NORMS AND DECISIONS

BY

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I. INTRODUCTION

The purpose of this paper is to develop a conceptual and theoretical framework for analysing differences between norms governing decisions, and the approach of decision-makers to such norms.

Traditionally, norm-oriented decisions are contrasted to goal-oriented decisions. This distinction is found in, for example, Weber's categories *wertrational* and *zweckrational*,[1] Eckhoff's and Dahl Jacobsen's subsumption models and means-ends models of decision-making[2] and in Aubert's normative and causal modes of perception.[3]

The view put forward in this paper is that this distinction is unsuitable for analysing all aspects of decisions, because goal-oriented decisions are also often governed by norms. What characterizes different types of decision in relation to norms is basically the approach of the decision-maker to the norms in question. Thus three types of approach are distinguished here: purposive, formalistic and evaluative.

The three approaches are further described in section 2, together with three different types of norm typically leading to one or other of them.

Although there is an ideal connection between the three types of norm and the three approaches, the connections are not of a necessary, causal kind. It is possible to assume all types of approach to all kinds of norm. Different relationships between the three kinds of norm and approaches to norms will be considered in section 3.

Section 4 addresses the approach of the decision-maker in more detail and points to factors which may influence the decision-maker's choice of approach to the norms governing the decision.

2. TYPES OF NORM AND APPROACHES TO NORMS

Purposive reasoning is oriented towards goals. The task of the decision-maker is to choose the appropriate means to reach a desired result. The question of

[1] Max Weber, *Economy and Society* (eds. Guenther Roth and Claus Wittich), Berkeley 1978, p. 24.
[2] Torstein Eckhoff and Knut Dahl Jacobsen, *Rationality and Responsibility in Administrative and Judicial Decision-making*, Copenhagen 1960.
[3] Vilhelm Aubert, *The Hidden Society*, Totowa 1965.

what result to strive for can be governed by explicit or tacit norms. The norms governing the result are explicit where for instance an engineer is required to find the solution which is cheapest in economic terms, or to find the solution which involves the least risk of injury. But experts are often governed by tacit norms; thus doctors have the cure of illness as their goal, economists strive towards cost efficiency. There are also cases where the goal is chosen by the decision-maker. His choice may be influenced by norms or values, but it may also be based on considerations of expediency, such as when one result is seen as the appropriate means of achieving other results which represent values on a higher level.

Once the goal is set, the choice of means is not governed by norms, but by efficiency. The decision-maker will, however, often find guidance in recommendations which have a propositional content. For instance, if such and such a medicament is used, then the patient will react in such and such a way; if the thickness of the wall is x millimetres, then it will resist a fire of n degrees of heat for y units of time etc. Such conditional statements express empirical knowledge and are the results of previous experience from scientific research, practical testing etc. They lack, however, the deontological operator which is characteristic of legal and moral norms. Such conditional statements of experience are here called *technical recommendations*.

Purposive orientation is thus often governed by norms relating to the results to be achieved, and by technical recommendations as far as the choice of means goes.

Technical recommendations are in many ways similar to norms, and a decision-maker may take the same approach to them as to norms proper. He may in other words feel obliged to follow them. The typical mode of orientation to technical recommendations is, however, purposive. They are regarded as pure advice concerning the means available to reach a goal.

Formalistic reasoning is typically based on *strict rules* governing the decision-making. The question of ends and means does not arise; the problem is fully and solely a question of compliance or non-compliance. The problem facing the decision-maker is to find the right category under which to subsume the facts of the case. When the subsumption is made, the decision is thereby given, regardless of its consequences. When deciding whether two people are married or not, the consequences which the solution may have, for instance for the division of property rights between them, are immaterial.

It is evident, however, that not all forms of reasoning according to norms can be said to belong to either one or the other of the categories described above. It is easy to find situations where the norms governing the decision are treated neither as strict rules nor as technical recommendations. When deciding upon a case of breach of contract, the value of keeping a promise is an

important premise for the decision. However, the consequences for the individual party of being bound by the contract may be so dramatic or unjust that it may be desirable to waive the rule that promises should be kept. The case may be that the buyer had no means of foreseeing the consequences of signing a contract giving all legal rights in the relationship to the seller. In such cases the value of social justice may outweigh the value of keeping promises. Even if consequences of the decision here are taken into account, the decision-maker's approach may differ from the purely purposive. The point is that according to the norms governing the decision, promises should be kept, but not at any price. The admissible price is not set out beforehand, but is the result of an evaluation in which relevance is given to different values and to states or actions which may affect these values. That such a situation is not new can be shown by the following passage from Aristotle:[4]

> *So we are back again with law, for organization is law.* It follows therefore that it is preferable that law should rule rather than any single one of the citizens. And following this same line of reasoning further, we must add that even if it is better that certain persons rule, these persons should be appointed as guardians of the laws and as their servants. Offices there must be, they say, but it is not just that there should be only one man in office, at any rate where all men are alike. Again, though there are matters about which the law appears incapable of giving a decision, in such cases a human being too would be unable to find an answer. It is in order to meet such situations that the law expressly educates the officials, and empowers them to decide and to deal with these undetermined matters to the very best of their just judgement. Moreover, it allows for amendments to be made, wherever after experiment a new proposal is thought to be better than the established practice. Therefore he who asks law to rule is asking God and intelligence and no others to rule; while he who asks for the rule of a human being is importing a wild beast too; for desire is like a wild beast, and anger perverts rulers and the very best of men. Hence law is intelligence without appetition.

Here, the decision-maker is oriented towards compliance with set norms. In addition, however, he is oriented towards balancing different values against each other; social justice vs. economic efficiency, freedom of speech vs. the integrity of individuals who might be libelled, administrative efficiency vs. rule of law etc. The norms governing the decision do not refer solely to categories under which to subsume the facts as is the case with the strict rules described above. Nor do they refer solely to goals to be reached. They explicitly or tacitly presuppose that the decision-maker undertakes an *evaluation*. This evaluation is creative in relation to the norms in that their final content is neither in principle nor in practice determined beforehand. As Aristotle states, the object of the evaluation may be both the filling in of "gaps" where "law appears

[4] Aristotle, *The Politics*, translated by T.A. Sinclair, revised and re-presented by Trevor J. Saunders, Middlesex 1981, p. 226.

incapable of giving a decision", and amendments to the existing norms where "a new proposal is thought to be better than the established practice".

Evaluation also has a place within the formalistic and the purposive approaches. In these cases, however, the evaluation required is a matter of evaluating factual matters. Within the formalistic approach, evaluation of the facts may be necessary to determine the normative category under which to subsume them.

In the same way, the purposive decision-maker has to establish the facts at hand. In addition, an evaluation may be necessary when establishing the possible and probable consequences of different alternatives. The decision-maker may also be called upon to evaluate the appropriateness of different technical recommendations regarding the problem with which he is faced. The recommendations may be general, and therefore not directly suited to the individual case. Or the question may be one of analogy: it may for example concern recommendations as to how the stability of ships can be applied to the stability of oil rigs.

In the evaluative approach, the evaluation does not only concern facts as described above, but also the actual norms governing the decision. The basic premise for the decision is not a set goal or a strict rule, but a *norm of evaluation*. This norm of evaluation may be explicitly stated, as is the case in sec. 36 of the Nordic Contract Acts, which states that a contractual obligation may be set aside if its strict application would have unreasonable consequences. The norm of evaluation may also be tacit, referring to a strict rule or to a set of norms and presupposing that the decision-maker through evaluation should fill the gaps and ensure that none of the norms be applied in an unreasonable way. By observing judicial practice, one could argue that such a tacit norm exists in any legal system, despite the fact that official legal ideology may state otherwise, for instance by strict adherence to precedent or to legal formalism.

The evaluation to be performed is often governed by norms pointing out reasons or grounds to be considered in it. Within legal theory, such norms guiding evaluation have been labeled *guiding standards*, or *guidelines*.[5] Guidelines may make certain kinds of fact relevant in the evaluation. Examples are found in sec. 36 of the Contract Act mentioned above, which gives relevance to the content of the contract, to the position of the parties, to the situation when the agreement was concluded, and to subsequent circumstances. The guidelines may also refer to other norms, or to more general values such as justice or fairness. In many ways guidelines may be compared to technical recommendations, in that they do not *per se* determine the outcome of the decision. One

[5] Torstein Eckhoff, "Guiding Standards in Legal Reasoning", *Current Legal Problems*, vol. 29, 1976, p. 205.

main difference is, however, that technical recommendations refer to probabilities whereas guidelines refer to relevance and weight of arguments.

The typical mode of orientation towards rules of evaluation and guidelines is *evaluative*. The evaluative approach treats norms governing the decision as reasons or arguments to be taken into account when reaching a decision, or defending the result.

The evaluative approach is similar to the formalistic approach in that the outcome of the decision is a categorization of the facts at hand and a subsumption under a norm. Therefore, both modes of approach are comprehensive in the sense that a decision can always be reached about all aspects of life. A given situation can always be categorized according to the norms as correct—incorrect, right—wrong, just—unjust, legal—illegal etc. The approaches differ, however, in the important aspect that the formalistic one takes the norms as given, whereas the evaluative one takes them as grounds or reasons to be taken into account.

3. ANALYTICAL ADVANTAGES OF THE TRIAD

Compared to the dyad often encountered when analysing decisions, the triad developed above has certain advantages. First, it should be clear that the evaluative approach is not well characterized as "something in between" the formalistic approach and the purposive. A rule of evaluation is not a mix of strict rules and technical recommendations, but a type of norm qualitatively different from these two. Guidelines connected with rules of evaluation are not the result of empirical experience like technical recommendations are, but may, among other things, qualify practical experience as reasons to be taken into account. In contrast to strict rules, rules of evaluation do not by themselves determine an outcome, but always have a relation to values and facts which can have a different bearing in individual cases.

Secondly, since the evaluative approach is not something in between the formalistic and the purposive approaches, actual decision situations may show blends of a formalistic and a purposive approach without having the characteristics of the evaluative approach. In the same way, one may see blends of the formalistic and the evaluative approach, of the evaluative and the purposive, or even of all three approaches in actual situations.

An example of a blend between the formalistic and the purposive approach is when goals are determined according to strict rules in a formalistic way. Another example is when strict rules set limits to what means can be applied to reach a goal. The doctor may for instance not perform experiments on a patient to find new methods of treatment without the consent of the patient.

The manufacturer of inflammable goods may not use asbestos to prevent a fire from spreading, the police may not apprehend suspects without a warrant etc.

The latter examples show that the standards for the choice of means in a purposively oriented decision may be regulated by strict rules. Just as in some settings strict rules may prohibit the use of some standards, strict rules may demand the use of certain technical regulations in other settings. This is often so in the legal regulation of technical activites, for example when building workers are legally required to wear helmets for protection against falling objects, or manufacturers to follow recommendations laid down by the International Organization for Standardization or similar institutions. From this it is evident that there is a continuum between the purely formalistic approach governed by strict rules and the purely purposive approach governed by technical recommendations.

The same sort of continuum may be found between the evaluative approach guided by guidelines, and a formalistic approach or a purposive approach respectively. A guiding standard may put such weight on for instance the probable outcome of a decision that this in most cases overrules other considerations. Or it may put so much weight on a rule governing the decision that deviation from the rule is possible only under extraordinary circumstances.

With the concept of three different types of orientation to norms governing a decision, we can analyse similarities and differences between actual decision situations. Further, we can analyse factors which may predispose the decision-maker towards taking one approach rather than another. We may describe and analyse different social conditions and functions of different types of decision. Finally we may describe historical developments over time.

Since there are three different modes of orientation, it is probable that they express different social functions. Briefly, the function of the purposive approach is goal attainment; of the formalistic, classification, and of the evaluative, pragmatic, reaching decisions where different values are unclear or contradictory, or where the means of establishing them are uncertain.

In the rest of this paper, only one of the lines of analysis mentioned above will be pursued, the one of factors which may predispose the decision-maker towards adopting one or another approach to norms governing the decision. In this context it is important to stress that although there is an ideal connection between type of norm governing the choice of action and the approach of the decision-maker towards the norms, this is by no means a necessary connection. It is possible, and in some instances highly likely, for the decision-maker to take a purposive approach to guidelines or strict rules, in the sense that he sees them as pointing to possible ways of reaching his goal and nothing more. A police officer may for instance regard the strict rule demanding a search warrant solely as a technical recommendation for how to collect evidence

which will stand up in court. If he thinks it likely that he by illegal entry to the premises can uncover facts that will hold up as evidence on other grounds than that they were found during a search, he might disregard the obligation to obtain a warrant. In other cases it may be the other way round. For a business manager, recommendations on business economics may be means of maximizing profits. He may nevertheless choose to treat at least some of these recommendations as strict rules, out of interest to "cover his ass" should profits decline in an uncertain market. He can then argue that he did all that could be expected. He may not be promoted, but he may in this way at least avoid being dismissed. Institutional factors determining matters such as the allocation of the decision-maker's attention, conflict, history and levels of ambiguity can all limit his purposive approach and influence the setting of the goal he is to strive for.[6]

4. FACTORS INFLUENCING THE APPROACH OF THE DECISION-MAKER TO NORMS GOVERNING THE DECISION

4.1. *Introduction*

When considering factors which may influence the decision-maker in his approach to the norms, one can distinguish between two different types of factor. One group includes factors connected with the general social setting and personal characteristics of the decision-maker. In the other group are factors that are more specific to the decision situation. In the first group the social expectations facing the decision-maker, his professional training and his general level of insight into the question at hand will be treated. In the second group the impact of the decision-maker's caseload and of different social interests germane to the decision, or the process leading up to a decision, will be analysed. The interests involved can be those of the decision-maker himself or of other parties.

4.2. *Social Expectations*

A factor influencing whether the decision-maker approaches the norms purposively, formalistically or evaluatively is the general social expectations he is faced with. One way these social expectations are stated is through the content of the norms governing the decision. If the norms are stated as strict rules, a formalistic approach is expected; if as technical recommendations, a purposive approach; if as guidelines, an evaluative approach. This however is no more

[6] James G. March, *Decisions and Organizations*, London (forthcoming 1988).

than a starting point. Social expectations may be stated by other means than the content of the norms, and are not the only factors influencing the decision-maker.

Another way social expectations may be stated is through expectations regarding the outcome of the decision process. There may be a high expectancy on the decision-maker that he reach a decision within limited time and other resources, or it may be that he is expected to achieve a certain result.

Civil servants are by training and by the norms governing the decision expected to be purposive in their approach. On the other hand, a public administrative agency is also under a clear expectation to reach decisions. A privately hired psychologist may tell the parents that it is outside the scope of his knowledge to determine what course of action is to the best interests of their child. The same expert acting as an official within the child welfare administration is in a situation where he will have to make a decision once a case is brought in. To facilitate this, he may find it convenient to treat some professional technical recommendations as strict rules, e.g. that in general it is best for a child to stay with its mother, that a child when once placed with foster parents should be allowed to grow up in a stable environment, etc. The expectation upon him to reach a decision fairly quickly will cause him to focus his attention not on the technical recommendations of his profession but on the merits of the individual case.[7] Thus his function will be more one of categorizing the facts of the case under general norms than one of goal attainment.

In other cases, a strong emphasis on results may lead to a purposive approach to norms which in content are strict rules or guiding standards. An example of this can be found in a study of the practice of the Norwegian police towards the use of imprisonment to be served in default of payment of a fine.[8] At the time of the study, the Norwegian criminal code required police to try to collect the debt if the offender failed to pay. Only where the offender had no means of paying should the subsidiary prison sentence be enforced. Midtbøe's study, however, showed that the subsidiary prison sentence was applied in many cases where collection would have been possible. The reason for this was that the public accountant criticized the police if outstanding debts were too many, and expected results in bringing the accounts in balance.

4.3. *Professional Training*

The decision-maker's professional training is a factor influencing his approach to the norms. Training for technical skills in engineering, medicine, economics

[7] March, *op.cit.*, p. 3.
[8] Finn Backer Midtbøe, *Bøtesstraff og subsidiær fengselsstraff*, (Fines and Subsidiary Imprisonment), Oslo 1960.

etc. will emphasize goal orientation, and therefore a purposive approach towards norms. Legal training on the other hand, with the emphasis on reaching decisions which make good examples for the future, will predispose the trainee towards an evaluative approach. Administrative training, with the emphasis on allocating different cases to different offices and different facts under different rules within a hierarchical command system, will predispose the trainee towards a formalistic approach.

Empirical research on the decision-making of different professionals illustrates these points. Interesting comparisons between persons with legal training, and people without such training can be made from studies of the jury system. In their classical study of the American jury, Kalven and Zeisel found that the laymen on the jury were non-rule-minded in their decisions.[9] The jury is apt to bend the legal rules to achieve a result in accordance with more popular opinions of equity. This may work both to the advantage and to the disadvantage of the defendant. In this setting, the norms of criminal law governing the jury's decision are treated in a purposive way to achieve what is perceived as an equitable result.

On a different level however it may be argued that the jury takes a more formalistic approach to norms than the judge does. Kalven and Zeisel list examples showing that if the defendant tells a story which is obviously false, the jury is apt to disbelieve him on all parts of his evidence, while the judge separates the evidence into false and true parts. An example is given where a person accused of drunken driving denied that he was under the influence and at the same time fabricated a tale about being beaten up by the police.[10] The jury convicted whereas the judge, not believing the account of police brutality, gave the defendant the benefit of the doubt as regards the intoxication. Kalven and Zeisel explain this tendency in complex-credibility cases by saying that a jury follows the old credibility maxim *falsus in uno, falsus in omnibus*. If that is the case, then the jury adopts a formalistic approach to this common-sense norm outside the scope of the norms formally governing the decision: those of criminal law and procedure. Non-rule-mindedness regarding the legal norms thus admits a formalistic approach to a different set of norms.

Lack of legal training may lead to a formalistic approach towards legal norms in settings where the decision-maker is expected to decide according to a detailed set of norms. The public service contains frequent examples of this and studies of the administration of taxes and social insurance in Norway give evidence of the credibility of such a hypothesis.

[9] Harry Kalven Jr. and Hans Zeisel, *The American Jury*, Chicago 1966, p. 495.
[10] Kalven and Zeisel, *op.cit.*, p. 387.

Similar results are reported from other countries. According to Andras Sajo,[11]

> the relationship of the official without legal training to legal regulations shows two contradictory trends. On the one hand ... the specialists bring the value expectations and orientations of their original professional communities along with them into the organizations. This means that in a given case, medical, engineering, etc., professional aspects may operate over the expectations specific to the organizations and stipulated in rules ... When it comes to understanding and applying the regulations those who do not have the lawyer's technique and are of a specialist orientation are estranged from the legal regulations and therefore their integration in the normatively oriented or controlled organization is lower. As if in compensation for the uncertainty of the situation, this leads to a rigid application of the regulations. In addition the non-lawyer official is forced to grasp these rules without knowledge of the techniques attainable through legal training which would otherwise enable him to alleviate rigidity while remaining with the framework of the regulations. Ritualism is particularly increased in Hungary because many officials have neither legal nor other professional training.

The extreme rule-mindedness implanted in persons by legal training may explain the tendency to adopt an evaluative approach to legal norms in legal reasoning. Lawyers have a professional concern that the norms they apply are "good" in the sense that they give adequate solutions to questions that arise. Rather than bending the rules by taking a purposive approach in cases where the rules do not fit societal needs, they will be concerned about how to give good answers in the future. In his study on the evolution of law, Watson shows how law develops through the reasoning of lawyers with a special professional attitude to the law.[12] Law is seen as an end in itself, and it is modified and developed in ways that make it seem consistent and exhaustive. Lawyers seek authority, not societal needs, when they rule on questions not clearly decided by the legal norms. This explains legal evolution in many forms; the maintenance and elaboration of out-dated doctrines, and the acceptance of solutions and norms from foreign legal systems.

4.4. *Insight*

The insight which the decision-maker has into different aspects of the situation will influence his approach to the norms. Insight is of course, among other things, a result of professional training. A doctor has insight into the standards of medicine, and into methods for diagnosis and treatment through experiments where the standards do not apply or are unknown. A judge, on the other

[11] Andras Sajo, "Why Do Public Bureaucracies Follow Legal Rules?", *International Journal of the Sociology of Law*, vol. 9, 1981, pp. 81 f.
[12] Alan Watson, *The Evolution of Law*, Oxford 1985.

hand, has insight into the legal system, to the structure of the normative relations and to the values which are reflected in the norms and the profession.

But insight is not only a function of training. First of all, not all professionals need to have the same insight into the different fields of their profession. An engineer may know how to construct bridges, but not ships. A doctor may be an expert on heart conditions, but not respiratory diseases. A judge may feel at home within the criminal law, but not within administrative law etc. The level of insight may vary according to experience, the ability to keep up with new knowledge within the profession and many other factors. Insight may also be obtained independently of formal professional training: it is also a function of learning through experience. The conditions under which learning took place may determine whether the decision-maker comes to rely on past history as norms, or whether he takes a more purposive approach towards previous experience.[13]

Insight is an important condition for the ability to perform evaluations independently of a set of norms or technical recommendations, and may therefore lead to a critical attitude towards authority as laid down in strict rules. The connection between insight and attitude towards authority is well known within our culture, and is stated for instance in Genesis, 3, where the knowledge of good and evil is what brings man to become as one of the gods. The relation between insight and attitude towards authority is stressed in the Gnostic gospels.[14]

Insight is, in other words, a condition for evaluation independently of authority. Both a purposive and an evaluative approach therefore presuppose insight on the part of the decision-maker, formerly into methods for reaching a goal, latterly into the system of norms. Lack of it may cause the decision-maker to fall back on a formalistic approach and to treat technical recommendations and norms governing the decision as authorities, viz. strict rules. The general practitioner, when confronted with a patient with symptoms he is not sure about, may refer strictly to his medical textbooks, and apply the recommendations stated there as strict rules of conduct. Lack of insight into the system of legal norms may explain the dualism of public officials described in the passage quoted from Sajo: a purposive approach towards legal norms governing the choice of means to reach a result, accompanied by a ritualist or formalistic approach to other regulations outside the scope of their professional training. The relation between insight and evaluation is also the factor Dworkin uses in his distinction between easy cases and hard cases within the law.[15]

[13] James G. March, *op.cit.*, pp. 9–12.
[14] Elaine Pagels, *The Gnostic Gospels*, Middlesex 1982, p. 63.
[15] Ronald Dworkin, *Law's Empire*, London 1986, p. 449.

The nature of the questions which the decision-maker has insight into will influence the direction of his evaluation, whether he treats the norms as technical recommendations pointing to a result or as guidelines for an evaluation of norms. This may explain why judicial reasoning is so seldom oriented towards the purposive attainment of results, even when the norms and the language used in justifying the decision are related to goals. The insight of the judge is into the system of norms and the values behind this, more than into empirical issues of causes and effects.

The celebrated case of *Regina* v. *Dudley & Stephens* illustrates this point clearly.[16] Two shipwrecked mariners saved their own lives by killing the cabin boy Richard Parker and eating him after they had been adrift in the lifeboat eight days without food and six days after they had finished their last drinking water. They were prosecuted for murder. One line of their defence was that their action was justified by necessity. Addressing this, Lord Chief Justice Coleridge pointed to the consequences of accepting such an act. If his line of insight had been into empirical questions and conditions at sea, one could have expected him to argue from the situation the two mariners were in; how famine and despair influence clear rational and moral thought. Further, he could have argued about the probability of similar situations arising, and the probable effects of his decision upon such situations in the future. He could also have taken a more instrumental approach towards how best to save lives at sea.

Instead Coleridge argued:[17]

> It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this source of necessity? By what measure is the comparative value of lives to be measured? ... It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own ... [I]t is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime.

The deliberation of Lord Justice Coleridge concerns normative consequences of the decision. Had the accused been tried by a board of ship's captains, the approach towards the norms might reasonably have been a different one. Their concern would probably have been less for the consequences for future decisions about such situations, but more how to best save lives in such situations. This is not to say that their *result* would necessarily have been different. The example shows, however, how the body of knowledge determines whether insight will lead from a formalistic approach to the norms governing the decision to a purposive one or to an evaluative one.

[16] 1884 14 Q.B.D. 273.

[17] Quoted from Neil MacCormick, "On Legal Decisions and Their Consequences: From Dewey to Dworkin", *New York University Law Review*, vol. 58, 1983, p. 250.

MacCormick has from a study of consequentialist reasoning in law made this point in a more general way regarding where the lawyers' body of knowledge leads them. In his view, lawyers mainly adopt an evaluative approach and not a purposive one:[18]

> So, in the main, what I call consequentialist reasoning law is focused not so much on estimating the probability of behavioral changes, as on possible conduct and its certain normative status in the light of ruling under scrutiny.

4.5. *Factors Specific to the Decision Situation*

The factors described above are related to the decision-maker and to more general expectations concerning his decision. In addition to such factors, the decision-maker may also be influenced by factors that are more specific to the situation when he makes his decision. Such specific factors may emphasize the influence of the more general factors. They may however, under different conditions, influence the decision-maker into directions different from those described above. The comparative force of different factors is a matter for empirical research to reveal.

4.5.1. *Caseload*

The caseload which a decision-maker is confronted with is an important factor explaining a formalistic approach towards the norms. It may influence the decision-maker where he would otherwise take an evaluative or a purposive approach, and may be important in two ways. First, a situation where there are many similar cases may lead to routinization of the decision-making. Secondly, the caseload will determine how much time the decision-maker has at his disposal, thus influencing e.g. the insight which can be gained into each individual case and the time that can be allocated to it.

Studies of the Norwegian planning system show a tendency of this kind. Here the administration has wide discretionary powers to promote welfare goals for economic planning. The intention of the legislation was for the administration to take a purposive approach to the goals and to recommendations of e.g. economics. "A common trait of decision-making in many of these fields, however, was the development of *self-made rules*, i.e. rules which developed gradually within the different administrative units, as a result of adherence to precedents and to instructions from superior authorities."[19]

[18] Mac Cormick, *op.cit.*, p. 254.

[19] Torstein Eckhoff, "Justice, Efficiency and Self-made Rules in Public Administration", in *Justice and the Rule of Law*, Oslo 1966, p. 88.

Eckhoff points to different factors explaining this development. Some have to do with the controversiality of the goals and conflicting interests, and will be dealt with below. The role of lawyers within the administration is discussed. But because of their rigidity and crudeness, the rules can hardly be regarded as typical products of legal reasoning. The approach to these self-made rules is typically conventional. Time and efficiency, on the other hand, are factors which Eckhoff emphasizes:[20]

> The underlying idea—that it is important to get through with the tasks without too much delay, and without running into serious conflicts with clients—in itself, was appealing. This kind of efficiency acquired the greatest importance to the decision-makers, particularly when the number of cases increased as it did in some of the control sectors.

Caseload may in the same way drive the decision-maker from an evaluative approach to a conventional, and to treat rules of evaluation and guidelines connected to them as strict rules. This is seen when the courts are used for summary treatment of criminal or civil cases, in Norway especially when deciding upon the use of custody in criminal cases and in debt-collecting in civil cases.

Empirical research regarding the Norwegian tax and social insurance administration shows this tendency. The administration is here faced with a large body of norms of different levels and normative status. Some are expressed in Acts of Parliament, some in governmental decrees and some are issued by superiors within the administration not as rules but as non-binding technical recommendations to aid legal classification. In a study of the administration of taxes, Brinkmann and Eckhoff[21] found that tax officials have an approach to the different norms that differs from what one would expect from a purely legal view on how rules are to be applied. Not only was their approach highly formalistic, but the norms that to the greatest extent governed their decisions were the ones with the lowest legal standing. The technical recommendations issued as an aid to legal classification were treated as strict rules. On the other hand, the officials seldom went to the prime source, the Norwegian Tax Act, and they did not try to interpret the rules here on their own.

4.5.2. *Interests of the decision-maker in the outcome of the decision*

If the decision-maker is interested in the outcome of the decision, this will encourage a purposive approach to the norms. Research on law-enforcement

[20] Eckhoff, *op.cit.*, p. 89.

[21] Johannes Brinkmann and Torstein Eckhoff, *Ligningsfunksjonærenes rettskildebruk* (The Use of Legal Sources by Tax-administration Officials), Institutt for offentlig retts skriftserie 1/86, Oslo 1986.

agencies shows that norms in such situations may be used as bargaining instruments to achieve results favoured by the agency.[22] This is the case even when the norms in question are strict rules. Similar situations have been found in studies of regulatory agencies within the scope of regulation of workers' health and safety[23] and environmental control.[24]

Agencies of the state may have the interests of other state agencies in mind, and take a purposive approach to the norms on account of this. Studies of the Soviet Procuratura illustrate this point. Contrary to popular belief, this institution does exercise an independent legal review of decisions and actions of other state agencies.[25] The Procuratura however, in compliance with the socialist doctrine of organs of the state as organs of the people, shows loyalty to higher organs of the state. David and Brierly state:[26]

> Its interventions appear to have occurred principally in labour law matters and in relation to measures taken by local authorities. The decrees of more highly-placed organs are less exposed to its criticisms because such bodies have in their own right greater administrative expertise and a greater ability to study matters in depth.

David and Brierly do, however, mention examples of decisions of higher authorities having been quashed.

Even the judiciary, who normally take an evaluative approach, may take a purposive approach when their own interests are involved. Clear examples of this are found when the judge is corrupted or bribed. One does not have to go to such extremes, however, to find examples of self-interest influencing the approach to the norms. It has been claimed that the shift in the attitude of justices in the United States Supreme Court in 1936 may be ascribed to the interests of the judiciary to avoid open confrontation over the New Deal policy. It is striking how the attitude of Justices Hughes and Roberts towards the constitutional issues changed permanently at the time of Roosevelt's court "quashing" proposal.

Courts may identify themselves with other state organs, and therefore take a purposive approach to protect their interests. A recent study of who most often comes out ahead in appeals to State Supreme Courts in the USA shows an undisputed tendency that the success rate of cities and state governments as appellants and respondents far exceeds that of any other type of party.[27] This

[22] Jerome Skolnick, *Justice without Trial: Law Enforcement in Democratic Society*, New York 1966.

[23] Hans Petter Graver, "Normative and Purposive-rational Reasoning", *Rechtstheorie* 1986, *Beiheft* 10, p. 47.

[24] Erhard Blankenburg, "The Waning of Legality in the Concept of Policy Implementation", *Law and Policy*, vol. 7, 1985, p. 481.

[25] René David and John E.C. Brierly, *Major Legal Systems in the World Today*, London 1985, p. 218.

[26] *loc.cit.*

[27] Stanton Wheeler, Bliss Cartwright, Robert A. Kagan and Lawrence M. Friedman, "Do the 'Haves' Come out Ahead? Winning and Losing in State Supreme Courts, 1870–1870", *Law and Society Review*, vol. 21, 1987, p. 403.

in itself is no evidence for the fact that the judges take a different approach to the norms in cases where cities and states are parties. But it does in the present author's view substantitate a hypothesis that there is a certain amount of identification between the appellate courts and other organs of government.

Similarly, this identification may be a factor against the defendant in larger criminal cases, where the prosecution has invested much time and prestige in obtaining a conviction. In other cases, the time and prestige invested may be by other organs of the state. The Norwegian case of the legality of a decision made by the Government and Parliament regarding exploitation of the hydro-electrical power of the Alta-Kautokaino river may be seen in this light.[28] Despite the fact that formal mistakes had been made in the decision to exploit the river, the Supreme Court sustained the decision. Much government prestige was at stake here.

Another example involves the legality of an Act making the gold standard tied to money obligations void.[29] A case was here filed by some French owners of gold standard obligations with the Norwegian state as debtor. The Supreme Court found that these obligations could be quashed in the interests of the national economy, despite the fact that this could be argued to be seen as a retroactive application of the Act. Overruling the Act in the 1960s would have had a serious impact on the national economy.

4.5.3. *Interests of affected parties*

The nature and degree of a conflict of interests in relation to the decision may influence the approach of the decision-maker to the norms, even if he has no direct interest in the outcome. The influence may work in different directions, towards different types of attitude towards the norms.

If there is a possibility for the decision-maker to exit from the situation and not make a decision, this implies a purposive approach to the norms at hand. A famous example of this is the case of Pilate at the trial of Christ. Finding no guilt in Christ according to Roman law, he "washed his hands" and left the decision to the Jews. This example may also be interpreted that Pilate sees it as being in his own interests to follow the wish of the priests, thus avoiding social unrest; and that he therefore does not avoid the decision but decides according to their wishes. Either way, this is a clear example of a purposive approach to the norms of Roman law. Both interpretations have support in the Bible, the former in St. Matthew's Gospel, the latter in Luke.

Similar tendencies to evade decision situations may be observed in law

[28] 1982 NRt 241.
[29] 1962 NRt 369.

enforcement agencies over questions of a highly controversial nature. One example of this is the police approach to the anti-abortion laws:[30]

> Notwithstanding the highly symbolic fights about legislation against abortion, these laws have been widely neglected by the prosecution agencies; sanctions are applied in extremely rare cases.

In many instances within the legal system, there is no escape route for the decision-maker. In such a case, the decision-maker may be inclined to take a position which underscores his neutrality. Avoiding purposive approach may be a way of protecting himself from criticism from the conflicting parties. This is a main point in the analysis of judicial and administrative decision-making of Eckhoff and Dahl Jacobsen.[31]

One result of this may be to take a formalistic approach and claim neutrality in applying a set of rules. An expert setting out to achieve certain goals may in this way adhere strictly to the technical recommendations of the profession and the formulation of the goals in binding rules. This is an approach consistent with Weber's concept of formal rationality according to legal authority,[32] and is possible under two conditions. The first is the existence of generally accepted norms formulating the goal for the activity. The second is the existence of a homogeneous expertise formulated as technical recommendations.

If the second condition is not met, the decision-maker may achieve neutrality by "finding" binding rules for the activity in the form of adherence to precedent, administrative guidelines elaborating and determining the content of the general goal-formulations, etc. Conflict of interest may in this way strengthen the tendency to formalism within the administration due to the effects of a high caseload and lack of time. This is an important factor when evaluating the impact of planning and social reform legislation with controversial goals and where uncertainty about how to reach the goals is high.

If the first condition is not met, and there is no generally accepted binding formulation of the goals, an evaluative approach to the norms may be necessary. This may be the case when the question of how to interpret norms formulating the goals is controversial. In such cases, a formalistic approach will not in itself secure the impression of neutrality on the part of the decision-maker.

Here, an evaluative approach will draw on the total system of norms. The legal system has a set of characteristics which support the impression of neutrality in an evaluative approach.

First, there is the case of the comprehensiveness of the system of legal norms.

[30] Blankenburg, *op.cit.*, pp. 483 f.
[31] Eckhoff and Dahl Jacobsen, *op.cit.* (footnote 2 above).
[32] Weber, *op.cit.* (footnote 1 above), pp. 212 ff.

Unlike the case in any other professional set of norms, a definite decision may be reached on any case within the framework of the legal norms.[33] If a question is found not to be regulated by the positive legal norms, the answer is simply that the issue at hand is legal or permitted, or that a claim is unjustified.

Secondly, there is the public nature of judicial decision-making: trials are open to the public. The parties involved have the same rights to stake and argue for their claim. The judge reasons according to accepted standards of practical argumentation, or at least closely enough to these to seem neutral.[34] Cases of deviance from such standards of practical reasoning can be explained by the fact that the activity is norm-regulated—the judge can take a formalistic approach to some of the norms which have relevance to the situation, as for instance when some arguments are deemed irrelevant by the rules of procedure.

In relation to modern social reform legislation, the judicial decision of courts and higher administrative agencies may lend support to the neutrality of administrative decisions as a result of the *differences* in the approach to the norms in the two types of decision-making. The evaluative approach of the judicial decision may result in decisions which can substitute unclear or controversial goal formulations, and may supply the necessary foundations for a formalistic approach within the administration. The *content* of the judicial decision is unimportant in this context: the important fact is that a result is reached which supplies the legitimate normative basis for a formalistic approach to the norms at hand. By maintaining an evaluative approach also to goal-oriented norms, the courts thus can fill a gap which arises for example where the goals themselves or the means of reaching them are controversial.

5. CONCLUSION

This paper has shown that the mere distinction between value orientation and goal orientation is insufficient for analysing different types of decision. The main difference between a judge and a business manager is not that the one is oriented towards legal norms and the other towards profits: they are both oriented towards norms, albeit of a different kind. The institutional and social setting they are in, which determines their decision situation, is what gives them their different approach to the norms that govern their decision. In this way, the present author's argument concurs with those of the new institutional

[33] Aubert, *op.cit.* (footnote 3 above).
[34] Robert Alexy, *Theorie der juristischen Argumentation*, Frankfurt am Main 1978.

approach to the question of rational choice.[35] The institutional approach has broken down the old myths of the rational choice models, paving the way for a breakdown of the myths of norm-oriented decisions as a category distinct from purposive rational reasoning. "Rationality" is an elusive concept, which brings into an empirical investigation expectations from social norms and theoretical reasoning on how the decision-maker ought to behave. The way to avoid this is to distinguish sharply between the types of norm governing a decision and the approach of the decision-maker. Such a distinction is not possible when operating with models of decision based only on a distinction between norm-oriented and goal-oriented decisions.

Just as institutional settings shape the approach of the decision-maker to goals and technical recommendations on the choice of means, so they shape the approach to strict rules and rules of evaluation. It is interesting and promising that the study of intentional decisions within organization theory on the one hand, and the study of norm-oriented decisions within legal theory on the other, lead to the same findings. This may, for legal theory, illuminate how institutional factors determine legal decision-making. On the other hand, legal theory and legal doctrine have quantities of empirical evidence to offer organizational theory on how decision-makers respond to factors such as conflict, ambiguity and historical learning, and the consequences of such adaptation in the formulation of a system of norms to aid, explain and legitimize itself. In the future, a blend between these two theoretical traditions may lead to better insight into the question of human choice in general.

[35] James G. March and Johan P. Olsen, "The New Institutionalism: Organizational Factors in Political Life", *American Political Science Review*, vol. 78, 1984, p. 734, and James G. March, *Decisions and Organizations*, London 1988 (forthcoming).