CRITERIA OF RELEVANCE IN LEGAL REASONING

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1.1.1. A problem which in modern Scandinavian jurisprudential debate has attracted some interest—but few attempts at a systematic analysis—is the question whether and to what extent there is such a thing as a specific method of judicial reasoning and, if such a method really exists, as opposed to the technique of problem-solving in the social sciences at large, whether and to what extent the *arguments* advanced in the course of legal reasoning must satisfy certain *criteria of relevance*. To illustrate the problem, let us take a very simple example used by a Swedish writer in favour of the thesis that even when moving in the large field of fairly "free" appreciations, the courts are—more or less consciously—bound by standards which can conveniently be called "criteria of relevance": the fact that a given issue of a dispute brought before the courts would favour a certain political party should not, and is not normally, considered by the judges as a "valid" argument for that issue.[1]

The present paper is an attempt to analyse somewhat more closely the problem thus defined. The point of departure, developed in an earlier paper, where the author tried to characterize the "technique of legal reasoning", is that there are good reasons for the hypothesis that courts in fact consider themselves bound by a set of "rules of reasoning" (in the character of frequently vague and perhaps not even conscious "meta-norms") and that the rejection of the idea of such a specific technique of normative reasoning leads to an unrealistic view of judicial decision-making.[2]

As will be explained more fully below, two basic points must be kept in mind whenever one tries to come closer to an answer to the questions outlined above. In the first place, it would be presumptuous to speak about "courts" in general. Judicial habits of thought vary considerably from one country to another; the present contribution deals with Swedish courts only. Secondly, in any attempt to obtain solid documentation for the problems to be discussed, almost insuperable obstacles are encountered. In addition to what can be found by unsystematic reading of cases and writers, the present writer has systematically analysed ten years of Swedish

[1] Professor Strahl in *Sv.J.T.* 1955, p. 298.

[2] Strömholm in *Festskrift till Ivar Agge*, Stockholm 1970, pp. 321 ff. The paper was reprinted in German in *Archiv für Rechts- und Sozialphilosophie* 1972, pp. 337–62.

Supreme Court reports and interviewed a small number of experienced judges; it should be acknowledged from the outset that this material is meagre—not only in extent but also in the clarity of the answers derived from it.

1.1.2. When trying to formulate the criteria of relevance which Swedish judges are presumed to apply for the purpose of discarding some arguments and retaining others, it seems possible to start by considering some characteristics of legal reasoning, features which may be assumed to result from the practical function of such reasoning, viz. to lead up to authoritative and final decisions in private disputes, through the application of general rules to particular and concrete factual situations. This function gives the person advancing an argument an incentive to develop, *inter alia,* what could be described as economy of reasoning. This contributes to the uniformity of reasoning from one case to another and facilitates the sifting out of some of the countless arguments which *can* be put forward. The judicial decision procedure—in spite of all the criticism of such ideas from those who advocate a "realistic" approach or profess a more or less far-reaching rule scepticism—is not built up, nor in practice understood, as an attempt to reach *an* approximate solution, but has the aim to reach *the* correct solution out of two or more possible ones. For this reason, such mechanisms as can simplify and shorten the path towards a solution must have a practical function to fulfil.

1.1.3. A question of essential importance for any discussion of arguments put forward in the judicial analysis is the relationship between two different kinds of reasoning; that adopted for the purpose of *finding* the solution of the case, and that used for *justifying* that solution. It appears probable that it would be possible, at least to some extent, to reduce the conflict of opinion between, on the one hand, those authors who refuse to admit the existence of a specific legal technique of reasoning or assign to it the role of "window-dressing legitimation" and, on the other, those who hold that such a technique not only exists but also exercises considerable influence on the reasoning. In order to obtain a clearer picture of this conflict of opinion and possibly to reduce it, it is necessary to try to define accurately which *type* of reasoning different authors are referring to and which *function* they ascribe to the reasoning.

As a basis for such a precise definition, we may choose the discussion of the American theorist Wasserstrom regarding the two stages in judicial reasoning—the "process of discovery" and the "process of justification". After having presented some examples of "motive" for behaviour in

different situations, Wasserstrom states that the examples "tend to explain the way in which a conclusion was reached. In certain contexts they do not respond to the question of whether the conclusion is in fact justifiable. Just as these two kinds of questions can be roughly distinguished, so the factors that led to the discovery can be differentiated from the process by which it is to be justified."[3] Wasserstrom applies this observation to the making of judicial decisions and points out that, although those theorists who have demonstrated the weaknesses of the deduction theories prevailing earlier and who have attempted to replace them with another account of what has actually happened have undoubtedly spoken of essential matters regarding the judge's "process of discovery", they have nevertheless fallen victims to a delusion in imagining that the *grounds for a decision as set out in the court's opinion purport to describe* this course of events. "Surely the kind of reasoning process that is evident by the usual judicial opinion is more suggestive of a typical justificatory procedure. Turning by way of analogy to the example of the scientist—it is one thing to read a judicial opinion as a report of why or how the judge 'hit upon' the decision and quite another thing to read the opinion as an account of the procedure he employed in 'testing it'."[4]

1.1.4. Wasserstrom's discussion of the two types of judicial reasoning is one of the few contributions to the somewhat meagre debate on criteria of relevance in judicial reasoning which neither dismiss altogether the idea of a specific judicial methodology nor limit themselves to enumerating and exemplifying conventional concepts borrowed from established logical or rhetorical stock phrases (of the *ex analogia, a fortiori* type, etc.). Accordingly, Wasserstrom's points of view seem to be worthy of some further consideration. It may be added that his distinction also seems to illustrate the relationship between "method" and "technique";[5] it can undoubtedly be established that the modern Scandinavian debate concerning the method of judicial reasoning refers essentially to the course of action for "judicial findings" and concerns itself to only a lesser extent with "justification". The latter stage usually becomes of immediate interest in connection with objections to proposals regarding "methods" which are considered inconsistent with the demands of legal security and similar demands—i.e. methods the use of which is difficult to reconcile with a normative "logic of justification". The conscious fundamental distinction

[3] Richard A. Wasserstrom, *The Judicial Decision. Towards a Theory of Legal Justification*, Stanford, Calif., 1961, p. 26.

[4] *Op.cit.*, p. 28.

[5] Wasserstrom, *op.cit. supra*, at note 2, pp. 308 ff.

of the two aspects, which Wasserstrom points out has not, so far as the present writer knows, been presented in the Nordic discussion;[6] it seems to make the issues in the penumbral country of legal reasoning more clear-cut and well-defined.[7] It would appear to be an almost impossible task to determine precisely to which stages in the process of making judicial decisions various authors refer in the modern Nordic debate on this subject. In any case, it appears obvious that no exact definition of the *object* of discussion has been made. When Professor Strahl, in the example mentioned in the introduction to this paper, refutes a certain line of reasoning, he is undoubtedly referring both to the "process of discovery" and to the "process of justification". Professor Ross's dismissal of the idea of a genuinely significant technique of reasoning obviously refers first and foremost to the "discovery stage". However, his approach must be considered to mean that no special process of justification exists: the judge gives certain *grounds* for the decision, but these only serve, so to speak, to clothe the result in conventional legal terms. As regards another important jurisprudential school of thought in modern Scandinavian discussion, Professor Ekelöf's "teleological method", it is highly probable that this author does not merely give recommendations for how the process of discovery shall be carried out, but also considers that this course of reasoning should be stated openly in the court's opinion.

1.1.5. One may ask whether Wasserstrom's analysis—in spite of the progress which the above-mentioned division would seem to signify—does full justice to the complexity of judicial reasoning. This question seems justified at least in respect of Danish and Swedish court decisions, for instance, where the grounds for the decision are often characterized by terseness of expression, in contrast to court practice in England, America, Norway, and Germany. It is quite conceivable that reasoning by Danish and Swedish courts, with their tradition, is an operation divided into three stages, viz.:

(1) finding the solution ("process of discovery");
(2) checking the solution by application of specific standards of reasoning ("process of justification");
(3) accounting for the course of reasoning, viz. concentrating the chain of arguments into a highly condensed form and giving a cautious account,

[6] The Swedish professor P. O. Bolding's proposal (in the book *Juridik och samhällsdebatt*) for a two-part type of judicial reasoning—first a "free" and open phase and then a "bound" one—might lead one's thoughts towards Wasserstrom's distinction, though the Swedish author energetically dismisses the idea of special legal reasoning.

[7] Cf. *op.cit.* in note 1 *supra*, at p. 310.

which lays stress on the use of existing legal principles or generally accepted precepts.

If this description is correct, the justification stage clearly emerges as exceptionally difficult to assess and analyse—almost as difficult as the "real considerations" which according to Ross dominate the discovery stage —and this makes it impossible to draw safe conclusions. However, this should not act as a deterrent from attempts at forming hypotheses.

1.1.6. The purpose of the present paper, stated more precisely, is to scrutinize in greater detail the *criteria of relevance* which we have thought possible to describe as being characteristic of legal—and, above all, judicial—reasoning in the sense of "arguments of justification". It does not seem necessary at this juncture to take up a position on the question whether there is reason to differentiate between an internal process of "checking" and the "account" in the ground given for a decision. However, it could be said that in general, *should* this be necessary, the hypotheses which will be given below refer to the "checking", the "internal process of justification".

It is necessary first of all to discuss some general concepts. The reasoning which we are dealing with is that which refers to *legal* argument in a narrow sense—not to assessment of the value of evidence.

1.2.1. In what follows, questions will be discussed concerning the relevance of "arguments". The term argument is here used to cover a number of phenomena. The one thing these have in common is that they (i.e. the linguistic designations for them) are introduced or put forward in judicial deliberations as being calculated to *legitimate* a certain decision.

The most disparate phenomena can be advanced as "arguments" in this sense: the existence or qualities of persons or objects, events, factual relations observed between persons and objects (closeness, distance, similarity) appraised from one point of view or another, lasting relations that exist by virtue of legal rules, general legal principles and laws of thinking, provisions within other legal areas, statements in the *travaux préparatoires* of legislative enactments, earlier decisions given by courts, and the qualities of and relations between such legal phenomena; also, various combinations of the phenomena listed. On the other hand, it hardly seems natural to maintain that a legal rule, the application of which to the actual case is recommended or discussed, should *as such* constitute an argument. Various linguistic or other arguments are employed within or outside the rule for or against its application. With a strict use of terms, it is probably more correct to describe as an "argument" the *actual mention* of, or

reference made to, the phenomenon the existence, qualities, relations, etc., of which can be considered to affect the solution in one direction or another. For practical reasons, however, we shall refer to "arguments" without observing this distinction. Those circumstances, subjects, etc., to which the person carrying out the reasoning refers will be described as "arguments".

1.2.2. It should be pointed out that "arguments" are, accordingly, used here in another sense and with a wider significance than is usual in elementary logic and in, at any rate, earlier writing on legal methodology, as found in expressions such as *argumentum ex analogia, a fortiori,* etc. In this paper, the meaning of the word "argument" is limited only by the *function,* within judicial reasoning, of the phenomena which have been called arguments.

1.2.3. It would undoubtedly be of some value for practical purposes if "arguments" in the extremely wide sense used here could be arranged in specific categories. Neither the traditional classifications just exemplified —which, of course, refer to concepts being part of the technique of legal reasoning and not to individual arguments—nor such descriptions as occur in philosophical or linguistic works devoted to the analysis of reasoning appear to be of much value in this connection. We shall revert, however, to the question of classification later.

1.2.4. The fact that the occurrence of, qualities of, or relations between persons, objects, events, or legal phenomena are advanced as "arguments" *for* a certain decision—i.e. are put forward in order to legitimate this decision within the accepted system of norms which forms the framework for the argumentation—or are invoked *against* a decision always implies certain assertions, namely: (1) that there exists a relation (for instance, a similarity or disparity) between the argument and the solution proposed (or some essential element of it); (2) that this relation is *relevant* within the given framework. In most of the more complicated cases, moreover, the use of a certain argument includes adopting an attitude towards at least two other issues, viz. (3) the *"closeness" or "weight" of the relation,* as compared with the relevance of other relations, and (4) the *degree of relevance* as compared with the relevance of other relations. Theoretically, it could be said that coefficients are assigned to relation and relevance. The question what principles are applied when determining this "weight" will not be discussed in further detail here. However, it is submitted as evident that, in a case where the argument quite simply constitutes a fact referred to in a

statutory text, the existence of which is reason enough for a certain decision, and which is found to be present, the relation between the fact concerned and the decision is relevant and both that relation and that relevance should have the maximum coefficient (unless, in exceptional cases, there can be said to exist a relevant relation with greater strength between another "argument" and another solution than the solution prescribed for in the statutory text concerned—as may be the case, for instance, in conclusions by reduction).

1.3.1 It would appear useful to define more precisely the logical character of the hypotheses and conclusions regarding the relevance of different arguments in judicial reasoning which will be set forth in what follows.

As has often been pointed out in the debate on legal reasoning, the choice and application of criteria of relevance are frequently—and perhaps even usually—not a conscious use of rational principles. Accordingly, there would probably be a great risk of rationalization and oversimplification if the author attempted to draw up and utilize—as a pattern of interpretation for "reality", as it appears in existing judicial decisions—a complex of self-invented principles for the application of criteria of relevance. The difficulty often encountered of finding even isolated explicit evidence of such criteria, and the difficulty of finding material which could be used for a verification with quantitative methods, is an argument against the adoption of such self-invented criteria.

It is scarcely more appropriate to endow those hypotheses and conclusions which will be given here—based as they are on an extremely modest empirical foundation—with the rank of *normative interpretations,* i.e. *recommendations* for carrying out the judicial justification process.

1.3.2. Against this background, the attempt at an analysis which is being made in this paper undoubtedly emerges as somewhat suspect. In it "hypotheses" will be presented, though at the same time the author does not wish to answer for these, either as elements in forming *theories* or as *recommendations.* Does the attempt, then, serve any purpose at all? Would it not be better to refrain from engaging in an undertaking which will produce little more than a number of more or less qualified guesses? To this the author would offer the defence (a) that legal reasoning deserves to be investigated more closely; (b) that in such an investigation, it is better to be aware of the pitfalls entailed by the special nature of the material; and (c) that it is legitimate to attempt—in the manner to be applied here—to draw up a precarious and probably, even at best, incomplete and highly simplified *model,* which consists of a number of hypotheses regarding the

solution of questions of relevance within such reasoning as is a part of the process of judicial justification. Within the framework of further investigations, the model can possibly be utilized, quite simply, as a point of reference, a modest preliminary staking out of the position, which can be referred to later on in a corrected or authenticated form—both for the purpose of describing what can be established as having actually taken place in judicial reasoning and for the purpose of making recommendations on what *should* take place.

What requirements should such a model meet? It should be based on reasonable assumptions about reality—otherwise it lacks all interest—and it should be framed, on that basis, in such a way as to avoid objections to its logical character. If, and to the extent that a verification of hypotheses on one or more points proves possible, a model *may* be acceptable as a description of reality; should such prerequisites regarding its basic features exist, the model *may* also serve as a starting point for recommendations. One condition for using it further in this way is that the model shall prove to be reasonably well-constructed; and from this there also follows the question of what kind of standards as regards quality should be aimed at when the model is being formed. However, it would appear that it is advisable to have only modest aims in the first instance. The following presentation is merely an attempt at setting forth a "model discussion" of this kind.

1.3.3. One essential basic hypothesis for the discussion has already been indicated, but it is worth restating it in more precise terms: what we are trying to find are such principles as define and delimit the relevance of arguments within a reasoning which is performed on the basis of general imperative propositions forming part of a system of similar propositions, and is performed exclusively on the basis of these propositions, of certain general laws of thought and of accepted methods of reasoning. This reasoning aims at reaching, as uniformly as possible from one case to another, one final solution of conflicts arising from such concrete factual circumstances as have already occurred at the time of the decision, or are expected to occur as a result of circumstances observed then or previously.

1.3.4. The last element of the definition just given—that we are dealing with reasoning within the framework of judicial assessment of circumstances which have already occurred or which, on the basis of definite indications, are expected to occur—was intended to express an essential *limitation* of the sphere covered by the present discussion. It claims validity only regarding such judicial reasoning as is employed in the application of

traditional legal rules, in which a certain sequence is linked with a fairly well-defined legal fact, simple or complex. In other words, the model will not cover the application of general provisions which leave full discretion to the judge or of rules to the effect that an authority is obliged to make a decision aimed at bringing about a certain state of affairs described by the legislator as desirable. This limitation is to be regretted, since there is an especially great need for investigating the principles of what might be termed "loyal reasoning" precisely when using the already important—and probably growing—group of rules which possess the character just referred to and which embrace matters and spheres of society that are at least as essential as those embraced by the traditional type of statutory enactments. On the other hand, it appears obvious that one would have to deal with entirely different problems, each requiring a thorough investigation.

1.3.5. The second basic hypothesis for the discussion carried out in the present paper is that the judge actually considers himself to be bound by a certain technique of legal reasoning and that this attitude also includes an endeavour to seek guidance in "formal" arguments—viz. in the first instance those which are taken from or which are connected with *authoritative material.*

When "authoritative material" is mentioned in what follows, no definite attitude is adopted towards any specific theory of the sources of law; we are only referring—without closer diagnosis—to such material as would without any hesitation be regarded as binding by the (Swedish) judiciary.

1.4.1. It might now be worth reconsidering whether, within the specially arranged and simplified framework of model reasoning, it might be useful and possible to draw up *classifications* of various arguments with a claim to relevance which will have to be tried *in casu.* One or two categories immediately come to mind: arguments for a *choice* (between A and B) and, in that connection, for *similarity* (between A on the one hand and C and D on the other) and *dissimilarity,* arguments for the *relevance of specific facts* (with the important subheading of *causality* arguments) and, finally, *quantitative* arguments (referring to the ratio of numbers). However, such a classification cannot be complete without a detailed investigation; otherwise it can hardly avoid becoming superficial and haphazard. The problem is illustrated in the following example.

1.4.2. Let us assume that both of the two banks in X-street in Y-town were robbed within a short period of time on the same afternoon by two

different persons, and that each person unlawfully took money belonging to the respective bank, with the intention of appropriating it, and in doing so used against the bank employees threats which involved pressing danger, in one instance by pointing a pistol at them and in the other by swinging a meat axe. On all the points which are expressly relevant in the description of the crime of robbery in the Swedish Penal Code (ch. 8, secs. 1 and 5), there is complete similarity between the two acts. Both offenders were arrested, brought to justice and found guilty. If one were to stick to the abstract descriptions of the crime as given in the Penal Code, it would appear obvious that both robbers should receive identical punishment. Only the difference between the weapons used could possibly be quoted as material for a certain differentiation of penalties, based for instance, on a difference in the danger represented by the threat in the two cases. Even half a century ago, it would have been considered a matter of course that the question of sanctions should be regarded, in principle, in this way. The arguments for the *choice* of sanctions were (with the exception of one referring to something quite different from the criminal act, namely certain previous convictions of the accused) on all essential points limited to those referring to the actual crime. It is in the nature of judicial reasoning, as I have tried to define it above, that *arguments based on comparisons of similarity* play an important part. Arguments which are drawn from factual events and attendant circumstances are usually coupled together with the various types of "legal arguments" which are exemplified in the foregoing—*in casu* above all in similar cases previously tried. Similarity and dissimilarity are often assigned either to "similarity of kind" —"dissimilarity of kind" or to "similarity of degree" and "dissimilarity of degree". Although the judge, on the basis of the wording of statutory provisions, may be forced to distinguish between these types, for instance, by establishing the difference between theft and robbery (difference of kind) and between robbery and qualified robbery (difference of degree), a difference of this kind as related to factual circumstances is obviously very difficult to define. The boundary between "arguments for choice" and "quantitative arguments" tends in a corresponding manner to be so artificial or, quite simply, arbitrary that it is scarcely advisable to uphold it. It is not possible to define the arguments for similarity or dissimilarity with the requisite precision required. If we take our example of the two robbers, the development in the field of criminal law during the past 50 years can be described as being such that a richly-varied range of sanctions has been created, and that at the same time, the circumstances which are considered to be *relevant* for determining the sanctions have constantly been extended and that, in consequence of this, an ever-growing number

of elements have been introduced in the comparison between similarity and dissimilarity.

Above all in this respect, the personal circumstances of the accused have been taken more and more into account. At the turn of the century, any comparison of similarity that was made was, with very few exceptions, directly related to the criminal act, whereas nowadays it embraces a whole range of other circumstances the taking into account of which would undoubtedly have been regarded as a violation of the principle that "all men should be treated alike". Since these have come to be acknowledged as having relevance as arguments for the choice of different sanctions—or, in other words, the field for comparisons of similarity has been radically widened—it is far from certain that the sanctions in the two cases in our example will be almost identical.

Now, examples from criminal law are particularly striking, since the circumstances relevant to sanctions but not to the description of the criminal act have to a great extent been indicated by explicit provisions.[8] In other fields, arguments for similarity, dissimilarity, and choice, the interplay of which the example was intended to illustrate, are seldom so accurately defined as they are within penal law. It is perhaps worth bearing these proposed categories in mind as rough divisions, but it is probably not possible to utilize them more actively in the continued investigation.

2.1. One fundamental hypothesis for what follows is that there is reason to believe that principles for the relevance of arguments, in so far as they can be applied at all, cannot be expected to form a coherent system, deducible from one or even a few axioms, and that accordingly it is also not reasonable to try to construct a *simple and uniform* model deduced by such means. Undoubtedly, different considerations of varying significance traverse the justification process, and it is therefore necessary to adopt several starting points. Obviously, with this approach, one runs the risk of ending up with a construction which is highly complicated. However, it would appear better to accept such inconveniences than to seek for simplifications that are all too streamlined. Let us discuss here some conceivable starting points that are justifiable with regard to the definition put forward above of the *function* of judicial reasoning and its *institutional framework*.

2.2.1.1. One such starting point arises naturally in connection with a judicial system which is distinguished in the main by the primacy of written

[8] Cf. Wasserstrom on comparisons of similarity in general, *op.cit.*, p. 32. See also the comparison between two cases, one sounding in tort and the other concerning property, *op.cit.*, pp. 100 ff.

law. (I would remind the reader that an investigation of the technique of judicial reasoning should limit itself to *one* legal system; disparities of material and practice concerning interpretation can be expected to be considerable.) This is the establishing of whether and in what way the *actual authoritative working material,* by means of its formulation, affects the reasoning in those respects which interest us. The function of judicial reasoning is, of course, often—even most often—to find the strongest connection between the factual circumstances forming the basis for decision and certain elements in this authoritative material. In the main, one can dismiss here the obvious and incontrovertible facts that (1) the stylized description in the statutory text often determines the actual type of questions around which the reasoning takes place and (2) different types of statutory provisions carry a corresponding variation in the issues propounded. The matter of criteria of relevance can obviously be placed at different levels of precision; at a high level of precision, it is probably necessary to distinguish between the technique adopted when applying for instance, on the one hand, older legal enactments mirroring concrete cases and, on the other, modern penal-law statutes characterized by a generalizing language which has been called, in Swedish discussion, "synthetic".[9] This does not mean, however, that it should not be possible at a lower level of precision to formulate more general principles, which can be assumed to be used when applying statutory provisions in general, as also when reasoning in fields where there is little or no legislation.

2.2.1.2. To begin with, it can be stated without further comment that the text of the law naturally supplies a *rough network of criteria of relevance,* inasmuch as it is regularly built up as a description, albeit extremely limited, of certain circumstances which together constitute legally relevant facts. In 3.3 below we shall discuss in more detail the significance of this structure for the purposes of reasoning technique. It can be established in an equally summary fashion that, in addition to this, one does not find in statutory texts any explicit instructions for the use of "arguments" for all those cases where the question is whether or not a certain concrete circumstance in issue shall be considered to be covered by such descriptions, or whether the legal consequence set out in the text shall be employed for other reasons (or, in spite of the plain meaning of the text, not be employed).

2.2.1.3. It would appear that a few observations, rather trivial in themselves, regarding statutory provisions in general—in the first place

[9] Agge, *Straffrättens allmänna del, andra häftet,* Stockholm 1961, pp. 87 f.

modern provisions—could provide certain angles of incidence. Statutory texts are, whether they are case-orientated or worded in general terms, and whether they operate with essentially technical terms or more commonplace language, the result of what could be called a *process of selection intended to establish typical,* i.e. particularly frequent or particularly important, *features.*

In another connection, the present writer has tried to illustrate this procedure in respect of copyright rules governing the author's right to demand that his name be set out on copies of his work whenever it is made available to the public (*droit de paternité*).[1] There the process of selection is presented as an analysis of different opposing interests where "typical" is separated from "non-typical", after which those interests of the parties concerned which have been sifted out as "typical" are counterbalanced; the process results in a legislative solution based on this confrontation of the *typical* interests. That solution may appear to be highly debatable, e.g. when it happens in the individual case that *both* the opposing interests are *non-typical* and the generalization made may, in other words, seem to be unfair.

The legislator's process of selection, which can be assumed to be based on more or less well-substantiated frequency or similar *quantitative* reasoning (to which is added, as a second phase, *qualitative* appraisal of the selected elements), means that deliberations which refer to atypical situations, interests, etc., are rejected as irrelevant, at least for the framing of the text. A process of selection of this kind is, of course, necessary wherever *general* solutions are sought for, but this does not mean that the atypical interests or situations are irrelevant for the purpose of *application of rules in individual cases.* On the contrary, one can claim that it is precisely on account of the inevitable existence, in the concrete cases presented for judgment, of such atypical elements which have, so to speak, been pushed aside preliminarily by the legislator that application of statutory rules so often meets with great problems.

2.2.1.4. Nevertheless, it appears reasonable to assume that the same endeavour as is expressed in the legislation to find acceptable solutions in *typical cases*—viz. cases which occur frequently or are especially worthy of consideration for other reasons—also plays a part in judicial reasoning. Within the framework of general principles, the judge tries to find solutions which merit validity for *groups* of cases and which thus express rules at a lower level of abstraction than that chosen by the legislator.

[1] Strömholm, *Le droit moral de l'auteur,* vol. II: 1, Stockholm 1967, pp. 32 f.

In order to render the idea concrete, reference may again be made to the above-mentioned example regarding copyright. There, it was assumed that the legislator, when formulating the rules governing the right for the author to be mentioned as the creator of his work, chooses to regard the interest, legitimate in itself, of the author to receive what honour may be due for his creation and to be morally responsible for its content as being the strongest and most frequently occurring interest on the part of the author—whilst, for example, it is assumed that pure publicity or a self-assertion which is clearly unreasonable in relation to the importance of the work or the special conditions of its publication seldom determines the author's attitude. At the same time, the legislator assumes, with regard to the opposing interests which can cause a publisher, theatre manager or other person making use of the work to oppose the author's claim to be mentioned, that they most frequently involve a question of cost. When choosing a solution, these interests, considered as "typical" on the strength of an estimate of their frequency, are confronted by a "qualitative" assessment, and the author's interests, which in the case in question gain some support in the "interests of the public", are found to be more worthy of consideration. With that, the framing of the *general statutory rule* is in the main settled.

Let us now assume that in *a concrete case* an author who has published an unimportant note in an economic journal of high standing insists that his name shall be mentioned, although his only interest in the matter is to acquire publicity for his activities as a financial consultant and in spite of the fact that he was well aware that the policy of the journal is to publish all matter anonymously; this policy is based on the interest, openly stated, of protecting contributors, who are often obliged to carry out delicate assessments of companies and economic development, in the face of reprisals, undue influence, or attempted bribery. Here the judge can establish the fact that the legislator's process of selection does not hold; the average solution based thereon is scarcely satisfactory. *Should* the judge consider the legislative solution to be so unreasonable *in casu* that he ought to seek another solution, we may assume that he will try to formulate a *principle* for this deviation from the law. (Alternatively—a less appealing but probably more frequent way out—he may seek to avoid conflict with the legislator's "normal solution" by maintaining, for instance, that the author must be considered to have given up his *droit à la paternité* by tacit acceptance of the journal's normal policy. There are other similar devices, too.) Should the judge make a *reduction* of the legislative solution—i.e. an openly-acknowledged narrowing of the scope of the provision concerned —he is, however, likely to consider this to be *legitimate* only if it can be

formulated by at least some generalization—in other words, on the basis of a more refined typification, intended for a subordinate group of cases within the framework of those considered by the legislator. The judge is likely to feel under an obligation, when he "corrects" the law, to do so by referring to a more adequate provision made for cases which are stated with greater precision. It is, as usual, difficult to find clear examples in practice, where corrections of this kind have been made by advancing general though, in relation to the legislative solution, more particular and precise provisions. Mention may be made, however, of a few decisions of the Swedish Supreme Court. In one case, dealing with the law applicable to matrimonial actions between Baltic nationals who formally held Russian citizenship but were in actual fact stateless refugees (1949 N.J.A. 82), the Court made a restrictive interpretation of ch. 3, sec. 2, of the Act of July 8, 1904, governing certain international legal matters concerning marriage and guardianship. What the Court in fact did was to reduce for a specific group of cases—namely those where an alien holds a "purely formal" citizenship of a state with which, being a refugee, he has broken all contacts—the scope of a statutory text which was both perfectly clear and general in scope. The Court laid down explicitly a new general rule for this group of aliens and, by virtue of that rule, applied Swedish law. We may mention another judgment of the Supreme Court, also dealing with private international law (1964 N.J.A. 1: explicit reduction of an accepted customary principle).

2.2.1.5. For the purposes of the model which we are attempting to draw up here, it appears justifiable, on the strength of the reasoning above, to formulate the following basic principle. Those elements in a factual situation which, when the legislative solution based on typical cases was adopted (or when a customary principle was established), were pushed aside as being atypical—and were thus considered as irrelevant in the "first round"—need not necessarily lack relevance in judicial reasoning for or against this solution *in casu*. In order to be assigned relevance, however, such elements must at least be *capable of being generalized in principle* and fitted into the framework of a rule of law, i.e. a new solution with validity extending beyond the individual case in question.

2.2.1.6. In order to test empirically the element now proposed for our model for criteria of relevance, it would be necessary to undertake an extensive investigation, the main question in which would be whether and to what extent courts are prepared to make clear "corrections" of legislative solutions by formulating rules which are general in principle but

valid for an area limited in relation to that covered by the original legislative rule, or whether they prefer to avoid the issue by referring to the "circumstances of the case" or by resorting to other, similar devices.

The issue of empirical verification leads us back to the discussion under 1.1.5. above, where the question was raised whether three, rather than two stages in judicial reasoning must be reckoned with: "the process of discovery", "the internal process of justification", and "the account of the operation" as presented in the court's opinion. There may be many practical reasons why a judge, however much he may be convinced that his "internal process of justification"—and this is what our discussion is about (cf. 1.1.6. above)—comes up to the required standard, may nevertheless prefer to refrain from formulating the general rule which he has sought in accordance with our hypothesis and will make reference, instead, to the particular "circumstances of the case".

The empirical verification of the hypothesis presented above would require large-scale interviews with judges as well as a systematic scrutiny of the written grounds for a great number of decisions. As pointed out above, both procedures have been tried by the present writer, the former—which should be the most rewarding, if one has reason to believe that the "internal process of justification" and the "account of the operation" differ essentially—being applied to only a very limited extent, however. Scrutiny of a limited body of case material (see 1.1. above and 4.1. below) tends to show that the "generalization hypothesis" advanced here does not find sufficient support in court opinions published in Swedish law reports. On the other hand, such sparse interview material as the present writer has been able to collect indicates that the hypothesis is at least probable in respect of the "internal process of justification". Interviews with experienced judges show, however, that there are considerable variations, both on the part of individuals and from one branch of law to another. To sum up, the hypothesis emerges as "weak" but not without support.

2.2.1.7. Our hypothesis can be placed in relation to Professor Strahl's example given above in the introduction, where he expresses the opinion that the advantages of a certain solution in favour of a certain political party should be considered as an unacceptable argument. If there is anything that makes an argument incapable of generalization, and thus, in accordance with the hypothesis, unable to support a general rule, it is the circumstance that the argument relates to a certain individual or some other unique phenomenon. *Names* which are not descriptions of species cannot be included in general rules at all (in contrast to instructions, regulations, charters and other directives intended for a certain definite

person or organization). A German writer, Professor Bockelmann, gives an example of the difference between what can be regarded as "just" and what must be rejected as "unjust". Rules prescribing a right of way for vehicles coming from the left (or right—one may be as good as another) are assigned by him to the first category, whereas similar rules for automobiles of certain specified makes would fall into the second.[2] Without going into the question of justice in further detail, it seems possible to state that the inability of the individual name to be generalized—the listing of *several* names does not mean generalization—renders arguments which refer to named individuals and organizations irrelevant, except in cases where the name is simply given as an unimportant description for the representative of a certain group. In other words, the fact that a solution is to be the advantage of Mr Nils Andersson or the Social Democratic Party of Sweden would be an irrelevant argument in our model, unless the words "Nils Andersson" are used as a designation for a person who is of some interest only as being a representative of, e.g., all the illegitimate children in Sweden whose fathers are citizens of countries where there is no possibility of instituting paternity suits, or the political party just mentioned is considered to represent the interests which are typical of and important for, e.g., all non-profitmaking associations having the aim of forming political opinions, or some similar aim.

2.2.2.1. It appears probable that the structural element in statutory enactments plays an important role as regards criteria of relevance in judicial reasoning. Thus the *systematic coherence of legal rules is an element of considerable importance.* It is, of course, true that Swedish legislation does not constitute a systematic codification and that, accordingly, the established "systematic interpretation of the law"[3] in Continental methodology does not hold general validity for Swedish law. Nevertheless, it would be wrong to claim that modern Swedish legislation is not influenced by such distinctions, generally acknowledged in Continental—particularly German—as well as in Swedish and Nordic legal writing, as those between the law of property, the law of obligations and the law of delicts, and that the idea of definite, named institutions, with specialized rules, is not living in Swedish law. It need not imply a relapse into conceptualistic jurisprudence to try to find the place of a problem in the system; it may imply, as

[2] P. Bockelmann, *Einführung in das Recht,* Munich 1963, p. 36.

[3] See, for example, K. Larenz, *Methodenlehre der Rechtswissenschaft,* 1st ed. Berlin, etc., 1960, pp. 244 ff.; K. Engisch. *Einführung in das juristische Denken,* 4th ed. Stuttgart 1968, pp. 77 ff. As regards Swedish law, see Strömholm, *Lagtolkning: huvudproblem och funktioner,* Uppsala 1972, pp. 5 f., 25 f., 34.

has been urged in modern discussion, above all by Canaris,[4] a striving for teleological points of guidance. However, consideration for the place of a rule or legal problem in the system should also be of importance for the relevance of arguments. The notion of the judicial system as being complete and coherent can be assumed to influence the relevance of the argument in two different stages of judicial reasoning. First, the position of a problem in a system means that certain arguments (for instance, those which can be taken from rules of law in a neighbouring area) acquire greater strength than others taken from more distant areas. Secondly, *conformity of system,* viz. the endeavour to find solutions similar to those found in the same part of the system, becomes an argument in itself.

2.2.2.2. Earlier in this paper (1.4.1.), arguments of choice, similarity, and dissimilarity were mentioned as groups of arguments which are especially significant. In a system of statutory law, the elements of which are not systematically arranged,[5] arguments of similarity and dissimilarity play a dominant role, and it often becomes a matter of finding a reasonably well-established contract type or principle under which a case can be fitted. Practically all arguments for choice have the nature of arguments for similarity or dissimilarity. A Finnish writer, Makkonen,[6] gives an example, viz. the question whether a majority rule existing in Finnish local government law regarding decisions for purchases, sales and exchange made by the local government authority in regard to real property is also valid as regards gifts of such property. In this connection Makkonen, following the German writer U. Klug, postulates various "spheres of similarity", all formed with the aid of different legal institutes or categories.

2.2.2.3. In order to extend further the two assumptions just made (2.2.2.1. *in fine*), it seems justifiable to advance the hypothesis that the existing legal systems—which can be said to imply the creation of a superstructure to the typifying of concrete cases effected by individual rules, in that certain criteria were determinative for the placing of the rule concerned into this or that category—strengthen the endeavour to find *general* arguments and to set aside those which are not capable of being generalized. Every main sphere of law—e.g. the law of property or the law of obligations—and probably the specific legal principles as well, can be

[4] Cl.-W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz,* Berlin 1969, pp. 86 ff.

[5] Casuistic at least inasmuch as only rules on particularly important typical institutions are laid down explicitly (on the assumption that such provisions will be used by courts of law over a wider field).

[6] K. Makkonen, *Zur Problematik der juristischen Entscheidung,* Åbo (Turku) 1965, pp. 132 ff.

assumed to be characterized by principles of relevance which are not necessarily valid in other fields.

2.2.2.4. One example must be mentioned. Two parties have concluded a purchase agreement; a dispute arises as to whether a binding agreement was entered into, and the seller institutes an action for the cancellation of the agreement and the return of the goods. The buyer, who maintains that the agreement is valid, declares that the seller, on concluding the agreement, acted negligently in a certain way. There cannot be, *a priori*, any doubt about the relevance *in principle* of this argument for the final outcome of the case. It is an argument for a choice between two solutions, the one demanded by the plaintiff, who wishes the contract to be avoided, and the one advocated by the defendant; if there are statutory rules or fairly fixed case-law principles, all arguments for similarity between the case at bar and the cases thus already decided are relevant. Let us suppose instead that we are concerned with a dispute concerning an owner's right of recovery (*vindicatio*). The owner of some movable property had deposited it with another person who in his turn disposed of it in breach of faith to a third person, who now maintains that he acted in good faith. The acquisitor's argument, that the owner acted *negligently* when he handed over the goods to the perfidious bailee, and that he should accordingly put up with the consequences, is by no means unreasonable. Should the Court find that the acquisitor displayed "bad faith" because he failed to investigate the title of the person from whom he acquired the goods, the decision of the Court might very well be directed towards a comparison between negligence displayed by the owner and negligence shown by the acquisitor, as may be envisaged in a contractual dispute between a seller and a buyer. Under modern Swedish law, however, it appears probable that the behaviour of the owner would be considered irrelevant (unless it involved elements which directly increased the "legitimation" of the perfidious bailee with regard to a third party). However, the terse and out-of-date statutory text dealing with "extinctive acquisition" in this situation could hardly be quoted as an obstacle to regarding the owner's negligence as an element which should be taken into consideration.

The example is of some interest from a more general point of view. It illustrates the close relationship between "substantive legal rules" and technical principles for reasoning. It is possible that it would be more appropriate to view the legal situation presented in the example as an expression of a "substantive rule", signifying that, in a dispute about who has the right to retain movable property which a disloyal bailee has made over to a third party, the owner's negligence does not in principle deserve

consideration. If there is a basis for such a rule, it would be as meaningless to advance an argument regarding the owner's negligence as it would be, in Swedish law, to attempt to prove, in a case about a railway's responsibility for damages caused by sparks from a locomotive, that the railway staff had not been guilty of negligence. (By way of information it should be added that under a special statute the railway carries strict liability in Swedish law.) And it would naturally be equally meaningless—and calculated to complicate a simple matter unduly—to speak of a "technical principle for reasoning" when we are merely in the presence of an ordinary rule of law. We have tried to choose an example which is not so self-evident. It is obvious that criteria of relevance, as elements of a technique of reasoning, are of a *normative* character. It is also not improbable that a certain development is taking place in the form of interaction between principles concerning the technique of reasoning and "ordinary substantive legal rules", in that norms of one type are transferred to the other. However, it is not possible to do more than to hazard a guess that this is so.

2.3.1. An observation which is often advanced is that neither traditional technical devices in adjudication nor the traditional methods of interpretation have any independent value of their own as guidance in doubtful cases. They constitute designations of procedures—nothing more. Conclusions *ex analogia* and *e contrario, argumentum a maiore ad minus, a minore ad maius,* and *argumentum a fortiori*[7] can be described as traditional devices. Among traditional interpretation methods discussed in methodological works, we find linguistic, logical, systematic interpretation, etc.

2.3.2. Interpretation methods can be left without further comments here; their nature, implications, and use are far too much in dispute for them to be discussed in the connection we are considering. On the other hand, the possibility cannot be excluded that the accepted technical devices for "conclusions" could be fitted into a model for criteria of relevance as embodied in a technique of reasoning used in order to justify authoritative solutions which imply the application of general norms to individual cases. Thus one could conceive that all arguments which could, *with the aid of these accepted notions,* be related to solutions in the authoritative sources (law, *travaux préparatoires,* case law) would also be relevant, though this statement is of very little value. Should an authoritative source expressly acknowledge the relevance of the nature or consequences of a certain act

[7] Schneider, *Logik für Juristen,* pp. 167 ff.

(purpose, damaging effect, etc.), the principle just suggested would lead no further than to the trivial conclusion that all arguments for similarity between the concrete case in question and those decided authoritatively are relevant; this means nothing more than that every argument for similarity can at least be adduced in support of conclusion *ex analogia.* It is evident that no choice between relevant and irrelevant arguments of similarity can be made in this way, and the converse holds, *mutatis mutandis,* for other traditional devices.

2.4. Further, it should be borne in mind that it is often possible to reject arguments, *not* as being irrelevant in principle, but as being *superfluous,* either because arguments already advanced are sufficient or by virtue of certain self-evident laws of reasoning. An example of the latter—which, however, is not without a problematic character in all those cases where quantitative arguments are of no avail—is the principle *majus includit minus,* which implies that an argument that is *only* of interest for the "minus" should be rejected as superfluous if there are sufficient arguments for the "majus". As another example, it can be mentioned that arguments assignable to a *certain* event can be disallowed without being irrelevant in themselves, if an *earlier* event is already sufficient ground for the legal consequence asked for by the party.

2.5. In addition to such principles as may follow from the nature of the authoritative material, there is reason to take into account such consequences with regard to the relevance of arguments as may follow from the nature and form of *judicial proceedings.*

3.1. The conflict-solving function of courts presents particular features which deserve to be emphasized. Their solutions represent a *theoretical level of ambition* which is, consciously, fairly modest. If a scientist presents a solution to a problem, he implicitly claims (even if his claim is not "absolute", and is formulated only in reference to a given system of measurement or designation) that *all* circumstances which are "relevant"—in the sense that their absence would have resulted in the sequence studied, or the substance examined, being of a more or less different form[8]—have been observed. If a technologist puts forward a proposal for a solution regarding a certain construction, he makes a similar claim: that he

[8] This is a consciously approximative attempt at characterizing "relevance" in non-normative reasoning, and makes no claim whatsoever to being exhaustive or exclusively valid. The essential feature is that "relevance" is something which is not settled by normative means, but can instead—according to one rational criterion or another—be assigned to any conceivable circumstance.

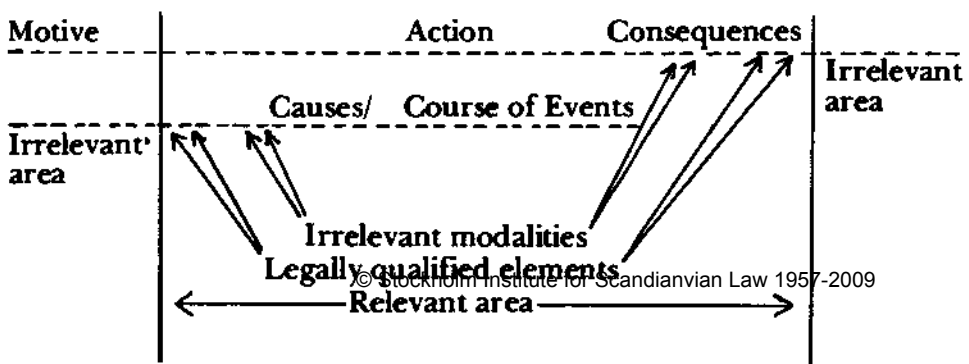
has taken into consideration everything which affects the applicability of the proposal. The claims made for the present-day administration of justice are far more modest. In the main, this system is a mechanism for putting an end to private *disputes* and for enforcing conformity to prevailing standards. It operates with certain normatively prescribed keywords (or "key concepts"), in standardized verbal descriptions of typified events and circumstances, around which evidence and arguments are concentrated.

It would seem that this definition of the function of the administration of justice could be used for some more precise hypotheses concerning criteria of relevance in legal reasoning.

3.2. One hypothesis, based on the function and purpose of judicial proceedings, could in purely general terms be expressed thus: Arguments drawn from factual circumstances are irrelevant if *evidence* regarding the facts in question, should these be litigious, would not be admitted. It must at once be stated that this hypothesis, plausible though it may be, is not particularly helpful. In the first place, it leads to a principle which is far from simple and self-evident, namely that given in ch. 35, sec. 7, of the Swedish Code of Judicial Procedure; and, secondly, it provides no help for assessing relevance in those cases where the factual circumstances from which arguments have been drawn are indisputable, or are such that no evidence is required at all. The above-mentioned provision in the Code of Procedure runs as follows: "If the court is satisfied that a fact which a party wishes to prove is without relevance to the action, or that evidence which is offered is unnecessary or would manifestly be of no avail, the court may refuse to permit such evidence to be produced." In spite of these limitations as to the validity and field of application of the hypothesis, it seems that it could at least serve as the basis for reasoning in greater detail. This can be carried out by means of three sub-hypotheses.

3.3.1. The following attempt to illustrate graphically the legal appraisal of an action or event (Table 1) can be taken as a starting point:

Table 1



The sub-hypotheses could be expressed in the following manner.

3.3.2. Arguments assignable to facts which lie *too far back in the cause or motive chain* (beyond the vertical line which forms the left-hand boundary of the relevant area) are not admitted as being irrelevant. Examples can easily be found, above all, in the field of criminal law. If a person fulfils the objective and subjective conditions making up a certain crime, arguments related, for example, to his intentions beyond those referred to in these conditions ("mercy killing", throwing eggs at an ambassador for "serious" political reasons) are irrelevant, unless express enactments or unwritten principles prescribe that regard to such circumstances shall be paid in the individual case (for instance, in cases of self-defence or provocation). This limitation of the claims of the judicial process to achieve a complete appraisal of the entire course of events is obviously a practical necessity, determined by its function of bringing an end to disputes in a practical manner with reasonable economy of investigation. It is obvious that this implies a considerable limitation in relation, e.g., to an historian's investigation into motives and causes, and that this severance of the chain of reasons and, therewith, of the chain of arguments "backwards" may, in some exceptional cases, appear brutal; it can be criticized as being a one-sided consideration for "symptoms" rather than for the "reasons for the illness". However, when comparing the legal appraisal with the historian's method of working, it should not be forgotten that the "verdicts" of history only constitute verbal sanctions. It would be an insufferable claim to omniscience, to definitiveness of judgment and to moral knowledge, if on behalf of the apparatus entrusted with, e.g., penal sanctions it were to be asserted that this weighty instrument is used in accordance with a comprehensive and scientifically irreproachable analysis of facts and on the strength of all the arguments which these can give rise to. In the same way, it would be preposterous if diagnosticians, who do not have the power actually to "cure" the disease of deviating behaviour, were to claim that they based their decision on a diagnosis of *all* causes of disease. The task of maintaining peace in the community by attacking certain phenomena harmful to society appears to be more important than the ambition to carry out a total analysis of the actions and events which are to be judged.

The example mentioned earlier (2.2.1.7.) from Professor Strahl, regarding the impossibility of adducing within the framework of Swedish present-day judicial reasoning technique the fact that a certain outcome of a case benefits a certain political party, could no doubt be extended so as also to illustrate the sub-hypothesis suggested here as an element of a model for such a reasoning technique: let us presume that an employee

has misappropriated his employer's funds in order to assist a political movement, and that he cites this purpose in his defence. This argument relates to those motives of the accused *before* the crime (or possibly to the consequences of the crime *outside* the relevant sphere, a matter dealt with immediately below) which are not relevant; arguments based on this purpose are accordingly also irrelevant.

3.3.3. Arguments referring to facts which are *too remote in the chain of consequences* (conclusions) following upon the act—(beyond the vertical line forming the right-hand boundary of the relevant area)—are similarly dismissed as being irrelevant. The situation just given, where embezzled means were handed over to a political organization, can be taken as an example.

Two comments can be added to this sub-hypothesis. In a number of fields, e.g. in the law of torts and in the administration of the rules on crimes which involve the causing of danger, the demarcation of consequences which should be taken into consideration as being relevant is often very difficult to decide. The method of reasoning proposed here, which is related to specific legal provisions, is of course subject to the same difficulties; these are, however probably inevitable and do not give rise to any objection to the principle as such.

The other comment refers to the relationship between "legal methods" in a narrow sense[9] and the technique of reasoning viewed—as here—as rules for the judge's *process of justification.* A methodological standpoint which pays particular regard to the "purpose" of legal rules and takes into consideration even distant and perhaps unforeseen *effects*—the author has in mind, particularly, a radical teleological method—must meet special difficulties when decisions reached by the application of such a method are to be *accounted for* within the framework of a model for reasoning technique of the type outlined here.

3.3.4. We now turn to the third sub-hypothesis. Regarding elements within the area which is relevant in principle, there are arguments that are *not legally qualified* (and which are denoted in the graphic illustration above as "irrelevant modalities"), and so cannot have any claim to relevance. It is easy enough to state this hypothesis, but it is hard to exemplify it adequately, above all because the language in which certain elements in an action or course of events are legally "qualified" (by means of being mentioned expressly in statutory provisions, case law or *travaux pré-*

[9] See Strömholm, *op.cit.* in 1.1.1., footnote 2, *supra,* pp. 308 ff.

paratoires) can scarcely ever be so precise that it would be easy to draw a boundary between what is relevant and what is irrelevant. However, the objection is not decisive; it is the kind of problem which can never be avoided. The example given above of a tortfeasor's motives can be used in order to illustrate this hypothesis as well; such motives usually exist and many undergo changes (without becoming more relevant in consequence) while the act is actually being committed. In a considerable number of cases, however, the hypothesis gives hardly any guidance at all. It is, of course, precisely in those situations where the judge has to consider the relevance of an argument which is *not* explicitly legally "qualified" that the real difficulties arise.

3.4.1. In the introduction, it was said that it is not possible to expect criteria of relevance in legal reasoning to constitute a rational and coherent system. Various considerations are intermingled, and different principles are in all probability applicable at the same time. The sub-hypotheses proposed under 3.3. above are based on the view that judicial proceedings as a mechanism for solving conflicts are subject to certain requirements for working economy. The decision-making process is carried out *authoritatively,* under the provisions of binding normative material. Accordingly, cutting right across all proposals for technical principles of reasoning, based upon rational or functional considerations, there runs a principle which may be self-evident and which could be formulated as follows: Relevance always devolves upon (1) arguments which are *taken directly from acknowledged authoritative sources*—including, indisputably, statutory texts, *travaux préparatoires* and Supreme Court opinions, at least in so far as these express a fairly established practice; (2) arguments which refer to such *factual circumstances as have been considered in such sources;* and (3) arguments which, by using arguments of similarity in accordance with the principles outlined here, *can be placed on an equal footing with circumstances mentioned under* (2).

3.4.2. The Swedish Supreme Court decision 1968 N.J.A. 104 can be cited as a concrete illustration of what has just been said. The case in question dealt with the implementation of a provision—regarding compensation for gramophone manufacturers and others for the exploitation of their products in broadcasting and television—which did not provide any guidance at all for settling the amount of compensation. The opposing parties—the Swedish Broadcasting Corporation and the gramophone industry—adopted quite irreconcilable points of view: the latter party, plaintiffs in the case, asked for approximately 30 Swedish crowns a minute,

while the Broadcasting Corporation maintained that 3 crowns a minute was a reasonable rate. The courts' attempts to find criteria on which to base a judgment that (and this was expressly emphasized by the Court of Appeal) "must to a very great extent be arbitrary" are of interest here, above all because of the energy devoted by all the courts concerned to the problem of how to use fairly general statements in the *travaux préparatoires* in order to *give legitimacy* to the various considerations acknowledged as being relevant. It is only when this material had been exhausted that the Supreme Court went on to discuss material brought forward by the parties regarding conditions and solutions in other countries. One may approve or disapprove of this giving of priority and of this maximum use of arguments which can be extracted from the authoritative material, but it seems clear that a model for legal reasoning—the purpose of which is to draw up a plan for criteria of relevance with a limited number of principles, independent of one another but each tolerably rational, or at least coherent, which it could be meaningful to test against Swedish legal material—must include the principle that authoritative material is invested with a high degree of relevance.

4.1. Additional proposals for the construction of a model for reasoning technique of the type referred to here could certainly be made, though only after an exhaustive and comprehensive empirical investigation of a very considerable body of material. Such an investigation would also be required in a study of the applicability of the principles proposed here in the legal reasoning—that is to say, the applicability of the model proposed for the purposes set out under 1.3.2. above. In addition to an empirical examination, the investigation ought to cover certain special issues, in order to elaborate in more detail what we have considered it possible to establish hitherto. Thus it would seem worth the trouble to study the question of the relation between criteria of relevance and reasoning-technique concepts such as analogy, in the first place in order to try to decide to what extent relevance limitations of the type referred to here "govern" the use of such devices. However, in the light of cases reported in the Swedish Supreme Court reports (N.J.A.) so far collected, which cover a period of ten years and have been analysed preliminarily, there is little hope that such empirical studies will provide satisfactory answers. The proposed study of the relation between criteria of relevance and "methods" in the narrow sense of the word used here[1] would possibly be more rewarding, though documentation is equally difficult to procure. It

[1] *Op.cit.* in 1.1.1., footnote 1, *supra.*

appears to be of interest, *inter alia,* to investigate whether and to what extent various methods can be described and analysed in the terms and categories of reasoning technique which have been used here (for instance, whether a certain "method" can be characterized by the relative weight it assigns to different types of arguments, or with regard to the more limited or wider application of criteria of relevance which characterize it). Finally, it seems meaningful—after a study of the order of priority between sources of arguments and arguments which has been given in other connections, together with the criteria of relevance characteristic for legal reasoning technique[2]—to study the interplay between principles of relevance and the priority given and to try to answer the question: Can any uniformity be observed in the relation between priority given to arguments and their degree of relevance? Here too, preliminary studies of material indicate documentation problems that are extremely difficult to overcome. The difficulty of obtaining any evidence at all regarding principles of the kind sought here is probably of special significance in the case material which is available in printed reports and which for many reasons can be assumed to be an atypical selection. It is not only the laconic style of Swedish judgments which contributes to the material being scanty, but also the fact that to a great extent counsel, in framing their standpoint, accept either consciously or unconsciously those limitations in the relevance of arguments which they believe to be valid in judicial reasoning, and avoid any conflict with these.

4.2. In summing up, we may try to answer the question: How does the "model" for criteria of relevance as regards arguments in legal reasoning really look?

In the absence of empirical verification, which alone can provide the basis for a more definitive appraisal, scrutiny of the "model" can very suitably be directed towards its relative coherence. Even if, as has been pointed out here in several connections, one cannot count with a uniform and "streamlined" model, it is a reasonable assumption that freedom from contradiction should exist between the hypotheses indicated. Do any of the proposed criteria of relevance *exclude* any argument or any group of arguments which according to other relevant criteria would fall within the "relevant area"? Can any *contradictions* be found in other respects which indicate that the "principles of construction" are arbitrary or irrational?[3]

It is probably easiest to begin with the principle dealt with under 3.4.1.

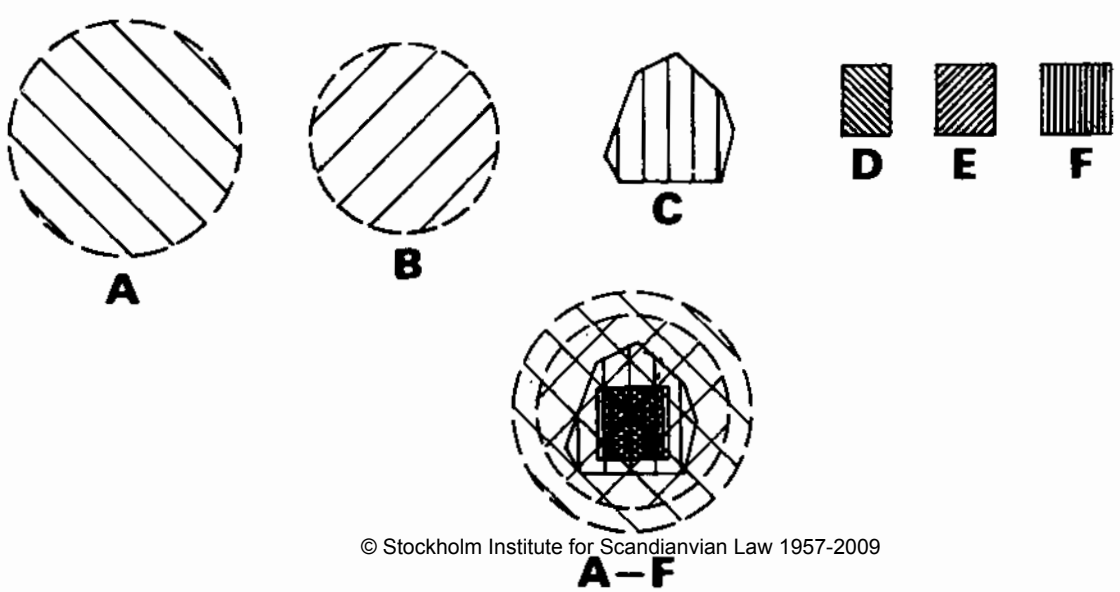
[2] *Op.cit.,* p. 322.

[3] Contradictions can probably not be excluded, but for that reason it should be required that the "model" should also include *principles of priority* for their solution.

above: the fundamental relevance of all "authoritative" material. That is the *clearest* principle for setting limits (even if, for want of empirical material, it is difficult to state with any claims to precision which types and degrees of connection with authoritative material may refer to the group in question such arguments as are not taken directly from such material), but it is at the same time the principle for which "rational" reasons cannot be advanced, and do not need to be advanced to the same extent as for the application of other principles. If one were to try to illustrate graphically the application of the various criteria, the vague criteria—"generalizability" and "system conformity"—must be regarded as general guiding indications, rather than as exact principles. They can serve as rough "basic test data" for reasoning which has been carried out. They would be illustrated graphically by large, regular areas with undetermined outer limits (Figs. A and B). The principle of the relevance of authoritative material would give an irregular, "spiky" figure with relatively clear outer limits (Fig. C). No conflict with the criteria A and B would seem to be probable, since the authoritative material comprises normally generalizable and system-conforming arguments.

The three sub-hypotheses given above under 3.3. which, like the principle of the relevance of authoritative material, express the limitations of legal reasoning (though less harshly) can obviously clash to some extent with this principle, but since on the other hand it should be evident that the latter principle "takes over" in such cases—there is, then, an order of priority—the conflict is not of such a nature as to jeopardize the coherence of the system.

Table 2



In a diagrammatic description, the three groups would be lined up in a row as three regular areas with fairly clear boundaries, coinciding largely, though not completely, with the area covered by the principle regarding the relevance of authoritative material (Figs. D, E and F).

With that, our graphical illustration would assume the appearance shown in Table 2.

This model is "rational" in the limited sense that it covers a number of fields which in the main overlap, each being defensible with regard to the material and function of legal reasoning. Its lack of precision is obvious: only empirical material can supply precision—provided such material is suitable, without unreasonable interpretations and subtle interpolations, for the analysis which would be necessary.

Finally, it may be added that the model outlined here may possibly provide a certain impulse for the study of the *priority hierarchies* which was mentioned in the paper referred to in the introduction[4] as probably being a normative feature of legal reasoning in addition to criteria of relevance. At all events, it is conceivable—several judges have indicated in discussions that this may be so—that it should be possible to arrange arguments in order of precedence in three groups by using the categories graphically illustrated above: (1) arguments under groups C, D, E and F; (2) arguments in Fig. B; and, finally, (3) arguments whose relevance can only be adduced by reference to circle A. The purport would be that these various arguments do not merely "take over" in this order in the event of reciprocal collision, but also, from a purely time-factor point of view, appear in that order in the judge's reasoning.

[4] *Op.cit.* in 1.1.1., footnote 2 *supra*, pp. 322 f.