CONSTRUCTION OF STATUTES

BY

FOLKE SCHMIDT

Professor of Private Law, University of Stockholm

"Particularly it should be a task for legal research to analyze carefully ... the judicial process of today in order to give us a conception of *officium judicis* more correct than that hitherto prevailing in legal writing."

— Mr. Justice Wilhelm Sjögren,
Tidsskrift for Rettsvitenskap, 1916, p. 335.

1. In the Scandinavian countries during the last few years there has been an intense debate on the methods of applying legislative enactments. Agge, Ekelöf, Hult, Malmström, Strahl, Thornstedt, and Welamson—to mention some of the Swedes alone—have made valuable contributions to the subject and provided a basis for further discussion. All the participants in the debate have taken it for granted that the construction of statutes should not be considered a mechanical operation. Unanimously they condemn the theory—which earlier went almost unchallenged—that interpretation is a logical application of certain general concepts inherent in positive law. Nor will they agree that the problem involved merely concerns the finding of the true historical intention of the legislator. Ekelöf, one of the most active participants in the debate, has stressed that the issue is to find the purpose of the statute. He has called his method "the teleological method of interpretation", a label which has been adopted by several other authors.

The author of this paper has the same general approach as most other Scandinavian writers of today but refuses to accept the label "teleological interpretation". This should not be misunderstood. I do not wish to deny that every statute should be supposed to have some reasonable aim. But, in my opinion, it is an over-simplification to contend that construction only concerns the question of finding out what the true statutory purposes are. It is more fruitful to ask the questions what is the function of the courts in our modern society and what are the principles upon which the adjudication process relies.

I shall begin by describing the judicial process as it is actually handled by the judges of my country, and I will try to avoid deviations from that route except in so far as they may be neces-

sary for an evaluation of our Swedish judiciary, its merits and its defects.

The author wishes to apologize to his readers at the outset for attempting too much. It would perhaps have been more seemly if the discussion of the present theme had been undertaken by a member of the Supreme Court, who would have been able to report his own observations. As an outsider, the author has had to base his study mainly on printed material, especially the law reports. I have done my best to check my observations by addressing questions to members of the judiciary. But this has not been done systematically, as my friends on the bench would almost certainly have refused to cooperate if I had requested formal interviews. In this connection I should like my readers to be aware of the fact that the material has been collected mainly from my own field of research, i.e. private law.

2. When a judge has to adjudicate a case I imagine his first question will be roughly as follows: *"Where do I go for guidance?"* The reader should carefully note the formulation of this question. Our judge does not ask the question which might perhaps have seemed the most natural one, namely: *"What is the law?"* In one respect, which will be explained later on and which seems to me essential, the two questions do not coincide. Nevertheless we will look for the answers to the two questions: "What is the law?" and "Where do I (the judge) go for guidance?". Both of them have a bearing upon our subject of statutory construction.

When the judge starts to prepare the answer to his question "Where do I go for guidance?" he may use many sources to supply himself with information. Within the sphere of codified law the text of the statute is, of course, the most important source. Further, he may look for previously decided cases and study the legislative history of the rules under dispute.

He may go to the opinions expressed by legal scholars, too. In my country one kind of writing is considered particularly valuable by the judges. When a statute has been passed by Parliament and has been enacted by the King in Council, often some of its draftsmen publish commentaries to the text. These are experts who have been members of the committe which has prepared the bill at the request of the Cabinet. In a handy volume the authors give the legislative material. Some of these commentators annotate cases and give their own opinion on the proper construction of the statute when they find an obscure point. The

commentator does not always indicate where the legislative material ends and his personal contribution starts.

There are other things to which the judge pays attention when he is seeking guidance. In many fields of the law, custom and usage may be said to have a creative force. Some judges try to find out, too, what opinions are held by people as to the rights and wrongs of the matter. These sources of law, however, will not be treated in this paper.

Having completed his study of the text of the statute, the precedents, the legislative history, and the literature, as well as of other elements, the judge may be fortunate enough to find that he has been guided in one direction only. His task is then quite simple. He has to state the legal rule, give the facts, apply them to the rule, and then conclude in accordance with the rule what the decision of the court shall be, whether to reject the claim, or to issue an order or other judgment. These are matters familiar to every lawyer. Let me, however, take an example. The Swedish Marriage Code, 1920, Chap. 11, sect. 1, runs as follows:

> "If the spouses have found that they are unable to continue their life together because of profound and lasting disruption, they shall be granted a decree of separation provided that they agree upon such measure."

In Chap. 16 of the same statute it is laid down that the court is not competent to adjudicate petitions on separation referred to in Chap. 11, sect. 1, unless the spouses have submitted to an attempt at reconciliation. Suppose that the judge has before him a joint application of the spouses in which they state that they are unable to continue their life together because of "profound and lasting disruption", and that the spouses have provided evidence of an attempt at reconciliation. Then the court *has* to grant the requested decree. For the purpose of this study we have an identical situation when the decision which has been deduced from the text of the statute is supported by previously decided cases, by the legislative history, or by any other authoritative statement.

On other occasions the judge can only reach his final decision by making a choice or a number of consecutive choices. In all cases the reasoning consists of different sets of operations. In one or more of these operations a choice may be involved. That the judge has to make a choice is often clearly indicated by the statute itself. This is quite apparent in all those cases where the

judge has to decide the amount of the fine which should be imposed upon a criminal offender. The Swedish Labour Court is in a similar position when awarding damages for breach of a collective agreement. The Collective Agreements Act, 1928, expressly authorizes the court to reduce the damages if the degree of culpability is slight and to take the financial position of the offender into account. Even those rules which govern the central issue—I am referring to the question as to whether a certain act should be considered a breach of contract or otherwise constitute a claim for recovery, the question whether a legal document is void or not, and the like—may indicate a choice. This is the case—at least on a superficial analysis—with all rules of discretion. An example is to be found in sect. 8 of the Swedish Promissory Notes Act, 1936, which prescribes that a provision in a promissory note may be disregarded when its application "would evidently lead to undue hardship for the debtor". Here the legislator has given the judge the power to decide whether the contended provision should be upheld or not.

The judge may also have the task of choosing even when the fact that he has to choose does not appear on the surface of the text. What choices have to be made is one of the problems which have to be thrashed out in the rest of this article (see particularly sections 5, 8 c, and 9).

Suppose that a statute defines a certain act as a criminal offence and that it prescribes a fine of from 5 to 100 dollars, or that the statute leaves it to the discretion of the court to assess the amount of the fine within certain limits. It can then be said that within the prescribed limits a judgment is correct irrespective of the outcome (i.e. irrespective of the amount of the fine ordered to be paid, provided that the amount is not less than 5 and not more than 100 dollars). The situation was simplified. I have intentionally left out of the picture possible subsidiary rules, such as that for the offence tried only one part of the scale from 5 to 100 dollars, e.g. its lower part, might be applicable. My intention was to underline the simple fact that the judge at the moment when he tries the case before the court has a choice of a number of propositions and that his decision will be within the framework offered by the legislator, whichever of these propositions he decides to choose. It should be added that the situation will often be substantially the same when the task is to decide whether certain facts can be subsumed under a legal concept such as marriage, custody or gift.

All of us are well aware of the fact that not all conceivable propositions offered for choice are proper. The judge, as it were, has to pass the propositions through a sieve. In the example just mentioned, an order to pay 101 dollars to the Crown would not have been permissible. We are, however, now ready to give a preliminary answer to the question: What is the law? *One may find the law by drawing a line between what is permissible and what is not permissible to the judge.*

Let us suppose that while considering the judgment, one member of the court mentions a number of propositions and puts this question: "Which of these propositions come within the framework offered by the legislator?" I think his colleagues would consider his way of dealing with the case rather awkward. For the main issue before the judge is to find the particular proposition which he regards as the right one. It is of no use to draw a line between the permissible and the non-permissible when those propositions on which you are focusing your attention are clearly on the right side of the line. When I have been talking about a sifting process in which the non-permissible propositions are rejected, I have done so in order to throw light upon the problem: What is the law? I do not propose to state that this process has any true counterpart in real life. Only in exceptional cases is a proposition so close to the line in the eyes of the judge that he has to ask himself whether he is vested with the power to decide accordingly.

I should like to stress one point in particular. The question of what is permissible and what is non-permissible represents a preliminary stage. As you may recall, our judge started his preparation of the case with a question formulated differently. He asked himself: "Where do I go for guidance?". That question may now be redrafted as follows: *"How shall I make my choice between a number of propositions?"* Very likely the choice is free in the sense that all propositions before the judge are within the framework offered by the legislator. Whatever the outcome, his decision is then the law in the case, too, provided that we have applied the definition of law presented above.

3. At this point we may turn to another subject and ask ourselves what the law is from other angles than that of the judge. An *attorney at law* advising his client has to predict how the case will be decided by the courts and his client's prospects of carrying his claim successfully. Having tried the facts and the evidence,

the attorney has to study the statutes, the legislative history, the precedents, and other possible sources of information. A good lawyer will do his best not only to grasp the line between the permissible and the non-permissible alternatives but also to try to see how the judge will make his choice among those alternatives which fall within the framework of the statute. If the client, upon his advice, decides to file a complaint, the attorney has to act a new part. He has to convince the court that his client has a good case. He then claims that the law offers no alternative to his client's proposition. Sometimes the counsel is simply unaware of the fact that earlier, he himself has made a choice between a number of propositions, several of them considered quite reasonable.

The *legal scholar* gives his opinion of the law, too. The American scholars sometimes restrict themselves to expositions of precedents and legislative material, carefully avoiding all loose predictions. In line with the European tradition, most Swedish scholars, however, regard it as their task not only to reproduce material but also to guide the courts. Some of them place themselves in the position of a judge in so far as they are aiming at solutions which would be likely to be accepted by the Supreme Court if the question involved should arise in a case. A scholar who is familiar with the general attitude of the members of the court can intuitively attain a certain degree of reliability in his predictions. The majority of the younger generation of Swedish scholars do not consider it their task to predict but prefer to present their solutions as contributions to a learned debate. It is up to the members of the judiciary to evaluate the scholar's formulation and the arguments in favour of it. The method applied depends to a great extent upon the scholar's personality and his conception of the judicial process. One man is conservative and more in favour of security and stability than of change. The second assumes the rôle of an engineer and suggests technical improvements, the third holds the view that society is a melting-pot and the law a product of the struggles between classes and pressure groups. The scholars formulate their conclusions differently, too. Earlier it was considered right and proper that the scholar should claim that his propositions were authoritative statements of the law. Today scholars are generally less ambitious. They appease their hunger to act a part by presenting recommendations to the members of the judiciary.

Jurisprudence has one distinctive feature. Its task is to *form-*

ulate rules, i.e., patterns covering a number of similar situations. Jurisprudence does not enter into the realm where matters are decided discretionarily or where no rules are discernible.

4. I will return to my subject—the judicial process as it is actually handled by the Swedish judges. A judge, especially a judge in a lower court, is inclined to regard as singularities the civil actions that cannot be adjudicated with the help of standard models. In such cases the judge may prefer to use his discretion and decide each case *ad hoc.*

However, one group of such cases is handled more strictly. The judge will be influenced by the fact that the case will probably be carried through the various instances. In all likelihood the Supreme Court will be more strict than the lower courts. As stated in the Swedish Judicial Procedure Code, 1942, the Supreme Court when granting a party the right to present its case on appeal must consider the interests of uniformity in construction of statutes and in adjudication.

In his paper on "The Authority of the Judge and Changes in the Law", written in 1916,[1] Mr. Justice Sjögren deals with the problem of how far the judge may disregard the interests of uniformity and decide cases *ad hoc.* In this connection he mentions[2] that the words "according to the circumstances", a phrase often met in the opinions of Swedish courts, may cover cases which have been decided *ad hoc.* Some members of our Supreme Court have explained to me that nowadays this phrase is only used when the court refers to the evidence and not to a question of law. I am not convinced that this practice is always followed.[3] I do not, however, wish to argue this. There is no doubt that *ad hoc* decisions are fairly common. However, one is not permitted to conclude that the Supreme Court has decided a case "according to the circumstances" as to the question of law from the mere fact that the Court in its opinion has used this phrase when the reader had expected a reference to a legal rule. Ambiguous expressions are used intentionally in the opinion when the Court is searching for a new path and is afraid of becoming entangled. Often the Court tests a rule in a number of cases, before it considers that the time has come to disclose it.

[1] *Tidsskrift for Rettsvitenskap,* 1916, pp. 325 ff.
[2] *Op. cit.,* p. 337.
[3] Cf. the opinion of the Supreme Court in re *Signe Landgren,* 1954 *N.J.A.,* p. 341.

There are different opinions as to the value of creating precedents. Mr. Justice Sjögren emphasizes the pitfalls of the method of deciding cases *ad hoc*.[4] "There is no possibility of predicting the outcome. There is a lack of security, as people will be searching in vain for fixed rules to which they can adjust themselves and their legal relations." It is not easy to tell what policy is followed by the Swedish Supreme Court today. Most probably the majority of its members think that the Court should move slowly and not create any precedent unless the consequences it will carry can be estimated. As far as I know, they have always had this approach. Mr. Justice Sjögren was in a minority in his own day, too.

The choice of the court in a decision which is intended to establish a precedent will produce an additional effect from that arising in cases decided "according to the circumstances". In either event the litigation will be settled. In applying *stare decisis* the court acts the part of a legislator, too, although only in matters brought to the court by the litigants. Something new is added to the law, as the rules concerned have become more distinctive than before. The method of making law by precedents is like marking out a navigable route by spar buoys. But our agent is very reluctant to act. That a ship has gone aground on a reef is not enough. Our agent prefers to postpone his action and to wait until he has obtained some idea of the extent of the reef.

Ordinarily the court, in its opinion, conceals its real function. The rule applied is described as existing beforehand and the decision as the result of a logical operation which can lead to no other conclusion. As a young appellate court judge, Louis De Geer, later Minister of Justice, wrote in his interesting essay of 1853 "On the Juridical Style"[5] "the court should use in its opinion only those arguments which support its decision and should exclude those that favour the opposite view".

The judges of past times did not pay much attention to this duality in the judicial process. It was regarded as a matter of course that a good judge had a special knowledge of the law, comparable to the power of divination possessed by a religious prophet. Mr. Justice Sjögren had once been a professor of law and was a keen observer. The dogma that the courts never create law but only explain what was there before, caused him many

[4] *Op. cit.* p. 337.
[5] L.D.G., Om den juridiska stilen, p. 12 (reprint in *Sv.J.T.* 1953).

a headache. He declares that this conception is one that "the judge has to accept as inherent in his official capacity".[6]

Today people are more sophisticated. One seldom meets a judge who is not willing to admit that the old formulas are fictional, that before the decision the court often considers a number of alternatives that are *in se* permissible, and that the court may create new law. In justification of his use of the old formulas, he may plead that they serve to manifest the impartial character of adjudication. But this is a dubious argument. It may equally well work the other way. The man in the street suspects that there is something improper lurking in the background, something the judges do not want to disclose. It might be better to admit the facts and tell people frankly in which cases the judge does not proceed according to previously existing rules but, in line with certain principles, functions as an arbiter between conflicting interests.

5. In section 2 I said that one may find the law by drawing a line between the permissible and the non-permissible propositions. The Swedish Judicial Procedure Code, 1942, mentions, as one of the grounds for a new trial, a manifest error of law on the part of the court which has adjudicated the case. The legislator has had in his mind cases where the court has overlooked the existence of a statute, or has applied a statute which has been repealed, and other situations of that kind. According to our definition, the fact that there is no ground for a new trial would be a test of the law in a case. Is this definition satisfactory? I do not think so. We have to go further in order to get a more adequate conception of the judicial process.

In Sweden, as in all other countries with a tradition that the law should be codified, the judges have never adhered to the theory that statutes should be regarded as exceptions to the common law. The rule *exceptio est strictissimae interpretationis* may sometimes be applied, but only for specific reasons. The general theory is that the text of the statute is mandatory even if its language is vague and ambiguous. The judge has always to do his best to find its true meaning.

I have already given a tentative description of the way the judge started to prepare his decision. In routine cases it may be enough to read the text of the statute. As soon as there is any doubt the

[6] Sjögren, *op. cit.*, p. 339.

judge has to go further and study previously decided cases, the legislative history, the literature, etc. Of this material, the precedents and the legislative history are of particular importance, as they include instructions supplementary to those of the text of the statute. *For precedents and legislative material perform the function of guiding the courts.* These sources of law are not supposed to be binding in the same way as the statute itself. They are properly classified as *secondary directives.*

The reader may object to this description of precedents and legislative material as being comparable to the statute. The word "directive" is generally associated with situations where a person has expressed his will in order to influence the behaviour of another person. The command, the typical directive, is an act of that kind. But there are two points of view involved, that of the man or the body issuing an order, and that of those to whom the order is addressed. There is no complete correspondence between them. Words and other manifestations which were meant as directives are sometimes understood differently by the person to whom they were addressed. On the other hand there are situations where words and manifestations which were not intended as directives are nevertheless regarded as such. When the author has labelled precedents and legislative material as sources of directives, his viewpoint has been that of the judge. I have tried to describe how in the Swedish judicial process precedents and legislative history function as directives quite apart from what was the intention of the persons or bodies from which this material is obtained.

We are now able to redraft our definition of the law as being those propositions which are within the framework offered by the legislator. We have to consider that the judge has to do his best to find the true sense of the text of the statute and that he is not permitted to set the statute aside for the mere reason that its words are vague and ambiguous. Further, we have to take into account the secondary directives which may be derived from precedents and legislative material. The sifting process in which non-permissible propositions are rejected has thus to be extended to a process in which the judge makes use of all the three directive instruments, the statute, the precedents and the legislative material. It might be proper to say that *the decision of the court is the outcome of a choice only in those cases where the judge on the bench has not been able to find his answer to the question submitted in the three instruments of directives.*

The decision of the court may have been the outcome of a choice for many different reasons. Earlier, I have pointed to situations where the legislator has intentionally left to the judge the power to decide a question by discretion. Another situation, although a less frequent one, is that none of the three directive instruments touches upon the question submitted to the court. More often it will happen that the directives derived from the statute, from the precedents, or from the legislative material, are incompatible. Some data guide the judge along one course, some along another.

One reservation must be made to the statement that there will be a choice only in situations where the three directive instruments leave no clear answer to the question submitted to the court. We have to take into account the possibility that under special circumstances the directives, although compatible, will be disregarded. This reservation will be dealt with in section 9.

There is one more point to stress. At the beginning of this paper I said that the judge asked himself the question: "Where do I go for guidance?" and that this question did not signify the same as the question: "What is the law?" The reader may suggest that the matter has been fully explored by my observations on different kinds of directives. That is not the case, however. The judge's choice is not quite free even in those situations which have been described as choice-situations. The free choice is controlled by certain norms. On this point, too, I must refer the reader to what I have to say later (section 10).

6. In this paper I shall concentrate my attention on the text of the statute and the legislative material as motivating factors in the judicial process. To get a complete view one would have to study the impact of precedents, too. Once a case has been decided, the situation will not be the same as it was before, owing to the authority attributed to the decision. But such a study would carry us too far. Suffice it to say on that subject that the decisions of the Swedish Supreme Court are regarded as persuasive. The Supreme Court does not bind itself, nor does it bind the lower courts. The Supreme Court is, however, slow to overrule its own decisions, and the lower courts consider the holdings of the Supreme Court as authoritative statements of the law. As they are in theory not binding, the judge of the lower court may go his own way if he finds that there are very strong reasons against applying the rule proclaimed by the Supreme Court.

The Swedish legislative process is based upon constitutional principles different from those prevailing in the U.S.A. The legislative power is divided between the King in Council[6] and the Parliament. According to the Swedish constitution, statutes on private law or criminal law must be passed by the King and the Parliament jointly. The right to levy taxes is, however, exercised by Parliament alone. On the other hand, economic and administrative legislation has been vested in the King in Council. Under the parliamentary system, the political power is entrusted to a Cabinet which enjoys the confidence of the majority in the Parliament. Constitutional issues will not be put forward, as they were in the days when the King chose his ministers on his own responsibility. The constitutional tradition, however, explains the fact that for practical purposes the Cabinet always has the legislative initiative.

The ordinary legislative process is as follows. The Cabinet appoints a committee which is instructed to prepare a draft of the bill. The committee may be composed of experts only, or of politicians and experts. There are several standing expert committees which are instructed to study one subject after another within a certain field, e.g. criminal law. One committee on civil law has been in existence since 1902.

The committee prepares a report which contains the full text of the bill and commentaries on the text. The next step is to submit the committee's report to various governmental agencies for advice and to a number of private organisations such as the Swedish Employers' Confederation, the Confederation of Swedish Trade Unions, the Swedish Federation of Industry, chambers of commerce, etc. On the basis of the opinions thus assembled, the Minister in charge of the department concerned has the task of preparing the final text. The Minister will then, after consulting certain of his colleagues, present the bill to the King in Council and propose its introduction in Parliament. Before such introduction, bills on matters of private or criminal law must be submitted for advice to the Council on Legislation, a body composed of three members of the Supreme Court and one member from the Supreme Administrative Court. The opinions of the members of the Council on Legislation and the Minister's comments thereon are part of the records adjoined to the bill.

[6] According to the Constitution, the King has to act in Council, i.e. upon the advice of his ministers.

After its introduction in Parliament the bill is referred to one of the joint committees composed of members from each of the two houses. The members of Parliament have the right to propose amendments but such motions must also be referred to the committee. If the bill has been passed by both houses without amendments, the King, after receiving notification from Parliament, promulgates the act. If there are amendments, the amended bill is regarded as a proposal from Parliament to the King, who has either to pass it or to refuse to pass it upon the advice of his ministers and the Council on Legislation. In practice it is always passed.

The legislative material is like the minutes of a long debate on the subject by various bodies. When the expert committee have drafted the text, they start to write their report, in which they set forth the general purpose of the bill and analyze its various sections. The committee endeavours to convince the Minister and all those who will have to give advice on the matter that their proposals are well-founded. In Sweden, the texts of the statutes are often drafted in a rather abstract way. The drafter cannot expect that his reader will have sufficient power of imagination to see all that lies behind the text without the aid of a commentary. In order to illustrate the text the drafters will present not only various technical alternatives but also examples of situations which are covered by the text and situations which are not. There is fertile soil in the minds of many drafters for the idea that their commentaries should be useful reading for the courts in the future when, as they hope, their proposals have been accepted by the legislator. A committee composed of experts of high reputation or of influential politicians can regard it as a matter of course that they have factual authority to speak even to the members of the judiciary.

The Minister who is in charge of the final preparation of the bill is supposed to comment in his exposition on all disputed points. Sometimes he will explain in detail his opinion as to the interpretation of a certain section. The Council on Legislation is the next forum. Then the Minister has to give his opinion, whether concurring with or dissenting from that of the Council on Legislation. When the bill has been introduced in Parliament, the joint committee has to prepare a report. If amendments are proposed by the committee, they must be explained. But the committee may find that the original text of the bill takes care of a proposal made by a member of Parliament. In such cases the

committee often expresses its opinion as to the proper meaning of the statute.

The chain of relevant opinions ends with the report of the parliamentary committee. The general debate in Parliament will not have the same bearing on the question of how to discover the meaning of the language of the statute. The speakers are aware of the line thus drawn. A minister who wants to express his view of the meaning of the statute in the course of the debate will use the method of referring to his own earlier exposition of the bill. A speaker who has been a member of the parliamentary committee may quote the committee's report.

There are many good reasons why the chain of relevant opinions should end in this way, with the report of the parliamentary committee. Political debates are never appropriate sources of information on technical questions. In those debates the speakers' words are not weighed as the words of the Minister are weighed in his exposition. Nor do they in the same way reflect concessions made to various conflicting interests. Further, it is expedient to keep the material within limits. We have in Sweden a private periodical, *Nytt Juridiskt Arkiv,* edited by members of the Supreme Court. This periodical has a special series for the legislative material of the new statutes. The editors do not include extracts from the debates in Parliament. Very few judges will take the trouble to look these debates up in the official reports.

At the moment when the bill is enacted into law, there is available—besides the text of the statute—a succession of opinions on the subject. At one point the responsible bodies have let the report of the drafting committee pass without any comments, at another point the committee's proposals have been amended, at a third point there is no information in the committee's report but a statement by the Minister or by the Council on Legislation or some of its members, and so on.

These various statements do not all possess equal weight as sources of information. In the legislative process the bodies enter one after the other and the body in action at any given time has the opportunity to express its opinion on those proposals which are at that time on the records. An opinion will not be considered informative unless the succeeding bodies have let it pass without objections. Consequently, the body in action has the power to cut out of the legislative material opinions from bodies which have come earlier in the chain. On the other hand, an opinion may subsequently be endorsed by another body, and thus be made

more authoritative than before. As a general rule, then, the body which is the last in the chain should have the best chance to exercise influence.

The various bodies differ in character. Some are composed of experts, some of politicians. The Minister has the advantage of being both an expert (at least in the sense that he has a body of experts at his disposal) and a leading politician. The centre of political power is in Parliament, a feature which is particularly noticeable in matters of tax statutes.[7] Apart from these I have the impression that the members of the judiciary are not inclined to attach the same weight to opinions of parliamentary committees as to those of the Minister in charge, or to unanimous opinions of the members of the Council on Legislation, provided that these opinions have not been under debate later on. This may be due to the fact that the members of the judiciary are seeking expert advice and that the reports from the parliamentary committees are not very valuable from this point of view. There is a further reason. The report of the parliamentary committee is the last in the chain. It has not been scrutinized like the other opinions which have been critically examined by the bodies coming later in the process.

7. In earlier days, when the legislative material did not appear in print or, at any rate, was not as easily accessible as today, the legislator had to give his directives to the judiciary in the text of the statute. The drafter had to adhere to the principle that the reader should be able to grasp all the directives from the language of the statute.

Many are of the opinion that this principle should still be strictly applied. The main reasons in favour of the old method have been presented by Herlitz and J. W. Pettersson. The committee charged with drafting the Local Government Bill, 1948, had proposed that the power of local self-government should be defined in the statute, in broad, abstract terms. The meaning of the definition was illustrated by a number of examples in the report. Herlitz[8] and Pettersson objected and held in a minority

[7] Cf. Welinder, "Något om motivens betydelse för lagtolkning", *Sv.J.T.* 1953, pp. 78 ff., esp. p. 83, and the opinion of Judge Klackenberg in the case reported in *Regeringsrättens årsbok*, 1953, p. 27.

[8] Herlitz was at that time a member of Parliament and professor of administrative law at the Faculty of Law, Stockholm University.

report[9] that it would be preferable to have an enumeration in the statute.

> "It is important that the will of the legislator shall be expressed by the statute itself, for the simple reason that those who play their parts in the legislative process should understand quite clearly what their decisions have implied. It is hard work to distinguish and to comprehend what is intended to become the will of the legislator in a report or an opinion delivered in the name of the drafting committee, or of the Minister, or of the parliamentary committee."

In addition to making the point that those who are responsible for the decisions ought to know what they have done, Herlitz and Pettersson touch upon the problems which will be met in the adjudication process.

> "But in the worst position of all are those who have to apply the statute. The citizen and the agent of the Government have the right to demand clear and explicit instructions as to how they shall act. This demand is especially justified when the legislator claims to speak to the ordinary citizen and the statute therefore should be known to him. It is quite unreasonable to tell him that instead of reading the statute books he should try to find his way through the labyrinth of the Parliamentary Reports. A still heavier burden is laid upon the citizen if Parliament has not agreed upon the proposals of the drafters on all points. In such cases the citizen has to put together in his mind three separate documents, the report of the drafting committee, the bill, and the report of the parliamentary committee."

Between the lines of the above quotation one may read a further reason why "the language of the statute should be the firm foundation for the decisions of the court".[1] I have in mind the interest of security in legal relations. It seems doubtful, however, whether this point of view should have a bearing upon the question. The argument is based upon the assumption that the members of the judiciary lack the capacity to pick out the essential elements from the legislative material. Apart from that, one ought to have a better chance of predicting what the courts are going to do when the judge makes use of the legislative material as a supplementary source of information, than one would if he had to rely upon the language of the statute alone.

But it is time to leave this question. Every observer must admit

[9] See *Statens offentliga utredningar*, 1947, No. 53, p. 163.

[1] These words were used by Dean Sundberg of the Faculty of Law at Uppsala University in the formal invitation to the "doctors' promotion" ceremony, 1954.

that in Sweden the legislative material functions as a guide for the courts.[2] What one can do, however, is to discuss the principles on which a system such as the Swedish one should work.

(*a*) It is generally considered that *directives in the legislative material do not have the absolute character of those in the statute itself.* The courts are not bound by such directives when there are strong reasons for not applying them. As said before, directives derived from the legislative material can properly be classified as secondary. That the directives of the legislative material are less authoritative than those of the statute is, in my opinion, the best feature of the system. The "legislator" has at his disposal an instrument by which he can exercise his influence, while still leaving the courts the power to meet the demand for change. In this connection I should like to recall my earlier observation that the various statements as to the purpose of an act or as to the construction of a particular section in the act are not all of equal weight. One has to consider, *inter alia,* from what body of persons the statement comes.

It has been said that a different principle should apply to the construction of tax statutes. The right of taxation is exercised by Parliament alone. Judge Klackenberg,[3] in a case before the Supreme Administrative Court, has referred to this clause of the Constitution and expressed as his view "that special weight should be accorded to the opinion of the parliamentary committee in matters concerning the purpose and construction of tax statutes. These opinions should be considered a part of the statute itself." Judge Klackenberg is in opposition to the general tendency of his court to construe tax statutes more literally than other statutes and to give the taxpayer the benefit of the doubt. But if his aim is to provide against tax evasion other remedies should be proposed. To introduce into taxation law a particular theory as to the impact of legislative material would lead to confusion. Assent to Klackenberg's proposal would mean surrendering the main advantage of the present system, namely that the two sets of directives are not of equal weight.

(*b*) Let us suppose that we still had the old system under which the reader was supposed to be able to visualize all the directives from the language of the statute. In such a case the expert committee could cut down their report to a short summary and a few cross-references from one section to another.

[2] This is also admitted by Herlitz and Pettersson.
[3] See *Regeringsrättens årsbok,* 1953, p. 27.

But our committee reports are not of that kind. In the text of the statute the modern Swedish draftsman often makes use of rather abstract formulas. This has certainly the advantage of flexibility, as it will be left to the courts to draw the definitive lines with due regard to practical needs. But abstract formulas are not easy to grasp. The language of the statute will be meaningless to the reader unless at the same time he studies the committee's exposition of each section. One might express the modern standard of drafting by saying that *the language of the statute must cover the directives in view, whatever it may express.* This is certainly a very modest request. That the drafter may not express one opinion in the proposed text and another in his report, is something he should have learned at law school, if not before. There is another point, too. A concrete example of how the statute should be applied is, if it functions as a directive, a *lex in casu*. The method of putting instructive examples in the legislative material will bring us in conflict with the fundamental principle of equality if those examples are not covered by the language of the statute. A court which abides by such directives will not be able in the future to apply the same rule to situations which have not been anticipated by the "legislator".

During the legislative process the drafter has to meet requests from government agencies, from pressure groups and from individual members of Parliament, each of them anxious to know whether the bill will take care of the case he has in mind. Some indication of the intention of the "legislator" might bring them comfort. But the proposed application must be in conformity with the language of the statute. In his text the drafter should use popular words in their plain, everyday meaning and juridical terms in their ordinary sense. If the drafter finds that the text of the bill is too narrow to admit an application in a case which should be taken care of by the bill, he must rewrite the text. But even Homer nods. The drafters may fail simply because they are in a hurry or are lazy, or sometimes because they are afraid that a new text will have unpredictable consequences, being in one respect too wide, in another too narrow in scope.

(*c*) It has happened that the "legislator" has tried to influence, by directives in the legislative material, the state of law in neighbouring fields. This practice has been severely criticized by Welinder.[4] I agree with Welinder that opinions of this kind are more

[4] Welinder, *op. cit.*, p. 83.

likely to express hasty views than mature thinking. Moreover, the method is ineffective as directives may easily be neglected because they are put in places where no one expects to find them. As a third principle I should therefore like to recommend that *the "legislator" should never try to put into the legislative material directives which do not concern the issue settled by the statute he has to prepare.*

There are, however, some modifications to be made to this standard. Suppose that a committe of experts has been given the task of working through a wide field, e.g., family law, commercial law, or criminal law, and is turning out one report after another. The result will be a number of consecutive amendments of the same code. In such a case all the bills have to be considered as one unit. An opinion in the legislative material of a statute already passed may have bearing upon a bill introduced later on.

The committee reports and the Minister's comments often contain expositions of the law in the field. It is explained which parts of the law will be changed by the proposed statute and which parts will not be touched. The drafter has not, by his exposition of the state of the law, intended to direct the judicial application of the statute. In principle, such expositions do not differ from expositions by a private commentator in an edition of a statute or in a legal journal.

However, the history of one particular section of a statute may indicate that the "legislator" had a definite conception of the state of the law and that he wanted to leave it as it was but for one point, where he offered a remedy against some existing mischief. The rule on the statute book would then be left in the air if this preconception turned out to be false, or if the courts should change the law by overruling. This may be illustrated by an example. The drafter of the Conditional Sales Act, 1914, held the view that clauses which coupled two or more instalment sales had full effect in relation to third parties and that the seller could consequently claim to be the owner of all the goods sold until the last payment on the last contract. Section 8 of the statute gave the buyer the remedy of a moratorium when the payments overdue did not exceed a certain amount. When the question of the effect of coupling clauses against third parties was brought before the Supreme Court in *Cronvik* v. *Malmquist Trustees,* 1944 *N.J.A.,* p. 184, the majority of the Court followed the lead of the drafters of the Conditional Sales Act. It is not necessary, however, to regard this case as an example of a modification to the standard recom-

mended. Part of the picture was that the "legislator" had offered a remedy. Thus, the motivating factor was the rule on the statute books rather than the drafters' exposition of the state of the law.

(*d*) In a lawsuit there are often interests at stake beyond those of the parties. Mr. A, owner of a small farm, enters into an agreement with Company B that he shall fell timber and bring it from the company's forests. He uses his horse to drag the timber. Part of the work is done by his servant. A is free to make similar agreements with other companies. A claims that he has been employed by the company and that, like other employees, he is entitled to a paid vacation as prescribed in the Vacations Act, 1945. The company refuses to pay, as in their opinion A is to be regarded as an independent contractor. Let us suppose that the question of law is still unsettled. The decision of the Supreme Court may stir up the feelings of many persons, just as it did in the case *Hult, etc.* v. *Säters ångsågsaktiebolag,* 1949 *N.J.A.*, p. 768. After an examination of the agreement and the social and economic position of the plaintiff, the Supreme Court held that he was to be regarded as an independent contractor and therefore decided in favour of the company.

In 1950 a member of Parliament proposed in a private motion that Parliament should request that the Vacations Act be amended so as to cover lumber drivers. The parliamentary committee reported that there were strong reasons in favour of the view that lumber drivers should be regarded as employees. The committee explained that the decision of the Supreme Court in the case Hult, etc. v. Säters ångsågsaktiebolag did not "justify too far-reaching conclusions" and that one ought to wait and see. The motion was not carried.

In 1953 the Cabinet introduced a bill for National Health Insurance. Wage and salary earners were to be entitled to additional sickness benefits as compensation for loss of income. The Minister of Social Welfare declared in his exposition that in the proposed statute the word "employee" should have the same meaning as in the Vacations Act. Later on, however, he added that lumber drivers should generally be regarded as employees.

In the general debate a member made the criticism that the Minister's recommendation would probably have no effect. It would be preferable to amend the text and thus express the will of the legislator in the statute itself.

So far as I can see, this member took the right view. The Minister may have had in mind the administrative application

of the National Health Insurance Bill only, or he may have intended to express his opinion on the judicial application of the Vacations Act, too. In the first case he contradicted himself, as he had explained earlier that the word "employee" should have the same meaning in the proposed statute as in the Vacations Act. In the second case he demonstrated a possible evil of the method of putting directives in the legislative material. If the "legislator" wishes to influence the courts to overrule a previous decision, this should not be done by directives in the legislative material. Otherwise he may create a situation where there will be two divergent directives. As mentioned before, the precedents are to be regarded as sources of directives and they are in that respect to be compared with the legislative material. The courts are bound to follow directives in a statute that a precedent shall cease to have effect, but there is no ground for the supposition that directives in the legislative material should rank higher than directives derived from precedents. The fourth principle recommended will therefore be that *the "legislator" should never try to influence the courts to overrule previous decisions except by clear directives in the text of a statute.*

An incident of the kind now described could easily lead to a constitutional conflict. However, in this situation that is not likely to occur. There is no reason to believe that for the sake of prestige the Supreme Court will keep the Hult case as a *stare decisis*. The problem of who is to be considered an "employee" has caused the Swedish courts and the administrative agencies much trouble. It has been said that some statutes were based on a private law concept, others on a broader social concept. The Supreme Court itself has not always been consistent in its opinions. It is unsatisfactory, indeed, that certain social groups should be regarded as "employees" in one situation but not in another. It would be better to let the concepts meet half-way and to secure uniform application of the statutes concerned. It is against this background that one must judge the last decision of the Supreme Court as to whether lumber drivers should be regarded as "employees" or "independent contractors", viz. *Eriksson* v. *Grana aktiebolag Trustees,* 1955 *N.J.A.*, p. 345. The Grana company, from whose forests Eriksson had carried the timber, became bankrupt. According to the Commercial Code, "employees" are preferential creditors. The trustee has to pay their wages in full out of the employer's property in preference to the claims of the ordinary creditors. In three cases of 1923 and 1924 the Supreme

Court gave lumber drivers the benefit of preferential claims. In the case *Eriksson* v. *Grana aktiebolag Trustees,* the court unanimously upheld this rule. Mr. Justice Lind, concurring in the decision, delivered an opinion of his own and stressed the need of uniformity in the application of different statutes.

8. In the last section we have considered some standards which the "legislator" should apply if he wants to supplement the language of the statute with the legislative material. In this section I will discuss the impact of the text of the statute and of the legislative material on the judicial process.

Traditionally, veneration for the language of the statute has been strong in Sweden. This is probably the case in all countries where the opinion has prevailed that the law should be codified. For the sake of comparison it may be mentioned that in earlier days the precedents were not so easily accessible to the ordinary lawyer or to the scholar as they are today. The first series of annual law reports was started in 1830. The present reports, *Nytt Juridiskt Arkiv,* acquired their semi-official character, with Supreme Court members as editors, as recently as 1910.

It is tempting to suggest that the method of using the legislative material as a source of information originated from the idea that the judge should ask himself what the will of the Sovereign was. However, Swedish constitutional principles have not favoured such a notion. The King has always shared the legislative power with Parliament. Judges and officials have been supposed to apply the law on their own responsibility and not to take instructions from the King. That the legislative material should be considered a source of information is probably quite a modern conception. The first piece of evidence that I know of dates from the beginning of this century. In Sweden the statutes which are of particular concern to the courts are reprinted yearly by a private publishing house. A member of the Supreme Court is the editor. In this publication, cases are annotated. When the Bills of Exchange Act, 1880, was still in force, the editor put under one of its sections a reference to the report of a parliamentary committee of 1905 on an issue of construction. Evidently, at that time, such material was considered relevant in the process of judicial application. In this connection it should be mentioned, too, that the members of the Supreme Court are familiar with legislative drafting. Several of them have acquired great skill in drafting. They have been appointed to their office because of their capacity

for that kind of work rather than because of their experience as judges.

It is not an easy task to demonstrate in detail the impact of the language of the statute, as distinct from the legislative material, by references to the law reports. There are other factors which may carry weight. The judge has no reason to indicate when he is crossing the line and entering a field where the language of the statute will give him no help. Indeed, such a line only exists in theory. The analysis of the text and of the legislative material are two simultaneous operations. Ordinarily the answer which the judge gets from the statute text is supported by his examination of the legislative material.

There are many traps that the student of the law reports may fall into. Earlier, the courts were extremely brief in their opinions. The Swedish courts, like the French, authoritatively stated certain rules and presented the decision as the result of a logical deduction. Often the court did not even say what the rule applied was, but only stated the relevant facts. When this is the case, the student has to find out why certain facts have been considered relevant in order to bring to the surface the rule applied by the court—a task which requires both imagination and experience. And that is only the first step. As to the question of why the court has laid down the rule applied, the decision will generally give no answer at all. Nowadays the courts are more willing to disclose their reasons in full, but the student of modern cases has another difficulty to meet. In the opinion the reasons may be stated one after another without reference to their relative importance. The student will not know whether one reason would carry the decision alone, or whether two or more reasons have to be present simultaneously.

Judges look on their work in different ways. Some are conservative, and believe that when the judge is unable to find a solution along the traditional lines, the legislator must take up the problem and introduce necessary amendments. Other judges are more radical. The Supreme Court, they hold, should not be ensnared by the language of the statute but should be free to create new law. However, the courts ought to refrain from entering the political battlefield. This great difference in approach is illustrated by the following case.

Frälsningsarmén v. *Brita Lundberg*, 1954 *N.J.A.*, p. 325. The Swedish Marriage Code, 1920, is based upon the principle that the property of both spouses is matrimonial property. Each spouse owns and ad-

ministers his or her part of the property, but upon dissolution of the marriage matrimonial property is divided equally between the husband and wife (or their assignees). By a marriage settlement the spouses can turn matrimonial property into separate property with the result that each spouse, on the dissolution of the marriage, will take the property that was owned by him or her at the time of the marriage or has been acquired later. Generally such settlements are entered into before the marriage. The settlement has to be registered at the court which has jurisdiction over the husband. According to the Judicial Procedure Code, this court is the court of the district where he has his residence.

In May 1921 Henning and Brita, who were engaged to be married, made a marriage settlement of the above kind. The document was registered at the court of the district where the couple intended to settle down, and not at the court of the district where Henning had his residence at the time of the agreement. This mistake of the parties was explained by a recent change in the law. Before 1920 the entry could be made in the register of the court of the district where the couple intended to take up residence. In 1933 Henning made a will, leaving his property to the Frälsningsarmén (the Swedish Salvation Army) and some other institutions. On the death of Henning in 1950, Brita refused to give up her share of the estate, which she considered to be matrimonial property. The Frälsningsarmén brought an action against Brita, with the demand that the court should declare the marriage settlement valid regardless of the fact that it had not been registered at the court which had jurisdiction over Henning at the time of the agreement. Brita pleaded as defence that the settlement was void.

The City Court held the defence good and dismissed the action. This judgment was affirmed by the Court of Appeal and by the Supreme Court. Two of the five Supreme Court members on the division which tried the case dissented.

Mr. Justice Walin stressed in his dissenting opinion that a strict application of the statute would serve no purpose but would instead lead to unexpected consequences for those concerned. When the couple registered their settlement they did so with the intention of complying with the regulations. It was open to doubt whether the district court was in error in permitting an entry to be made. It would lead to insecurity if this application of the statute were later on to be set aside—for the mere reason that it was not in accordance with the best or the right construction of the statute—with the result that the arrangement had been made in vain and that all the dispositions based thereupon were nullified. It was unfair to permit a spouse who had entered into a marriage settlement and permitted its registration, to rely upon the defence of annulment in a case where the interest of the creditors was not concerned.

In order to demonstrate the general attitude of the Swedish courts I have chosen a number of Supreme Court decisions from the last few years. My examples are all within the field of private law. The cases have been arranged in three groups: (*a*) cases in which the question involved is the impact of the language of the statute, (*b*) cases which demonstrate the impact of the legislative material, and (*c*) cases in which the Supreme Court has disregarded the directives of the "legislator".

(*a*) I have already suggested as a standard of legislative drafting that the language of the statute must cover the directives in view, whatever it may express. The following case demonstrates that the Swedish Supreme Court is not inclined to go beyond the language of the statute when the words of the statute are clear, even though the purpose of the statute or similar considerations would have been arguments in favour of a more liberal construction.

Frisk v. *Aktiebolaget vin- & spritcentralen*, 1951 *N.J.A.*, p. 440. According to the Vacations Act, 1945, an employee for each month he is at work becomes entitled to a certain period of paid leave. He has to take his leave during the ensuing calender year. If a man terminates his employment he is entitled to get as vacation pay a sum equivalent to the pay for the period of leave earned by him at that time. Supposing a man starts his employment on July 1 and quits it on December 31 the same year and the leave is a day and a half for each month at work, he should then receive pay for nine working days when he quits. With this construction, a man who gets a pension on retirement would be entitled to double pay for the first period after his retirement. The Vacations Act gives a special rule for this case in sect. 20.

"When the employee on the termination of his employment is provided with a pension, the employer is entitled to deduct the pension from the vacation pay for the period which is covered by the vacation pay."

Mr. Frisk, an employee of the Swedish Wines and Spirits Monopoly, retired on pension. At the time of his retirement he had earned vacation pay for 22 working days. The company deducted from this an amount equivalent to the pension for a period corresponding to 22 working days. Frisk, however, like all other employees of the company, had contributed to the pension by paying about 8 per cent of the premiums.

He claimed that the company had no right to deduct from his vacation pay more than a sum proportional to the employer's share of the premium. The company should therefore make restitution of the sum it had deducted above that amount.

In its decision the City Court summed up the arguments of the parties. Frisk had relied upon an opinion expressed by Hesselgren and Samuelsson in their commentaries to the Vacations Act that from the vacation pay should be deducted an amount proportional to the employer's contribution to the pension. This opinion was "authoritative, as the two commentators had taken part in the preparation of the statute".[5] The company, on the other hand, pleaded that the statute did not mention any exceptions to the rule prescribed. The opinion of Hesselgren and Samuelsson "was not part of the legislative material".[6] The company evidently held that in this case their opinion should not have more weight than the opinion of two ordinary experts.

The City Court dismissed the action because "the arguments of the plaintiff did not provide sufficient ground for a construction that would give the statute a meaning other than that indicated by its wording."

The Court of Appeal refused to reverse this judgment. The Supreme Court affirmed the decisions of the courts below, four of its five members concurring in the result. Mr. Justice Sjöwall delivered an opinion of his own which had the approval of Mr. Justice Santesson. In this he explained his view of the court's decision. "Having considered the history of the statute and the legislative material and the reasons set forth by the City Court I have come to the conclusion that there is not sufficient ground for a construction disregarding the language of the statute."

The opinion of Mr. Justice Sjöwall is of particular interest, inasmuch as it reveals the general standard of construction. The language of the statute is a motivating factor of great weight, but the court is free to go beyond the text when there are strong reasons in favour of such a solution.

It has often been said that the ordinary or judicial usage of the language should decide the construction. If we start from the conception that statutes are instruments "to express the will of the legislator", we ought to ask what was the meaning of the language at the time when the statute became law. Later changes in the usage would be of no concern. This is, however, not necessarily the standard of construction.

Skidfrämjandet v. *Areskoug*, 1946 *N.J.A.*, p. 767. Föreningen Skidfrämjandet (the Swedish Association for the Promotion of Skiing) is an old and well-known private association of lovers of skiing. It

[5] Hesselgren had been the chairman and Samuelsson the secretary of the drafting committee.

[6] The quoted opinion of Hesselgren and Samuelsson is not to be found in the report of the drafting committee.

spreads information through films and demonstrations, organizes local ski clubs and committees, and trains sports instructors. The association runs hotels and camps at several of the Swedish winter resorts. One of its activities is the examination of the quality of skis and other sports articles such as ski wax and ski oil. Manufacturers are granted licences to use the mark and the name "Skidfrämjandet" on their product as a kind of hallmark. The association is remunerated for this, generally by a royalty.

Mr. Areskoug, a manufacturer of ski wax and ski oil, had registered at the Swedish Board of Trade the mark "Skidfrämjandet" for his products. The question in the case was whether Skidfrämjandet was protected against such infringement. According to the Trade Marks Act, 1884, sect. 4, point 2, no mark may be registered which contains the name or trade name *(firma)* of another person except with his consent. Any person who is aggrieved by a wrongful entry in the register may apply to the court for an order for the expunging of such entry. At the time of the enactment of the statute the legislator had had in mind only names and marks belonging to persons engaged in industrial occupations, in commerce or other trades. This limitation as to scope is clear from the text of sect. 1. The "legislator" had not considered the legal implications of standardization marks.

The Supreme Court held unanimously that the Skidfrämjandet was protected by the statute. Three of the five judges on the division that tried the case delivered the opinion of the court.

"Granted that the examinations of skis and other sports articles which are undertaken by the Skidfrämjandet will not be regarded as a trade such as is referred to in sect. 1 of the Trade Marks Act, 1884, the Court has found that sect. 4, point 2—although its range was originally narrower—should be construed in conformity with its language and the sense of justice as providing protection for the names of persons who are not engaged in a trade such as is referred to in sect. 1."

During the last twenty years, the Swedish courts have redrafted the industrial property law. The Skidfrämjandet case is one of the leading cases. It would carry us too far to dwell upon this subject here. For my purpose it is enough to say that in this case the Supreme Court did not pay regard to the original intention of the "legislator", but nevertheless relied upon the language of the statute in its present usage as an argument for a decision that for other reasons was considered desirable.

The next case also concerns the usage of language, but from a sligthly different aspect.

Smålands Bank v. *Telra Industriaktiebolag Trustees,* 1952 *N.J.A.*, p. 195. Loans of personalty, by way of floating security, are an old

institution in Swedish law. An industrial enterprise can offer its trade machinery, its raw material and products as security for a loan. The Industrial Floating Security Act, 1883, requires that the document effecting the transaction shall be in a certain form and shall be registered. Since the Farm Floating Security Act, 1932, came in force, the farm creditor can arrange a security of the same kind. The secured creditor is not entitled to realise his security, but the trustee of the bankrupt debtor has to pay the secured creditor in full unless the property is insufficient or there are other debts which have priority over the secured creditor.

Smålands Bank had a floating security in the property of the Telra company. Telra had bought some of its machines on conditional sale. At the time Telra became bankrupt the whole of the purchase money had been paid except for a small amount. The trustee paid the seller in full and sold the machines on the market. Smålands Bank as secured creditor claimed the proceeds of this transaction.

The buyer in a conditional sale has the right to get the goods by paying the rest of the purchase money, and when there are only a few instalments left this right may have considerable financial value. The courts had to decide whether the buyer's right under such contract was covered by the words "the property of the debtor", in which case it was included in the floating security. At the time when the Act of 1883 was enacted, conditional sales of trade machines were unknown in Sweden. The question was considered in the legislative material of the Act of 1932. In his exposition of the bill the Minister stated "that the floating security will cover only property which belongs to the debtor. Consequently it does not refer to machines bought on instalments". The parliamentary committee expressed the same opinion by the words: "The security does not include chattels which under a conditional sale or any other title belong to a third person."

The City Court, quoting these opinions from the legislative material, dismissed the Smålands Bank's action for priority. The Court of Appeal affirmed.

The Supreme Court reversed this decision (two of five members dissenting) on the following grounds: "That the seller has the right of an owner to recover goods sold under a conditional sale, does not exclude the buyer's being the owner, too, even though his right is conditional until the purchase money has been paid in full. Goods obtained under a conditional sale shall therefore be included in the security, if this will not infringe upon the right of the seller."

In the Smålands Bank case, the courts had to decide a more technical issue than in the Skidfrämjandet case. Whether the buyer who has goods under a conditional sale shall be considered the owner or not is one of those problems which learned men

of the old school loved to discuss. Earlier, the opinion prevailed that the seller alone was the owner. The modern scholar has another approach. He tries to describe the legal situations as they are, having regard to the state of law. The terminology is regarded as a secondary question. Both the seller and the buyer are holding positions which are equal to that of an owner in certain relations. It has therefore been considered accurate to attach the term "owner" to both. In the Smålands Bank case the new labels attached by the scholars have served the purpose of legitimizing a change in the law.

(*b*) As mentioned before (in section 6), the weight attached to an opinion in the legislative material depends upon its place in the chain, the reputation attributed to the body which has delivered the opinion and other considerations of that kind. The following cases concern another aspect. Opinions in the legislative material refer to different matters.

The legislative material is a valuable source of information about the general purpose of the statute, about what were the mischiefs in the law before the making of the statute, and about what remedies the "legislator" wanted to offer.

In re Anna Sternbrink, 1953 *N.J.A.*, p. 120. During the Second World War, apartments became scarce in Sweden. Rent control was introduced in order to freeze the rents at their existing level. The Rent Control Act, 1942, also protects the tenant against the risk of losing his apartment because of the housing shortage. The price control has had a tendency to make the lack of balance permanent and has given rise to some of the most serious social problems of present-day Sweden. Generally, lease-contracts are on a yearly basis, terminable on notice three months before the end of the year. If the tenant has received notice of termination from his landlord, he has to apply to the Local Rent Board to nullify the notice, with the result that the lease will continue. According to sect. 7 of the Act, the board may grant this remedy "when the termination of the contract would be repugnant to good standards of lease relations or would be otherwise unfair".

Mrs. Anna Sternbrink, a widow, lived alone in an apartment consisting of five rooms and a kitchen. In the same apartment-house a colonel with his wife and their two children had a flat of two rooms and a kitchen. The landlord thought that the colonel had more need of a big flat than the widow. He gave her notice of termination and offered to let her have the colonel's flat instead of her own. The Local Rent Board held this arrangement proper and dismissed the widow's claim for annulment. On appeal the decision was upheld by the Central Rent Board.

In principle the decisions of the Central Rent Board are final. The case was, however, brought before the Supreme Court by way of a petition for a new trial. According to the Swedish Judicial Procedure Code, 1942, the Supreme Court may order a new trial when a court or an administrative board has made a manifest error of law. Although the Supreme Court considered the error not so manifest as to meet the very rigorous conditions for a new trial, it took the opportunity to make the following statement on the law in the case.

"The purpose of the Rent Control Act, 1942, is to protect the tenant not only against a general rent increase due to the economic crisis but also against the risk of losing his apartment because of the existing shortage of accommodation. On the other hand, regard has been paid to the fact that the landlord may have a reasonable cause to ask for the disposal of the apartment. In the Rent Control Act, sect. 7, it has been prescribed that the Rent Control Board may annul a notice of termination when the termination of the contract would be repugnant to good standards of lease relations or would be otherwise unfair. The statute gives the board the power to use its discretion. From the legislative history it will be gathered that the board has to consider the interests both of the landlord and of the tenant. Grounds for a dismissal of an application for annulment are, *inter alia*, that the landlord wants to have the apartment himself or that the eviction of the tenant is justified for the sake of the general benefit. So far as the Court knows there is nothing in the legislative material—at the time when the statute became law or later on—to support the view that the board has the power to use its discretion, as it has done in this case, to judge the need of each tenant and move a tenant from one apartment to another. No such limit to the protection of the home supplied by the statute was in the mind of the legislator."

The language of the Rent Control Act, 1942, leaves to the board the power to decide what allowances should be made for the interests of the parties. But besides the language of the statute the board has to consider those directives which are to be found in the legislative material. The board had meant to help a family with young children to get a better apartment at the expense of a widow living alone. What the board did was to ration available space in relation to the need. A rationing of apartments had not, however, been the purpose of the statute. In the opinion of the Supreme Court such considerations were therefore not permissible.

Ordinarily the report of the drafting committee consists of two parts, one being a general survey of the state of law, the demand for a reform, and the possible remedies, and the other being

commentaries to each section of the proposed statute. As I have said before, the commentator illustrates the meaning of the statute by means of examples. The politicians attach great importance to such illustrations. It is easier for a non-lawyer to evaluate the result by the help of a catalogue of examples than by a study of the abstract text of the statute.

The courts, too, pay regard to the catalogue of examples. From my interviewing of judges I have got the impression that many of them consider examples in the legislative material quite equal to precedents. The following case supports my observation. The Supreme Court puts the example from the legislative material and the precedent side by side in its opinion.

> *Nilsson Sisters* v. *Johan Karlsson and Relatives,* 1950 *N.J.A.*, p. 483. According to the Swedish Inheritance Act, 1928, in case of intestacy the surviving spouse takes the whole estate where there is no issue, but upon his or her death the estate is to be divided between the relatives of the husband and the relatives of the wife. It has been an old custom in Sweden that spouses—when they have no children of their own—make a joint will by which the estate is left to the surviving spouse. Part of the background of this is the fact that before 1920, in the case of intestate succession, the surviving spouse did not get any part of the estate. The committee which was commissioned to draft the Inheritance Act took account of the impact of the new rule on joint wills. The committee explained that there were reasons for presuming that a spouse who in a will left his property to the other spouse had meant that the surviving spouse should have the right to dispose of the property by will. If she died intestate the property should pass to her heirs and not to the heirs of the spouse first deceased, provided that there were no special provisions in the will of the spouse first deceased.
>
> It is hard to say whether this presumption corresponds to what people generally expect regarding the effect of a will by which property passes to the surviving spouse. In a number of cases it has been claimed that the rule provided for in the Inheritance Act, 1928, represents the natural construction and that therefore upon the death of both spouses the relatives of the spouse first deceased should take their share. In the Nilsson Sisters case the Supreme Court declares as the rule of construction that the heirs of the spouse first deceased should be excluded. In its opinion the court gives as reasons (1) that the court has decided previously in that way, (2) that this rule has been recommended in the legislative material, and (3) that the public may have adjusted themselves to the established rule. The main passage of its opinion runs as follows:
>
> "As to the construction of a will by which the estate has been attributed to the surviving spouse as full owner (without provisions

for the succession upon her death), such wills have been consistently considered by this Court to imply that the testator has excluded the application of the rule of intestate succession, and that the relatives of the spouse first deceased shall therefore have no share in the estate. In plain words, the drafters of the Inheritance Act, 1928, have expressed as their opinion there should be no application in this case of the rule in the statute that the relatives of the spouse first deceased are heirs of the surviving spouse. It is probable that this opinion has obtained such a footing in the mind of the public that it ought not to be overruled by the courts."

(*c*) As a third group I take some cases in which the Supreme Court has disregarded the directives of the "legislator".

The Estonian refugee cases. In consequence of the Second World War, Sweden became an immigration country which had to receive streams of refugees from different quarters. One large group was that formed by the Estonians who sought asylum in Sweden when Russia again annexed the Baltic States in 1944. From the point of view of international law the Estonian refugees were Soviet-Russian citizens. The fact that the Estonian refugees were considered Russian citizens gave rise to a number of problems. The principle of nationality is the main rule of Swedish private international law. By a statute passed in 1904 Sweden has adopted the Hague Convention, designed to settle conflicts of laws with regard to the conclusion of marriage, and to divorce, judicial separation and guardianship. An application of this act to an Estonian refugee would mean that his right of marriage must be tested by Russian law. The consequence of this would be, for instance, that Estonian refugees could not contract marriage with Swedish subjects, since Russian law prohibited marriages between citizens of the Soviet Union and foreigners. With special reference to the Estonian refugees, an amendment of the Act of 1904 was therefore made in 1947.

The amendment of 1947 was a makeshift designed to alleviate the most distressing situations. It enabled a foreign refugee to marry on conditions applicable to Swedish citizens if he had a Swedish domicile and had been resident in Sweden for at least two years. But other problems remained, such as the right to petition for separation or divorce. Since the refugees were foreign citizens, the Swedish court would have jurisdiction only if the respondent was domiciled in Sweden and therefore these remedies would not be available to a spouse who alone had taken refuge in Sweden. Moreover, even in cases falling under the jurisdiction of the Swedish courts, according to the Act of 1904, judicial separation or divorce could be granted only if they might take place, and if grounds for them existed both according to Swedish law and according to Soviet law. Before, however, any scheme for a fresh alteration of law had been introduced,

the problem of the status of the Estonian refugees was dealt with by two decisions of the Supreme Court, which represent a new departure in Swedish case law.

In the case *Elmar Lohk* v. *Ilse Lohk*, 1948 *N.J.A.*, p. 805, the court dealt with the question of Swedish jurisdiction. Elmar Lohk, an Estonian, had applied for separation according to the Swedish Marriage Code, 1920, Chap. 11 sect. 6, which section concerns divorces where the defendant spouse has been absent for the last three years and is not known to be alive. The case *Laurine*, 1949 *N.J.A.*, p. 82, referred to a joint application for separation presented by husband and wife, both domiciled in Sweden. In the two cases the lower courts had assumed that the law of nationality must be applied in accordance with the Act of 1904. The Supreme Court, on the other hand, took a different view. In spite of their Soviet-Russian citizenship, Estonian refugees should, it said, be put on a level with persons without citizenship. Stateless persons being, in the eyes of Swedish law, subject, in personal respects, to the law of their domicile, Swedish jurisdiction must be exercised, and the case must be decided according to Swedish law. The first decision was reached by a majority of four members to one. In the second case, the division of the Supreme Court which tried the case reached a unanimous decision.

The reasoning in the Lohk case is fairly brief. The court held that the Act of 1904 does not specially provide for those who "hold no citizenship or, though possessing a citizenship, do not enjoy the protection of their native country". In the Laurine case three judges out of five gave a joint opinion in which they set forth in greater detail their reasons for the decision. After stating that the parties were political refugees who did not enjoy Soviet-Russian protection and did not intend to return to their native country, the judges held that their Soviet citizenship was of "a purely formal nature". When the Act of 1904 was drafted, the legislator had apparently "not envisaged the occurrence of this kind of citizenship". Although the statutory regulations recognize that citizenship governs the personal law, yet "it would be incompatible to attach to citizenship of the nature referred to the paramount importance that these regulations involve. Rather, the arguments leading up to the idea that stateless persons ought to be subject to the law of their domicile, must on important points be considered applicable also to foreigners who hold the status referred to, and who consequently have no real connection with their native country".

The language of the Act governing certain international relations concerning marriage, 1904, clearly indicates that the right to petition for separation or divorce shall be tested by the national law of the spouses. The statute does not leave room for

any exceptions. In the Estonian refugee cases, nevertheless, it was held inapplicable. The Supreme Court considered that it had power to disregard the directives of the legislator and to create new law, because the legislator had apparently "not envisaged the occurrence of" the situation which the court had to adjudicate.[7]

Marian C. v. *Juan A.*, 1951 *N.J.A.*, p. 265. Marian had become pregnant, but after due permission of the medical authorities the pregnancy was ended on medical indications. Later she sued Juan, the man with whom she had had sexual intercourse at the time of the conception, and claimed that he should pay half of the expenses incurred by her because of her pregnancy and the abortion.

In Sweden abortion was earlier considered a criminal offence, although it was in fact free from punishment when the operation was made by a doctor for medical reasons. By the Abortion Act, 1938, abortions on certain grounds were made legal. As regards abortion on medical indications, the Act is probably a little more lenient than the law before the Act. According to sect. 1 (a) the pregnancy may be ended when, because of the sickness, bodily defect or weakness of the mother, the bearing of the child would seriously endanger her life or health. An amendment of 1946 extended the Act to cover cases of so-called mixed social and medical reasons. When the medical indications are supported by certain social indications, they need not be so grave as in the cases referred to in sect. 1 (a) of the Act.

According to the Swedish Parents and Children Code, 1949, Chap. 7, sect. 10, the father of an illegitimate child has to support the mother also for a certain period before and after her confinement. This rule was introduced in 1917. Before the enactment of the Parents and Children Code the rule was embodied in an Act concerning children born out of wedlock. Consequently the rule of support came into existence at a time when all abortions were in principle considered illegal.

In the Marian case, the lower courts held that Juan could not legally be ordered to pay the expenses incurred by Marian because of the abortion and dismissed her claim. The Supreme Court took the opposite view in a decision reached by a majority of three judges to two. Mr. Justice Alsén and Mr. Justice Ericsson delivered the opinion of the court. "According to the reasons for Chap. 7, sect. 10, of the Parents and Children Code, Juan has the duty to contribute to the costs and the loss of income which Marian has been caused by her pregnancy and the abortion."

Mr. Justice Regner, the third of the majority judges, delivered an opinion of his own. Regner finds his arguments in the legislative

[7] The author has treated the Estonian refugee cases and their general implications in an article "Nationality and domicile in Swedish private international law", published in *The International Law Quarterly*, 1951, pp. 39 ff.

history. As just mentioned, the rule that the man had to support the mother first appeared in an act of 1917. The drafters of this act had considered the rule applicable when the child was stillborn. It could not be supposed that the duty to support was dependent upon the delivery's being spontaneous or taking place during the latter part of the period of pregnancy. Regner comes, therefore, to the conclusion that the duty to support must also be considered to have been in existence in a case where the pregnancy had been ended at an earlier stage, and this had arisen through an abortion carried out by a doctor for such medical reasons as were held to be legal grounds for abortion even before the Abortion Act, 1938. When this statute became law, the duty of support was extended to cover at least the remaining cases of abortion referred to in sect. 1 (a).

Probably Alsén and Ericsson differ in their opinion from Regner on the following point. According to the former, in the eyes of the legislator, abortion is not equal to stillbirth. As a rule abortion implies the expulsion of the human foetus at a time before it is viable. The Abortion Act prescribes that the action shall if possible not be undertaken after the twentieth week of pregnancy, a time limit chosen in order to avoid situations involving the extinction of human life. In stillbirth, on the other hand, the mother has borne a child.

It is interesting to compare the opinion of Alsén and Ericsson and the opinion of Mr. Justice Regner, on one hand, with the opinion of one of the dissenting judges, Mr. Justice Söderlund, on the other. In his opinion Mr. Justice Söderlund stresses the difference between abortion and stillbirth which I have pointed out. Further, as an argument against Regner, Söderlund explains that the legislative history will not give any guidance. It was considered a matter of course that the man should have to support the mother in case of stillbirth, too. This was a consequence of the construction of the rule. The duty to support should cover a period before the confinement, and a right once acquired would not cease to exist if the child was later born dead.

The following passage in Söderlund's opinion may be quoted. "Considering the fact that the legislator has later held it necessary to give access to abortion in certain cases, the court may have the authority to grant the mother the remedy of support with the help of a liberal construction of the rule in Chap. 7, sect. 10 of the Parents and Children Code, 1949." But it was preferable that the problems involved should be solved by the legislator through an amendment of the law and not through rules created by the courts.

Mr. Justice Alsén and Mr. Justice Ericsson, who delivered the opinion of the court, apparently held the view that Chap. 7, sect. 10, of the Parents and Children Code, 1949, did not cover the duty of support in case of abortion. Nevertheless, they held that

such a duty existed, at least for abortions on medical indications. The main reason for this analogy seems to have been the change in the social evaluation of abortion since the introduction of the rule of support in 1917. If we approach the problem in the way Mr. Justice Söderlund did, we may call attention to the fact that this change received official recognition by the Abortion Act, 1938.

9. A familiar topic in the textbooks of jurisprudence is the problem of whether a statute ceases to be law if it has been persistently disregarded for a long period. Wilhelm Sjögren in his article on "The Authority of the Judge and Changes in the Law"[8] presents evidence that this has sometimes been the case in Sweden. For a statute to become inoperative without formal repeal must be rather unusual in a country like Sweden where the legislative process has worked without distortion and where in most fields of the law the statutes have been revised from time to time.

However, the textbook writers have not paid much regard to the fact that all directives from the legislator are changed little by little in the course of development. Yet this constant, gradual change is a phenomenon more deserving of careful study than the doctrine of desuetude. As time goes on, the directives get worn out. The adjudication functions as a process of reinforcement of the law. But the reinforcement by the courts does often include a reshaping and a transformation of that what has been into something new, at least in part. That the directives lose in strength as time passes is demonstrated by the fact that the courts do not attach the same weight to the language of an old statute as to the language of a statute recently enacted. In order to find a statute that has wrinkles on its face, we do not have to search among statutes enacted long ago. The Skidfrämjandet case and the Smålands Bank case[9] may serve as examples. In those cases the court gave new content to statutes from the late nineteenth century. In this connection I should like to refer to the cases in which the court disregarded entirely the directives from the legislator. They all concerned statutes of a certain age. In the Estonian refugee cases[1] the statute set aside was from 1904, and the Marian case[2] concerned the construction of a rule introduced in 1917.

[8] See *Tidsskrift for Rettsvitenskap*, 1916, p. 349.
[9] See *supra*, pp. 182 ff.
[1] See *supra*, pp. 188 f.
[2] See *supra*, pp. 190 f.

Most probably directives in the legislative material have less capacity to remain fresh than directives in statutes. The same is the case in Sweden with precedents.

However, the time factor is not the decisive one. In the Estonian refugee cases, the Supreme Court disregarded the Act of 1904 governing certain international relations concerning marriage, in spite of the fact that the language of the statute clearly indicated its application. According to the opinion of the court in the Laurine case, this was done for the reason that the "legislator" apparently had "not envisaged the occurrence of" situations of the kind the court had to try. In the Anna Sternbrink case, the Central Rent Control Board deals with the power of an administrative authority in a special letter of explanation delivered upon the request of the Supreme Court. In the minority report in this letter the same idea is expressed as in the Laurine case:

> "It might be necessary to give a statute a construction which goes further than its language or its legislative history supports, but this should be done only when it is necessary to meet unexpected situations."

However, I am not convinced that the Supreme Court or the minority of the Central Rent Board has hit on the point. What the persons on the bodies in the legislative process may have had in mind is only one aspect of a complex problem. Every judgment on a statute should take into consideration that the statute is the outcome of human aspirations and a manifestation of social values. One reason why the judge will be free to disregard directives from the legislator is that people have ceased to believe in the values on which the statute was based. Generally, both the unexpectedness of the situation and the change in values will be reasons in favour of a new departure. But in extreme cases the judge may have to rely upon the latter reason alone.

However, the judge should not let his private opinion as to right and wrong decide whether the social values carrying the statute are still alive. The test should rather be the values of those who are *now* in charge of the legislative process. Are the values of the "legislator" of today incompatible with the values of the "legislator" who made the statute?

10. Let us return to the question which the judge asked himself, when he started to prepare his decision. "Where do I go for guidance?" When the judge creates new law, his work has not the character of free constructions. It would be an error to suggest

that the judge is free to choose among all the alternatives that are theoretically permissible on the basis of his own evaluation of the social needs involved. On the other hand, it is a fiction of the mind that the courts should never do anything but apply rules already in force and that the decision should be the result of a logical operation. A discussion of all the problems involved in the choice would demand further study. Only a few comments will be added. As the point of departure I take the classical methods of juridical reasoning.

As far as I have been able to find, the judges of the old school used as their tools two pairs of arguments in particular, each pair consisting of two alternatives which exclude one another. The first pair is restrictive and extensive interpretation, the second *argumentum e contrario* and analogy. I will try to illustrate the classical method of reasoning with the help of a concrete example. In the Marian case, 1951 *N.J.A.*, p. 265,[3] the two judges who delivered the opinion of the court probably searched for the result in the following way. Is it possible to subsume Marian's claim for support under the rule in Chap. 7, sect. 10 of the Parents and Children Code, 1949? Granted that this rule refers to the case when a child was born dead. But abortion, in the eyes of the legislator, is not equal to stillbirth. The answer to the question must therefore be No. Having thus excluded the possibility of an extension of the rule on the statute book the next operation will be to use the pair *argumentum e contrario* and analogy. If the two judges had tried the *argumentum e contrario*—which I do not think they did—they might have made the following propositions. Is the meaning of the statute rule to give an account of all the situations where a duty of support may arise? If this proposition is correct, then there is no duty to support a woman whose pregnancy has been ended by abortion. As the reader may recall, the decision in the case was based upon an analogy. The argument by analogy means that a rule may be applied to a case which is not covered by its language but which has some essential elements in common with those cases which are governed by the rule. With the help of the analogy the judge makes the new law the expression of the spirit of the old—of the *ratio juris* as the Romans called it.[4]

[3] See *supra*, pp. 190 f.

[4] When the decision is based on an analogy the Swedish courts always use the phrase that the court relies upon "the reasons for" the rule applied. See the Supreme Court's decision in the Marian case, *supra*, p. 190.

It is evident that the classical method has little to do with logic. A logical operation should have presupposed, *inter alia*, definite criteria for the extensive construction of a rule and for the analogy. In other words, one should have been able to ask, first, "When is it permitted to apply a certain rule to a case in spite of the fact that the case tried differs in some respect from those cases which the 'legislator' had in view?" or "Which elements of a rule on the statute book express the spirit of the rule?", and, secondly, "Are these elements part of the case before the court, too?" But such criteria do not exist.

The Danish scholar Ross[5] has criticized the classical method. According to Ross the old arguments are used "to legitimize the result which the lawyer has found just and socially desirable according to his personal postulates as to right and wrong. With few exceptions these arguments are so wisely constructed that they never demand application but may be picked up in case of need".

In my opinion Ross goes too far in his criticism, when he considers the old arguments to be tools of advocacy only.

The old arguments should at least be given credit for the fact that they offer questions to be put. For the mere question may give a hint as to the road along which the answer has to be sought. The classical arguments are pairs of contraries: the question is always whether or not to apply a rule in view. Thus the starting point is a rule, already established, whose domain will be put under debate. The old technique relies upon the principle that the judge should never create norms which are altogether new but should seek his guidance in rules which have already been recognized for other situations. There is a further element in the analogy. The stress is put on the similarities. Like to like is probably the value norm most firmly rooted in the democratic society of today.

Very often the judge will meet on his way two opposing rules which are competing for room. This happened, for instance, in the Estonian refugee cases, since the principle of nationality and the principle of domicile each have their province in Swedish international private law, and there were reasons in favour of the application both of the first and of the second principle.[6] How is the judge to know which lead he should follow? Earlier the courts paid too much attention to external similarities and differences. But what should be the substitute if we want to avoid

[5] Ross, *Om ret og retferdighet*, København 1953, p. 181.
[6] Cf. *supra*, pp. 188 f.

arbitrariness? On this point I can only give my own personal opinion. Values and principles embodied in modern statutes should be given more weight than the values and principles of past days. If the courts apply this standard, old statutes will be transformed and brought into harmony with modern statutes. *The judge should make it his constant aim to rejuvenate the old laws on the model of the new.*

11. In this study, I have called attention to the impact of the motivating factors in the language of the statute, in the precedents, and in the legislative material. The Swedish Supreme Court is not, like the United States Supreme Court, a centre of political power. On the other hand, the Swedish Supreme Court is not the subordinate servant of the legislator, but rather a body which acts like "an independent contractor". The Swedish judges do not claim political power: on the contrary. In 1936 the Council on Legislation[7] seized an opportunity to state this view officially. A bill on the right of association in labour relations had been introduced in the Parliament. All the political parties were in favour of the idea of some statutory remedies against violations of the right to join unions, but there was considerable disunity as to whether the proposed act should cover encroachments of the right to refuse to join a union. In order to secure the passing of the statute the definition of the right of association was excluded from the text of the bill, which on this point came only to contain a statement that "the right of association shall be left inviolate". The Council on Legislation, in its opinion, raised the question as to whether the legislator had not left to the Labour Court a power of making law which did not properly belong to a court.

According to the Swedish tradition, legislation ought to be the main source of innovations. Mr. Justice Sjögren particularly emphasizes one reason for this view in the paper which I have frequently quoted before.[8] Only the statute law, he says, can satisfy the need of security. "Even a bad statute is preferable to the insecurity which is inseparably connected with the discretion of the judge. If necessary, the individual may in private law matters

[7] As the reader may remember, the Council on Legislation is a board of four members, three of whom are Supreme Court justices and the fourth a judge at the Supreme Administrative Court. Bills on matters of private and criminal law have to be examined by the Council on Legislation before their introduction in Parliament. Amendments by Parliament are submitted to the Council before the enactment of the statute.

[8] See *Tidsskrift for Rettsvitenskap*, 1916, p. 338.

—and only these are referred to here—adjust his relations to a bad statute, but against the power of the judge the individual is defenceless."

Sjögren's drastic description of the evils of a case-law system has to be seen in the light of his severe criticism of the practice of the Swedish court of deciding cases "according to the circumstances".[9] Even those who disagree with Sjögren on his point have to admit that the method of making law by precedents is rather ineffective when it comes to innovations. It may be a long time before a disputed point is brought before the Supreme Court, and sometimes it is a matter of chance whether the court gets to it at all. The question of whether collective bargaining agreements were legally binding and could be enforced by the courts was not settled until 1914, through a number of cases concerning incidents which took place in the shadow of the general strike of 1909. Yet at that time the collective agreement was an instrument that had been recognized by the parties in large areas of the labour market for thirty years or more. Another handicap of the courts as lawmakers is the fact that they are bound by the limits drawn by the parties in their claims. Further, many cases before the courts are not fitted to furnish material for a decision which is intended to stay.

It has often been pointed out that a change in the judge-made law, brought about by overruling earlier decisions, will be retroactive in its effect, since the theory is that the judge only declares the law and the overruling is therefore a declaration that the supposed rule has never existed. On the other hand, a repealed act regularly remains in force in respect to matters relating to the time before the date of the repeal. There are no signs that the Swedish Supreme Court would be willing to give up this old theory and choose a more realistic approach. If the legal relations are of a short-term character, as business transactions generally are, the retroactive effect may cause little or no harm. In the field of real estate the problem is more serious. One may question whether some of the doctrines on real property in Swedish case law would have been able to survive if the court had not been anxious to avoid the destructive consequences of an overruling decision.

It has not been my intention to enter into a discussion of the law-making process as such. My closing comments have had the

[9] Cf. *supra*, p. 164.

sole purpose of emphasizing the dominance of legislation as a source of directives. However, a system such as the Swedish one will not function satisfactorily unless the legislative process is constantly operating. It is not enough to have well-qualified experts as draftsmen. It is also requisite that the politicians in the Cabinet and in Parliament shall be able to compromise and agree upon the steps which should be taken by the legislator. If this is not the case, the courts will of necessity have to face the task of settling disputes between conflicting social groups.