THE ROLE AND LOGIC OF SUBSTANTIVE REASONS IN ADJUDICATION

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> The true grounds of decision are considerations of policy and social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes.
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> *Justice Oliver W. Holmes*

> I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and distance.
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> *Justice Benjamin N. Cardozo*

I. Introduction

In this paper, we analyze the role and logic of substantive reasons in adjudication. There can be no doubt as to the value of such a study. Substantive reasons abound in jurisprudence, and when imprudently used, leave the judge open to the charge of subjectivity, arbitrariness, and even bias. Clearly, some attempt must be made towards specifying some standards as to their correct use. We attempt just that, with special attention paid to Philippine jurisprudence.

Our discussion necessitates several sections. First, we define a substantive reason by contrasting it with a formal one; in the process, we also distinguish a rule from a principle or policy. Secondly, we demonstrate that substantive reasons are indispensable to adjudication, be it jurisprudence found in the United Kingdom, the United States, or the Philippines. Thereafter, a characterization of a substantive reason and an exposition of its two main types will be provided. Each type will then be assessed and analyzed to determine the respective requirements of a good substantive reason of that type. Finally, we show the need for a proper framework in which these substantive reasons can be

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objectively weighed against each other, in order not only to arrive at a just decision to the case but also to formulate the legal norm covering the case, with the desired degree of precision and generality.

II. Formal and Substantive Reasons

All sorts of reasons are cited by the judge to justify his decision. They may either be formal or substantive. The prototype of a formal reason is an authoritative legal rule: the existence of a readily identifiable rule directly covering a case and providing sufficient ground for rendering a decision in accordance with it. Three requirements are involved:[1] (i) that the formal reason is a rule; (ii) that such rule can be "mechanically" identified by means of some source-based test;[2] and (iii) that such rule is "mechanically" applied. No controversial interpretation is possible and no value judgment necessary. All that is required is the purely mechanical skill of identifying the rule and determining whether the facts of the case are logically subsumed under the rule for the decision to be made.

On the other hand, substantive reasons are based on moral, economic, political, institutional or other social considerations.[3] They will be classified into two main types: principles and policies. They are not necessarily derived from authoritative legal sources and applying them involves controversial interpretation and the use of value judgment. Moreover, they are applied whether or not a rule directly covering the case already exists. In these instances, they provide the underlying value or purpose behind the rule, or an independent reason for deciding in accordance with it, or an argument for a contrary result. Normally, the judge uses both formal and substantive reasons to justify his decision.

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[1]Atiyah and Summers distinguish between four main types of formality: authoritative, content, interpretative and mandatory formality. *See* P. ATIYAH AND R. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 12-17 (1987).

[2]A source-based test is to be distinguished from a content-based test. To borrow from Raz, such tests for determining the existence of law "depend exclusively on facts of human behavior capable of being described in value-neutral terms, and applied without resort to moral argument". *See* RAZ, THE AUTHORITY OF LAW 39-40 (1979). Hart's rule of recognition is generally considered to be a source-based test. *See* HART, THE CONCEPT OF LAW 89-107 (1961).

[3]Summers defines it thus: "A good substantive reason is a reason that derives its force from a moral, economic, political, institutional, or other social consideration". Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*", 63 CORNELL L. REV. 716 (1978).

Rules are to be distinguished from substantive reasons in terms of four characteristics: (i) levels of generality;[4] (ii) degrees of precision; (iii) degrees of directiveness; and (iv) ability to self-justify.[5] Rules possess a low level of generality, a high degree of precision, a high degree of directiveness (*i. e.*, dictating rather than merely guiding or influencing the result), and are not self-justifying. Substantive reasons, on the other hand, possess a high level of generality, a low degree of precision, a low degree of directiveness, and are self-justifying.

These logical distinctions between rules and substantive reasons explain not only why the latter, and not the former, necessitate the use of value-judgment in interpretation but also why the latter's content may be further articulated by rules. In being more general, less precise and self-justifying, substantive reasons serve as the guiding rationale for the construction of rules. They express or embody fundamental principles or policies, like those found in the Constitution[6], or in certain statutes.[7] By the incorporation of these principles into the law, substantive reasons not only justify themselves but also the more specific rules constructed in their light. For example, the policy of protection to labor embodied in the Constitution and the Labor Code is rendered more specific and precise by means of rules also found in the Code guaranteeing minimum wage, maximum work hours, overtime pay, injury compensation and the like.

There is another fundamental difference between rules and substantive reasons. Substantive reasons function on two levels, whereas rules function only on one. On the first level, substantive reasons directly influence acts, or, in the judicial situation, the result or decision. Insofar

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[4]By `level of generality', we mean not only wideness of scope but also ability to encompass unspecific acts. "Rules prescribe relatively unspecific acts; principles highly unspecific actions. Generic acts, types of acts, are of various degrees of specificity. An act is highly unspecific if it can be performed on different occasions by the performance of a great many heterogeneous acts on each occasion. It is more specific to the extent to which there is only a small number of generic acts by the performance of which it is performed." *See* Raz, *Legal Principles and the Limits of Law*, 81 YALE L. J. 838 (1972).

[5]Dworkin tends to lump these distinctions between a rule and a principle together: "Rules are applicable in an all-or-nothing fashion" and "principles have a dimension of weight or importance that rules do not". *See* DWORKIN, TAKING RIGHTS SERIOUSLY 24-26 (1977).

[6]These include freedom (Art. III), democracy and republicanism (Art. II, sec. 1), international peace (Art. II, sec. 2), supremacy of civilian authority (Art. II, sec. 3), peace and order (Art. II, sec. 5), separation of Church and State (Art. II, sec. 6), and social justice (Art. II, sec. 10).

[7]*See*, for example, Art. 3 of the Labor Code (protection to labor), Art. 1159 of the Civil Code (security of contract), and Rule 1, sec. 2 of the Rules of Court (just, speedy and inexpensive determination of cases).

as their effect is not mediated by rules, they belong to the same level. Both are mandatory norms[8] of conduct, but they differ in that substantive reasons are more general, less precise and less indicative of a course of action than rules. On the other hand, in their higher-level sense, substantive reasons affect rules in two ways. First, they help determine the scope of a rule. Specifically, they serve as guiding standards against which rules are interpreted in particular situations. Rules may be narrowed, widened or qualified in the light of underlying substantive reasons. Secondly, substantive reasons supply rules with some weight, that is, they help support the application of a rule when the latter is measured against the weight of contrary reasons.

It is in the first way that substantive reasons in their higher-level sense function much like canons of construction or techniques of interpretation. These techniques are used by judges to interpret the language in which a law or legal norm is expressed. The three canons of statutory construction in English law, for example, are the literal rule,[9] the golden rule,[10] and the mischief rule.[11] More specific techniques of

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[8]*See* RAZ, PRACTICAL REASONS AND NORMS 50 (1975) for essentially the same characterization of a mandatory norm, which in turn is derived from Von Wright in NORM AND ACTION, Chapter V (1963). "For convenience, I shall, following Von Wright ..., distinguish four elements in every mandatory norm: the deontic operator; the norm subjects, namely the persons required of them; and the conditions of application, namely the circumstances in which they are required to perform the action."

[9]"The only rule for the construction of Acts of Parliament, is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statutes are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the lawgiver." Sessex Peerage Case, 11 Cl. & Fin. 85 (1844).

[10]"... I believe that it is not disputed that what Lord *Wensleydale* used to call the golden rule is right, *viz.*, that we are to take the whole statute together, and construe it all together, giving their words ther ordinary signification, unless when so applied they produce an inconsistency, or an absurdity and inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary significance, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear." River Wear Commissioners v. Adamson, 2 App. Cas. 743, 764-765 (1877).

[11]"And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law), four things are to be discerned and considered:

1st. What was the Common Law before the making of the Act?

2nd. What was the mischief and defect for which the Common Law did not provide?

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth?

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction to suppress subtle inventions and evasions for

interpretation are the *ejusdem generis*, the *noscitur a sociis*, and the *expressio unius est exclusio alterius* rules.[12] But these techniques of interpretation, unlike principles or policies, are not also norms of conduct guiding the behavior of citizens. However, they function indirectly as an aid to interpretation, and as such, are just as essential to adjudication.

III. The Indispensability of Substantive Reasons

> But to say that the law is a rational enterprise is to say, not just that a legislator's enactments must be justified by certain kinds of reasons, but also that he must be able to justify them to the citizens which they are meant to bind; that he is engaged in a rational rather than purely manipulative or coercive relationship with the citizens. Law involves, not just manipulating or controlling the citizen's behavior towards some morally approved goal, but subjecting them as rational agents to the requirements of rules which impose obligations on them.
>
> *R. A. Duff*

> Fact situations do not await us neatly labelled, creased and folded; nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand, with all the practical consequences involved in this decision.
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> *H. L. A. Hart*

The advantage of formal adjudication or of adjudication by appealing exclusively to rules is plain to see. It is even-handed, impartial and uniform. By applying rules, the ideal of formal justice, that like cases are to be decided alike and different cases differently, is adhered to. The law becomes no respecter of persons; it applies to friend or foe alike, to strong or weak, to rich and poor. Hence, charges of bias and prejudice disappear.

Yet, substantive reasons abound in jurisprudence. This is no accident. They are unavoidable. For no legislature can ever devise a set of rules so complete and precise, that it can predict in advance, clearly

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continuance and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*." Heydon's Case, 3 Co. Rep. 7 (1584).

[12]Literally, the maxim *ejusdem generis* means "of the same kind"; *noscitur a sociis* "a thing is known by its companions"; and *expressio unius est exclusio alterius* "the mention of one thing is the exclusion of the other".

and unequivocally, the just solution to every dispute that will arise in adjudication. This is both a human and linguistic inadequacy in a situation where man is compelled to categorize amidst an infinity of facts. Human foresight is limited and human language is never precise enough.[13] There will always be situations where the law is not amenable to a clear, undisputed and mechanical interpretation, which is satisfying to justice. In these situations, referred to as "hard cases",[14] substantive reasoning is indispensable.

However, substantive reasons are used not only in hard cases, but also in easy ones.[15] This happens when the judge reinforces his use of a formal reason by substantive ones.

Hard cases would fall into four categories: (i) cases in the gaps; (ii) cases governed by substantive legal norms; (iii) cases of conflict; and (iv) cases of unsatisfactory law. In the discussion which follows, the claim that substantive reasons are indeed all-pervasive shall be substantiated by means of legal examples.

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[13]*Compare* with Hart's statement, *supra* note 2, at 121-132.

[14]Dworkin used the term 'hard cases' to refer to Hart's idea. "Legal positivism provides a theory of hard cases. When a particular lawsuit cannot be brought under a clear rule of law, laid down by some institution in advance, the judge has, according to that theory, a 'discretion' to decide the case in either way." *See* Dworkin, *supra* note 5, at 81.

Hart distinguished these cases from 'clear cases' and called them 'problems of the *penumbra*'. "We may call the problems which arise outside the hard core of standard instances or settled meaning 'problems of the *penumbra*'; they are always with us whether in relation to such trivial things as the regulation of the use of a public park or in relation to the multidimensional generalities of a constitution." *See* Hart, *Positivism and the Separation of Law and Morals*, 71 HARVARD L. REV. 598 (1958).

In this paper, not all 'hard' cases are simply 'problems of the *penumbra*'.

[15]'Easy' cases are to be contrasted with hard cases. Hart called them 'clear' cases, "where no doubts are felt about the meaning and applicability of a single legal rule". "The clear cases are those in which there is general agreement that they fall within the scope of a rule, and it is tempting to ascribe such agreements simply to the fact that there are necessarily such agreements in the use of the shared conventions of language. But this would be an oversimplification because it does not allow for the special conventions of the legal use of words, which may from their common use, or for the way in which the meanings of words may be clearly controlled by references to the purpose of statutory enactment which itself may be either explicitly stated or generally agreed." *See Problems of the Philosophy of Law*, THE ENCYCLOPEDIA OF PHILOSOPHY 271 (1984).

David Lyons defined it in the way we use it in this paper. "Let us define an *easy case* as one in which the law is clear enough so that it can be decided in a more or less "mechanical" way, by applying relevant rules in a logically rigorous argument." Lyons, *Justification and Judicial Responsibility*, 72 CAL. L. REV. 180 (1984).

A. Easy Cases

There can be no better proof of the indispensability of substantive reasons than in the adjudication of easy cases. For in easy cases, substantive reasons are unnecessary. The fact that a legal rule can clearly be said to cover a case is already sufficient grounds for the latter to be decided. Nevertheless, the judge, when applying such a rule, at times makes use of substantive reasons. This is so for either of two reasons. First, he may do so for clarificatory purposes, giving the spirit or meaning behind the law by citing its rationale. Or secondly, he may do so for justificatory purposes, reinforcing the use of the rule with its rationale or with an independent reason.

Mobil Oil v. Diocares,[16] for example, involved a straightforward application of Art 2125 of the New Civil Code in upholding the validity, as among the parties, of an unrecorded mortgage agreed upon by them. The said article provides: "If the instrument is not recorded, the mortgage is nevertheless binding between the parties." It is obvious, then, that "(t)he law cannot be any clearer. Effect must be given to it as written. The mortgage subsists; the parties are bound".[17] Nevertheless, then Justice (now retired Chief Justice) Fernando used other reasons in resolving the case. He appealed to legislative purpose as an aid to interpretation, citing the Report of the Code Commission. More importantly, he reinforced the formal reason with the substantive reasons of equity, justice, the binding effect of a promise, and the harmful consequences of noncompliance. "Equity so demands and justice is served. There is thus full acknowledgment of the binding effect of a promise, which must be lived up to, otherwise the freedom a contracting party is supposed to possess becomes meaningless".[18]

B. Hard Cases

1. Cases in the gaps

A case in the gaps occurs when the situation involved does not exactly fall under what Hart calls the "hard core of standard instances or settled meaning" of a legal rule.[19] The situation will then be said to fall in the penumbra or be in the borderline. To resolve the dilemma, the judge quite often cannot avoid appealing to substantive considerations as a guide.

[16] 29 SCRA 656 (1969).
[17] *Id.*, at 660.
[18] *Id.*, at 661.
[19] *Supra* note 14.

In *Matabuena v. Cervantes*,[20] the question facing the Court was whether a ban on a donation between the spouses during a marriage could be extended to apply to the borderline situation of a common law relationship. Art. 133 of the Civil Code mentions specifically only a ban on donations between spouses during marriage, and does not explicitly contemplate a common-law relationship. Nevertheless, Justice Fernando, in applying Art. 133 to common-law husbands and wives, appealed to the law's rationale and other substantive reasons: "(P)olicy considerations of the most exigent character as well as the dictates of morality require that the same prohibition should apply to a common-law relationship."[21] Hence, the policy consideration of avoidance of undue and improper pressure and influence upon the donor, which was the rationale for instituting a ban on donations between spouses, was held to be equally relevant to common-law husbands and wives. Furthermore, the moral dictates of justice, rightness and fairness were heard. "[I]f (spouses and common-law relationships are) at all to be differentiated, the policy of the law which embodies a deeply-rooted notion of what is just and what is right would be nullified if such irregular relationship, instead of being visited with disabilities, would be attended with benefits".[22]

The case of *Tañada v. Cuenco*,[23] on the other hand, was concerned with the interpretation of a constitutional provision regarding the composition of the Senate Electoral Tribunal and its application to the situation where the minority party lacked the three necessary members to fill the Tribunal. The provision reads:

> Each Electoral Tribunal shall be composed of nine Members, three of whom shall be justices of the Supreme Court to be designated by the Chief Justice, and the remaining six shall be the Members of the Senate or of the House of Representatives, as the case may be, who shall be chosen by each House, three upon nomination of the party having the largest number of votes therein."[24]

It was the contention of the majority Nacionalista Party (which had 23 Senators) that Senator Tañada, the lone member from the minority Citizens Party, waived his right to nominate members by nominating only himself and failing to nominate another two. Due to the waiver, the Nacionalista Party now had the right to fill up the

[20] 38 SCRA 284 (1971).
[21] *Id.*, at 287.
[29] *Id.*, at 288.
[23] 103 SCRA 1051 (1981).
[24] CONST., (1935), art. VI, sec. 11.

vacancy, since (as borne out by the Opinion of the Secretary of Justice dated February 1, 1939) by the use of the word "shall" in the constitutional provision, it is mandatory and not merely directory that the Tribunal be composed of nine members.

This interpretation was, however, ruled out as erroneous by then Justice (now deceased former Chief Justice) Concepcion for several reasons, which included substantive ones. On the issue of whether or not Senator Tañada waived his right to nominate members, the Court held that the power to waive constitutional rights which involve public policy or public morals, as opposed to constitutional rights intended for private benefit, does not exist. As to the claim that the Tribunal must be composed of nine members, the Court pointed out that the word "shall" is also used in connection with the procedure for nomination. Hence, if the argument of the majority party is followed, it must be mandatory, as well, that the minority party shall exercise the exclusive right to select three members, and if the party selects only one either by design or by force of circumstances, then that is its sole prerogative. Ultimately, an appeal to the rationale behind the constitutional provision was made to determine its correct interpretation, which was made possible by consulting the Records of the 1935 Constitutional Convention. The substantive reasons of fairness, judicial impartiality and the elimination of partisan considerations in the determination of electoral contests provide the essence of this provision. "(T)he most vital feature of the Electoral Tribunals is the equal representation of said parties therein, and the resulting equilibrium to be maintained by the Justices of the Supreme Court as members of said Tribunals".[25] This was "to insure the exercise of judicial impartiality", for "even the most well-meaning individuals often find it difficult to shake off the bias and prejudice created by political antagonisms and to resist the demands of political exigencies, the pressure of which is bound to increase in proportion to the degree of predominance of the party from which it comes".[26]

Vague terms like "equivalent" have an area of uncertainty where substantive reasons can be used to aid in interpretation. This was the situation facing the Supreme Court in *Marcopper Mining Corporation v. Ople*,[27] where P.D. 851, the 13th Month Pay Law, was to be applied. The pertinent portion reads thus:

> *Section 1.* All employers are hereby required to pay all their employees receiving a basic salary of not more than P1,000 a

[25]103 SCRA 1085 (1981).
[26]*Id.*, at 1083, 1091.
[27]105 SCRA 75 (1981).

> month, regardless of their nature of employment, a 13th month pay not later than December 24 of every year.
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> *Section 2.* Employers already paying their employees a 13th month pay or its equivalent are not covered by this Decree.

Marcopper sought an exemption from this requirement by claiming that the mid-year and year-end bonuses it granted to employees on the basis of a collective bargaining agreement was equivalent to a 13th month pay.

In ruling that it was not equivalent, the Court made use of semi-technical distinctions. A bonus was defined as an obligation created by contract and, according to the terms of such contract, is dependent on the realization of profit; thus, it is more appropriately called a fringe benefit. Thirteenth month pay, on the other hand, is an obligation created by law and, as such, is absolute and mandatory; thus, it is more properly referred to as a wage. This would have been sufficient. Nevertheless, a purposive approach to interpretation was availed of in citing the principles of social justice and protection to labor to support the decision: "Time and time again, we have stressed that statutes intended to benefit labor should be accorded the most hospitable scope to attain their dominant purpose. Thereby fidelity is manifested to the constitutional policy embodied in the principle of social justice and the mandate of protection to labor."[28]

From the British experience comes *Donoghue v. Stevenson,*[29] which concerned a manufacturer's duty of care. The British law lords were asked to consider whether the scope of such duty extended to a consumer of ginger beer who suffered physical and psychological injury as a result of drinking from a ginger beer bottle which contained the decomposed remains of a snail. There were other cases of similar nature[30] to suggest that this case ought not to lack authority. However, conflicting interpretations of these cases abound.

From a conservative viewpoint, the manufacturer's duty towards a person with whom he has no contractual relation arises only in two cases: (i) where the article itself is dangerous; and (ii) where the article, not in itself threatening, is still dangerous by reason of some defect known to the manufacturer. Two lord justices, relying on these

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[28]*Id.*, at 84, citing La Mallorca v. Workmen's Compensation Commission.

[29]1932 A.C. 562.

[30]*See*, for example, Langridge v. Levy, 2 M.IJ.W. 519, 4 M.I.W. 337 (gun of defective make); Langmeid v. Holliday, 6 Ex. 761 (defective lamp); Winterbottom v. Wright, 10 M.I.W. 109 (carriage negligently constructed); George v. Skivington, L.R. 5 Ex. 1 (noxious hairwash)

categories, concluded that no duty of care towards the consumer of ginger beer existed. This minority opinion was bolstered by substantive reasons. Lord Tomlin argued against the injustice of subjecting manufacturers to an action of tort, when they have already satisfactorily complied with all terms of the contract. Both Lords Tomlin and Buckmaster feared the consequences of allowing this new category of tort, since this would result in increased litigation, as well as unduly restrict commercial activity.

Lord Atkin, who penned the majority opinion, took a different line of interpretation. In two previous cases,[31] a comprehensive principle, outlining a general duty of care based on a relationship of proximity, had already been boldly enunciated. Lord Atkin reformulated this into the now authoritative principle of liability for negligence, commonly known as the "neighbour" principle:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be -- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.[32]

Hence, Lord Atkin held that since there is no possibility of intermediate examination of the ginger beer, sealed and encased as it is in a bottle made of opaque glass, before it reaches the ultimate consumer, there is sufficient proximity between the manufacturer and the ultimate consumer, for the "neighbour" relationship to occur or for the former to owe a duty of care to the latter.

Lord Atkin's ruling was influenced by substantive reasons. He appealed to the principle requiring an offender, in this case, the manufacturer, to pay for his moral wrongdoing.[33] Lord MacMillan, in concurring with Lord Atkin, reaffirmed the inherent rightness of requiring manufacturers, who intentionally place themselves in a relationship with the consumer for the purpose of profit, to be held liable for their harmful, negligent acts. He stressed this point by analogy:

> Suppose that a baker through carelessness, allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned, could he be heard to say that he owed no duty to consumers of his bread to take

[31]Heaven v. Pender, 11 W.B. 503; Le Lievre v. Gould, [1893] 1 Q. B. 491.
[32]1932 A.C. 580.
[33]*Id.*

> care that it was free from poison and that, as he did not know that any poison had got into it, his only liability was for breach of warranty under his contract of sale to those who actually bought the poisoned bread for him?[34]

2. Cases governed by substantive legal norms

Sometimes the substantive reason is already incorporated into the law. This is not surprising since the law is intended to regulate the affairs of men, and this can most effectively be done by means of fair and reasonable standards. Hence, the Constitution already embodies the highest ideals and aspirations of the State. Legislation is often required to cure a mischief, to pursue a remedy or to promote a policy. Codes are constructed with an underlying comprehensive philosophy behind them. And judicial precedent is formulated with the intention to pursue justice in each case. The application of such substantive legal norms often requires controversial interpretation and value judgment, normally features of hard cases.[35]

Articles 19 and 21 of the Civil Code, for example, are both substantively formulated. Article 19 reads: "Every person must, in the exercise of his rights and the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith." Article 21 provides: "Any person who willfully causes injury to another in a manner that is contrary to morals, customs or public policy shall compensate the latter for the damage." In applying these articles, the judge automatically makes use of substantive reasons.

For instance, Shell Co. of the Philippines, in *Shell v. Velayo*,[36] was held liable for damages when its credit manager, who had just agreed with the other creditors of the financially troubled Commercial Air Lines, Inc. (CALI) to preserve CALI's only assets and to strive for a fair pro-rata division, violated Articles 19 and 21 of the Civil Code. Upon learning that CALI's only remaining substantial asset, a C-54 plane, was docked in California, he, suddenly and without the knowledge of the other creditors, assigned Shell Philippines' credit against CALI to the American corporation Shell Oil Co. for $79,440.00. A writ of attachment was subsequently issued against the plane by the Superior Court of the State of California, which placed the plane beyond the jurisdiction of the Philippine Courts to the detriment of the

[34] *Id.*, at 620.

[35] To be more accurate, cases governed by substantive legal norms, as hard cases, are actually variants of the three other types of hard cases. We decided to put them under a special category.

[36] 100 Phil. 186 (1956).

other creditors. Justice Felix classified Shell's act "which may be a shrewd and surprise move that enabled (Shell) to collect almost all if not the entire amount of its credit"[37] as one "committed in bad faith and with betrayal of confidence"[38] which "entirely disregarded all moral inhibitory tenets".[39]

Article 22 of the New Civil Code, which articulates the principle of unjust enrichment, is another substantively formulated legal provision. It reads: "Every person who through an act or performance by another, or by any other means, acquires or comes into possession of something at the expense of the latter, without just or legal ground, shall return the same to him." In *Perez v. Pomar*,[40] this principle was applied as a doctrine implicit in the law, since, at that time, there was no clear statutory authority for it. In that case, Pomar was held liable for the six-month service rendered by Perez as interpreter. There was no written contract entered into by the parties. Nonetheless, Pomar's liability was established because all the elements necessary to constitute a contract of lease of services existed. The conclusion, that an implied contract sufficient to create a legal obligation existed, was arrived at through the application of the principle of unjust enrichment.

3. Cases of Conflict

It is perhaps a truism in law that many cases brought for adjudication involves a conflict of law.[41] Each side to a dispute cites the law supportive of his case. If distinct laws are cited, the judge has to decide which of them is controlling. At times, this conflict may be resolved through the use of a hierarchy. For instance, since the Constitution is a higher law than a statute, the judge will decide that the constitutional provision cited is controlling. However, in many cases, the resolution of the conflict is not that simple; hence, one has to appeal to substantive reasons.

One good example of a conflict situation is that posed by the due process clause. Unlike in English jurisprudence, where the right is

[37]*Id.*, at 199.
[38]*Id.*, at 204.
[39]*Id.*, at 198.
[40]2 Phil. 682 (1903).
[41](T)he line of inquiry via rationalization has come close to demonstrating that in any case doubtful enough to make litigation respectable, the available authoritative premises, *i.e.* premises legitimate and impeccable under the traditional legal techniques -- are at least two, and that the two are mutually contradictory as applied to the case at hand." *See* Llewellyn, *Some Realism about Realism: Responding to Dean Pound*, 44 HARVARD L. REV. 1239 (1931).

confined to procedural due process, a sweeping interpretation of such right in both American and Philippine courts resulted in the extension of its scope to substantive due process. The right affects all other types of rights, such as social, political, economic and intellectual rights. Thus, the due process clause has been used to strike down legislation deemed violative of an individual's fundamental rights, although said legislation had satisfied all procedural requirements for its valid enactment.

In *Calalang v. Williams*,[42] for example, a conflict arose between the application of the constitutional provision on due process and the police power of the State as expressed through a traffic resolution prohibiting animal-drawn vehicles to use Rosario Street and Rizal Avenue. While the principle of due process is expressly provided for in the Constitution, the State's police power is not, since it is inherent in the very concept of the state and is likewise a manifestation of the exercise of sovereign rights. It has been variously formulated in judicial decisions as "the power to prescribe regulations to promote the health, morals, peace, education, good order or safety, and general welfare of the people"[43] or as "that inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort, safety and welfare of society."[44]

Justice Laurel, in ruling that the closing down of streets to animal traffic was within the police power of the State, said that the contested legislation "aims to promote safe transit upon and avoid obstructions on national roads, in the interest and convenience of the public", "was prompted by considerations of public convenience and welfare", and "was inspired by a desire to relieve congestion of traffic, which is, to say the least, a menace to public safety".[45] Hence, he resolved the issue substantively, as a conflict between two values -- liberty and authority to provide for public welfare.

The American case of *Minersville School District v. Gobitis*[46] also involved a conflict between the due process clause and a statute, as well as competing interpretations of the First and Fourteenth Amendments to the U.S. Constitution. In particular, the due process clause needed interpretation to determine whether a statute requiring all public school pupils to participate in a ceremony saluting the U.S. flag directly infringed the right of a member of Jehovah's Witnesses to

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[42]70 Phil. 726 (1940).
[43]Primicias v. Fugoso, 80 Phil. 71 (1948).
[44]Rubi v. Prov. Board, 39 Phil. 660 (1919).
[45]70 Phil. at 733.
[46]310 U.S. 586 (1940); 84 L. Ed. 1375 (1940).

practice his religion. The religious sect, maintaining that such a ceremony is tantamount to worshipping false idols or graven images, firmly believed that it was expressly forbidden by Scripture. Lillian and William Gobitis, then aged 12 and 10, being faithful members of the sect, refused to participate in the ceremony, and consequently, were expelled from the school. The action sought in behalf of the Gobitis children was to enjoin the authorities from continuing to exact participation in such flag-saluting as a condition for attendance in the school.

Justice Frankfurter, in writing the majority decision in favor of the school authorities, stressed an aspect of the judicial function, which implicitly relied on the doctrine of separation of powers. The judiciary, being a non-elected body, ought to allow legislative bodies, as representatives of the people, freedom to enact statutes designed for a legitimate purpose. Since the purpose of the said legislation was the worthwhile one of promoting national cohesion and unity, the judiciary had no power to declare it unconstitutional. It did not at all matter if the means chosen to achieve the end were unwise. The court has no power to look into the wisdom of a statute. If it were to do so, it would usurp a legislative function not its own.

Justice Frankfurther also affirmed that religious freedom is not absolute, and that the Court, in fact, has previously recognised the State's right to restrict such freedom, notably in the interests of public safety and public welfare.

The dissenting opinion of Justice Stone, on the other hand, stressed the role of the judiciary as the guardian of the Constitution and, in particular, the Bill of Rights. He conceded that the judiciary has no power to declare unconstitutional legislative acts, where such acts restricted the free exercise of religion or free speech in the interests of public safety or public welfare. He was, however, not willing to go so far in his interpretation of the Constitution and judicial precedent as to allow that the State had the right "to coerce children to express a sentiment which they do not entertain and which offends their deepest religious convictions".[47] Pointing out that legislative authorities have other means at their disposal to encourage sentiments of national unity without directly infringing on the individual's right freely to exercise his religion, he concluded that the inconveniences involved in some such sensible adjustment in method to secure the end intended, cannot outweigh the individual's said right.

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[47] 84 L. Ed. at 1383.

4. Cases of unsatisfactory law

Sometimes, the existing law which governs a given case appears unsatisfactory to the judge because its application would lead either to a manifest absurdity or a grave injustice. This happens when a judicial precedent is overruled. If the judge were to abandon the precedent and formulate what appears to him to be the correct legal doctrine for the case, he would need the support of substantive reasons.

Overruling is a much more prevalent practice in both the U.S. and the Philippine Supreme Courts, than in the House of Lords of England. In the case of the former, the justices are not strictly bound by their own decisions, overruling them whenever necessary. In contrast, the House of Lords has been, until recently, bound by precedent. This was established in *London Tramways v. London County Councils*..[48] In 1966, the House issued a Practice Statement[49] liberalizing their approach to previous decisions. However, they still acknowledge the virtues of certainty and stability in the law, and have overruled previous decisions only sparingly.

As an example, the case of *National Federation of Sugar Workers v. Ovejera*[50] overruled the *Marcopper* case.[51] The facts were similar in the relevant aspects, but while the Supreme Court in the earlier case ruled that the mid-year and year-end bonuses are not equivalent to 13th month pay, the Court in the later case held that

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[48]1898 A.C. 375.

[49]The Statement was read by Lord Gardiner L. C. on behalf of himself and the Lords of Appeal in Ordinary before judgements were delivered on 26 July 1966. It reads as follows:

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development ofthe law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection, they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal precedent elsewhere than in this House.

[50]114 SCRA 354 (1982).

[51]In fairness to Justice Plana, he did not consider the *Ovejera* case as overruling *Marcopper*, since he considered the latter as lacking "the necessary eight votes to be doctrinal". *Id.*, at 371.

Christmas, milling and amelioration bonuses were equivalent. According to Justice Plana, it is the actual payment which is essential, and not whether the bonus is "out of pure generosity or on the basis of a binding agreement."[52] To require employers (already giving their employees a 13th month pay or its equivalent) to give a second 13th month pay would be unfair and productive of undesirable results. To the employer who has acceded and is already bound to give bonuses to his employees, the additional burden of a 13th month pay would amount to a penalty for his munificence or liberality.

West Virginia Board of Education v. Barnette[53] also reconsidered the doctrine in *Gobitis*, a similar case.[54] In overruling *Gobitis*, the clear and present danger test was applied as the proper norm of protecting freedom of religion and of speech under the First and Fourteenth Amendments.

The public outcry which followed the *Gobitis* decision reflected the increased importance placed by the public on the value of religious freedom. This may have provided the explanation for the change in view by the Supreme Court which now accorded primary importance to religious liberty in their interpretation of the Constitution.

British Railways Board v. Herrington[55] so effectively reconsidered the *ratio decidendi* in *Addie v. Dumbreck*[56] as to practically overrule it. Both cases, similar in relevant details, involved an infant trespasser. Straying into a field owned by a colliery company, inadequately protected by a hedge to keep the public out, 4-year old Dumbreck was killed, crushed by a terminal wheel of a haulage system belonging to the company. The children disregarded the colliery officials' warnings to get out of the field. On the other hand, Herrington, aged 6, was injured on a live rail when he wandered into the property of British Railways. The fence securing the property was dilapidated. The defendant's station manager knew about this, and that children had been seen in the property. In both cases, the parents sued the owner-occupiers.

The *Addie* decision favoring the owner-occupants resolved the case using the method of rigid conceptualism. The law recognized only three classes of persons entering another's property: the invitee, the

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[52] *Id.*, at 369.
[53] 319 U.S. 624 (1943).
[54] 310 U.S. 586 (1940).
[55] 1972 A.C. 877.
[56] 1929 A.C. 358.

licensee and the trespasser. To the trespasser, the owner owes only the duty not to cause harm recklessly or deliberately, since the former trespasses at his own risk, regardless of his ignorance of the consequences and the dangers. Hence, Lord Hailsham, speaking for a unanimous court, absolved the owners from any liability.

The courts in subsequent cases expressed their dissatisfaction with the *Addie* ruling and took steps to mitigate or circumvent its harshness. Prominent among the devices was the use of the fiction of treating trespassers, particularly children, as invitees if the property contained a dangerous but alluring item, and alternatively, as licensees when the owner had not taken positive or effective steps to deter them from entering.

The resulting dissatisfaction with the law can be traced ultimately to the use of the formal method of conceptualism. In the words of Lord Wilberforce, "human conduct can rarely be squeezed into a predetermined slot; and if this is what courts are told to do, they will find ways, according to their views of the merits, of crossing the lines."[57] In *Herrington,* a substantive approach was utilized to overrule *Addie* and frame the new legal norm. The moral justification for the old norm (*i. e.,* trespassers, by their misbehavior, should not impose onerous obligations on others) was not penetrating enough, failing as it did to distinguish between different types of trespassers. Two substantive reasons, a principle and a policy, were mainly relied upon to overturn *Addie.*

The principle was the socio-moral norm of rightness based on the concept of fault liability -- that a wrongdoer must pay for his harmful acts. Seeing the dangerous nature of the live rail and its perils for a small child, "the railways board were grievously at fault in allowing a fence at the particular place in question to remain for a long time in a broken-down condition. It must at any time be a matter of regret and of concern if the answer of the law does not accord with what common sense would suggest".[58]

The other substantive reason was the policy of promoting public safety. This was inevitable - the changes in physical and social conditions, particularly in towns and cities, warranted it; as a result of overpopulation and advances in industrial technology, children were and are still placed near potentially dangerous situations. Much avoidable harm and damage would continue undeterred if the attendant situation, where no liability had been placed on the owners to keep

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[57]1972 A.C. 912-913.
[58]*Id.*, at 901-902.

their premises either inacessible to or safe for wandering children, remained as it was.

With the aid of a proper evaluation of these substantive reasons, a new legal rule governing owner-occupier liability towards trespassers was framed. Lord Reid phrased it thus:

> [T]he question whether an occupier is liable in respect of an accident to a trespasser on his land would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have avoided it."[59]

Clearly, no too rigid a standard nor one too open-ended was desirable. "The dangers of too precise, or exhaustive, or codified a definition are exemplified by *Addie's* case itself. On the other hand, to adopt the expedient of recoiling upon the comfortable concept of the reasonable man is hardly good enough. It evades the problem by throwing it into the lap of the judge. We must try at least to set up some boundary marks."[60]

III. TWO TYPES OF SUBSTANTIVE REASONS

A. *Definition of Substantive Reasons*

There are two main types of substantive reasons - principles and policies. Dworkin defined a principle as "a standard to be observed ... because it is a requirement of justice or fairness or some other dimension of morality", and a policy as a "standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community."[61] We prefer, however, Prof. Summers' characterization of a rightness reason, which is analogous to a principle, and of a goal reason, which is analogous to a policy.[62] To

[59] *Id.*, at 899.

[60] *Id.*, at 919.

[61] Dworkin, *supra* note 5, at 22. He formulates other distinctions: Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole ... Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right." *Id.*, at 82, 924.

[62] "A good (goal) reason derives its force from the fact that, at the time it is given, the decision it supports can be predicted to have effects that serve a good social goal." And "a rightness reason draws its force from the way in which the decision accords with a sociomoral norm of rightness as applied to a party's actions or to a stte of affairs resulting from those actions. Summers, *supra* note 3, at 717-718.

Summers, a principle is a socio-moral norm of rightness, deriving its force from the way in which the judicial decision accords with it when applied to a party's actions or to a state of affairs resulting from those actions. The three main kinds of principles are those based on culpability, fairness and appropriateness. A policy, on the other hand, is a social goal. It draws its force from the fact that at the time it is given, the decision it supports can be predicted to have effects which contribute to realizing a good social goal; examples are social welfare, public health, and national security.

There are three basic differences between principle and policy. First, their justification rests on different grounds - a principle rests on the sense of rightness and a policy on the worth or desirability of the goal to be realized.

Secondly, principles are primarily past or present regarding, *i. e.*, applying either to a party's past actions to a present state of affairs resulting from these actions. Policies are future-regarding, helping to justify decisions predicted to contribute to the future realization of a desired social goal.

Thirdly, a principle is individually-oriented and distributive, while a policy is collectively-oriented and maximal.[63] A principle, being a norm, has a scope of application and is to be consistently applied therein, to all instances where it covers the party's actions. The principle, for example, of requiring a wrongdoer to pay for his harmful acts is supposed to apply to any individual, so long as his situation falls under the principle. A policy, on the other hand, does not ambitiously aim to entitle every single individual to its benefits, but simply provides to as many people as possible the chance to enjoy them. Thus, a policy is collectively-oriented and maximal.

Despite these distinctions, there are connections between principle and policy. Some principles originate from policies; when a policy, like public health, becomes so well entrenched in society that it is considered proper for the individual to be entitled to it, it becomes protected under a norm. When that happens, the reason for pursuing policy becomes a reason of principle. It has acquired a sense of rightness; in determining whether the norm applies or not, it is past-

[63]Hart uses these concepts to distinguish between utilitarianism and natural rights theory. "The crucial difference between these two doctrines thus opposed in 1776 is that utilitarianism is a *maximizing* and collective principle requiring governments to maximize the total net sum or balance of the happiness of all its subjects, whereas natural right is a *distributive* and individualizing principle according to priority and to specific basic interest of each individual. *See* Hart, *Utilitarianism and Natural Rights*, 53 TULANE L. R. 663 (1979).

regarding, and in entitling every individual to it, it is individually-oriented and distributive.

Alternatively, a policy may provide some justification for a decision which helps realize certain rightness values normally embodied in principles like securing individual rights or introducing more fairness in society. But since the rightness value is a goal to be pursued, it is to be measured in terms of its worth or desirability. This is obviously future-regarding as well as collectively-oriented and maximal, designed mainly to produce as much rightness as possible. Hence, the reason is one of policy and not of principle.

It is not suprising that these two types are related to each other. Their source is one and the same -- the background norms of society, reflecting widely shared values in society's moral, political, cultural, economic, and institutional framework. This is not to deny, however, that some of them have already been incorporated into the law and have become binding legal norms.

B. Types of Principles and Policies

1. Principles

Principles may be classified into three types -- culpability norms, fairness norms, and appropriateness norms. A culpability norm is justified from the way the decision is in accord with some socio-moral norm of rightness which applies to some wrong in the past. It played a conspicuous role in the actual cases cited in Section II, on the indispensability of substantive reasons. One of them, that a wrongdoer ought to pay for his harmful or negligent acts, was appealed to in the *Donoghue* and *Herrington* cases. Articles 19 and 21 of the New Civil Code provide an example of several related culpability norms taken together. Even the State can be guilty of violating a culpability norm. In fact, the Bill of Rights prohibits the State from enforcing its power in a manner that infringes upon human rights.

Fairness norms, on the other hand, apply to cases involving inequity in the situation. Unlike culpability norms, no wrong can actually be pinpointed as the cause for the basic inequity, which may simply have arisen. The unfairness lies in leaving the present inequitable situation as it is. That is why fairness norms are essentially present-regarding.

Fairness norms may also be classified into two types -- those involving an individual's dealings with another and those concerning

the treatment of a class of individuals distributively. An example of the first type is unjust enrichment when the party who, believing them to be gratuitous, did not pay for services rendered to him, thus profiting by the loss of another; it would only be fair that the latter be recompensed.[64] An example of the second type is *Matabuena*, which held that it would be unfair to treat common-law wives differently from spouses.

Appropriateness norms are role-related reasons, referring to norms defining the roles of individuals as members of institutions as well as the roles of social and political institutions. An instance of the former can be found in the *Gobitis* and *Barnette* cases, concerning the duty of a citizen to show respect for the authority of the state by obeying its laws; the *Calalang* case, referring to the police powers of the State, provided an instance of the latter. *Gobitis* and *Barnette* also discussed conflicting versions of the role of the judiciary. Under the separation of power doctrine, the judiciary is without power or competence to debate the wisdom, as distinguished from constitutionality, of legislative statutes. In the second case, the role of the judiciary as guardian of the Constitution, particularly the Bill of Rights, was stressed. Under this norm, it has the power to look into whether specific legislation has infringed constitutionally protected rights.

2. Policies

Policies, on the other hand, cannot be as neatly classified into distinct types. They are varied and numerous; some promote values basic to any society, and others values important only to a particular society. Some are institutional goals while others promote rightness values.

Of the basic values promoted by policies, the more notable ones are community welfare, protection to labour and social justice, national cohesion and security, individual liberty, democracy and public safety.[65] The interest of manufacturers in *Donoghue* and of employers in *Ovejera* may be considered as values of considerable importance only to particular societies, namely those advocating free-enterprise. Some policies may even be less universal than these, like that of promoting a sport like *sipa* or affirming the rights of animals. It is admitted that behind every narrow interest lies a goal representing a general value

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[64] *See* Perez v. Pomar, 2 Phil. 682 (1903).

[65] *See*, for example, Donoghue v. Stevenson, 1932 A.C. 562; Calalang v. Williams, 70 Phil. 726 (1940); Matabuena v. Cervantes, 38 SCRA 284 (1971); Marcopper v. Ople, 105 SCRA 75 (1981); Minersville School District v. Gobitis, 310 U.S. 586 (1940).

basic to any society. Nonetheless, it is important to realize that certain special interests may be treated as goals.

Some policies are institutional policies; for instance, the protection of the courts was cited in *Donoghue* and *Barnette*. Opening a new category of manufacturer's negligence, and raising issues on the legitimacy of religious sects, respectively, would lead to a flood of litigation.

Finally, some policies promote rightness values. In the *Tanada* case, prohibiting the majority party from nominating more than three members to the Electoral Tribunal would lead to more fairness and prevent partisan considerations from deciding electoral disputes. The decision was arrived at to promote the rightness value of fairness.

IV. REQUIREMENTS OF A GOOD SUBSTANTIVE REASON

> I know that over 300 years ago, Hobart, C.J. said that 'Public policy is an unruly horse'. It has often been repeated since. So unruly is the horse, it is said (per Burrough, J. in *Richardson v. Mellish* [1924]) that no judge should ever try to mount it lest it run away with him. I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice.
>
> *Lord Denning*

Understandably, the requirements of a good substantive reason are different for principles as distinguished from policies. However, they share these common features. Both types of reasons must be constructed out of values which are widely-shared in society and deemed worthy of or considered sufficiently significant to be accorded legal recognition. We will first analyze the requirements of a good reason of principle and then proceed with an analysis of a good reason of policy, highlighting the contrast between the two.

The analysis is conducted for a prescriptive purpose. Although a prescriptive analysis must be based on a descriptive one, we admit that the principles and policies as prescribed are not often used and formulated by judges in quite the manner and detail proposed; we claim, however, that the construction of substantive reasons in the manner proposed articulates better the implicit arguments judges often use when they cite substantive considerations. As a result, the analysis will not only provide the judge a clearer and more cogent justification for his

decision, but also enable the reasoning therein to undergo severe scrutiny by the legal community.

The analysis, moreover, will not entail an assessment of the force or weight of the value affirmed by the substantive reason when compared with or contrasted against other values, *i.e.*, the analysis will be conducted independently of any estimate of the value affirmed in the scale of values.

Finally, the classification of the requirements into three distinct conditions is mainly for the purpose of determining the soundness and assessing the force of the substantive reason. A substantive reason must satisfy all three conditions for it to be sound and to have force. It is by no means intended that the conditions represent stages of a process the judge must undergo in order to construct the substantive reason properly.

A. Requirements of a Principle

A principle derives its justificatory force from the way in which the decision accords with that principle, a socio-moral norm of rightness, as applied to the facts of the case. Thus, there are three basic requirements for the construction of a good principle. First, the socio-moral norm to be formulated must adequately reflect its guiding rationale, that widely accepted rightness value upon which the norm is based. To be legally recognized, it must also be understood as morally or socially right and deemed significant independently of community acceptance. Secondly, given the norm's range of factual application, the facts of the case must fall within this range. Finally, the decision must be one which most accords with the relevant norm as it applies to the facts of the case.

1. The norm must adequately reflect its guiding rationale

Moral insight, common-sense knowledge, awareness of social, political and institutional factors, sensitive judgment, and conceptual sophistication are required to formulate any of the diverse socio-moral norms so as to characterize adequately its guiding rationale, the widely-shared rightness value. The *Donoghue* and *Herrington* cases, for example, applied the culpability norm which holds that the wrongdoer ought to pay for his negligent acts. This makes use of important moral concepts like harm, negligence, responsibility, act and others. Similarly, the fairness norm appealed to in the *Marcopper* case,

as expressed in the maxim, "he who has less in life should have more in law", is based on the concept of equality and social justice. Finally, the appropriateness norm placed emphasis on institutional knowledge, specifically the role of the judiciary in a democracy's separation of powers.

Incidentally, the norm does not have to be framed according to standards of precision and generality. This is not only because of the impossibility of a precise delimitation of a norm's scope due to the open texture of language but also because of the undesirablity of such precise delimitation due to its tendency towards artificiality and arbitrariness. The requirements for articulating a socio-moral norm or principle need not be as stringent as the requirements for a legal norm. It is not required that the norm be suitably formulated to take account of all future cases that may arise in adjudication; neither is it required that the norm reflect the relative weights of the competing substantive reasons that argue for or against its application. All that is needed is that the norm fit the situation; and a general standard with an open-ended scope, applicable to most situations with reasonable certainty, and to which a relevant distinction can be made if a case is not falling within its ambit, suffices.

Finally, the examples of the rightness values just cited as well as the other examples in the section on the indispensability of substantive reasons, are all widely-shared; furthermore, they are all understood as morally or socially right and are deemed worthy of legal recognition, independently of community acceptance. They are precisely those values implicit in the rightness norms of culpability, fairness and appropriateness mentioned in the previous section.

2. The norm must cover the facts of the case

The second condition requires that the facts of the case be subsumed under the norm. This, therefore, involves a correct determination of the relevance and truth of the alleged facts, involving not only an investigative undertaking but a logical and conceptual one as well. For example, is the relationship between the manufacturer and consumer in *Donoghue* of sufficient proximity to establish any moral obligation to take care? What were the extent of the consumer's injuries? Did it occur as a result of her consuming the contents of the manufacturer's products or was it due to other causes? These and similar questions need to be settled to determine whether the principle formulated to apply to the case actually covers its facts. Moreover, questions of this type need to be answered in all other cases, where a socio-moral norm of rightness is formulated.

So long as the other requirements are satisfied, the existence of a subsumption relation between the norm and the facts of the case ensures the soundness of the principle. Its force is not affected by other considerations. For instance, the lack of an effective remedy to enforce the decision or the sufficient fulfillment of the value affirmed by the norm, are irrelevant in this situation. As an example, the soundness and force of the decision based on the norm prescribing the manufacturer, in *Donoghue,* to compensate the injured customer would be unaffected by the Court's inability to make him pay, were this to be true. All that matters is that his behavior is governed by the socio-moral norm which prescribes such an obligation. Neither would the decision's force be lessened if it were claimed that since there has already been a sufficient number of victims of negligence compensated for (again assuming this to be true), there is no longer any need for yet another victim to be recompensed. The norm, being a rightness norm, is to be applied to every single victim of negligence it appropriately covers.

3. The decision must accord with the norm as it applies to the facts of the case

The third requirement states that the decision must be the one which most accords with the norm or principle as it applies to the facts of the case. The relation of accordance is a simple concept and is best explained by means of our examples. The decision to hold both the manufacturer in *Donoghue* and the owner-occupier in *Herrington* liable accorded with the socio-moral norm that a wrongdoer ought to pay for his harmful, negligent acts. In *Gobitis,* the decision in favor of the school upholding the constitutionality of the Pennsylvania statute accorded with the norm of appropriateness that the judiciary has the power to inquire only into the reasonableness of legislative statutes, and not its wisdom. In *Barnette,* when a contrary decision based on relatively similar facts was reached, this, in turn, accorded with the norm that the judiciary as guardian of the Constitution, has the duty to safeguard individual rights. The other decisions accorded in a similar fashion with the respective principles which proved overriding.

B. Requirements of a Good Policy

A policy, as already mentioned derives its force from its goal -- a future, desirable condition or state the decision it supports helps to secure. As in the case of a good principle, there are also three requirements for the construction of a good policy. First, the goal must represent a value of public interest which will benefit the community as a whole or at least, a significant segment thereof. The goal itself must

be widely-shared and highly-valued in the community. Secondly, since prediction rather than subsumption is the key concept essential to analyzing policies, there is, unlike principles, a weaker, less definite connection between the facts of the case and the value promoted. No clearly defined relation like subsumption exists between the facts of the case and the norm, which affirms the principle. Rather, the general situation must merely be conducive to the application of a decision that will help secure the intended goal. This means that other facts, not just the facts of the case, are relevant for the proper construction of a policy. Finally, a causal means-end relation, not a non-causal one of accordance, must hold between the decision and the future goal. The decision must be best suited to achieve the goal.

1. The policy must represent a value of public, not merely private interest

All the policies cited in the cases found in Section II on the indispensability of substantive reasons are values of public interest. They include such policies as prevention of a flood of litigation, community welfare, protection to labor and social justice, and others. While it may be argued that prevention of a flood of litigation is not a value of public interest, because it is concerned only with the judiciary, yet it is undoubtedly in the best interests of the community that the courts be able to dispense justice smoothly and well.

It was also argued by some of the justices that the protection of interests of manufacturers in *Donoghue* and the protection of interests of employers in *Ovejera*, identified as they were with community welfare, are worthy of legal recognition. This is, in the end, justifiable not because they represent a significant sector of society but also because it is in society's interests that these groups operate effectively, since they provide vital social services. In *Marcopper*, the interests of labor are more readily conceded as a public interest, comprised as they usually are of a large, underprivileged section in society. In fact, all the policies cited in the other cases are indisputably of public interest.

Many goals are, indeed, capable of being appreciated independently of community acceptance; but as earlier mentioned, that is not essential to a good policy. It does not provide a necessary condition. A widely-shared goal but one not seen to be independently worthwhile, like the promotion of an obsolete or indigenous sport, may nevertheless qualify as a good policy, so long as the community values the revival of the sport highly. Neither does it provide a sufficient condition. A goal such as the promotion and protection of basic liberties

of a cultural minority, independently seen not only to be worthwhile but right, may not be widely-shared. Thus, the policy of protecting their individual liberty may lack force.

2. The general situation must be conducive to the application of a decision that will help secure the intended policy

The second requirement distinguishes more emphatically a policy from a principle, the former being based on the concept of prediction and not of subsumption. Thus, other facts, not just the facts of the case, are relevant. The *Herrington* case, where the goal of public safety was cited as part of the justification for the decision, provides an excellent example. The facts concerning the general conditions of society (*e.g.* overcrowding of cities, lack of proper playgrounds for children, increase in dangerous industrial and manufacturing sites, etc.) were relevant. This general situation provides the background for determining not only whether a goal is worth achieving but also the means of achieving it.

General facts are also relevant. These are facts based on sociological, economic or political theory, establishing a causal means-end relation between types of situations, or those which pertain directly to the causes and cures of social ills, or to the best means of achieving worthwhile goals. In *Herrington*, the effects of different decisions might be predicted to determine which decision will best achieve the goal of public safety. For example, it might be contested that a decision imposing a new liability for owners and occupiers to fence their land adequately when it may contain items dangerous to unsuspecting trespassers is the best way of protecting wandering children from harm. To resolve a dispute of this type, knowledge of general facts is indeed indispensable.

Moreover, the soundness and force of a policy is affected by other considerations like the lack of an effective remedy to enforce the decision or the sufficient fulfillment of a value. The first condition is obvious since the enforcement of a decision forms part of the means by which a goal is achieved. If the British Railways Board, for example, can avoid having to pay compensation to an injured trespasser, this will discourage owners and occupiers from taking *Herrington* seriously, and to fence their property adequately. Likewise, the sufficient fulfillment of a value may weaken the force of a good policy which promotes such a value. This may be harder to envisage for goals like public safety or national security, where it can be argued that one can never err on the side of too much safety or security. On the other hand, if too much

emphasis has been placed on the interests of labor or any other sector in society, then the further promotion of their interests becomes injudicious.

3. A causal means-end relation must hold between the decision and the future goal

This emphasizes once again the importance of the concept of prediction and the indispensability of more accurate, empirical, and sociological studies. It is no secret that judges are often poor at prognostication. In *Donoghue* and *Barnette*, for example, it has been proven false that the respective majority decisions, when enforced, would open the floodgates to litigation. On the other hand, the prediction intrinsic to the *Tañada* policy has just been proven right by recent events in the House of Representatives.[66] The decision limiting the majority party's representation in the Electoral Tribunal is the best way to secure the goal of preventing partisan interests from deciding electoral contests. Similarly, an empirical study can be made on each of the other cases to determine whether its decision, in relation to the goal being promoted, is the decision which best secures the intended goal.

V. WEIGHING SUBSTANTIVE REASONS

> So also the duty of a judge becomes itself a question of degree, and he is a useful judge or a poor one as he estimates the measure accurately or loosely. He must balance all his ingredients, his philosophy, his analogies, his history, his customs, his sense of right, and all the rest, adding a little here and taking out a little there, and must determine, as wisely as he can, which weight shall tip the balance.
>
> *Justice Benjamin N. Cardozo*

> It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation, and that an expression in an opinion yields later to the impact of facts unforeseen.
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> *Justice Brandeis*

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[66]*See*, for example, Lerias v. House of Representatives Electoral Tribunal in which the five members of the majority party in the Electoral Tribunal decided along partisan considerations, thus outvoting the three Supreme Court justices and the lone minority member in the Tribunal. The New Constitution, due to the proportional representation clause, allows for majority party representation to outnumber the other members of the Tribunal. The suspension of Congressman Camasura's membership in the majority party and resulting ouster from the Tribunal, allegedly due to his failure to vote along party lines in another electoral case, provides another example.

A substantive reason, no matter how sound or forceful, is not sufficient in itself to justify conclusively the decision in a given case. For it usually is just one among many reasons relevant to deciding the case; and while determining the soundness and force of a reason independently of other reasons is essential, there still remains the need to weigh these reasons relative to each other. Moreover, there are reasons based on authority and techniques of interpretation that need to be considered. The purpose of this final section is to provide a framework by which the weights of the substantive reasons relative to each other can be measured; with the aid of techniques of interpretation, the authoritative legal standards relevant to the case can then be interpreted in arriving at a subsumptive justification of the decision.

While we have taken great pains to show how prevalent a role substantive reasons play in adjudication, we have in the process taken for granted adjudication's other aspects. First, adjudication also makes use of authority reasons, those legal standards found in judicial precedent, statutes and the Constitution. This feature, moreover, is precisely what distinguishes legal reasoning from ordinary moral reasoning. In the latter type, no reason is given special prominence so as to give it authoritative status. The weight of moral reasons are measured on its own terms.

In legal reasoning, on the other hand, some significance must be attached to the fact that a reason has been incorporated into the law; otherwise, what is the point of the entire legal enterprise? Hence, a reason, now given legal recognition, is authoritative and cannot be merely equivalent to an extra-legal one. This thought is captured in terms of this characterization: a reason is authoritative in that it is to be applied or to be followed even against the balance of reasons or against one's better judgment.[67]

This may happen in either of two ways: an authoritative reason may be either a weighted *prima facie* reason or an exclusionary

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[67]Raz says that "legal systems contain, indeed consist of, laws which the courts are bound to apply regardless of their view of their merit". *See* Raz, THE INSTITUTIONAL NATURE OF LAW, THE AUTHORITY OF LAW 113 (1979). He defines the authoritativeness of a legal reason in terms of its being exclusionary. *See* Raz, *supra* note 8.

In contrast, Summers, *supra* note 1, uses the notion of mandatory formality: "We have said that a formal reason typically has the attribute to some degree of overriding, or excluding from consideration, or diminishing the weight of, at least some contrary substantive reasons. This is what we call mandatory formality."

one. A weighted *prima facie* reason is one which has a weighted primacy or importance which has to be overridden or overcome if it is not to apply to the case. To give its authority further prominence, we merely increase the additional weight that needs to be overcome. Thus, for an authoritative reason not to be applied, the substantive and other reasons that argue against its application, must outweigh not only the substantive reasons in favor of its application but also the additional weight by virtue of the fact that the reason is authoritative. An exclusionary reason, on the other hand, is a second-level reason which excludes from consideration some reasons which may be applicable to the case.[68] If the exclusionary reason is also a mandatory norm, it is likewise a first-order reason to decide in accordance with it. A command by a parent to his child to stay at home, for example, is an exclusionary reason in that it is a second-level reason to exclude other reasons, like his desire to go out and play, from consideration. It also provides a first-level reason for the child to stay at home. The scales are tipped in favor of the authoritative reason's application, in that some substantive reasons that argue against it are excluded from consideration.

Secondly, techniques of interpretation are relevant. In Section I, we mentioned briefly that they are second-level reasons used by judges to interpret the language in which a law or legal standard is expressed and we provided a few examples. It only remains to state that even techniques of interpretation can be part of judicial precedent and hence, acquire authoritative status.

Finally, adjudication is subsumptive. Under the subsumptive requirement, the justifying reasons, which include both substantive and authority reasons, are to be interpreted and articulated in the form of a universal norm under which the facts of the case are to be subsumed so as to entail logically the decision. Moreover, this norm is to govern not only the given case but all cases relevantly similar to it. This embodies, respectively, the notions of both *ratio decidendi* and *stare decisis*, so familiar in jurisprudence.

The subsumptive legal norm to be formulated is akin to the structure of a principle but differs from it in three important respects. First of all, greater emphasis is placed on the desired degree of precision and level of generality with which the legal norm is to be articulated. Secondly, and this has already been implied, whereas a principle merely characterizes a basic rightness value, a legal norm is supposed to reflect the relative weights of the various substantive

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[68]An exclusionary reason is a second-order reason to refrain from acting for some reason. Raz, *supra* note 8, at 39.

reasons relative to the case. Finally, the purpose for determining the scope of the legal norm is to decide whether it is to be used as the justification for the decision in the case. Hence, it affects the decision directly. On the other hand, the purpose of determining the scope of the principle is merely to ascertain its soundness, or its relevance to the case. If it survives this test, it is then used merely as one of the reasons that will help formulate the subsumptive legal norm with the desired degree of precision and level of generality. Hence, it only affects the decision indirectly, the subsumptive norm being intermediate.

It is not difficult to see why greater emphasis ought to be placed on the desired degree of precision and level of generality with which a subsumptive legal norm, as contrasted with a principle, is to be articulated. Their functions are different. The former, in providing direct justification for the decision, must also see to the law's certainty and predictability, values highly prized in a system attaching importance on guiding human behaviour to achieve outward conformity to its norms.[69] Furthermore, and precisely because of the above-mentioned reason, it is desirable within the context of adjudication that the judge not only settle the dispute presently before him, but have an eye towards future similar cases as well, in justifying his decision in the present case.

The proper role which substantive reasons play within the context of subsumptive adjudication can now be discussed with reference to the five types of cases mentioned in Section II. In each type of case, we see the necessity for an appreciation of the weights of the substantive reasons relative to each other in terms of some sort of conceptual framework. Even the so-called easy case, which involves nothing but a straightforward application of a simple rule, requires this. For it is often the substantive reasons behind the rule (the rule's rationale, in other words) and not the way the rule is worded, that determine the rule's scope and therefore indicate what its standard instance is and whether it is an easy case or not.

The necessity for a conceptual framework of substantive reasons is made much more apparent with respect to the four types of hard cases. The relative importance of the substantive reasons have to be weighed against each other for (i) the case in the gaps where no authority reason is directly in point, (ii) the case of a substantively formulated legal norm which needs interpretation, (iii) the case of

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[69]Raz claims that it is a basic underlying function of the law "to provide publicly ascertainable standards by which members of the society are held to be bound so that they cannot excuse non-conformity by challenging the justification of the standard". Raz, *supra* note 8, at 52.

conflict of legal norms which needs resolution and (iv) the case of unsatisfactory law which might require overruling. Hence, the conceptual framework not only helps determine the interpretation and applicability of the authority reasons in point to arrive at a decision, but also helps fashion either a revised version of an old subsumptive legal norm or frame an entirely new norm to cover the novel facts in the hard case.

There is no ideal final formulation of the subsumptive legal norm. This is because it is impossible to characterize precisely and to capture fully for all time the relative weight and importance of these substantive reasons which provide the underlying rationale for the norm. It can only be approximated without ever being realized. Because of this, the necessity of the need for a conceptual framework is reemphasized; and, to this end, an analysis or evaluation of the weights of substantive reasons relative to each other is required.

Briefly, the evaluation of the weight attached to a substantive reason depends on two factors -- on the weight the law, in terms of the judge's interpretation of the appropriate legal standards, ascribes to the value it upholds, and on its soundness and justificatory force as described in the previous section. The first factor presupposes some hierarchy of values, whether absent, implicit or explicit in the law which the judge by his legal training either has to invent or merely to decipher or detect. Moreover, the ranking of values need not be constant throughout the law but may vary through different categories and subcategories of the law. The second factor emphasizes the importance of the three requirements of a good substantive reason. No matter how high on the scale of values lies the value upheld by a substantive reason, its weight may be correspondingly or completely diminished or reduced depending on how well or whether at all it satisfies any of the three requirements.

The element of judicial subjectivity and creativity is inevitable in this process. The ranking of values in the hierarchy, although guided by the appropriate legal standards, nonetheless involves a degree of choice. And the selection of the relevant substantive reasons, as well as the determination of their justificatory force independently of other reasons, despite the three requirements, is not a purely mechanical undertaking.

Going back to one of our examples, the *Herrington* case provided a further opportunity for the "neighbor" principle to be applied, this time to a situation involving the relationship between owner-occupiers and trespassers. Again, a new legal norm was formulated, acknowledging the standard of the humane and

conscientious man, although it also incorporated the leading concepts in the `neighbor' principle, like that of proximity, foreseeability and the standard of the reasonable man. The substantive reasons behind formulating a new norm had to outweigh the powerful reasons behind maintaining fidelity to the authoritative *Addie* precedent. The precedent was based on a time-honored doctrine that trespassers trespass at their own risk, which in turn appealed to the rightness norm that a person should not be held liable for acts or omissions done without malice, which cause harm to persons who force a relationship upon him. The change in conditions proved central in deciding the case. Both the principle based on wrongful negligence of owner-occupiers when they reasonably foresee harm befalling unsuspecting trespassers whom they can expect to trespass, and the policy of promoting public safety, was given overriding consideration.

The *Gobitis* and *Barnette* cases tested the scope of competing norms on the proper role of the judiciary in a democracy. Although both were principles based on appropriateness, they already formed part of the legal doctrine. The judiciary could inquire only into the reasonableness of legislative statutes in the *Gobitis* case. This affirmed that the statute requiring public school children to participate in a compulsory flag salute did not constitute an unlawful infringement on religious freedom. The statute, insofar as it was enacted to promote national cohesion and security, was reasonable and thus constitutional.

The values of national cohesion and security were thus accorded overriding importance in this case. The values of representative democracy and majority rule were also significant, since it was conceded to be the role of the legislature, as the duly elected representative of the people, to inquire into and decide upon the wisdom of statutes. The values of maintaining fidelity to law were also prominent, as no decision of unconstitutionality had yet been reached in cases of this sort involving the conflict between religious freedom and a compulsory flag salute. Moreover, religious freedom had always been previously interpreted as "freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma."

The *Barnette* decision reversed the *Gobitis* doctrine despite the added weight of the precedent provided by the *Gobitis* case itself. Greater respect and importance was accorded individual liberties not only by the justices in this case but by society as well, as reflected in the public outcry against the *Gobitis* decision. The inviolability of an individual's right to speak his own mind or to keep silent, where he cannot be compelled to utter words he considers sacrilegious to his religion, was acknowledged. Fears of the surrender of the liberty of small minorities to the popular will were again expressed and this time

given greater prominence. Moreover, it was suggested that the goals of national cohesion and security could best be achieved by other means. Thus, the norm that the judiciary, as the guardian of the Constitution and the Bill of Rights, not only has the power but the duty to inquire into the constitutionality of legislative statutes, was applied to the case. A different test, the clear and present danger rule, was used to determine the constitutionality of statutes which infringe upon an individual's intellectual freedom.

Some conceptual framework of the weights of substantive reasons relative to each other is, therefore, of indispensable value to subsumptive and authoritative adjudication. It is indispensable for those reasons mentioned earlier, those of suitably interpreting, qualifying and reformulating an old norm or formulating an entirely new one to achieve precision and generality. This means that if a legal norm has been articulated properly, it already incorporates the weights of the substantive reasons relative to each other by the way it has been formulated. It does not follow, however, that substantive reasons become unnecessary with suitably articulated norms. For the articulated norm is never able to characterize precisely or to capture fully, once and for all, the weight and importance of these substantive reasons relative to each other. It attempts only to approximate this, without ever quite realizing it, as it is tested by each new case that arises for adjudication. Thus, no matter how satisfactorily articulated the new norm is, the conceptual framework is still necessary for the norm's proper interpretation and possible reformulation.