of Case 1. But the analysis here shows that important comparisons are not limited to the one he explores. In addition, since Alexy's view just covers Case 1 level analysis, it is insufficient for the higher level considerations. See Alexy, *Recht, Vernunft, Diskurs* (Suhrkamp, 1995) Kap.2, S.41ff. In addition, for a useful summary of Alexy's view, see Hiroshi Kamemoto, "Hō ni Okeru Rūru to Genri" [Rules and Principles in Law] (in: *Hōgaku Ronsō*, Vol. 122-2 & 123-3, 1994)
- (6) The concept of value-aspects is suggested by Nicholas Rescher's explication of values. cf. Rescher, *Introduction to Value Theory* (Univ. Press of America, 1982) chs. II and IV
- (7) This assumption is based on an interpretation of the normal distribution. cf. Peter Sprent, *Taking Risks* (Penguin Books, 1988) p.104ff.
- (8) See below, p.320f.
- (9) The following passages are partly adapted from my book, *Kaishaku to Hōshikō*. See my book, *op.cit.*, ch.5, p.127ff.
- (10) See my book, *op.cit.*, ch.5, p.133ff.
- (11) For an explication of the role of law in society, see my book, *op.cit.*, ch.7, p.185ff.

- (12) This view on moral epistemology is different from moral subjectivism. Although it is incompatible with moral realism because moral responsiveness in my sense is interpretive, I think it is compatible with a sophisticated intuitionism developed by Robert Audi. cf. Audi, "Intuitionism, Pluralism, and the Foundations of Ethics" (in: W.Sinnott-Armstrong & M.Timmons, eds., *Moral Knowledge?*, Oxford U.P., 1996) esp. p.118ff.
- (13) Aulis Aarnio seems to seek the ground of legal reasoning for a certain interpretation of Wittgensteinian concept of form of life; a shared knowledge of relevant values among persons. I think his line of thinking is mostly correct, and yet we should specify the substantive content of that shared knowledge. It will be determined by an interpretive theory of justice. cf. Aarnio, *The Rational as Reasonable* (D.Reidel, 1987) ch.IV, p.213ff. On the same type of problem, see Aleksander Peczenik, *On Law and Reason* (Kluwer, 1989) ch.4, p.177ff.
- (14) For a tentative sketch of my view on justice, see my "Riberaru na Byōdō ni Tsuiteno Oboegaki" [Notes on Liberal Equality] (in: *Hokudai Hōgaku Ronshū*, Vol. 43-5, 1993)
- (15) To illustrate the context-relativity of the articulation of justice, let us look at the arrangement between claims of equality and claims of freedom. At the most abstract level, we can say that equality and freedom are harmonious since equality provides the baseline protection of resources to realize one's freedom. Then, in the field of constitutional law, this arrangement can be realized as a certain balance between, say, welfare rights and economic freedom. Also, in the field of civil law, it can be realized as a certain balance between, say, equality of the sexes and private autonomy. And, in the field of anti-trust law, it can be realized as a certain balance between, say, protection of small companies and free competition. In this way, the most abstract understanding of justice is concretized according to the relevant circumstances of the problem-context at hand.
- (16) See Peczenik, *The Basis of Legal Justification* (University Press, 1983) p.112
- (17) See Toshio Yokokawa, *Saiban to Saibankan* [Trial and Judges] (Yūhikaku, 1973) p.189ff. Also, cf. Richard Posner, *The Problems of Jurisprudence* (Harvard U.P., 1990) chs.2 & 3, Michael Stocker, *Plural and Conflicting Values* (Oxford U.P., 1990) Ch.8, Anthony Kronman, *The Lost*

Lawyer (Harvard U.P., 1993) ch.2

- (18) On the significance of justice as element, see my article "Posutomodanizumu to Seigiron" [Postmodernism and Theories of Justice] (in: *Hô no Riron*, 17, 1997)
- (19) For the following remarks, I received many valuable suggestions from Prof. Segawa.
- (20) See Segawa, *op.cit.*, esp. p.74ff.
- (21) See my book, *op.cit.*, ch.6, esp. p.158ff.
- (22) See my book, *ibid.*
- (23) This point is suggested by Prof. Segawa.
- (24) See above, p.320.
- (25) This means that there should be a variety of dimensions for understanding the entire picture of legal reasoning, among which a socio-political standing of legal reasoning and its relationship to a value theoretical structure are important aspects not to be ignored. It is Prof. Yoshida who reminds me of this point. Also, see Katsumi Yoshida, "Gendai Shimin Shakai no Kôzô to Minpôgaku no Kadai" [The Structure of Modern Civil Society and the Task of Civil Law Theory] Ch.II (in: *Hôritsu Jihô*, Vol. 69-6 & 7, 1997)
- (26) Cf. Kazuo Seiyama, *Seidoron no Kôzu* [An Angle of Institution Theory] (Sôbunsha, 1995) p.135ff.