LEGISLATIVE MATERIAL AND CONSTRUCTION OF STATUTES

NOTES ON THE CONTINENTAL APPROACH

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I. PURPOSE AND METHOD OF THE PRESENT STUDY

In jurisdictions where codified law prevails, one of the major problems raised by the construction of statutes consists in the choice between "objective" and "subjective" interpretation. One school of thought holds that enactments should in principle be construed in accordance with objective, impersonal standards, without regard to such legislative intentions as have not found expression in the text itself; its opponents contend that the ideas and intentions of the legislator—whoever he may be—are necessarily of capital importance for any attempt to translate an enactment into a decision. A wide range of intermediate opinions is to be found in the vast mass of literature on the topic, but it seems unnecessary to discuss these here.[1] One remark, however, should be made. I think it justifiable to include under the heading of "objective" methods of interpretation the most primitive and most ancient of all techniques of construction: that which keeps—or rather purports to keep—strictly to the grammatical sense of words and phrases. This is still widely acknowledged as the first stage of any interpretative activity, even where a "subjective" method is adopted for further stages of that activity.[2]

The questions I propose to discuss may be considered, from a logical point of view, as *preliminaries* to the theoretical problems of construction. The discussion relating to these problems is largely based, more or less consciously, on the existence of a given *legislative technique* and of a given kind of public documents which provide information about the process of legislation —and, on uncertain points, about the "lawgiver's intentions". These documents, commonly referred to as "legislative material" (French: *travaux préliminaires* or *préparatoires;* German: *Entstehungsgeschichte des Gesetzes, Gesetzgebungsmaterialien;* Swedish: *förarbeten*), constitute the means of ascertaining the "intentions" of the legislature. The present study is essentially devoted to an analysis

[1] A brief but masterly survey of the problems is furnished by Professor Engisch in his *Einführung in das juristische Denken,* 2nd ed., 1959, pp. 85 ff.
[2] Engisch, *op. cit.,* pp. 77 ff.

of legislative technique—i.e., for present purposes, the material process in the course of which enactments are conceived and drafted—and more particularly of legislative material.

My basic assumptions are (1) that any school or method of statutory interpretation is likely to be influenced by the legislative technique and the character of *travaux préparatoires* in the legal system within which such method is applied, (2) that numerous misunderstandings and arguments in the theoretical discussion just referred to can be avoided if this simple fact is taken into account, and (3) that the legislator's knowledge about the use made by courts and lawyers of legislative material is likely to influence in its turn the technique of drafting not only the statutory text itself but also the *travaux préparatoires*.

The task presented by this study is essentially of an *historical and descriptive character*: I shall try to give a survey of the relevant material facts in three legal systems—those of France, Germany, and Sweden—and to discuss, upon that basis, the probable effects of these facts upon the theoretical problem of interpretation. It seems appropriate to begin with a few words on the starting points of modern development in the field under discussion (II) and on the evolution of legislative technique and the drafting of legislative material (III). Attention is then given to the situation prevailing in France, Germany, and Sweden (IV and V). In the last section of the study (VI), I shall try to define the impact of the facts described upon the theoretical problem of construction, and to make a few critical remarks.

II. THE STARTING POINTS OF MODERN DEVELOPMENT

The aim of the present study, as defined above, determines the historical conditions with the help of which we can fix, at least within a reasonably limited period, the starting point of the evolution which is of interest for our present purpose. To find that point two steps are necessary: first, *the conditions must be defined, in abstracto,* on the basis of what we know about the specific character of the problems raised in the course of theoretical discussion; secondly, *the earliest time when the presence of these conditions can be established* with some certainty *must be found empirically.*

1. The first condition required for the emergence of the question whether it is seriously worth trying to follow something called "legislative intentions" when construing an enactment would seem to be the existence of a certain amount of knowledge, or at least consciousness, of the fact that enactments are not simply part of an objective order of things but embody a volition of some kind. This, in fact, places our starting point at a fairly late date; it cannot be earlier than the late Middle Ages or perhaps even the Renaissance. In earlier centuries, the "law" was indistinctly a body of effectively applied rules *and* an eternally valid standard.[3, 4] A flood of enactments intended to promote "good policy" was one of the foremost results of the new kind of State that emerged during the late Middle Ages and the Reformation.[5]

Two elements which characterized this period of development and survived well into the 17th century would seem to be of particular importance from the point of view of the present study. One of these elements, the lack of a conscious and disciplined *theory of the sources of law,* is likely to have obliterated problems of construction.[6] The other element, the idea that *enactments express the will of a given body or person,*[7] is at the root of all theories of "subjective" interpretation.

2. As long as there was a choice between local custom, Roman law, and royal or princely statutes, the problems raised by an intensified interpretative activity could not be serious, for there was always the possibility of referring to another body of rules in support of a given solution, or simply of choosing a different rule from another system when it seemed impossible to accept the results of the application of a particular enactment.[8]

[3] Cf. Hans W. Kopp, *Inhalt und Form der Gesetze*, Zürich 1958, vol. 1, p. 2.

[4] Inevitably there is a danger of over-simplification when skimming over the centuries so lightly as we necessarily have to do. There was, of course, legislation much earlier than the late Middle Ages, but it seems fairly certain that where it did not assume the form of "agreements", as would often be the case in politically weak communities (like the German Empire) or with regard to questions of particular importance (as in much of the medieval "peace" legislation), legislation tended to take the form of "amendments", which purported to re-establish old law rather than to create new rules. See Wilhelm Ebel, *Geschichte der Gesetzgebung in Deutschland*, Göttinger Rechtswissenschaftliche Studien, vol. 24, 2nd ed., 1958, p. 17. But cf. Gagnér, *Studien zur Ideengeschichte der Gesetzgebung*, Acta Universitatis Upsaliensis, Studia Iuridica Upsaliensia 1, 1960, pp. 341 ff.

[5] Cf. Ebel, *op. cit.*, pp. 59 ff.

[6] Cf. Jägerskiöld, *Studier rörande receptionen av främmande rätt i Sverige under den yngre landslagens tid,* Lund 1963, pp. 57 ff.

[7] Ebel, *op. cit.*, p. 63.

[8] See Jägerskiöld, *op. cit.*, pp. 59 ff.

Generally speaking, the era of princely absolutism had to arrive before the judiciary could be confronted with the particular situation which makes an intensified construction necessary: the situation where only one set of legal rules is available, and the applicability of one or several of these principles to the case at bar seems doubtful.

3. The maxim *Quod principi placuit legis habet vigorem* is an old one;[9] in order to produce the effect we have just referred to, it must be developed into a creed possessing a greater firmness than it is likely to have enjoyed in its earlier days. It certainly never excluded supplementary sources, such as local custom, either because legislation long remained a patchwork or because princes liked to pay some respect to old law. It is interesting to observe that the custom of consulting the public on new laws, which exists in Germany even today, goes back not only to the Enlightenment in the 18th century (when it found a new *ratio* in contemporary thinking),[1] but is of far older origin, reflecting a period when new laws were often described as "restatements" of customs about which the general public could provide information[2] (on this practice, see p. 185, *infra*).

Nevertheless, in the course of time absolute sovereigns came to claim the status of sole sources of law,[3] and it seems evident that, in so far as this claim was respected, the "will of the legislator" became the supreme object of judicial research. There are enough reported cases to show that, at the end of the 17th century and during the greater part of the 18th, efforts were made, in doubtful cases, to ascertain the opinion of the sovereign before a court made up its mind.[4] Another expression of the jealous maintenance of legislative powers by the prince is the prohibition of commentaries as proclaimed, e.g., in the Prussian *Corpus Juris Fridericiani* Bill of 1749.[5]

[9] See the examples from the Middle Ages quoted by Gagnér, *op. cit.*, pp. 324 ff. Cf. no. 17 among the "Judges' Rules" compiled in the 16th century by the Swedish theologian Olavus Petri.

[1] See Anners, in *Festskrift till Halvar G. F. Sundberg*, 1959, pp. 7 ff.

[2] Ebel, *op. cit.*, pp. 70 f.

[3] The term is obviously used in the sense in which it was employed by Austin, not in the sense, more frequent on the Continent, of "source of *information* about the law". In Continental usage, the sovereign was not, so far as I know, described as the "source" or "fountain" of justice but as the *giver* of the only authentic sources, i.e. the documents containing legal rules.

[4] The so-called *"référé législatif"*. See Lukas, "Zur Lehre vom Willen des Gesetzgebers", *Festschrift für Paul Laband I*, 1908, pp. 399 ff.; Jägerskiöld, *op. cit.*, pp. 72 f.; Augdahl, *Rettskilder*, Oslo 1949, p. 83.

[5] Ebel, *op. cit.*, p. 72. See the French *Ordonnance civile* on the reform of the administration of law, 1667, *titre* I, *art.* 7, where interpretation is expressly forbidden and doubtful cases are referred to the King.

4. The *référé législatif* was too complicated a procedure to be used frequently; the prohibitions against commentaries and—even more—the rules against *interpretation* as such were based upon illusions and, as a German scholar once said, are "monuments of legislative naïveté".[6] Construction was unavoidable, as even Portalis, the foremost among the editors of the French *Code civil,* and an experienced practising lawyer, admits.[7] This does not mean, however, that the problem of "objective" or "subjective" interpretation was raised, as long as the possibility remained of consulting, in case of doubt, *other* sources than the law. Such sources existed, and were even recognized in statutory enactments during the Enlightenment.[8] The standard of "reason" was applicable not only as a means of understanding the—implicitly reasonable—considerations of the lawgiver but also as a regular source of law.[9]

Towards the end of the 18th century a conflict between the will of the autocratic legislator and the objective standard of reason became possible; a similar conflict between royal commands and the law of nature had of course been possible much earlier, but for various reasons the problem became more acute in the period of the Enlightenment. That, so far as I have been able to find out, no such conflict actually arose seems to be due to a number of circumstances—political and technical—which need not be analysed here. It is enough to mention that modern legislation in those days (and it was, of course, only in relation to comparatively recent legislation that the prince's claims to the exclusive right of construction were put forward) did in fact try to be reasonable,[1] and that the complexities of the notion of "meaning" as well as the particular logical character of normative propositions were unknown.

Thus, so long as "reason" in an unsophisticated sense was regarded as the ultimate end of legislation, our problem could scarcely arise. What was needed, in addition to the conditions I have already discussed, would seem to be a measure of *historical relativism* in the form of an insight into the difference between ethics and its brother in disguise—"the law of nature"—on the one

[6] Engisch, *op. cit.*, p. 93.

[7] In his *Discours préliminaire* (See Fenet, *Recueil complet des travaux préparatoires,* Paris 1827, vol. 1, *passim*).

[8] Thus the Austrian Civil Code (1811) refers explicitly to the standard of reason as a source of law. See *Festschrift zur Jahrhundertfeier des ABGB,* Vienna 1911, *passim.*

[9] Kopp, *op. cit.*, vol. 1, pp. 174 ff.

[1] Thus, the Prussian Bill from 1749 purports to be "founded upon Reason and local Constitutions". Cf. the *Festschrift* of 1911 quoted above.

hand and positive law on the other. For it is only when the choice between two different solutions has to be based upon considerations of a *technical* character that a conflict between different methods of interpretation is likely to occur: so long as one of the possible solutions has in its favour the weight of "reason", conceived as an objective standard—and, generally, a standard which the legislator has attempted to attain—there is hardly any need to develop methodological principles for the finding of correct answers.

If my thesis is correct, it is to be expected that in legal systems where the "law of nature" has managed to hold its own, more or less completely, our problem would hardly materialize. If it did, it would not be discussed very intensely and only according to the simple pattern outlined above: Where the "legislator's will" and the voice of reason clash, which should prevail? Conversely, where positive law has become emancipated from "natural justice" and born, as it were, to a problematic existence of its own, our problems will follow in due course. There is at least some evidence to indicate that this hypothetical and simplified picture of two possible lines of evolution is a true one. In France, where the "law of nature" has never lost its grip, the problem of interpretation has not been systematically discussed, except in a small number of works.[2] Germany, on the other hand, may be considered the home of analyses of this kind. From the points of view which are of immediate interest for the present study, German evolution since the Enlightenment, although extremely complex, is characterized by a number of particularly important features which support the thesis put forward above. First, the critical analysis of Kant and his successors put an end to the unsophisticated idea of the relation between "natural" and "positive" law and defined the latter essentially with the help of *formal* criteria.[3] In addition, the "Historical School", headed by Savigny and related, on important points, to German romanticism with its glorification of national features and its rejection of rationalism, struck another blow at the earlier, naïve view of the relation between "reason" and "positive law", and put the emphasis on the latter (sometimes not without glorifying venerable but irrational surviving monu-

[2] The leading work is still undoubtedly François Gény, *Méthode d'interprétation et sources en droit privé positif*, 1st ed. 1899, 2nd ed. 1919, reprinted in 1954. See also Carbonnier, *Droit civil*, Paris 1957, vol. 1, no. 39, p. 127.

[3] See Stintzing–Landsberg, *Geschichte der deutschen Rechtswissenschaft*, part 3, vol. 1, pp. 509 ff.

ments of legal history).[4] The combined influence of critical philosophy and of historicism gave German legal thinking the turn which is characteristic of its greatest achievements in the 19th century—"positivism" in the sense of concentration upon positive law as the exclusive object of analysis. Methods of interpretation assumed an importance which they had not possessed in earlier periods.[5] Finally, during the latter half of the 19th century a further process of differentiation took place in German legal thinking: Laband and his successors developed the distinction between "laws" in the formal and in the material sense. This distinction seems likely to strengthen the idea that the construction of statutes is an intellectual operation of a peculiar kind, different from, e.g., the interpretation of historical documents.[6]

Towards the end of the 19th century, the discussion concerning statutory interpretation entered, in Germany, the modern phase of development.

Although this historical survey is little more than a rough sketch, it seems permissible to state, by way of conclusion, that it was only towards the middle of the 19th century that legal theory came to possess those elements of knowledge and those instruments of analysis without which a systematic investigation of the subtle problems of construction is impossible.

III. LEGISLATIVE TECHNIQUE AND TYPES OF PRELIMINARY WORKS

Having thus established the probability that the problem of subjective or objective interpretation in its modern form is hardly likely to arise until a number of conditions are present, it remains to verify the hypothesis that *the modern discussion also presupposes a specific legislative technique.*

[4] This attitude was not unknown in Roman law. Cf. Coing, *Die juristischen Auslegungsmethoden und die Lehren der allgemeinen Hermeneutik*, 1959, p. 8.

[5] It should be stressed, on the other hand, that it is too rash a simplification to regard 19th-century positivism as the result of a complete breach with the "law of nature" ideas of the preceding period. Cf. Kopp, *op. cit.*, vol. 1, pp. 36 ff. The main difference would seem to be the growing insight into the *complexity* of ethical and legal rules and the greater discipline in ascertaining the contents of "law", conceived as a system without *lacunae*.

[6] A very full analysis of this development is given in Kopp, *op cit.*, vol. 1, pp. 26 ff.

1. A simple "subjective" interpretation theory is obviously possible as soon as there is a *text* which is to be construed and which originates, to the knowledge of those who apply it, from a given "legislator".[7] However, I have already pointed out that obedience to *the unequivocal language* of enactments is an attitude adopted not only by the subjective school of thought, but also—with few exceptions—by those who advocate a more or less total freedom with regard to the *implicit, underlying* intentions of the lawgiver.[8] The point of time from which a conscious choice between theories of interpretation is possible would seem to be *when legislative intentions find an expression in sources other than the actual enactment.*

It should be added in this context that the *style* of enactment is likely to be of some importance for the attitude of courts in many respects. Thus, the form of direct commands which was frequent in early German legislation obviously stresses the volitional element, whereas the neutral and scientific style of the great codifications from the 18th century onwards—as well as the obvious dependence of such codifications upon ready-made sets of theoretical concepts—would seem likely to lead to methods of construction where principles of formal logic and deductions from the extra-legal concepts of legal science occupy an important place.[9] Incidentally, the "mathematical" style of 18th- and 19th-century codes is certainly an expression of the same set of ideas as those which make "reason" the supreme standard.[1]

2. The task of making courts and the public acquainted with legislative intentions not expressed in the form of actual enactments may be performed in different ways, and in this respect the history of legislation provides a fairly rich collection of different techniques.

Among these techniques I have already mentioned the *negative* approach to construction: the prohibition of any interpretative

[7] This rules out of our sphere of interest the periods in which legislation was not considered as a *volition*. In Germany, the change in this respect seems to have taken place gradually, from the 16th century onwards. Cf. Ebel, *op. cit.*, pp. 70 ff.

[8] See, e.g., a standard work like Lehmann, *Allgemeiner Teil des bürgerlichen Gesetzbuches*, 14th ed., Berlin 1963, pp. 54 f.; and a radical representative of objective construction, Ekelöf, "Teleological Construction of Statutes", *Scandinavian Studies in Law* 1958, pp. 79 ff.

[9] On the development of German legislative technique in this particular respect, see Ebel, *op. cit.*, pp. 74 ff.; Folke Schmidt, "The German Abstract Approach to Law", *Scandinavian Studies in Law* 1965, pp. 133 ff.

[1] Cf. Ebel, *op. cit.*, p. 76.

activity. Without entering upon the question whether this attitude has older roots, it may be stated that it had its heyday towards the end of the 18th century, under the influence of Montesquieu,[2] although it did not survive even in France, where the *Code civil* is, in actual fact, based upon a different idea.[3] Where the negative approach to construction has found clear expressions in statute texts,[4] it is likely that, whatever method was actually used, judges would take some pains to present their results as undoubted deductions from the text itself.

Another expression of the negative attitude to construction dating from the last days of 18th-century rationalism is article 84 of the Swedish Constitution of 1809, where it is laid down that the organic laws of the Kingdom shall be construed in strict accordance with their literal meaning.[5]

Where this negative approach prevailed, various kinds of *référé législatif* were often provided for. This institution—which gave governments a chance of modifying *ex post* the contents of laws and thus creating retroactive legislation—was doomed from the moment parliamentary bodies became the principal lawgiving organs.[6] In Sweden (where Parliament was omnipotent in the 18th century and always had at least a right of co-decision with the Crown in legislative matters) the *référé* was organized as a consultation of a particularly well qualified body of non-political experts.[7]

3. Independently of the prevailing view upon interpretation, legislators have often found reasons for developing, more explicitly and more freely than the style of statutory texts admits, their views upon the spirit in which the law should be applied. As long as statutes were drafted in the form of direct commands to subjects, often in a highly patriarchal tone, the need for such *exposés* would not be very great. The neutral style of modern legislation—from the latter half of the 18th century onwards (see *supra*)—deprived the lawgiver of such means of conveying hints about the intentions pursued by the enactment. During the same period sovereigns, probably under the influence of the Enlightenment philosophy,

[2] Cf., e.g., Ross, *Theorie der Rechtsquellen*, Leipzig and Vienna 1929, pp. 34 ff.; Augdahl, *op. cit.*, p. 83.

[3] Ross, *loc. cit.*

[4] See Engisch, *op. cit.*, p. 93 (with note 100).

[5] Similar enactments are found in Joseph II's Austrian Civil Code of 1786 (Introduction) and in sec. 46 of the Prussian Code of 1794.

[6] Ross, *op. cit.*, pp. 36 ff.

[7] See Malmström, in *Minnesskrift ägnad 1734 års lag*, Stockholm 1934, vol. 1, pp. 99 f. The same idea was used in Prussia (sec. 47 of the Code of 1794).

began to feel a greater need to justify their actions.[8] These two facts, it may be at least conjectured, contributed to the development during this period of *preambles* (French: *préambules;* German; *Gesetzesvorsprüche*) in which the aim of an enactment and the reasons why the sovereign has seen fit to promulgate it are expounded, sometimes very fully.[9]

It is obvious that a preamble where the sovereign endeavours to demonstrate that his intentions are in fact rational would carry considerable weight, more particularly as the preamble was published *with* the actual text and the line between the two may not always have been clearly drawn.[1]

Occasionally preambles developed into regular treatises of legal philosophy and technique, as was notably the case with the Introduction to the Prussian Civil Code of 1794 and the *Livre préliminaire* of the French *Code civil* (1804), though the latter was omitted from the text finally adopted.[2] Yet, however complete and eloquent these preambles may have seemed at the time, they could not contribute to the solution of problems of construction.[3]

4. The preamble was, as far as its practical function was concerned, a speech to the courts and, more generally, to the citizens. When legislation became the business of a parliamentary body—as has been the case in Sweden since the Middle Ages, in France (at least nominally) from the beginning of the Revolution and in Germany, with many variations, since 1815—governments, which still largely kept the initiative in matters of legislation, had to convey to a new group of persons the justification and the meaning of proposed enactments. At the same time, since the parliamentary body itself was formally or actually regarded as the *legislature*—or at least as one of the bodies covered by that term—*dicta* origi-

[8] Cf. the complaint of a conservative observer reported in Laboulaye & Guiffrey, *La propriété littéraire au XVIIIe siècle,* Paris 1858, p. 278.

[9] The practice of preambles, which saw a revival in Germany in the Hitlerian period, see H. H. Dietze, *Der Gesetzesvorspruch im geltenden deutschen Reichsrecht,* 1939, pp. 12 ff., and often reappears, as a short formula, in constitutions and international treaties, is of very old standing. See Dietze, *op. cit.,* pp. 10 ff.

[1] A late and interesting example is furnished in Pouillet, *Traité théorique et pratique de la propriété littéraire et artistique,* 3rd ed., Paris 1908, no. 398, pp. 438 ff.

[2] The Swedish Code of Laws, 1734, is also preceded by a short introduction, but this document, which contains some historical data about the legislative work and some very general reflections on legal philosophy, cannot be compared to the introductions referred to in the text.

[3] Preambles still play a certain part in the English doctrine of interpretation. See Maxwell, *On the Interpretation of Statutes,* 11th ed., 1962, pp. 43 ff.

nating from parliamentary work assumed particular importance as sources of information about "legislative intentions".

Brief mention should be made of what may be called an intermediate stage—although the technique thus referred to still finds favour in certain cases—namely the so-called "referendum to the public" whereby proposed statutes were published and the general public was invited to give its opinion on the text. Particularly common in the period 1770–1830, under the influence of Rousseau and other 18th-century philosophers active in the domain of political science,[4] this method has survived, in a modified form, in those countries where persons and organizations to whom a proposed statute is of particular concern are invited to give their opinion before the bill is finally submitted to the legislature.

The measure of importance given to the various and often quite numerous opinions expressed in the course of the regular process of legislation by parliamentary assemblies depended, it would seem, chiefly upon two circumstances: prevailing constitutional theories about the identity and composition of the legislature, and prevailing theories about the reasons *why* legislative intentions should be of importance for the construction of statutes. In countries where Montesquieu's doctrine of the division of powers was more or less strictly adhered to—as was the case in France from the time of the First Empire, in theory if not in fact—it was only logical that particular stress should be laid upon parliamentary opinions.[5] This is obviously even more true where Rousseau's theory of the *souveraineté du peuple* was adopted. Where the situation was more complex, as in Sweden (at least after the Constitution of 1809) and in most German states, particularly Prussia after the constitutions granted in the first half of the 19th century, parliament had no such claim to exclusive attention. Government bills and papers also could be held to express, to some extent, the "legislator's" intentions.

The modern discussion concerning "subjective" and "objective" interpretation starts—for all practical purposes we can confine ourselves to the German discussion, for nowhere else were these questions debated so early or with such richness of argument—within the historical framework of early Constitutionalism, roughly about 1830–40. It is enough to state that most of the principal argu-

[4] See Anners, *op. cit.*
[5] Cf. Ebel, *op. cit.*, p. 72.

ments used in later discussion were known by about 1840.[6] The early studies, as well as later contributions to the discussion, presuppose a legislative technique of the kind outlined above: statutes pass through a process in which government bills, parliamentary committee deliberations, and parliamentary debates occupy a predominant position. The question of "subjective" or "objective" interpretation tends to be largely identical with the question whether the collateral documents drafted in the course of that process are entitled to particular attention for the purpose of construction.

5. Before we proceed to describe the modern legislative process and the documents originating from its successive stages, it seems justifiable to analyse, in general terms and without direct reference to any particular legal system, the various kinds of documents which may be considered as *travaux préparatoires* in relation to a given text.

Without pretending to cover all possible variations or to establish a complete "typology", it is submitted that documents belonging to the category of legislative material may be grouped under three main heads: *descriptive, motivating,* and *expounding* texts. It is further submitted that "subjective" methods of interpretation are likely to be particularly successful and widespread where the two latter types of preliminary works are used and that, by way of reflex, a fairly uniform adoption of subjective methods is likely to encourage the elaboration of expounding documents in the course of preliminary works.

By *"descriptive texts"* I mean documents which record the process of legislation—deliberations and debates. Generally speaking this method is the oldest one, for from time immemorial statutes of any importance have normally been the result of collective effort. Thus the preliminary works of the Swedish Code of Laws, 1734, consist of the minutes of a commission appointed in 1686 which submitted its results in 1734.[7] To this material should be added the records of the debates in the Four Estates of the Realm. Similar collections of documents have been published in respect of the great Continental codes.[8]

[6] See R. von Mohl, in *Archiv des Kriminalrechts,* 1842, pp. 246 ff., where these arguments are criticized.

[7] The *travaux préparatoires* were published by Sjögren in eight volumes (1900–09).

[8] The most complete collection of legislative material relating to the French Civil code is Fenet, *Recueil complet des travaux préparatoires,* Paris 1827–28. A corresponding collection for the German Code has been published by Mugdan, but the preparatory works were also published as command papers in the course of the preparation of the Code.

Descriptive *travaux préparatoires* tend to be uneven sources of information. Quite apart from the obvious danger of mistakes in the process of recording, the part played by chance is considerable: whether a proposed enactment is discussed at all, whether it is correctly understood by those whose opinions are recorded and whether misinterpretations are corrected are matters which depend upon a great number of political, personal, and other often trivial circumstances. Where memoranda or other pieces of writing of the same kind are attached to the records, these risks are reduced to some extent.

"Motivating texts" are such as explain *why* an enactment is proposed and what considerations have led its authors and/or drafters to choose the solution embodied in the proposed enactment. The typical 18th-century preamble is a characteristic document of this kind. For the purposes of interpretation, motivating texts are obviously of some interest because they tend to express, in a concentrated form, the evaluations underlying the proposed enactment and the result which its authors hope to achieve. On the other hand, documents of this kind are likely to keep to a comparatively high level of abstraction: details will seldom, if ever, be discussed.

"Expounding texts" are such as comment upon the proposed statute, section by section, in much the same way as commentaries or textbooks. The presence of expounding texts gives rise to the problems of subjective and objective interpretation in their most acute form: here the "legislator" purports to give guidance to the solution of a great number of questions but, at the same time, for obvious practical reasons, runs the inevitable risk of simplifying and standardizing conflicts which, when they come before the courts, may be attended by special circumstances not foreseen by the drafters and tending to make their solutions difficult to accept.

Expounding texts are fairly recent; hardly known in France, they developed in the course of the 19th century in Germany and Scandinavia, where probably Sweden has pushed the method further than any other country. It is difficult to venture any conjecture as to the origin of the system, but it reflects the method adopted in the great German commentaries on the "gemeines Recht", the modified Roman law that was applied as a principal or subsidiary source of law in most parts of the Reich until the period 1790–1810, was applicable in some German territories until the coming into force of the *Bürgerliches Gesetzbuch* in 1900, and

is still of some interest as "local law" in branches of the legal system left outside the *Bürgerliches Gesetzbuch*. Since the better-known systematic commentaries of this kind served as unofficial sources of law, and since codification tended to be made according to the systematic pattern of legal science, at least in the field of private law, it would seem quite natural for German lawyers to draft statute books as a series of theoretical propositions duly commented upon and exemplified.[9] Another trend of legal thinking seems likely to have favoured the rise of elaborate preparatory works of this kind (although it must be admitted that this is only a conjecture, and would be hard to prove). German "positivism", as it developed towards the middle of the 19th century, identified "law" with "statutory law" to an extent and with a consistency unparalleled even in those periods when absolute monarchs claimed the role of exclusive fountains of justice. The logical outcome of this attitude would seem to be legislation which covers all imaginable problems; since the actual text of the statutes cannot possibly be drafted so as to achieve such a result without having recourse to highly abstract language, the need for detailed commentaries must be particularly great.

Within the category of "expounding" texts, various different patterns and methods can be observed, but three types seem entitled to particular attention. The first method is that of laying down, more explicitly than the statutory text and the short *exposé des motifs* by which it may be accompanied, the general purposes and principles of proposed enactments. In what follows this method will be referred to as the "abstract" technique. The second type—which obviously corresponds to the method known in the history of legal doctrine as "conceptualistic jurisprudence" (*Begriffsjurisprudenz*)—tends to expound the text by means of deductive reasoning; it makes the terms of enactments the essential starting point of analysis and goes on to lay down series of *definitions* intended to make clear the field of application of each particular enactment. This method may be called "conceptualistic". Generally speaking, an abstract and scientific legislative technique of the kind which is found particularly in the German *Bürgerliches Gesetzbuch* would seem to encourage this method of expounding. Finally, use may be made of a pragmatic and casuistic method whereby each enactment in a proposed legislation is elucidated by series of practical examples. This method—for which

[9] See Folke Schmidt, *op. cit.*, pp. 133 ff.

there would seem to be particular justification where the statute is drafted in a casuistic manner—may be called the "pragmatic" method.

It may be of some interest to make a further distinction, based upon possible differences in *contents:* comments upon proposed enactments may relate to *the actual state of the law* within the field concerned by the new text, to the *interpretation of the proposed enactment* or to points of law within *neighbouring fields.*

6. Three more groups of distinctions may be of some value for further analysis.

a. The original, and still the prevailing, argument in favour of a "subjective" interpretation is that any enactment has its origin in the *will* of one or several persons, referred to as the "legislator". The question *who* may have a claim to that name cannot be answered in general terms: it is a problem of constitutional law which must be studied separately for each State. However, it seems useful to draw between the various groups of persons engaged in legislative work a line based upon constitutional status.

Normally, the first persons to deal with a proposed enactment (except in the dwindling group of instances where private members' bills result in legislation) are either the drafting experts and members of commissions or public officials, often with legal training, who are employed in a ministry or are otherwise in the public service. Documents originating from such persons will express expert opinions, no more. I shall refer to these groups of persons as the "technicians". Among those who play an active part in legislative work in some capacity which may give them a claim to at least a share of the constitutional functions of the "legislators", one group of persons consists of those who have *an individual function* in the process—such as ministers in certain legal systems—and another group is composed of those who act in, and derive their claims from, their capacity as *representatives,* e.g. chairmen of parliamentary committees or government spokesmen with subordinate functions. Finally, *private members* of parliamentary assemblies and *majorities* within such assemblies should be mentioned.

b. Among all the layers of opinions expressed and all the series of documents drafted in the course of legislative work are some which are directly adopted, while others stand in a more remote position. Where the idea of the "legislator's will" prevails, the degree of remoteness or proximity in relation to the final text must be of some importance. This is particularly obvious where

the technicians have commented upon a proposed enactment, but the "legislator", whoever he may be, has introduced such modifications of the text as make the relevance of the technicians' interpretation doubtful.

To characterize those elements of preliminary works which originate immediately from the "legislator", I shall use the term "immediate legislative material"; those elements which have been submitted to the constitutional lawgiver and left without objection are called "indirect legislative material"; all other documents or opinions will be described as "secondary material".

A priori, it would seem natural to attach greater influence to the "immediate material". This is due partly to the high constitutional status of the last body to express its opinion—normally parliament—but also, as has been pointed out by Professor Folke Schmidt,[1] to the fact that this opinion is the concluding element in a "long debate", in the course of which some arguments are rejected and others retained.

Generally speaking, it is obvious that the classifications we have outlined above tend to overlap at a number of points. Thus, expounding texts are usually drafted by technicians and belong to the indirect legislative material. Occasionally they may have been drafted in the course of legislative work and thus belong to the immediate material. However, the methods of work of modern assemblies seldom permit the elaboration of such texts.

Conversely, descriptive sources are more likely to throw light upon parliamentary debates than upon the earlier stages of the process of legislation; the latter are often likely to take the form of unrecorded deliberations.

c. The last distinction which I find useful to introduce is that between *published* and *unpublished* preliminary works. In fact, it seems justifiable to state that the use actually made of preliminary works largely depends upon how easily they can be consulted. Opinions scattered in public records not easily accessible to the judge and the practising lawyer are likely to pass unnoticed, whatever their merits. Thus the methods of publication adopted in different countries possess very considerable importance.

7. In the following sections I shall deal successively with the French, German and Swedish legislation. The best way of illustrating existing differences seems to be a study of concrete examples. It has been thought preferable to pick out a field of law

[1] Folke Schmidt, "Construction of Statutes", *Scandinavian Studies in Law* 1957, pp. 167 ff.

where national habits irrelevant to the purposes of the present study are likely to play an unimportant part. Moreover, it is essential that the chosen examples should be relatively uniform, that they should relate to statutes generally considered to be of some importance—unlike the mass of "small change" which fills the days of modern parliaments—and that they should be fairly recent.

Copyright seems to be an almost ideal example: new statutes in this domain were introduced in France in 1957, in Sweden in 1960, and in Germany in 1965. Moreover, a new Copyright Act was passed in the United Kingdom as recently as 1956, and the U.S.A. is preparing a reform.

The following analysis will be divided into two sections: the first will be devoted to the "technician stage", the second to the "government and parliamentary stage" of legislation.

IV. THE "TECHNICIAN STAGE"

Under this heading I propose to discuss (1) the composition and methods of work of drafting commissions, in so far as they are known, and (2) the documents drafted in the process.

1. *a.* The Swedish Copyright Commission, appointed in 1938, originally consisted of two experts assisted by a secretary. Some changes were made in the course of the work, which was concluded in 1956, but it may safely be stated that all the persons involved were lawyers of the highest standing.[2]

A number of persons were appointed to "deliberate with the experts upon their request".[3] They were chosen from among the representatives of bodies and organizations likely to take some interest in copyright law.

As for the methods of work adopted by the Commission, the introduction of the report submitted in 1956 provides some information.[4] In the first place, it should be noted that the copyright reform was carried out in close collaboration with Denmark, Finland and Norway. This, however, does not necessarily mean

[2] *S.O.U.* 1956: 25, pp. 9 ff.

[3] *Loc. cit.*

[4] *Upphovsmannarätt till litterära och konstnärliga verk,* published in the official report series *Statens offentliga utredningar* (*S.O.U.*) as no. 25, 1956.

that the methods of work of the Swedish experts were influenced.[5] "The Commission", it is stated in the report, "was anxious to keep in touch with the numerous organizations and groups representing interests involved by the proposed legislation. So, in the course of the work, drafts and memoranda were sent to organizations and interested persons in order to obtain their views; moreover, in a great number of cases, the Commission, one of its members, or the secretary, has held informal deliberations with the representatives of various groups or parties with an interest in the questions under consideration."[6]

These informal discussions, as well as the deliberations within the Commission, are not recorded. It seems safe to state that the *normal* method of work implies that the secretary, who in a commission of this order of importance is usually employed on a full-time basis, does the preparatory work: collecting material, not least from foreign sources, drafting statute texts or at least the text of the *motifs* attached to the proposed enactments, writing memoranda, and conducting the administrative business of the commission. But it may also be stated with reasonable safety that *the final drafting of the text itself and of such parts of the "exposé des motifs" as are deemed particularly important is likely to be the work of, or at least approved in all details by, the most prominent lawyers taking part in the work. Drafting*—done in accordance with a number of traditional principles relating to contents, technique, and style—may be considered the very heart of lawmaking in Sweden. As for the *motifs,* it may be stated that, although they naturally tend to be drafted with greater freedom from the point of view of style, they are nevertheless *written in full consciousness that they will be consulted by courts and lawyers,*[7] and that the words used in them must be weighed with the greatest care.

Another remark should be made before we leave the methods of work of Swedish commissions. Normally—there are exceptions—the actual policy decisions are made by persons who cannot be held to represent any particular interest; one or more public servants, who are usually judges and are almost invariably officials with legal training, participate in these decisions, and not only

[5] This appears not least from the considerable difference in sheer size between the reports of the four collaborating national commissions. The Norwegian report contains some 30 pages, the Finnish 88 pages, and the Danish 190 pages, while the Swedish report runs to more than 600 pages.

[6] *S.O.U.* 1956: 25, p. 11.

[7] See Professor H. Hessler in *Sv.J.T.* 1957, p. 242.

as mere technicians. It is true that the King in Council or the responsible minister, as the case may be, always gives law commissions "instructions" (*direktiv*) concerning the object, scope, and sometimes the general principles of the contemplated legislation, but within this framework—which is usually liberal, particularly in the fields of private and criminal law[8]—the greatest freedom is enjoyed. It seems correct to state that the general spirit in which legislative problems are studied and solved closely approaches that of a judge administering equitable justice: the representatives of opposed interests are admitted to hearings, no more. Incidentally, commission work is often carried on without such close contacts with the various interests as characterized the methods of the Copyright Commission. Normally, hearings are organized at a later stage of the process (see below).

That later stage is the overhauling of the draft statute text with its *motifs* in the ministry concerned. In the course of this process the text proposed by the commission is submitted "for comment" (*på remiss*) to the representatives of the interests involved, regardless of whether a similar procedure has been followed by the commission. The number of organizations invited to give their opinion on the proposed enactment varies according to the degree of specialization attaching to the field of application of the contemplated rules; texts of some importance are often sent to fifty or more organizations.

On the basis of the opinions submitted, a new draft is elaborated in the ministry. Policy decisions are made, in the last resort, by the minister, but in technical matters the specialists obviously exercise considerable influence. The new text is referred to as the "ministry draft". Comments intended to elucidate the text, particularly the proposed modifications of the commission's draft, are styled, according to tradition, as statements by the responsible minister.[9] I shall return to the minister's statement below.

The "ministry draft" is submitted to the King in Council: the proposal leaves the technician stage to enter upon the political scene.

b. Lawmaking in Germany presents many features which are

[8] Thus the instructions given by the Minister of Justice to the Swedish Copyright Commission stress the importance of achieving uniformity within the Scandinavian countries but contain no directives as to the principles or tendency of future legislation. See *S.O.U.* 1956: 25, p. 49.

[9] See, e.g., *N.J.A. II*, 1961, p. 230 (concerning sec. 29 of the 1960 Copyright Act), where both these elements of ministerial comments are found.

similar to the Swedish legislative process.[1] There are, however, certain differences of a general character which should be noted before we give a rough outline of the piece of legislation which will serve as an example.

Lawmaking in Sweden is very much the work of judges. The predominance of the judiciary is in fact a characteristic feature of the Swedish system. The regular ministry staff is seldom engaged in the preparation of statutes of importance; legal scholars and practising lawyers, although occasionally employed in legislative work, can hardly claim an established position in this branch of public life.

In Germany the dominating elements in the legislative process are the civil servants—usually career officials from the ministries—and, to a smaller extent, legal scholars. The birth process of the *Bürgerliches Gesetzbuch* of 1900 furnishes a good example in support of this statement.[2] The modern copyright reform also exemplifies the procedure. The first preliminary works were undertaken by the Federal Ministry of Justice as early as 1930; a first draft with a relatively full *exposé des motifs* was published in 1932.[3] The next official text to appear was published in 1954.[4] It is characteristic of both of these publications, in comparison with the Swedish Commission report of 1956, that they are "anonymous" in the sense that no authors or collaborators are indicated,[5] and that they appear under the authority of the competent ministry. Although the German draft is thus made by one or several responsible ministry officials (*Referenten*), it is customary, at least in matters of some importance, to appoint a commission of experts.[6] It is difficult to venture definitive statements on the distribution of work between the commission and the ministry offi-

[1] The following books, to which I refer in a general way, contain valuable information on legislation, the style of enactments and the lawmaking process in modern Germany: Müller, *Handbuch der Gesetzgebungstechnik*, 1963; Wolff, *Die Gesetzessprache*, 1953; Lechner–Hülshoff, *Parlament und Regierung*, 2nd ed., 1958; Kopp, *Inhalt und Form der Gesetze*, 1958; a "case study" of legislation is furnished in Schlegelberger, *Zur Rationalisierung der Gesetzgebung*, 1959, pp. 5 ff. For a short survey, see Apelt, "Die Gesetzgebungstechnik", *Schriftenreihe der Hochschule für Politische Wissenschaften*, München 1956, vol. 5.

[2] Of the eleven members of the "First Commission", two were professors (Windscheid and Roth), and the others were career officials.

[3] *Entwurf eines Gesetzes über das Urheberrecht an Werken der Literatur, der Kunst und der Photographie mit Begründung*, Berlin 1932 (138 pp.).

[4] *Referentenentwürfe zur Urheberrechtsreform*, Bonn 1954 (397 pp.).

[5] Information on this point *may* be found elsewhere in the case under consideration; the best source would seem to be the review *Gewerblicher Rechtsschutz und Urheberrecht*.

[6] *Referentenentwürfe*, p. 63.

cials. In the 1954 draft it is stated that two earlier texts had been elaborated "within the Commission"; this seems to indicate that the members—among whom were scholars and representatives of interested organizations—actually participated in the drafting work. It seems reasonably safe to assert, on the other hand, that the actual wording of the text published in 1954 was, in the last resort, *drafted by the ministry officials*. It is accompanied by a short foreword, signed by the Federal Minister of Justice, which is of some interest for the present study.[7]

This foreword stresses what may be called the "scientific" approach of the German legislator: the draft, it is stated, is intended to serve as the starting point of discussion. Thus it is considered in much the same way as a paper submitted at a colloquium or a meeting of a learned society. Although the invitation extended to the "public at large" (*die breite Öffentlichkeit*) is, of course, addressed to two specific groups, viz. legal scholars and interested organizations, it nevertheless reminds one of the "referendum to the public" of 18th-century lawgivers (cf. *supra*).

It should be pointed out, before leaving the *Referentenentwürfe*, that the method of work adopted for the purpose of preparing copyright reform is not the only one practised in modern Germany. There may be more emphasis on commission work, as was the case when the *Bürgerliches Gesetzbuch* was elaborated and as is the case today in the field of penal reform.

The next stage of the German copyright reform was the *Ministerialentwurf*, elaborated on the basis of the very intense debates on the 1954 text carried on in the specialized reviews.[8] This time the text is covered by the authority of the Minister of Justice, which was not the case with the 1954 texts. Commission work seems to have been intensified by the creation of a working group within the original Commission of experts.[9] As will be explained more fully below (see under (2) in the present section), both the statute text and the *exposé des motifs* of the *Referentenentwürfe* were extensively used for the new document.

It may be doubted whether the next stage of the German copyright reform—the elaboration of the final Government Bill—belongs to what we have called the "technician stage". The reason why we prefer to mention this draft, the *Regierungsentwurf* 1962, in

[7] *Op. cit.*, pp. v f.
[8] *Entwürfe des Bundesjustizministeriums zur Urheberrechtsreform*, Cologne 1959.
[9] *Op. cit.*, p. vii.

this connection is its fundamental similarity to the earlier drafts.[1] This time, it is the Cabinet which speaks to Parliament—in the form of an introductory letter from the Bundeskanzler to the Speaker of the Bundestag, asking the latter to submit the Bill to Parliament for decision—but otherwise the *Regierungsentwurf* is simply a modified edition of the earlier drafts (with one further element to which we shall return under V below). Its genesis, so far as it is known, is equally identical with that of the 1954 and 1959 texts. The "anonymous" character is maintained; nowhere does the Minister speak in the first person. The *exposé des motifs*, like most proposed enactments, largely coincides with the corresponding elements of the *Ministerialentwurf*.

c. French legislative tradition, in its present form, would seem to have developed in the course of the 19th century. As in Sweden and Germany, important legislation was prepared by commissions. The classical example is the *Code civil* of 1804; however, for various reasons the extensive *travaux préparatoires* of the Code—which are still used to some extent[2]—do not seem to be typical of modern legislation. The French approach is radically different from that prevailing in Sweden and Germany in two respects: the *motifs* are usually much shorter, and the role of *Parliament* is more important.

The French copyright reform illustrates the statements above. It should, however, be pointed out that here again other methods of work are occasionally adopted. In particular, the work that has been in progress for many years to bring about a complete reform of the *Code civil* seems to come fairly near the German system: preliminary texts with *motifs* are published at intervals and submitted to general discussion. However, the *documents* drafted in the course of the process are essentially *descriptive* and *motivating*.

As in Sweden and Germany, copyright was on the *ordre du jour* for a long time in France before it materialized. A number of Government Bills and private proposals were discussed from the twenties onwards.[3] A commission draft was published in 1944 with

[1] *Regierungsentwürfe zur Urheberrechtsreform* (*Bundesdrucksache* IV/270), Cologne 1962.

[2] See, e.g., Planiol & Ripert, *Traité pratique de droit civil*, 2nd ed., vol. 2, no. 912, pp. 146 ff.

[3] The best source of information about the general progress of copyright reform in France is J. Vilbois' article "Historique", in *Revue internationale du droit d'auteur*, 1958, vol. 19, pp. 28 ff. Cf. also my *Europeisk upphovsrätt*, Stockholm 1964, pp. 29 ff.

short remarks by one of the specialists who had prepared it.[4] The text was submitted to the Société d'Études législatives, a semi-official society chiefly consisting of Supreme Court judges, professors and eminent barristers.[5]

In 1944 a reorganized commission, composed of distinguished lawyers and representatives of authors' organizations, was appointed by the Cabinet in order to prepare a statutory instrument on copyright. To this commission were submitted the draft and the report adopted by the Société d'Études législatives, together with a number of texts proposed by various organizations. After less than two years' work a fairly complete collection of texts, memoranda and minutes from the sittings of the Commission was published.[6] The Commission then went on to prepare the second part of the contemplated enactment. The representatives of the interests involved were officially invited to give their opinions; a great number of hearings were organized and recorded. In 1947 a new draft was submitted to the competent Minister, who asked the Commission to reconsider the whole draft and to give particular consideration to a number of observations made by the Ministry concerned. The results of the Commission's deliberations were presented to the Minister in 1950. It would take too long to describe in detail the subsequent history of the draft; but at last, in 1954, a Government Bill, accompanied by a short *exposé des motifs,* was submitted to the Assemblée Nationale.

The complexity of the process of preparation must be kept in mind when we pass on to an analysis of the remarkably short documents resulting from legislative work at the "technician level". A characteristic feature is the fact that important parts of the preparatory work are carried out in the form of oral deliberations and of hearings; these parts of the process are not reported in published documents.

2. *a.* The first point which must be considered for the purposes of the following analysis of the *travaux préparatoires* emanating from experts and commissions is the question *what documents are published, and in what form.*

In the case of Sweden, it is easy to give a short reply. Commission reports are regularly published in an official series, *Statens offentliga utredningar* (*S.O.U.*) Copies are sent to courts and public

[4] Vilbois, *op. cit.,* p. 37.
[5] See *Bulletin de la Société d'Études législatives,* 1945.
[6] *Travaux de la Commission de la Propriété Intellectuelle,* Paris 1945.

bodies deemed to take an interest in the matter concerned; they can also be bought by the public at a very low price.

The "Ministry draft" (cf. under 1. *a.* above) as well as short reports of the comments made by consulted organizations, in so far as these comments are considered to be of interest, are found—together with the documents issuing from the subsequent stages of pre-parliamentary *travaux préparatoires*—in the *Royal Proposition,* i.e. the command paper containing the Government Bill submitted to Parliament. The Proposition is published in the official parliamentary records, which however are somewhat less used; their handling demands some practice.

Finally, a selection of *all* documents, including parliamentary reports, normally made by an official who has taken active part in the handling of the matter, is published in a private periodical, *Nytt Juridiskt Arkiv, Section II* (*N.J.A. II*). This journal, which has been appearing since the 1870s, is available in all courts, all practising lawyers' offices, and all public offices of importance.

German preliminary works at the pre-parliamentary level, when published at all, appear separately, in the form of pamphlets. Law reviews occasionally give descriptions of the contents of proposed enactments and sometimes reprint the draft statute itself but never, as far as I know, reproduce the *motifs.* The Government Bill is published in the official series of parliamentary publications. Generally speaking, however, it is rather unlikely that judges—particularly in lower courts—and practising lawyers will be able to consult preliminary works on matters of a more specialized character without library research.

The methods of publication now referred to are complemented, in Germany as well as in Sweden, by textbooks which appear shortly after the promulgation of a new statute and reproduce selected parts of the legislative material. Usually these books are written in the form of "commentaries": the enactment is reprinted section by section, and the relevant parts of the *travaux préparatoires* are appended to each section. In Germany these books—*Referentenkommentare*—are written, or rather compiled, by the ministry officials responsible for the preparation of the statute in question. The corresponding publications in Sweden, although brought out by a private publisher, are likewise usually the work of an official who has taken active part in the *travaux préparatoires.* Textbooks of this kind are extensively used in both countries.

In France, separate publication of *travaux préparatoires* is ex-

ceptional. The main source—and generally the only one—is that part of the *Journal officiel,* i.e., the official Government gazette, which contains parliamentary reports. The *texts* of new enactments also appear in several privately published law reviews—it is enough to mention the *Recueil Dalloz.* Occasionally the *exposés des motifs* —which seldom exceed a few pages—of Government Bills submitted to Parliament are reprinted in these reviews.[7] As a general rule, however, research in the parliamentary records of the bulky *Journal officiel*—which are not easy to handle—is necessary to find the motifs.

The function of introducing and commenting upon new enactments, for the benefit of courts and practising lawyers, is performed by another group of publications: the commentaries, often very comprehensive and written by eminent lawyers, which are published in most of the great law reviews.[8] However, in these articles the *travaux préparatoires* are used only to the extent the writer concerned sees fit to draw upon them.

It seems justifiable to state, by way of conclusion, that legislative material is not only very much more abundant in Sweden and in Germany than in France, but it is also easier to find and to use.

b. The next point which has to be examined is *the character of the documents* drafted in the course of that part of the legislative procedure which we have called the "technician stage".

(*aa*) The report of the Swedish Copyright Commission (*S.O.U.* 1956: 25) is composed of the following parts: (i) an introductory letter to the competent Minister, which gives a short description of the work performed by the Commission (pp. 9–12); (ii) the text of the proposed enactment and of various amendments made necessary by its introduction (pp. 13–33); (iii) the *exposé des motifs* (pp. 34–486); (iv) a summary of the proposals of the Commission (pp. 487–97); (v) dissenting opinions expressed by some Commission members on a number of specific points (pp. 498–506); (vi) appendices, chiefly containing the texts of relevant international agreements (pp. 507–633).

The *exposé des motifs* is of particular interest for the purposes of the present study. In one respect the Copyright Commission

[7] Thus, the *exposé des motifs* of the Copyright Bill, 1954, was reprinted *in extenso* in the *Revue internationale du droit d'auteur.*

[8] The Copyright Act, 1957, was made the object of important studies in *Recueil Dalloz (Bulletin législatif,* 1957, no. 22); *Gazette du Palais,* 1957, vol. 1, "Doctrine" pp. 62 ff.; *Juris-Classeur Périodique,* 1957, no. 1398; a volume of the *Revue internationale du droit d'auteur* (vol. 19, 1958) was entirely devoted to the new Act.

report is not typical of Swedish *travaux préparatoires*: the *motifs* do not contain an introductory chapter ("general *motifs*") where the principles of the proposed enactment and the reasons why certain solutions have been adopted are stated in general terms.[9]

As an example, I choose one of the principal provisions of the proposed text, section 2, which defines the contents of copyright. This text is elucidated on pp. 87–113 in the *exposé des motifs*. After surveying the Swedish law as it stood before the introduction of the 1960 Act, and corresponding enactments in Scandinavian and foreign law and in international treaties, the Commission goes on to discuss the contents and application of the proposed enactment.

The first part of this discussion (p. 92) clearly belongs to the category of "*motivating texts*": the Commission states the reason why it has preferred to give a definition of copyright in general terms instead of enumerating the kinds of acts falling within the author's exclusive right. To explain the methods adopted for defining that right, the Commission gives an analysis of the various proceedings by which a literary or artistic work is made available to the public (pp. 92–7). However, within the framework of this analysis "expounding" elements recur frequently. Thus the sense of the term "copy" is obviously analysed for the purpose of the application of the proposed enactment. From a technical point of view, the method adopted for this analysis may be characterized as "pragmatic" (see the distinctions, *supra*): no conclusions are drawn from the alleged "nature" of the concept designated by the term "copy". By means of examples the Commission makes clear not what the word *means*, but what it *should mean* for the purposes of construction. On the following pages (pp. 94–7), the Commission goes on to analyse in the same way the other elements of the provision under consideration.

This analysis is sufficient. Modern Swedish *travaux préparatoires* at the technician level usually contain both motivating and expounding texts, the latter being far more lengthy than the former. The technique used in the *exposés des motifs* is normally of a pragmatic character; "abstract" elements (*supra*) are found particularly in introductory parts of the *motifs* attached to each section.

[9] A typical example of this technique is *S.O.U.* 1965: 14, where the Commission (*in casu* a single expert) had to choose between two possible and radically opposed solutions and where his reasons for preferring one of them are set forth in the "general *motifs*" (pp. 162–73). To use the terminology adopted above, this is a typical "motivating text".

References to the law actually in force as well as provisions in neighbouring fields of legislation are often found. A summary of rules operative at the time of drafting forms the normal introduction of *motifs,* but these summaries are mostly of a general character. It is likely that the drafters of the *exposés des motifs* are aware of the risks which would undoubtedly attend statements on difficult problems made in reports of this kind: apart from the danger of actual errors, it does not seem advisable that experts appointed to prepare a new enactment should make use of this opportunity to advocate their own views on controversial questions of construction. However, there are several exceptions from this general principle in the text now under consideration. To some extent such exceptions are inevitable: before a law reform is proposed, it seems reasonable to explain what precisely is the state of the law to be amended.[1]

It is hardly an exaggeration to state that the *exposé des motifs* of the Swedish Copyright Commission report is a comprehensive treatise on copyright. The report is distinguished from a normal textbook by the absence of two features: theoretical discussion and references to decisions and writers. The analysis follows the text closely; the interpretation given to its provisions is not—or at least is not explicitly—based upon a theory concerning the nature of copyright. When references are given, they are used less to support the proposed interpretations than to illustrate problems. The *exposé des motifs* thus benefits, as it were, from the freedom that is the result of keeping aloof from theoretical arguments, and assumes the character of authoritative statements difficult to question and to attack.

(*bb*) The *exposé des motifs* of the German *Referentenentwurf* begins with an introduction (pp. 55–77) which contains a very brief survey of the legislation in force since 1901, a statement of the reasons for a complete reform, and accounts of technical progress within the fields of arts and letters and of the development of copyright law, neighbouring rights and international agreements. After a survey of earlier drafts used in the course of elaborating the proposed enactment, the fundamental principles and the new ideas of the draft are systematically expounded. Finally, the divisions of the text are analysed in a few words.

Some ten pages (pp. 93–104) of the *exposé des motifs* are devoted to sections 10–14 of the text, which correspond to section 2, sub-

[1] Cf., e.g., *S.O.U.* 1965: 25, pp. 95 f., concerning the legal aspects of the sale of copies already distributed and related problems.

section 1, of the Swedish bill. The *motifs* attached to section 10 are clearly *motivating*: the drafters explain why they have preferred to define the economic rights of authors by means of a general formula accompanied by examples. As for the following sections, they are characterized in the respective *exposés des motifs* as "definitions of concepts" (*Begriffsbestimmungen*; see, e.g., pp. 94 and 95). However, this terminology, which suggests a "conceptualistic" method (*supra*), is hardly adequate. While the drafters proceed *as if* they were deducing certain consequences from a given, firmly established theoretical concept, in actual fact it is only in appearance that the time-honoured methods of German conceptualism (*Begriffsjurisprudenz*) are applied. The "definitions of concepts" are essentially expounding texts in the same way as the corresponding Swedish texts: the drafters actually *give a meaning* to terms used in the proposed enactments. Instead of making theoretical demonstrations on the basis of abstract ideas, they consciously lay down rules of interpretation.

The principal difference between the Swedish and German *exposés des motifs*—apart from terminological aspects—is the relative paucity of concrete examples in the latter. It is clear that German courts and practising lawyers are not likely to find the same exhaustive catalogue of practical questions answered by the drafters of the *travaux préparatoires* as is the case in Sweden.

There are, however, elements in the German Commission report which stress the "conceptualistic" tradition I have referred to above. In the introduction of the *exposé des motifs* attached to the sections dealing with the rights of authors (pp. 91–3), there is a short discussion of the "unity" or "duality" of copyright as being a right composed of "personal" and "economic" elements. In the controversy between the two schools of thought existing among German writers on this point, the drafters of the report choose sides: copyright, they state, is a unity. They thereupon proceed to show the correctness of this proposition by means of an analysis in which the two "elements" are in fact treated as pre-established concepts imposing a given solution upon the legislator with the same inevitability as that which attends the conclusion of a syllogism (p. 92 *in fine*, p. 93).[2]

[2] In 1933 an eminent German scholar, the late Professor de Boor, attacked the idea of the two "elements", which was clearly expressed in, and served as the basis of, the official report published that year. According to de Boor, this was a good example of the conceptualistic habit of imagining theoretical concepts as "bodies" with a substance of their own. De Boor, *Vom Wesen des Urheberrechts*, 1933, pp. 23 ff.

(*cc*) In spite of the differences set out above, and even though the German texts are shorter, more abstract, and occasionally influenced by theories even upon points where the legislator seems quite able to do without them, it seems justifiable to state that the modern German method of making *travaux préparatoires* comes very close to that adopted in Sweden. This statement cannot be extended to the French *travaux préparatoires.*

We can leave aside the documents published in 1945 (see under 1. *c., supra*), which were, incidentally, essentially descriptive or motivating documents: memoranda and records from discussions. It is equally superfluous to discuss the records of the Société d'Études législatives, which do not seem to be entitled to the rank of official *travaux préparatoires.*

What remains is the *exposé des motifs* preceding the Government Bill presented to Parliament in 1954. However, as we found above (under 1. *c.*), this text does not really belong to the technician stage: it originates from the Ministry responsible for the Bill. Therefore, since it seems preferable to make the terms of our comparison as similar as possible, the *exposé des motifs* will be characterized in the next section, where we deal with the "government and parliamentary stage" of the legislative process.

The result of these considerations, as applied to the situation in France, would be that the history of an enactment, in so far as it is ascertainable from published documents, has its origin in Parliament, at the moment when Government presents its Bill, to which is attached the official *exposé des motifs.*

V. THE GOVERNMENTAL AND PARLIAMENTARY STAGE

In the present section we shall follow the same order as in the preceding one: after a short account of the outward progress of legislation (1), the documents drafted in the process will be analysed (2).

1. *a.* We left the Swedish copyright reform at the moment when the responsible Minister submits the "Ministry draft" to the King in Council. On that occasion, the Minister comments upon the proposed text as a whole and upon such particular enactments as seem to merit further explanation. These comments are attached to the records of the Council meeting where the "Ministry draft" is provisionally adopted by the Government. What the King

in Council decides, at this stage, is merely to submit the draft to the Council on Legislation, a body consisting of three Supreme Court Justices and one member of the Supreme Administrative Court. The Council, which, under section 87 of the Swedish Constitution (1809), must be consulted on matters of civil and criminal legislation, may be said to maintain tradition in the style of drafting and coherence in relation to the precepts of the legal system at large. Generally speaking, it represents expert knowledge in legislative matters. The amendments and observations made by the Council are recorded in minutes which are formally submitted to the King in Council. A final overhauling in the Ministry results in the *Government Bill,* once more submitted to the King in Council together with comments by the Minister, whose observations chiefly deal with the views put forward by the Council on Legislation.

The Bill is submitted to both Houses of Parliament at the same time and is then immediately handed over to a joint committee, *in casu* the First Committee on Legislation.[3] The Committee is at liberty to call in experts, to hear the representatives of interests involved and, generally, to use all means of obtaining information about the matter under consideration. An important person within the Committee is the secretary, who is a career official, almost invariably a junior Court of Appeal judge, seconded to this task for a number of years. However, the Committees on Legislation normally have at least some members with legal training.

The work in committee results in a report, submitted to the Houses, in which the Committee proposes such amendments and makes such observations as it deems necessary. The report also contains observations on private members' bills connected with the Government Bill.

For present purposes, the Committee's report is the last document of interest in the process of legislation. The final stage—the actual debates in the Houses—are seldom likely to produce material of importance for the construction of statutes. There may, of course, be comments and explanations by the responsible Minister, but private members' opinions are never taken into consideration for the purposes of construction. Incidentally, parliamentary debates on matters of legislation without political implications tend to be very short and businesslike.

[3] The Constitution Committee was also consulted on one point, where a question relating to the Press was concerned.

The text finally adopted by Parliament, which contained a few minor amendments to the Bill,[4] was dispatched to the King in Council for promulgation. The proposed amendments were all accepted by the King—as seems normally to be the case—and the Act was promulgated on December 30, 1960.

b. In describing the progress of the German copyright reform (*supra,* IV, 1. *b. in fine*), mention was not made of a certain stage which may be called a semi-parliamentary interlude and which comes in before a Government Bill is submitted to the Bundestag. In addition to the proposed text and the *exposé des motifs,* the Bill contains an appendix, the observations of the Bundesrat—i.e. the council of representatives of the States (*Länder*) of which the present Federal Republic of Germany is composed—and the replies of the Federal Government.[5] Since these documents are of little interest for present purposes—they raise the constitutional issue of Federal legislative competence—we can leave them aside.

Of the parliamentary stage of German private-law legislation, and particularly of the copyright reform, little need be said. The important differences, in relation to the corresponding phase of legislative work in Sweden, are to be found in the form of the documents rather than in the actual order of proceeding. The Government Bill is handed over to a committee, which may be one of the standing committees of the Bundestag or appointed *ad hoc.* In the case of the Copyright Bill, a special subcommittee was formed from one of the standing committees. Discussions were also held with other committees. The committee work resulted in an amended text, to which was attached a memorandum by the *rapporteur* of the committee.[6]

As for the last stage of legislation—the parliamentary debates—it seems justifiable to state that the description of the corresponding process in Sweden largely applies to Germany.

c. The relative simplicity of the procedure of legislation at the parliamentary level in Sweden and Germany contrasts radically with the situation in France.[7] It is impossible to give here a complete account of the lengthy and complicated stages of parlia-

[4] See, e.g., *N.J.A. II,* 1961, pp. 97 ff., concerning sec. 9.
[5] *Regierungsentwürfe zur Urheberrechtsreform,* pp. 176 ff.
[6] *Deutscher Bundestag, 4. Wahlperiode,* document IV/3401 with appendix.
[7] It should be stressed that the account which follows deals with legislation under the Fourth Republic. I am unable to say whether the constitutional changes made since 1957 have modified the situation, but it seems unlikely that the parliamentary procedure as such would have been altered.

mentary work which led to the Copyright Act, 1957, but a number of features should be stressed.[8]

In each of the two Houses of the French Parliament—the Assembly (Assemblée Nationale) and the Senate (Conseil de la République)—the Government Bill was handed over to the permanent Committees on Legislation, which submitted short reports with some amendments. Other committees were also consulted. However, the Senate and its committees did not enter upon the stage until a text had been adopted by the Assembly after a regular debate which lasted for a couple of days. The Assembly text was submitted to the Senate and made the object of several separate and successive reports by its committees. A text that differed in part from that adopted by the Assembly was voted and sent back to the Assembly, where the same process was repeated and a new text incorporating most of the Senate amendments was adopted. The Senate, in its turn, now adopted a version with few changes in relation to the last Assembly text. Finally, the Assembly accepted the last Senate version proposed.

2. *a.* A few remarks will be made about the various *publications* in which preliminary works originating from the governmental and parliamentary stages can be found. As regards Sweden, it is enough to refer to the sources enumerated above (IV, 2. *a.*). The *Royal Proposition*[9] contains the statements of the responsible Minister when submitting the "Ministry draft" to the King in Council and when presenting the first Bill as well as the records of the Council on Legislation. The parliamentary papers publish the report of the Committee,[1] all private members' bills, and complete minutes of the debates. All documents deemed important, from the whole legislative process, are published in *Nytt Juridiskt Arkiv II*[2] and in a textbook presenting the same selection of material as that review.[3]

German *travaux préparatoires* from the parliamentary stage are normally found only in the official series of parliamentary papers. However, the *Referentenkommentare* (cf. IV, 2. *a., supra*) contain all material deemed to be important.

[8] See *Revue internationale du droit d'auteur* 1958, vol. 19, pp. 37 ff., and the references in my *Europeisk upphovsrätt,* p. 31.

[9] *Royal Proposition no. 17,* 1960.

[1] Memorandum no. 41, First Committee on Legislation (*Första lagutskottets utlåtande*) 1960.

[2] *N.J.A. II,* 1961, pp. 1–417.

[3] Regner, *Lagarna den 30 dec. 1960 om upphovsrätt till litterära och konstnärliga verk samt om rätt till fotografisk bild,* Stockholm 1961.

In France the only source from which precise information can be had about the destiny of a Government Bill is the *Journal officiel*. To follow the treatment of the Copyright Bill from the moment it was presented to the Assembly until its final promulgation, no fewer than twenty-five different texts must be found.

b. It remains to describe the documents originating from the Government and parliamentary stages of legislation.

(*aa*) In Sweden, three texts are of interest: the responsible Minister's comments upon the "Ministry draft", the minutes of the Council on Legislation, and the memorandum of the parliamentary Committee on Legislation.

The Minister's comments usually contain an introduction and observations on the "Ministry draft", section by section, generally in the form of short, approving summaries of the Commission texts where these have been left unchanged, comments on proposals invited from the representatives of interests, and, finally, statements concerning the reasons why the Commission's text has been altered on particular points. However, the Minister (i.e., the Ministry responsible for the drafting of the "Ministry bill") also enlarges upon questions of construction mentioned in the Commission's *motifs*.[4] These comments contain both motivating and expounding elements. Sometimes the latter assume what may be called a clearly didactic character: the Minister particularly emphasizes a certain point or proposes a precise construction to a certain enactment.[5] Occasionally, the Minister goes even further and expounds his view upon the construction of a statute already in force (or at least of an expression used in earlier statute texts).[6]

The minutes of the Council on Legislation should not be regarded as a *descriptive* text, for they do not record debates. The opinions recorded are prepared in much the same way as the Minister's "speech" on the "Ministry draft", although they are usually much more laconic.[7]

Where the responsible Minister sees fit to follow the proposals of the Council, this usually appears from the text of the final Bill; where the Minister is of a contrary opinion, he states his reasons when submitting the Bill to the King in Council.[8]

[4] See, e.g., *N.J.A. II*, 1961, p. 230, fourth para. of the Minister's comments.
[5] See e.g., *op. cit.*, p. 56, second para.
[6] Cf. the examples furnished by Professor Folke Schmidt, "Construction of Statutes", *Scandinavian Studies in Law* 1957, pp. 174 ff. See also *N.J.A. II*, 1953, p. 298.
[7] For a striking example, see *N.J.A. II*, 1961, p. 231.
[8] See, e.g., *op. cit.*, p. 191.

The memorandum of the parliamentary joint committee—*in casu* the First Committee on Legislation[9]—ends with an appendix where the amendments proposed by the committee are printed in italics with the text of the Bill. On most points deemed to be controversial or important, the Committee adds comments which are essentially similar to those of the Minister. Occasionally, the Committee expresses its approval of constructions proposed by the Minister[1] or the Council on Legislation.[2]

To conclude, it may be stated that the *expounding* elements are particularly numerous and systematic in the documents originating from the governmental and parliamentary stages of the Swedish process of legislation. On certain points of particular importance, the court or lawyer having to apply a certain enactment may find no fewer than four concurring opinions.

(*bb*) The position of the Government, as distinct from the "technicians", is less clear in German preliminary works. As we have already pointed out, the *Regierungsentwurf* is anonymous in the sense that no ministerial opinions are expressed: the *exposé des motifs* of the Government Bill is essentially identical with that of the preceding drafts.

The opinion of the parliamentary committee is expressed in much the same way as in Sweden, with the important difference that the German memorandum is the work of a *rapporteur*. The sections of the Government Bill are discussed, where this is found necessary, and amendments are proposed. Upon the whole, however, German committee reports tend to be more economical than their Swedish counterparts. The expository elements are less abundant than in a Swedish memorandum of the same kind.

On the other hand, *debates* are usually more intense than in the Swedish Parliament, and tend to go into greater detail. It is therefore more frequent to find explanations on the intentions pursued by a given enactment or on the correct sense of particular provisions. However, it must be kept in mind that the texts in which such information can be found are of the kind referred to above as "descriptive"; consequently, one cannot expect to find a *systematic* treatment of the questions raised by the text.[3]

[9] Memorandum no. 41 of the First Committee on Legislation, 1960, contains 116 pages.

[1] See Memorandum no. 41, p. 35.

[2] *Op. cit.*, p. 71, *in fine*.

[3] The debate on the copyright reform was, however, very short. See *Deutscher Bundestag, 187. Sitzung*, May 25, 1965, pp. 9416B ff.

(*cc*) If the Swedish and, to a lesser extent, the German Government Bills with their *exposés des motifs* constitute regular *treatises* on copyright, the *exposé des motifs* of the Bill submitted to the French Assemblée Nationale in 1954 may be characterized as an *essay* on literary and artistic property.[4] After an introduction, where the reasons for introducing a new legislation are set out together with a statement of general principles and spirit of the Bill, the *exposé* goes on to describe in few words, and with some general motivating remarks, the contents of the essential provisions.

The texts originating in the parliamentary procedure may be divided into two groups: *committee reports* and *records from the debates*. Few words are needed to characterize *the latter* category: they are *"descriptive" texts,* and more often concerned with discussions concerning the merits of two or more proposed solutions than with the sense and proper construction of a given enactment. Committee reports, drafted and submitted to the Houses by a *rapporteur* elected by the committee and serving as its spokesman in the ensuing debates, contain proposed amendments, comments on such provisions in the Government Bill as are approved or proposed to be modified, and judgments upon private members' bills. Even the most comprehensive reports concerning the French Copyright Bill of 1954 do not exceed two folio pages.[5] Where the reports are not simple summaries, they belong to the category of "motivating" documents.

3. It is time to sum up the results of this and the preceding sections. If we try to apply the distinctions and classifications proposed in Section III above to the legislative material produced in the course of lawmaking in the three countries concerned, the following statements may be made.

In Sweden and Germany material from the *"technician stage"* is regularly *published,* in one way or another; in France, this first phase of the legislative process is usually inaccessible to the public.

A constitutional problem which cannot be discussed in this context is *who* is to be considered as the "legislator" in the three States under consideration. It may be assumed that the memo-

[4] *Journal officiel* 1954, *Assemblée nationale, Annexe* no. 8612, pp. 985 f. The whole *exposé* fills less than two folio pages in the parliamentary reports.

[5] *Journal officiel* 1954, *Assemblée nationale, Annexe* no. 10681, and *Journal officiel* 1956–1957, *Conseil de la République, Annexe* no. 11.

randa and reports of parliamentary committees can be regarded as *"immediate" legislative material* in the sense explained above (Section III 6. *b.*) and that Government Bills with their appendices are *"indirect" travaux préparatoires.* Under these assumptions, the mass of "immediate material" is more important in Sweden and Germany than in France, although the *proportion* between "immediate" and "indirect" texts is clearly in favour of the first category in France as compared with the other two States.

The distinction between opinions given by "technicians", persons speaking in an individual capacity, and by representatives of collective bodies is difficult to fit into the patterns of legislation we have just analysed. "Technician" opinions as such are hardly ever given at governmental and parliamentary level. On the other hand, such opinions are adopted, intact or with amendments, by governments and/or parliamentary committees. Only in Sweden is the distinction between individual and collective opinion of interest: the Minister—although technically nothing but a member of the King's Council—speaks in his own name. Generally, the Swedish system gives the clearest and most precise accounts of the *origin* of all opinions at pre-parliamentary level.

I have already pointed out the "descriptive", "motivating" and "expounding" character of the documents discussed above. To sum up, it may be stated that, in France, *descriptive* texts—records of parliamentary debates—are the most important *travaux préparatoires* from a merely quantitative point of view; however, the legislative process also creates a number of *motivating* texts which often furnish information about the evaluations which are at the base of proposed enactments and contain certain clues to construction inasmuch as they proceed by antithetic reasoning and rule out one or several possible solutions. *Expounding* texts are unknown. In Sweden, *descriptive* documents are few, short, and uninteresting. *Expounding* texts, usually of a pragmatic character, abound throughout the legislative process; they clearly surpass the equally abundant *motivating* texts in quantity. Germany represents an intermediate position in all these respects. On the other hand, it sometimes results from the abstract technique used in Germany that the statements concerning the proposed enactment assume a wider scope and raise theoretical questions of a more general *portée* than do the pragmatic opinions found in Swedish legislative material.

VI. CONCLUSIONS

1. The main purpose of the present paper has been to give a survey of certain facts which are likely to have some influence upon the methods of construction adopted in legal systems in respect of which it is justifiable to make the basic assumption that legislative material is, in fact, used as a sort of secondary source of law. This purely descriptive analysis leads at least to one important conclusion: whenever the use of preliminary works for the purposes of construction is discussed across national borders, it is essential to make sure that the parties engaged in the discussion speak the same language, i.e., refer to the same types of *travaux préparatoires*.

To this conclusion a few remarks will now be added. After an analysis of the probable reasons *why* legislative material is elaborated as it is and why courts tend to make use of such material for the purpose of construction, I propose to discuss the probable impact of different kinds of *travaux préparatoires*. This analysis will be made wholly *in abstracto*. This approach seems justifiable because it is doubtful whether the hypotheses which will be expressed would be proved conclusively by any number of concrete examples and because, if such proof were possible, it would certainly require very extensive evidence of a kind difficult to obtain. Finally, I shall make some suggestions towards what seems a rational approach to the problem of legislative material as a secondary source of law.

a. It seems superfluous to examine the reasons why preliminary works of the "descriptive" category are made and published: from time immemorial, public doings of any importance have been recorded. It has long been held a sound principle that such records should be made available to the public.

The reasons why *motivating* texts are drafted in the course of the process of legislation seem equally obvious in view of the way in which that process is organized in modern Western communities. At each stage the person or body entrusted with the drafting of the statute text certainly feels a need to convince himself and, more particularly, to convince the next person or body in the process that the proposed solution is just and rational. To achieve this result, it is necessary on the one hand to point out certain evaluations known to be acceptable to the person who is to be

convinced, and on the other hand to show that the suggested solution leads to results which are in harmony with those evaluations. Motivating texts give *information about the underlying evaluations* and about such solutions as are considered obvious by those who proposed them.

Expounding texts may also have an important function for the purpose of convincing the next stage in the process of legislation, since they furnish concrete information about the way in which a proposed provision is going to work. However, beyond a certain limit an expounding text ceases to perform this function. Thus, a statement to the effect that a provision should be construed "in a broad sense", or "restrictively", contains no information of this kind. It is, in fact, a volition, an order of the same kind as the statute text itself. A statement that music performed at a private entertainment should be considered, for the purposes of a certain provision, as performed "in public" belongs to the same category, even if it is styled as an explanation of the "proper" sense of the notion of "publicity". Statements of this kind are written for the courts.

The question which arises, once it has been found that certain elements of expounding texts are in fact intended to complement the statute provisions to which they are attached, is *why* this technique is resorted to. I do not propose to give an answer to this question. There is no lack of practical considerations in favour of the method: it is convenient, whenever tradition, style, or necessity renders more explicit statute texts impossible; it is practical, since statements in the *exposé des motifs* need not be thrashed out in parliamentary debates; it is flexible, where the future development of the field of law concerned is uncertain and an explicit provision would tie the courts more rigidly than a mere suggestion in the legislative material. To each of these reasons, however, there is at least one serious objection.

The question now discussed arises only with regard to expounding texts of the type referred to above, for descriptive and motivating texts have a function independent of this possible use as "secondary sources of law". The problem which remains, in respect of such texts, is only why courts use them and whether this is a desirable method. It is unnecessary to ask why they are drafted as they are: that question is determined by their other functions.

b. My next objective is to discuss, also *in abstracto,* why legislative material is actually used for the purposes of construction.

The more or less rational reasons for that method may be divided into five groups.

(1) The first argument is based upon the elementary observation that words in themselves cover an area of meaning with diffuse margins, and that the context, including the speaker's identity and the purpose of the speech, is the safest way of arriving at greater certainty about its meaning. Statutes are composed of words, and however specific their function may be, they fall under the general rule. They are even likely to illustrate it with particular clarity because words occurring in statute texts are often in isolation from such linguistic contexts as might otherwise furnish some clue to their meaning.

Against this reasoning, it may be objected that statutes should in fact be excepted from the rule according to which meaning can be found chiefly by reference to the speaker's identity and the purpose of the statement, because the circumstances attending their genesis are only one element of the social context from which their meaning is to be found, and it would be most unfortunate to give this particular element more weight than others. This objection may be adopted in a more or less extreme way; for instance, it is not incompatible with the idea that *some* importance should be attributed to *some* elements of the legislative process or that preliminary works may be used during the *first* period after a statute has come into force. During that period, it may be argued, courts have not had time to analyse other elements of the relevant social context, and the intentions, or at least the underlying evaluations, of the legislature are in no danger of becoming obsolete.

(2) The second argument is that which is based upon the notion of *the will of the legislature*. Statutes are binding because they express the will of the highest political organs of the State. The same statement, however, is true of preliminary works. Statutes, according to this opinion, are orders given by the sovereign, and it is irrational not to inform oneself about the sovereign's intentions in giving them.

Here again, various objections are easy to foresee. If the sovereign wants to be obeyed, he has a duty to tell his servants clearly, in the form of explicit commands, i.e. statutory provisions, how to act. This would seem to be the traditional English attitude. Moreover, the idea of the sovereign's will is an illusion, particularly under modern parliamentary systems.

(3) Apart from these traditional considerations, there are, however, a couple of arguments which do not pretend to give a clear-

cut and uniform solution but which speak in favour of a selective and limited use of legislative material for the purposes of construction.

Thus it may be argued that *travaux préparatoires,* whether good or bad, whether expressions of any particular will or not, have at least one important function during the initial period of application of a new enactment: if used by judges for the purpose of construction, *they secure uniformity in the application of the law.*

It is true that uniformity means security, one of the ultimate ends of the administration of justice. On the other hand, it seems objectionable to demand that courts give up their independence to follow instructions given in the *travaux préparatoires*—instructions which may not always be wise—merely in order to achieve uniformity. When has the initial period come to an end? What precedents—or how many precedents—shall be held to set aside contrary opinions in the legislative material?

(4) Legislation, at least on important matters, is usually prepared with considerable care. We have already stated that in Germany as in Sweden, the *exposés des motifs* made by experts in the course of the preparation are often regular treatises on the subject under consideration. The hearings organized with the representatives of interests involved give legislative commissions and ministries opportunities—which the individual writer seldom has—of basing their conclusions on solid social facts. It seems reasonable to state that the legislative material is, if nothing else, *the first expert study on the new statute.* There is no reason why *travaux préparatoires* should not be allowed to claim the same position as textbooks. This attitude is recommended by economic considerations: the individual judge cannot possibly put in the same amount of time and work to analyse the social and legal facts which are at the base of a new statute. On a number of points, it seems perfectly legitimate that he should accept the work and the conclusions embodied in the *travaux préparatoires.*

(5) The last argument in favour of using legislative material for the purpose of construction hardly merits the name of argument, nevertheless it certainly reflects the attitude, by no means uncommon, that *travaux préparatoires* are used because superior courts are known to use them, so that a decision which is in harmony with statements made in course of the legislative process is likely to be confirmed. Indirectly, this down-to-earth approach to the problem may lead to uniformity.

c. Each of the groups of arguments which may be involved in support of the habit of resorting to legislative material for construction purposes results in a definite attitude to each of the categories of preliminary works, at least if the arguments are used coherently. In other words: the reasons why *travaux préparatoires* are resorted to are likely to have some impact upon the selection and ranking of different kinds of such *travaux,* according to their character, contents and origin.

(1) The idea that statutes can be understood only through the context involves the most difficult problems of selection, since it is obvious that many enactments are the result of such a complicated process of creation that the individual voice from which the words—or most of the words—originate is literally drowned in the parliamentary chorus. Usually a provision can be followed back, in those cases where legislative material from the technician stage is published, to a draft accompanied by an *exposé des motifs,* but even though this earlier text makes sense, it is possible that quite minor amendments introduced in the course of legislative work will upset the relations between statute text and "context" in such a way as to make the *exposé des motifs* valueless.

Thus the hypothesis that statutes, like other communications, are best understood through the context almost invariably conflicts with the often unanswerable question, *"Who was the speaker?"* Even if, by chance, the original speaker can be traced, and the original context restored, uninfluenced by interventions in the subsequent parliamentary process, then the question arises *why* this particular speaker—who is more often than not a "technician" speaking in the name of a commission—should be allowed to exercise decisive influence upon the decisions of a court.

(2) The hypothesis that preliminary works should be consulted because they express the "will of the legislator" goes one step further upon the theoretical basis furnished by the argument under (1) above: what is added by this hypothesis is in fact a *principle of selection,* for it is obvious that under this theory only the "constitutional lawgiver" is of importance.

As far as the *character* and *contents* of legislative material are concerned, this principle of selection seems to be fairly efficient if logically applied. Motivating texts are generally of importance, for they express evaluations which must reasonably be assumed to have exercised an immediate influence upon the lawgiver's choice of a given solution. They at least furnish information about "the master's spirit". Descriptive texts may also be used,

if by any chance they contain unequivocal expressions of legislative intentions. As for expounding texts, it seems obvious that only the actual legislation can reasonably be assumed to be the object of the "legislator's will". Similarly, theoretical and abstract elements of expounding texts cannot claim attention under this theory, for such analyses concern matters over which legislative volitions have no power.

Although the "will theory" also implies a principle of selection with regard to the *origin* of texts included in the legislative material, this selection constitutes the stumbling-block of the whole theory. For if it is true that only the constitutional lawgiver can claim obedience, the problem of immediate, indirect, and secondary legislative material arises. It is clear that *immediate material,* as defined *supra* (Section III, 6. *b.*), is relevant; it is equally clear that *secondary* material should be ruled out (although it may, of course, be admitted as interpretative evidence of legislative intentions which have been expressed, but with insufficient clarity, in the relevant material). But what about *indirect* material, which constitutes most of the *travaux préparatoires* in Sweden and Germany? It is obviously a pure fiction to state that all the opinions expressed in this material are conscious and clear expressions of the will of the constitutional lawgiver. The memoranda and reports of parliamentary committees may possibly claim this position; in Sweden, the responsible Minister's opinion, which is published separately, is perhaps entitled to similar treatment. However, most expounding texts are invariably to be found in documents originating from "technicians", and there is no doubt that, at least in Sweden, these texts are written with a view to influencing the application of the proposed enactment.

In the light of these facts, the principle of selection embodied by the "legislator's will theory" seems rather irrational. Of such of that material as is, from an objective point of view, particularly valuable, most will either be ruled out or admitted only by means of an obvious fiction. In both cases, arbitrary selections are inevitable.

(3) The principle of consulting legislative material in order to achieve uniformity in the application of recent statutes also involves the problem of selection: uniform methods of choice among the mass of *travaux préparatoires* available are obviously a *conditio sine qua non* for the success of this technique. To leave the choice to the courts without any established rule would be equivalent to abandoning the whole idea of *travaux préparatoires* as

instruments of security. Consequently this method has to be complemented by a system of rational principles of selection and of ranking different opinions.

(4) If preliminary works are used in much the same way as good textbooks—*as expert advice to the court*—the problem of selection and of ranking loses most of its importance: it is no longer the *origin* but the *rationality* of the opinions given in the course of the legislative process which counts, and uniformity is given up as an end in itself. It is likely, in fact, that this approach will put the emphasis on "technician" rather than on "politician" elements in the legislative material. On the other hand, there is nothing to prevent due consideration being given to clear expressions of legislative intentions even where they are not accompanied by or based upon considerations which seem rational. For "rationality" is obviously a relative idea; no solution is "rational" in itself. The term can only be applied to the methods by which it is attempted to attain a given result. This result is the sum of legislative intentions as expressed by the statute as a whole and by unequivocal motivating texts of a general scope supported by such bodies or persons as may reasonably be called the "legislator".

(5) The principles of selection applied where the fifth argument for the use of legislative material is used cause no trouble: such elements of the *travaux préparatoires* are invoked as are known to be resorted to—with or without good reason—by the courts above.

2. The foregoing analysis will probably have given at least a hint of the present writer's standpoint. This can be expressed in a few words.

Whatever their origin and genesis, statutes have the same function as orders given to the judge and the community at large. It is, of course, perfectly possible to accept the proposition that they are obeyed because disobedience is sanctioned, but that statement gives no clue to *the way in which they should be obeyed.* A minimum of "theory" is necessary for that purpose and such a minimum, on which general agreement ought to be possible, is the statement that statutes should be treated as rational means for the achievement of a certain result. If the statute itself does not contain any information in that respect—and modern statutes on technical matters are often silent on such points—it seems legitimate to go to the legislative material to look for *general intentions, on a sufficiently high level of abstraction to be generally*

adopted by those who are entrusted with the process of legislation in individual or representative capacities.

Once this framework of fundamental evaluations has been laid, the only reasonable approach, in the present writer's opinion, is to treat the *travaux préparatoires* as expert advice, no more and no less. If political rulers want to enforce a solution which cannot be attained by honest reasoning on the basis of the text and the general intentions of an enactment, but needs the support of hints in the *travaux préparatoires* which go further than the actual provisions, they have the power to do so, and they ought to accept the corresponding responsibility.

Considered as expert advice, legislative material—particularly in the form of expounding texts drafted by "technicians"—is a valuable instrument for courts and practising lawyers. It is probable that good *exposés des motifs* are sufficiently convincing in themselves, independently of any vague ideas of the "legislator's will", to secure uniformity in the application of statutes. The French system, which leaves judges to tackle new enactments practically alone, undoubtedly possesses the advantage of giving the courts of justice a great deal of independence, but experience seems to show that under this system it takes a long time and a comprehensive body of clear precedents from the superior courts to achieve stability in the construction of statutes.