TELEOLOGICAL CONSTRUCTION OF STATUTES

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1. INTRODUCTION

"Our judges have always shown, and still show, a really marvellous capacity for developing the principles of the unwritten law, and applying them to the solution of questions raised by novel circumstances. Unfortunately, they have, for reasons which it is perhaps not very easy to define, been far less successful in their interpretation of the written law, in other words, of statutes."

This statement by Sir Frederick Pollock dates from 1893.[1] Judging, however, by certain pronouncements by modern Anglo-Saxon legal writers it would seem to have retained at least part of its validity. Even at the present day the courts tend to show a certain awkwardness in the application of statutes to concrete situations,[2] though whether this is more frequently the case in England than on the Continent I am unable to judge. Moreover, it seems to me that the problems of the application of law are now given as much attention by English-speaking writers as by others. In the English and American works listed at the end of this article many penetrating views are to be found on these problems, and indeed the list could have been made considerably more extensive. On the other hand, I have difficulty in understanding how English jurists can obtain any guidance from such a standard work as *Maxwell on The Interpretation of Statutes.* Cannot one find in its pages support for practically every conceivable way of setting about applying a law to a concrete case? Maxwell's handbook can of course always be used as an index to the innumerable cases it deals with. But I have no idea what kind of conclusions can be drawn from these cases as regards the methods according to which English judges have to apply statutes.

It has been said that interpretation of statutes is one of the domains where English law diverges from Continental law. Per-

[1] Quoted from Davies, p. 519. See the bibliography, *infra* p. 117.

[2] Stone states in his book, published in 1946: "The common lawyer, despite the growing importance of legislation, has not acquired the techniques of handling legislative materials in a similarly creative manner to that in which he handles case-law. Our judges do not yet argue by analogy from statutes as they do from cases" (p. 200). See also Pound II, p. 950, Amos (1934), pp. 166 ff., and Paton (1948), p. 188.

sonally, however, I have a feeling that here, as in so many other respects, there has been an exaggeration of the differences in *technical* form between the two systems of law. If we look at their contents the problems of statutory interpretation appear, nowadays at least, to be much the same in English and in Continental law. It is true that the fact that precedents are binding even in the codified parts of English and American law constitutes an important difference.[3] In the U.S.A., moreover, the requirement that a statute must not be applied in conflict with the Constitution gives rise to special problems.[4] These distinctive features, however, will not be dealt with in this article.

It may thus be presumed that English jurists will have some interest in learning how Continental courts apply statutes. Any attempt to give an account of this, however, must encounter great difficulties. On the Continent there is no more agreement than in England on how statutes should be applied in concrete cases. The most diverse opinions have been put forward in legal writing in this respect. Practising lawyers, too, seldom have any decided opinion on the matter. As a rule they evaluate the questions of interpretation which arise intuitively, and when in a concrete case they justify their opinion they do not hesitate to take arguments from widely differing doctrines concerning the correct application of the statute.

Moreover, one cannot always assume that the reasons which a court cites in support of its view that a statute should be applied in a certain way have in reality determined the attitude taken by the court. For it may happen that while certain types of argument have the backing of tradition and can therefore be cited in a judgment without embarrassment, others are considered not quite *comme il faut* and are therefore not allowed, as it were, to show their faces among the reasons given by the court. Whereas such arguments as "the intention of the legislator" and "the plain meaning of the statute" are sanctified by tradition the same is not true, at least not to the same extent, of views regarding the purpose of the statute. Yet there can be no doubt that such considerations also influence the application of law by the courts.[5]

It is not possible to give here an account of all the different opinions concerning the correct application of statutes which have been put forward in Continental doctrine. In what follows

[3] On this see, for example, Allen, p. 484; Levi, p. 38; and Davies, p. 525.
[4] Cf. Friedmann, pp. 297 ff.
[5] On this, see Radin II, pp. 418 ff.

we shall be on the whole concerned only with the so-called *teleological* method. This term is used for describing several methods which differ considerably from one another,[6] but I shall deal here with only one of these, namely the one which I myself consider to be the most suitable. When in this article I refer to the teleological method and teleological construction of statutes it is therefore only this particular method which is meant.

The word "teleological" is of course derived from the Greek *télos*. Now it frequently happens that the "reason", "purpose", "scope", "object", "goal", "end" or "aim" of a statute is said to be the proper ground for its application. As an example I may refer to a statement made in Maxwell in connection with the account of the celebrated resolutions in Heydon's case of 1584: "The literal construction then, has, in general, but prima facie preference. To arrive at the real meaning it is always necessary to get an exact conception of the aim, scope and object of the whole Act."[7] However, what above all distinguishes the method here recommended is that this aim is accorded significance in another way than as an argument for determining "the real meaning" of the statute.

In what follows I shall first describe briefly how to set about using the method in question. Then, in order to throw light on its peculiar character, I shall compare it with two other ways of applying a statute in a concrete case. Finally, I shall give some examples of its use.

2. THE TELEOLOGICAL METHOD

I should like to use as a starting point for my account of the teleological method a pronouncement by Denning, L.J. He says that "it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision . . ."[8] The observations which are made in this pronouncement are undoubtedly correct and are, in my view, of fundamental importance in

[6] A prominent representative of the teleological method is the Swiss scholar O. A. Germann (*Methodische Grundfragen*, Basel 1946). If I have understood this work correctly, Germann's opinions differ from mine on several points. See also A. Meier-Hayoz, *Der Richter als Gesetzgeber*, Zürich 1951, pp. 50 f. and W. Scheuerle, *Rechtsanwendung*, Nürnberg 1952, pp. 174 ff.

[7] Maxwell, p. 19.

[8] Quoted from Allen, pp. 462 ff.

the study of statutory interpretation. The first circumstance pointed out by Denning implies that, however a statute is formulated, one cannot expect that the result will always be practical when one takes the *meaning* of the law as the sole basis for its application. In certain cases there exist, side by side with the circumstances which are relevant according to a statute, other circumstances which cause that an application of the statute will counteract—or at least will not contribute towards—the total result that the statute as a whole is trying to achieve. On other occasions, too, there may be lacking in the actual case some circumstance which is relevant according to the statute, but owing to special circumstances an application of the statute would nevertheless contribute to the realization of the result in question.

It is especially worth emphasizing that this does not apply only to *new* situations which arise owing to changed conditions in the life of the community. In my opinion there is no reason to make these the subject of special treatment. The life of the community is now so complicated and diversified in its structure that it is in any case impossible to foresee all the various situations which may arise *at present*. Indeed, I would venture to say that those who make statutes should not even try to survey and regulate all situations. It is, of course, the *ordinary* cases which have the greatest practical importance, and it may be difficult enough to find a suitable form of regulation for these. The legislator should therefore concentrate his attention on the ordinary cases and not allow himself to be distracted by all the *special* situations which may arise in practice, and which are often extremely difficult to evaluate. Any attempt to regulate such cases as well as ordinary ones will lead, moreover, to the statute's becoming so comprehensive and detailed that it will be difficult to use it. To judge from the pronouncements of legal writers, it would seem that those responsible for English legislation have not entirely succeeded in avoiding shortcomings of this kind.[9]

On the Continent at least it has, however, been fashionable since the creation of the Code Civil to give statutes an *abstract* form. As a result, the problems of interpretation have come to change their character somewhat. As a type, abstract statutes have a wider extent than statutes framed in a casuistical manner. This means that, whereas in the latter case the difficulties for the courts consist mainly in knowing when the statute is to apply *analogously*,

[9] Allen, pp. 458 ff., and Paton, p. 191.

in the former case it is essentially a question of *excepting* from the field of application of the statute certain cases which are covered by its import. On the other hand the change in the technique of drafting laws has not made the work of the legislator very much easier. The difficulty, when framing a statute, of keeping in view all cases likely to arise in practice and finding a suitable form of regulation for them is, of course, the same irrespective of how the statute is formulated.

Let us, however, return to the pronouncement by Denning already quoted. In this he emphasizes as a further difficulty that it is not possible for the legislator "to provide for all facts which may arise, in terms free from all ambiguity".[1] This is connected with the fact that in legislation it is necessary to conform to ordinary linguistic usage, and this lacks the precision which distinguishes the language used, for example, in scientific and philosophical treatises.[2]

Linguistic expressions can, however, be marked by "ambiguity" of various kinds. Take, for example, the word "forest". This is "vague" in a quite special respect. There are certain tree-covered areas of which we can safely say that they are forests and there are others which equally certainly lack this character. But there are also tree-covered areas which are rather sparsely covered with trees, and we cannot say *with certainty* whether they are forests or not. Nor can we give any criterion which helps us to decide whether a certain area is in this category or *obviously* is or is not a forest. One might say that it is not only the *term* "forest" but also the *concept* "forest" which is vague.

It is thus not possible to give any explicit definition of the word "forest". All one can do is to state what distinguishes a *typical* forest. This, however, also applies in another respect. Let me give an example. Adjoining the house that I live in on the outskirts of Uppsala is an area which, at one time at least, was a forest. Nowadays, however, this area is traversed by a number of narrow paths and is used by the residents of Uppsala in the same way as they would use an ordinary part. Though the actual growth of trees in the area has remained unchanged one may well

[1] Cf. Allen, p. 486: "The fundamental weakness lies in the inadequacy of human language to convey thoughts and intention with perfect accuracy"; see also Frank, p. 293.

[2] Allen, p. 464: "The more commonplace a word is, the more difficult is it to arrive at its exact meaning—and for a very good reason, since it is commonplaces which are used most vaguely and with the least attention to precise significance."

ask oneself whether the area is now a forest or a park. In this case it is true there is no such gradual transition between similar phenomena as in the former one. But nevertheless the question cannot be answered, because on the point involved there is no fixed linguistic usage which can be applied.

These semantic considerations have attracted attention in the literature on method. As an example may be mentioned the following pronouncement by the prominent German scholar Philipp Heck: *"Ein 'Begriffskern' wird von einem 'Begriffshofe' umgeben."*[3] What phenomena fall within the former—or *within the inner word-limit,* as we shall here express it—can be determined with certainty. On the other hand what belongs to the *"Begriffshof"* of the term and therefore falls *within the area between the inner and outer word-limits* is less certain.[4] Sometimes, it is true, the context shows whether *in the actual case* a term is used to describe a phenomenon which falls within the term's *"Begriffshof"*. Often, however, we have to confess that the meaning remains unclear.[5]

[3] Heck, *Begriffsbildung und Interessenjurisprudenz,* 1932, p. 52 [see also *Archiv für die civilistische Praxis,* 112 (1914), pp. 46, 173 and 206]; Radbruch in the *Revue internationale de la theorie du droit,* 12 (1938), pp. 46 f.; Llewellyn, p. 79 n. 1; W. Jellinek, *Gesetz, Gesetzesanwendung und Zweckmässigkeitserwägung,* 1913, p. 37); Jesch, D., in the *Archiv des öffentlichen Rechts* 82 (1957), pp. 172 ff. Cf. also the following pronouncements. Radin (I, p. 881): "The 'plain meaning' of a statute offers us a large choice between a maximum and a minimum of extension"; Cox, p. 376: "Although the central meaning of the term 'employer' is plain enough, its precise contours are ill-defined even in ordinary usage." Williams, p. 191 (cf. 182): "The words we use, though they have a central core of meaning that is relatively fixed, are of doubtful application to a considerable number of marginal cases."

[4] In the Symposium with Cohen and Hart in *Aristotelian Society* (Supplementary Volume XXIX, 1955) the latter says on p. 258: "It is important that the difficulty of applying legal rules to concrete cases does not usually arise from the use in the formulation of the rule of *expressions* which like 'inconsiderable variation in weight' would themselves be considered vague because it is recognised that *in all or most cases* the criteria for their application would be a matter of dispute. Most of the difficulty in applying legal rules to concrete cases arises where (*a*) there is no difficulty in citing *clear or standard cases* to which the rule undisputably applies, but (*b*) in a given case a difficulty is precipitated because *some feature present or absent in the standard case is absent or present in this case. Any* rule may be found to be vague confronted with unforeseen vicissitudes" (in part my italics).

[5] Cf. Payne, p. 98: "Such general words as 'accident', 'article' and 'carriage' have *a hard core of agreed meaning,* but, as the cases show only too well, are *uncertain on the fringes,* there being no agreement in common usage on the rank of particulars to which they extend. Context does much to fix the extension of a general word, but even the fullest consideration of context generally leaves an uncertain fringe of meaning, and *it is this uncertain fringe of meaning which gives rise to so many problems of statutory interpretation*" (my italics).

I consider that from the foregoing it is possible to draw certain conclusions on how a wise legislator should set to work. What such a person should strive after in the first place is to ensure that the cases *ordinarily* arising in practice, to which a statute is intended to be applied, really fall within the *central core* of its meaning or, in other words, are covered by the *certain* import of the statute. He should also endeavour to ensure that cases to which the statute is not adapted certainly fall outside this meaning. As a rule, however, he should confine himself to this. As we have seen, it is not possible to formulate laws which are entirely unambiguous. Nor is it possible to survey and provide rules for all the varying situations which may arise in practice.

As pointed out earlier, it is fashionable nowadays to give statutes an *abstract* formulation. As a result, statutes have become vaguer as regards their contents, since the abstract expressions used in everyday speech are often very ill defined. In Sweden at least one can, however, discern a conscious effort among legislators to use words and expressions whose meaning is indeterminate and even to introduce in statutes so-called *general clauses* which have very little descriptive content. The use of such a drafting technique may be regarded as a directive to the courts to use a freer method when applying the statute.[6] But otherwise this technique seems to me to have no advantages. It may well prove that the statute will be emptied of descriptive content to such an extent that the courts will have *difficulty in establishing any cases ordinarily arising in practice which can with certainty be covered (or not covered) by the wording of the statute.*

Let us now, however, turn to the problems which arise in connection with the *application of the statute to concrete situations.* I should like to make the point that it is desirable here to examine different *types of cases* in relation to the import of the statute. In other words, one would make use of a method similar to that which is used in applying precedents.[7] Even in England, however, it is usually held that a statute should be applied in an entirely different way from a precedent. In the case of a precedent the question is put whether the case previously judged is analogous with the one under consideration, whereas in the case of a statute one would only be concerned with a subsumption under the abstract principle which can be discerned in the text of the

[6] Von Mehren, pp. 92 ff., and Payne, p. 106.
[7] Cf. Payne, pp. 107 ff.

law.[8] *"Non exemplis sed legibus judicandum est."* I question the validity of this approach. May it not explain why case law is in certain respects obviously more useful than statute law?[9] The advantages of a codification of the law can only be fully enjoyed if the statute is applied in an intelligent way.[1]

In my opinion, one should, when applying a statute, try to make clear to oneself whether the situation is of a *type* that arises so commonly that the author of the statute ought to have had it in mind when framing the text.[2] If one finds that this is so and that the situation is without any doubt covered by the meaning of the law, then one has established that the statute is applicable to the case. If, on the other hand, the sense appears uncertain or there are such special circumstances that a mechanical application of the statute can be regarded as militating against its purpose, one must adopt instead a different and more complicated procedure.

Of course it is desirable that even cases of the latter type should be adjudicated in such a way that the judgment will contribute to the achieving of *the total result* which may be regarded as the purpose of the statute. The question, however, is how the relevant purpose is to be determined. This must obviously be done by taking as a starting point the statute in question as a means for achieving the purpose. One must assume the statute to be applicable to the "certain" cases referred to earlier and ask oneself what function the statute performs in the legal system with regard to *these* cases. Then one passes to the "uncertain" cases which are under adjudication. The statute must be applied to cases of this category, if that would contribute to the achieving of the above-mentioned purpose. Otherwise the statute cannot apply.

By this method it is possible to establish what I will call the "sphere of application" of the statute. This may differ to a greater or lesser extent from its "meaning". The result of the operation of interpretation may be that a statute is applicable to certain

[8] Cf. von Mehren, pp. 93 ff.; Allen, pp. 269 and 340; Stone, pp. 192 ff.

[9] On this, see Allen, pp. 476 ff.

[1] See the interesting comparison between the application of case law and statute law in Radbruch, *op. cit.*, pp. 52 ff.

[2] The fact that the teleological method makes use of a type-concept approach has been observed by H. J. Wolff in an essay entitled "Typen im Recht und Rechtswissenschaft" contained in *Studium generale* 5 (1952), pp. 201 ff. Regarding the use of the type concept in other sciences see C. G. Hempel and P. Oppenheim, *Der Typusbegriff im Lichte der neuen Logik,* Leiden 1936, and articles in the above-mentioned issue of *Studium generale,* pp. 205–247.

cases which cannot, or cannot with certainty, be said to fall within its meaning. It will then be a question of so-called "extensive" application or of application *ex analogia*. And other cases, which are clearly or possibly covered by the meaning of the statute, may fall outside the sphere of application (so-called "restrictive" application).[3] The fact that one rule is applied extensively generally means a corresponding restriction of the field of application of another rule.

What especially distinguishes this teleological method is—apart from the elaboration of different types of cases—the importance which is given to what I have called the "inner word-limit".[4] Within this fall—as we have seen—all those cases that can *with certainty* be subsumed under the meaning of the statute. On the other hand, the "outer word-limit" covers also situations which might *possibly* be subsumed in this way. The customary opinion is that it is the latter which should form the starting point for the work of interpretation. As an example, one may quote the approach which is recommended by Radin in the first of his two articles in the *Harvard Law Review*. Here he says: "There would then be two questions of importance in the interpretative process. The first would be: Can the statutory determinable [i.e. the rule of law] *in the widest range* be taken to include the determinate before the court? ... And the second question would be: Will the inclusion of this particular determinate in the statutory determinable lead to a desirable result?"[5]

The importance which is thus accorded to the outer limit is, of course, justified by reference to legal security, or in other words the requirement that everyone shall be able to foresee the outcome of a legal action. But in this connection I would draw attention to another pronouncement by Radin: "A determinate that is sought to be brought within a statute is almost always capable of being included if the statutory determinable is made as inclusive as the limits indicated by the words will allow."[6] While this may be an exaggeration, one must nevertheless admit that in

[3] The Swedish *"extensiv"* can be rendered in English by "liberal", and *"restriktiv"* by "strict". Thus, see Radin I, p. 880: "A strict construction is resorted to when it is desired to exclude a determinate (i.e. a concrete case) which might readily enough be included within the statute. Liberal construction, as a rule, merely means that no such effort of exclusion will be made"; cf. Radin II, pp. 404 ff. Allen (p. 499) speaks instead, however, of "narrow" and "broad" interpretation.

[4] Cf. above, p. 82.

[5] Radin I, pp. 883 ff.; my italics.

[6] *Op. cit.*, p. 881.

modern statutes the "distance" between the outer and inner limits is usually considerable. Owing to this it is of great importance from the point of view of legal security that it should be possible, at least to some extent, to foresee how these cases will be adjudicated. This, I believe, will be achieved if the relevant purpose is derived from the text of the statute in the way described above. However, in the article in question Radin appears to start from the assumption that there is no difference between divining the purpose *de lege lata* and *de lege ferenda*. "So far as purposes or results are concerned", he says, "courts act in the case of statutes as they act when no statute is in question."[7] And if he has somewhat modified his view in his later study, it is nevertheless surprising how little interest he devotes to the question of how we shall be able to bind the judge in his evaluation of purpose. So far as I have been able to find, however, this also applies to other writers who hold that the purpose should be given weight when applying a statute.[8]

It may further be observed that it is generally considered that a statute will contain "gaps"[9] and that its rules must therefore to some extent be applied analogously, which—as we have seen—often implies a corresponding limitation of another rule in conflict with its wording. In my opinion there is no reason to evaluate such cases differently from those which can *possibly, but not certainly,* be subsumed under the text of the statute. For these cases, too, one should try to find a form of regulation which will help to ensure that the statute fulfils the function which it has with respect to the "certain" cases.

But, it may be asked, cannot the establishing of the purpose of the statute give rise to difficulties? Indeed it does. What function a rule of law fulfils in the legal system can only be judged by comparing it with other rules. These rules may be contained in entirely different statutes or belong to entirely different spheres of law from that to which the rule to be applied is regarded as belonging. Experience shows, too, that a legal provision can appear in an entirely new light by being placed in a connection other than that in which one has been accustomed to study it.

[7] *Op. cit.*, p. 878.

[8] Frank, pp. 295 f., and Betti in *Festschrift für Leo Raape,* Hamburg 1948, p. 393, compare the judge's interpretation of a statute with the pianist's interpretation of a musical composition. In my opinion this comparison is only just insofar as it relates to a highly unsatisfactory form of application of statutes. Cf. Payne, pp. 109 ff.

[9] The German word is *"Lücken"*.

Moreover, a rule may have several different purposes or represent a compromise between several mutually conflicting purposes. And a particular case can be of such a nature that while an application of the rule will certainly contribute towards the achievement of the purpose of the statute, it may only do so to a limited extent. One cannot therefore assume that the choice between different purposes will always lead to a definite result. It may even be without any significance at all whether a rule is applied or not to cases of a certain peculiar type. Indeed this is a matter of course. The legislator, too, often comes up against a dilemma of this kind. Whether a provision is given one content or another may be entirely indifferent from the point of view of purpose. The main thing is that the question should be regulated in such a way that the public has something to hold on to.

All this means that we should not depart from the meaning of the statute unless there is an *obviously convincing reason* for doing so. Even if the courts observe this principle, however, there is a risk that no uniform evaluation of similar cases will be achieved. It is here that *precedents* have one of their most important tasks to fulfil. Every English jurist knows that there are precedents not only in spheres of law which are "case law" but also in those which are "statute law". The same is true in countries where the law is codified to a larger extent. Experience shows that a system of this type functions very unsatisfactorily unless the statutes are supplemented by precedents during the whole of their period of validity. Whether, on the other hand, these precedents are binding on the courts proves to be a question of secondary importance. As everyone knows, on the whole precedents are followed even in countries where they are not binding on the courts. Indeed, so far as I can see, this system is to be preferred. It is true that corrections can always be made by amending the law, but such a method is too cumbersome to apply every time a precedent proves to have been ill-advised.

As will have been seen from the foregoing, the teleological method requires that the judge should weigh different purposes against one another. This cannot be done without *evaluations*. Some have thought it dangerous to introduce such a subjective element in the application of statutes. It should, however, be remembered that it is not on his *own* opinions on questions of legal policy that the judge should base his evaluation. As we have seen he should derive, as far as possible, the relevant purposes and their relative importance from the text of the statute,

regarded as applicable to the "certain" cases.[1] It is necessary to distinguish between the teleological method which is exercised *secundum legem* and an application of the law which takes place *praeter* or *contra legem*. "Law-making" of this kind may lead to the situation that a rule becomes obsolete or is applied with an entirely different meaning from that intended.[2] Such things happen even in legal systems which are entirely codified. It may prove especially necessary to proceed in this way in periods when the life of the community is undergoing far-reaching changes but the work of legislation is not proceeding so rapidly as the new circumstances require. The freedom which one would wish to accord to the courts on such grounds is of an entirely different kind from that we are here concerned with, which is connected solely with such deficiencies as must necessarily occur in any legislation.

In spite of this, however, it may be questioned whether it is suitable to classify the teleological method as a form of "interpretation" of statutes. One might conceivably reserve this term for the establishing of the *meaning* of the text. In that case "construction" would mean what is here called the establishing of *the sphere of application* of the statute.[3] And in the application of the statute to concrete cases it would, according to the view here maintained, be a question not only of an interpretation but also of a construction of the statute.[4]

Finally, it may be briefly noted that in *theological* hermeneutics there arises a problem which has a certain similarity to that which we have been concerned with here. In that science a distinction is made between the *explicatio* of a bible text by an exegetist and

[1] Using a German expression one might say that it is a question of a *"gebundenes Ermessen"*. In performing his work a judge must accustom himself to evaluate *as if* he approved the purposes behind the statute. This is probably not possible without a certain degree of personality-splitting. See also the following statement by H. L. A. Hart in *Harvard Law Review* 71 (1958), p. 613: "We may say of many a decision: 'Yes, that is right; that is as it ought to be', and we may mean only that some *accepted* purpose or policy has been thereby advanced; we may not mean to endorse the moral propriety of the policy or the decision" (my italics).

[2] I would describe only such an application of law as "spurious". Cf. Pound I, pp. 382 f. and II, pp. 947 f.

[3] Cf. Radin I, p. 877: "That cannot be the result which tells us to interpret a statute, because we find this result only after we have interpreted." The vicious circle Radin here objects to can be avoided if in the quotation we replace the first term "interpret" by "construct" and these two terms are taken in the meaning here suggested.

[4] In old English law "interpretation" and "construction" were used in different senses; on this see Radin II, p. 404, compared with pp. 397 ff.

the *applicatio* of the text by a preacher. The latter process is not solely of a theoretical nature; it does not consist only in examining the meaning of the text.[5] The relation between a sermon and the text on which the clergyman is preaching and the relation between a judgment and the statute on which it is based thus exhibit certain similarities. On the other hand, there is a fundamental difference between legal doctrine and theological exegetics, which proceeds in a purely scientific manner. Generally an author of a legal commentary or a systematic presentation of existing law does not confine himself to establishing the meaning of the different rules. He also gives advice to the courts on that which we have called the "sphere of application" of the rules—though these recommendations are generally given in a veiled form. A parallel to this in theology is to be found in those works concerning prevailing beliefs which are usually described as dogmatic.

3. THE INTENTION OF THE LEGISLATOR

The preceding account of the teleological method has been extremely condensed, but in this short article it is not possible to undertake a more detailed analysis of the various problems which arise in its use. I must confine myself to comparing this method with certain other ways of applying a legal provision to concrete cases, in order to make clear in this way what the differences are. There are, however, a number of methods of statutory interpretation, which differ from one another in varying degrees. And, as pointed out earlier, it is not possible to deal with them all here. For purposes of comparison I shall use only two other methods, and these are of such a kind that they can seldom, if ever, be consistently applied in practice. But the modes of thought involved constitute important elements in different doctrines of interpretation. Moreover, it appears to be the case that if the difference between the two methods is also of practical importance it is so subtle that it can easily be overlooked. I want to raise the question whether this has not been the case to a marked degree precisely in English and American doctrine.

One of the conceptions which we are now going to discuss might be described in the following way. What is decisive in the applica-

[5] Joachim Wach, *Das Verstehen* II, Tübingen 1929, p. 20. "Der Forscher, der verstehen will und soll, und der Prediger der wirken soll, haben verschiedene Aufgaben"; see also pp. 62 ff.

tion of a statute is not the "verbal" meaning of the statute but the "personal" meaning of the legislator.[6] One might also say that "the intention of the legislator" should prevail. The issuing of a statute has no other aim than to make it possible for the courts to establish what the legislator has intended by the statute in question.[7] As a rule this source of knowledge should be sufficient. When that is not the case the courts should, however, use other available sources of knowledge as well. The authority applying the law should, as Windscheid has expressed the matter, "considering all relevant circumstances, try to put himself in the place of the legislator as completely as possible".[8] For in principle there would be no reason why a court should proceed any differently from a legal historian who has taken on the task of finding out the intention of a legislative measure.[9]

Let us examine this idea a little more closely. The first question which arises is what is meant by "the legislator" in this connection. Clearly it is not the authority (for example a parliament or a monarch), which has adopted or issued the statute, but the persons who may be described as its draftsmen or "originators". Among these must be numbered in the first place the official or committee which prepared the original draft of the statute. Then we have the minister who presented the bill to parliament and different members of that body. In the present connection, however, the opinion of these persons is generally of interest only insofar as they have been the cause of any changes in the original draft.

Naturally, it may be impossible to establish at any given point "the intention of the legislator". It may indeed be possible to show that no such intention ever existed. Here, however, it is worth noting that those who apply the statute in the way now referred to usually pay regard also to the "hypothetical" inten-

[6] See the Symposium with Schiller, Ewing and Hardie in *Aristotelian Society* 1927 (Supplementary Volume VII). The first says (p. 101): "It is convenient to distinguish between the meaning of the words and the meaning of those who use them ... So the possible divergence between *verbal* and *personal* meaning evidently detracts from the usefulness of words."

[7] A "genuine" interpretation is to derive from the language used "the same idea which the author intended to convey" (quoted from Pound I, p. 381, footnote 2).

[8] *Lehrbuch des Pandektenrechts I* (1891), p. 52. The original German text runs as follows: "sich unter Beachtung aller erreichbaren Momente möglichst vollständig in die Seele des Gesetzgebers hineinzudenken."

[9] Smith (p. 156) complains that the courts interpret the law "in direct conflict with the methods of all rational investigation in the historical or scientific field" and that " lawyer's history is a term of derision among historians" (see also p. 164).

tion of the legislator.[1] They ask themselves what the legislator himself would have thought the statute to mean *if* he had more closely considered such cases as the one being decided.[2] If, too, the legislator has noted the problem in question but has not analysed it in detail it may be the task of the interpreter to make clear the intention which the legislator has only dimly felt.[3] If in such cases one contents oneself with *comparatively weak reasons* for assuming that one consideration or another constituted the "intention" of the legislator, a great number of doubtful questions can certainly be solved with the help of the method now indicated.

However, the word "intention" is ambiguous. One might mean by it the *purpose* of the legislator in proposing the legislative measures in question, the result he wishes to achieve by them.[4] But as will have been seen from the foregoing this is not the meaning. By the "intention" of the legislator I mean how the legislator has evaluated, or would have evaluated, the question of the application of the statute to such cases as the one under consideration.[5] The only importance of the above-mentioned purpose in this connection is that one can sometimes draw conclusions from it regarding the legislator's "intention" in the meaning here referred to.[6]

[1] Allen (p. 474) uses for this the term "the implied will of the legislator", Salmond (p. 185) speaks of the legislator's "dormant or latent intention" and in Maxwell (p. 77) we find the expression "the probable intention".

[2] Sometimes attention is instead directed to how the legislator would have *formulated* the statute under the presumption concerned. And it might thus possibly be a question of applying a clause with a different content from that which it has in the statute. See, for example, the following statement by Cox (p. 371): "The 'Intent of Congress' is used ambiguously to mean both a particularization which the legislature consciously intended but failed to state explicitly, and also, where that is lacking, the specific application of the general, more pervasive purpose which the interpreter believes the legislature would have made, had it foreseen and faced the controversy." Cf. Payne, pp. 101 ff. and 108, footnote 11.

[3] Joachim Wach (*op. cit.* II, p. 17) speaks of "die alte Forderung, den Autor besser zu verstehen als er sich selbst verstand".

[4] See Radin I, p. 875, and the following statement by this author (II, p. 408): "The purpose of the statute is not quite the same as its policy. The policy may be part of a general governmental theory. The purpose is the specific result that can reasonably be taken to be what the statute is striving to attain." See also Cox, pp. 370 ff.

[5] See Davies, p. 521, footnote 9.

[6] Cf. Landis, p. 888: "Intent is unfortunately a confusing word, carrying within it both the teleological concept of purpose and the more immediate concept of meaning—the assumption that one or more determinates [i.e. concrete cases] are embraced within a given determinable" [i.e. a legal provision]. It is in this latter meaning that I use the expression "the intention of the legislator".

But how extensive are the researches that the court must undertake, and are all conceivable sources of knowledge to be allowed? As regards the first question, it is sufficient to point out that as a rule a court has only a very limited amount of time at its disposal. One cannot therefore expect it to collect its material and evaluate it with the same care as an historian does. In regard to the second question, supporters of the method concerned maintain that there is no reason why the courts should be prevented from making use of whatever sources of knowledge they may be able to gain access to.

English legal writers often point to it as a curiosity that during the Middle Ages the judges paid attention to what the originators of the statute themselves thought about the contents of their work.[7] At that time there were not very many judges in London. It therefore often happened that a judge had a colleague who had taken part in preparing the statute to be applied or that he had done so himself. In such an eventuality the chairman of the bench might well have interrupted counsel with the words: "Do not gloss the statute, for we know better than you; we made it."

In Sweden this method plays a certain part even today. Sweden is a small country in which a great deal of legislative activity is going on. The judges and other lawyers in the service of the State often know each other personally, just as it frequently happens that they act as members or secretaries of committees appointed to draft bills. So, if a judge who is confronted in his work with a complicated problem of interpretation knows someone who has taken part, in the way indicated, in preparing the statute involved, it will happen that he consults that person. I have heard Swedish judges say that by doing so they had made use of the best conceivable sources of knowledge regarding the true meaning of the statute.[8]

But in what way does this method differ from the teleological one? Well, a jurist who, faced with a complicated problem, invokes the "intention of the legislator" often in fact bases his opinion on teleological considerations of one kind or another.[9] This is particu-

[7] See for instance Allen, p. 467.

[8] Heck (*Archiv für die civilistische Praxis* 112 (1914, p. 107, compared with pp. 119 f.) mentions a case where a German court, wishing to inquire into a complicated question of interpretation, heard evidence on oath from committee members and members of parliament concerning what had arisen during the preparation of the statute.

[9] Cf. Radin II, p. 418: "The search for the intent of Congress, even when bolstered by legislative history, is scarcely more than an additional fortification of a position already unassailable."

larly the case when the legislator's "hypothetical" will is made the peg from which his reasoning is suspended. In that case what will usually be decisive is the evaluations of purpose which the judge *himself* makes, using the text of the statute as his starting point. It is true that in applying this method the judge must also base his conclusion on certain further premises, such as that the creators of the law are sensible people and belong to the same community and cultural milieu as himself.[1] However, circumstances of this kind seldom permit of any definite conclusions as to what the legislator would have intended in any difficult questions arising in the application of the statute to special situations.[2]

It is a different matter when the legislator has made a pronouncement on some question of the interpretation of his statute. In Sweden the committees which draft new statutes generally put their reasons on record. The same applies to the amendments which are made during the subsequent treatment of the draft. Such *travaux préparatoires* are published in a semi-official publication.[3]

The chief aim of recording the reasons is to convince the authorities who will have to scrutinize or approve the draft statute of its suitability. It therefore deals first and foremost with the results which it is desired to achieve by the various rules. But it also contains pronouncements on the meaning of the rules and on their application. It may, for example, be pointed out that a certain word occurring in the text is to be apprehended in a certain way or that the statute is to apply to a particular situation which is described.

It is self-evident that such pronouncements are of great value. The people who have prepared a draft statute generally have a more thorough knowledge of the particular sphere of law in question than any other lawyers in the country. But under the method now being discussed these pronouncements are accorded a quite special importance. As a rule they will be made the basis

[1] Cf. Pound, p. 381: "It assumes that the law-maker thought as we do on general questions of morals and fair dealing."

[2] Cf. Allen, p. 474: "When a court declares, 'The legislator did not say this, but he would have said it if he had thought about it', it is clearly resorting to what is, in reality, a fiction. It is often entirely uncertain, not only what the intention of the law-giver was, but what it would have been in particular circumstances."

[3] *Nytt juridiskt arkiv*, Second series. Cf. regarding the Swedish procedure of legislation Folke Schmidt, "Construction of Statutes", *Scandinavian Studies in Law* 1957, pp. 156 ff.

for the application of the statute in concrete cases if no mor certain evidence of the intention of the legislator is available Thus, these pronouncements acquire the same importance as i they had formed part of the statute itself.[4]

This does not happen with the teleological method. In such a construction of a statute it may, of course, happen that the resul arrived at is in conflict with a statement in the preparatory work In such a case, according to the conception here preferred, the former and not the latter should be given credence. In my opinion there are good reasons for doing this. It would seem that the originators of the statute ought to make the teleological method the basis for their pronouncements in special questions of interpretation. For why should they recommend any other interpretations than those which contribute to accomplishing the desired total result which the application of the statute to concrete cases may lead to? But it must be borne in mind that the originators of the statute may misjudge these special questions of application, which, of course, lie somewhat apart from their main task as legislators. Often they have not had access to the records of any cases where the question which they are to regulate has been adjudicated. And how common it is that an interpretation which at first sight seems reasonable is revealed to be entirely untenable once the opportunity to study such material has arisen! There is nothing that we jurists have such reason to bewail as the imperfections of the human imagination.

But, perhaps someone will object, the same applies—if to a smaller extent—to the statute itself. Even as to the "ordinary" cases, there may be general agreement that a provision has been unfortunately framed. Such shortcomings, however, can be rectified by legislation. On the Continent at least it is quite common to resort to partial reforms which consist in amending the contents of a section or sections of a statute which have proved not to be well adapted to their purpose. There is nothing corresponding to this in the case of the preparatory work. Moreover, the intention of the legislator is an historical fact which cannot be changed afterwards. A pronouncement in the record, which is considered binding on the courts, can only be nullified by means of legislation. It may thus be necessary *to amend a statute although there*

[4] Radin (II, pp. 410 ff.) who criticizes this opinion, says that in his view the declared purpose is certainly "neither irrelevant nor incompetent, but in no sense controlling".

is no defect in it but only in the preparatory work. I hold this to be a rather unsatisfactory consequence of the method of interpretation now being discussed.

4. THE PLAIN MEANING OF THE STATUTE

We will now turn to the second of the two methods which were to be used for purposes of comparison. According to this method it is the *verbal* meaning of the statute which is always decisive. If the legislator has expressed himself badly and the statute has acquired a different meaning from that which was intended, the courts must keep to the text and entirely disregard the intention of the legislator.[5] "Interpreting a statute is not searching for and discovering an intention which was the source of the word, but an intention which constitutes the content of the statute. ... The point is not to reveal the meaning which the legislator in fact connected with the rule, but the meaning which is inherent in the statute."[6]

What then is meant by the "verbal meaning of the statute"? Words, of course, have no meaning in themselves apart from the use they have been put to. Such being the case, what we have to consider is the meaning which the statute has *according to common usage*.[7] But what is it which makes usage "common"? It is, of course, clear that some kind of average conception is involved here.[8] It is not necessary to take account of what imbeciles and fanatics find in the statute; but apart from such people, are we to take the whole nation, or only the more educated portion of it or, for that matter, only those who have had some basic legal training? The answer may well depend on the standard of education in the community and on how lucidly the statute has been

[5] According to an oft-cited statement by Lord Halsbury "the worst person to construe a statute" is "the person who is responsible for its drafting, for he is much disposed to confuse what he intended to do with the effect of the language which in fact he has employed". Another English judge has said in a case: "whether that is what the Legislature intended to express I do not know, but that, I think, is what the Legislature has said" (Davies p. 526).

[6] Adolf Wach, *Handbuch des Zivilprozessrechts* I, 1885, pp. 256 and 258. The original German text runs as follows: "Das Gesetz interpretieren heisst nicht einen Willen suchen und aufdecken, welcher die Quelle des Wortes wurde, sondern welcher der Inhalt des Gesetzes bildet ... Es ist nicht Darlegung des Sinnes, welchen der Gesetzgeber thatsächlich mit dem Satze verband, sondern des Sinnes, welcher dem Gesetze immanent ist."

[7] Cf. Williams, p. 384.

[8] See Heck, *op. cit.*, pp. 40 f. and J. Lucas in *Festgabe für Paul Laband*, Tübingen 1908, I, p. 401.

drafted. There is no reason to include those people who when studying the statute repeatedly fall victim to obvious misconceptions.

In every social group the use of linguistic means of expression follows certain rules. In part, however, these rules are very complicated and difficult to establish. Assume that somebody takes it upon himself to investigate the *dictionary* meaning of each word which occurs in a legal provision. This interpreter would soon find that he cannot establish the meaning of *the rule itself* in this way alone. For the meaning of the rule is not the sum of the meaning of the words which it contains. As an example we may mention the case of a word which is used both in an original and in a transferred sense. Taken in isolation, the word has both these meanings. Inserted in a sentence, on the other hand, it has only one of them. And which one it is will depend entirely on *the context* in which the word appears.

When we are trying to establish the meaning of a sentence we must, however, pay attention not only to the context which *the sentence itself constitutes* but also to the context of which *the sentence forms part.* In a different connection a sentence can have an entirely different meaning. And it is not only the verbal context which is of importance but also *the whole situation in which the statement arises.*[9] This means that a sentence can be given different meanings according to whether we pay attention only to its immediate context or look beyond that to more remote circumstances. As an example let us take the first few lines of a novel. Assume that we have established the meaning of these lines by taking into consideration only the portion of the text which immediately follows. It may happen that later we have to revise this conception when we have got a better knowledge of the trend of the novel and the circumstances under which it was written.[1] We might even say that the sentences in question have *different* meanings according to the extent of the context in which they are inserted.

These facts should be borne in mind when it is a matter of

[9] "The importance of verbal context has at all times been fully appreciated by students of language. But this somewhat narrow view of context has been considerably enlarged of late; it is now increasingly realized that the non-verbal elements of the situation, and the wider influence of social setting and cultural background, are also of direct relevance to the full understanding of an utterance and its components" (Stephen Ullman, *The Principles of Semantics,* Glasgow 1951, p. 61); see also Hugh R. Walpole, *Semantics,* New York 1941, pp. 105 ff.

[1] See F. Paulhan in *Journal de Psychologie* 25 (1928), pp. 324–328.

applying a statute to a concrete case. Assume that a judge states that he believes he ought to follow "the plain or literal meaning of the statute" or that the statute should be applied "strictly" and not "equitably". Assume further that one of his colleagues accuses him of having, by so doing, misrepresented the meaning of the statute. It may happen that the difference of opinion here involved relates only to the *extent of the context* to which regard has been paid in determining the meaning of one of the rules in the statute. The first-mentioned judge perhaps considers that the relevant context consists only of the rest of the statute, whereas the second wants to take into account the entire legal system, the function performed in that system by the rule in question, the circumstances prevailing at the time of its creation, and so on.

Of particular interest in this connection is the question whether the *travaux préparatoires* form part of the relevant context or not. In Sweden the courts establish, without exception, the meaning of a statute in the light of the record mentioned above. In England, on the other hand, it has long been forbidden to pay regard to "parliamentary proceedings", which also include "the report of a Royal Commission".[2] In practice, it is true, a distinction has been made between "the negotiations previous to the Act or the original form of the Bill" and "the subject-matter with which the legislature was dealing and the facts existing at the time with respect to which the legislature was legislating".[3] But whatever this distinction may now mean, it is clear that the ban on "parliamentary history" implies that in English law the relevant context may be more restricted than would be the case when applying a corresponding legal provision in Swedish law.

But if the meaning of the statute is determined in the light of its parliamentary history, does not the method we are now dealing with coincide with the one considered earlier, according to which "the intention of the legislator" is decisive for the application of the law? No, that is not the case. Assume that the meaning of a statute—determined without taking regard to the *travaux préparatoires*—conflicts with certain statements of its originators. It is not certain that this will give us reason to revise our conception of the meaning of the statute. It may be that we stand by this conception and assert that the originators of the statute have not had a sufficiently clear idea of what they intended or, alternatively, that the

[2] Cf. Allen, pp. 468, 487 f. and 501, Frankfurter, pp. 540 ff., and Davies, pp. 531 f.

[3] Cf. Allen, p. 495.

statute has been given a formulation in conflict with what they intended. It is difficult to say when we shall react in one way and when we shall react in the other. But one important factor is the *dictionary meaning* of the words.[4] The context is not given such weight that the words of which the statute is composed acquire an entirely different meaning from that which is generally accepted.

This circumstance, however, means that the teleological method, also, does not always lead to the same result as that arrived at when the meaning of the statute is alone regarded as decisive. The latter method establishes certain limits beyond which the interpreter cannot go. It will not be possible to apply a provision *analogously,* nor restrictively, in the sense that the provision *is not applied* to certain cases which are covered by its meaning.[5] The teleological method, on the contrary, allows this. As pointed out earlier, that method does not require that the field of application of a provision shall coincide with its meaning.

But what happens in situations which, at least at first sight, fall in the area between what I have called the outer and inner word-limits?[6] Here it is necessary first and foremost to pay attention to the significance of the context as an aid to interpretation. It is true that it sometimes happens that the more of such material we bring into the picture the less clear the meaning is, because the various arguments conflict with one another.[7] But at other times a more certain result is achieved. With the aid of the context we can eliminate certain interpretations which *prima facie* do not appear unreasonable.[8]

On the other hand, we often get no further than determining that, of two possible interpretations, one agrees a little better with ordinary linguistic usage than the other and that therefore there are *better reasons* for regarding the meaning as being in accordance with the first interpretation. There is, of course, no guarantee that such a result of interpretation is also desirable. What practical function the provision fulfils when one interpretation or the other is made the basis for its application is, of course, only one of the interpretation data alongside many others. Nor

[4] Radin I, p. 866: "Words are certainly not crystals, as Mr. Justice Holmes has wisely and properly warned us, but they are after all not portmanteaus. We cannot quite put anything we like into them."

[5] Such an application Heck, *op. cit.*, p. 215, has called "*Kernberichtigung*"; cf. above, p. 82.

[6] See above, *ibid.*

[7] Cf. Allen, pp. 489 ff.

[8] Cf. Heck, *op. cit.*, p. 85: "Der unbestimmte Wortlaut wird zu einem bestimmten Endbilde ergänzt, die andere Möglichkeiten ausschaltet."

does the public acquire a greater possibility of foreseeing how the courts will judge questions of interpretation of the kind now referred to.

We may, however, note that the context which is used as an aid to interpretation is always limited in some way or other.[9] What the drafter of the statute may have intended is clearly not to be taken into account, otherwise it would be impossible to establish any difference between this and what the statute itself signifies. But in other respects, too, limits are set to the extent of the context, if only for reasons of convenience. In the doctrine of interpretation, however, *rules* have been established regarding what material should be taken into consideration. Such a rule is the *exclusion,* already referred to, of "parliamentary proceedings". Other rules have the purpose of *fixing the importance attaching to various parts of the interpretative material.* As an example we may mention the importance which should be ascribed to the preparatory work when the courts have to take notice of them. In Continental doctrine this appears to be a perennial subject of dispute.[1] In this connection I will also mention the two methods of interpretation designated as "grammatical" and "systematic", and such old principles as *"expressio unius est exclusio alterius", "ejusdem generis"* and *"singularia non sunt extendenda".*

I do not propose to discuss at length whether principles of this kind have been useful or not. This depends, in part at least, on the extent to which they have been applied consistently and on *whether the originators of statutes have worked with a view to this being the case.* But what I wish to suggest is that the principles in question may have helped to make jurists as confident as they are that they can establish "the plain meaning of the statute". Some writers have asserted that the jurists overestimate their possibility of doing this.[2] There can be no doubt that to a large extent lawyers find a statute quite clear where an educated layman, even with expert assistance and after the most thorough examination, finds the meaning obscure. A contributory circumstance to this may be that whereas the layman proceeds intuitively and in the same way that he establishes the meaning of a text in other connections, the lawyer limits the relevant context in

[9] Alf Ross, *Om ret og retfærdighed,* Copenhagen 1953, p. 144.

[1] See recent articles in *Schweizerische Juristen-Zeitung* 48 (1952), pp. 213 and 229, and in *Neue Juristische Wochenschrift* 4 (1951), p. 681, and 5 (1952), p. 1033.

[2] Cf. Allen, p. 483, and Radin II, p. 406.

accordance with certain rules and *accords to certain parts of the context a greater importance than the layman finds it natural to do.*

Anyone who wants to grasp what part the principles of the kind mentioned play in practice should, however, also observe the situations in which they are used. Generally, at least, they are used in such situations as I have here described as "uncertain".[3] The principles have been used in order to accomplish what German writers have called a *Randberichtigung,*[4] that is to say the establishing of where one should assign situations which, at least at first sight, fall within the area between the inner and outer word-limits.

But in these circumstances what purpose do the principles in question serve? Well, it is, or at least ought to be, that of ensuring that even situations of the kind referred to shall, by and large, be adjudicated properly. This, of course, is the same object as that which it is desired to achieve with the teleological method! The question then arises *whether it might not be sufficient, when establishing the meaning of a statute, to ascribe to its purpose greater importance than is the case if a "natural" procedure is employed.* In order to be able to decide this, however, one must be clear how the *context* as a whole is made use of in determining the content of a legal provision or another statement. It seems, however, that semanticists have not interested themselves in this question. What follows may therefore be regarded as a hypothesis, which is put forward in all modesty.

Assume that we will ascertain such a concrete psychological fact as has here been called the "personal" meaning of the legislator. This is done by evaluating certain *evidence* of what the person in question has meant by what he has said or written. As such evidence we may accept not only the dictionary meaning of the statement but also, for example, the situation in which the statement has been made, the level of education of the person in question, the direction of his interests, and so on. In determining the "verbal" meaning a similar procedure seems to me to be applied. The difference is merely that what is to be proved is what *people in general* would have meant if they had found themselves in the same situation and had made the statement in question. The importance of the context would thus be that its various parts are used as *evidence* for this.

[3] Cf. above, p. 84.
[4] See, for example, Heck, *op. cit.*, p. 207.

But how can one estimate *the value as evidence* of the various elements of the context? Probably one should proceed in the same way as when evaluating problems of evidence in other phases of life, for example concerning questions of fact in a trial. One does not apply fixed rules but has recourse to the principle of free evaluation of evidence and thus builds on one's general experience of life.

If this is correct the rules of interpretation dealt with earlier in this study appear in a new light. The exclusion of "parliamentary proceedings" acquires the character of a rule on "inadmissibility". And the principle *singularia non sunt extendenda,* for example, would constitute a "presumption".[5] Its meaning would be that an exceptional provision should be interpreted restrictively unless other elements in the context create *especially strong* evidence that the sense of the provision is different. And, correspondingly, special attention could be paid to the *purpose* of a legal provision when establishing its meaning.

But obviously one cannot expect that an application of a statute in accordance with this principle will always lead to results as practical as those achieved when the teleological method is used.[6] Moreover, there is a certain risk that the purpose of the statute will also *largely* determine its meaning within the inner word-limit. For this, in my opinion, there is no justification. As I have previously emphasized, the justification of the teleological method is solely that the legislator cannot and should not try to regulate situations of a very special character.

But does not the traditional procedure more effectively meet the requirement that the courts shall be bound by the statute? I do not think so. In his *Ethics and Language,*[7] Charles Stevenson assumes that in a certain community a special tax is imposed on "dwelling places" but not on "vehicles". The question thus arises what happens in the case of trailers which remain parked for a considerable period on a camping site. He further supposes that "the terminology of the legislators was too vague to cover this borderline-case". Why in that event should the courts declare that

[5] Cf. P. O. Bolding, *Skiljeförfarande och rättegång,* Stockholm 1956, pp. 110 f.

[6] Heck, *op. cit.,* p. 59: "Die richtige Methode der Gesetzauslegung ist keine andere als die der Gebotsauslegung des Alltags." I would agree with this in so far as it is a question of deciding the meaning of the statute. The teleological method here dealt with clearly gives no guidance on how this is to be done but only on *how one should make use of the meaning of the statute when establishing its sphere of application* (cf. *supra,* pp. 84 f. and p. 88).

[7] New Haven 1944, p. 295.

trailers *are or are not* "dwelling places" within the meaning of the tax law in question? As Stevenson rightly points out, this mode of expression is very like what he calls "a persuasive definition". Would this be done in order to give the impression that the result is in agreement with the meaning of the statute and is not based on any evaluation of purpose? It is of course possible that some will be deceived by the misleading expression. But in the long run it is impossible to inspire respect for justice by such means.

5. APPLICATION OF THE TELEOLOGICAL METHOD OF INTERPRETATION TO SOME PRACTICAL SITUATIONS

All this is very vague and very uncertain. It would be helpful if by empirical investigations it was possible to find out how our judges actually reason. But it would probably be difficult to achieve any definite results, as the courts do not usually state in their judgments all arguments which have been of decisive importance for the attitude they have adopted.[8] In any case I must confine myself to analysing, with a view to illustrating what has been said above, some questions of interpretation which have been the subject of evaluation in practice.

It would of course be most suitable to choose some examples from English law. Unfortunately, my knowledge of that system of law is not sufficiently extensive to permit me to do so. I have therefore taken my examples from Swedish law and from that part of it of which I have some special knowledge—procedure. But I have chosen cases which will be comprehensible without any special knowledge of Swedish law. It is only on a few points that it has proved necessary to burden the presentation with information on the general structure of Swedish procedure.

All the examples are treated on the same pattern. First I establish the *meaning* of the statute as accurately as I can and try to solve the problem at issue *on this basis alone*. After that I proceed to consider it in accordance with *the teleological method*.

(*a*) My first example is taken from criminal procedure. In Sweden as in other continental countries there is a hierarchically organized corps of state-employed prosecutors. Criminal actions are in general conducted by such a prosecutor, who also has the

[8] See above, p. 78.

guidance of the preliminary investigation which precedes the trial before the court. It is the court which decides whether a suspected person shall be arrested, but otherwise the court concerns itself but little with the case until after the preliminary investigation has been concluded and the action is brought. The court does not consider whether the prosecutor has had sufficient reason to prosecute but only whether the prosecution is justified or, in other words, whether the defendant has committed the offence in question, a matter which of course is decided after the trial.

The suspected person can be assisted by a *defence counsel* both during the preliminary investigation and during the trial, though the ability of the counsel to intervene during the first part of the process is somewhat limited. Defence counsel are of two kinds: private and public. A counsel of the former kind bases his right to plead on a commission from the defendant, who is then also responsible for paying his fee. A public counsel, on the contrary, is appointed by the court and receives his fee from public funds. If the defendant is found guilty of the crime he is generally liable to reimburse the Treasury for what it has paid out in fees to the public defence counsel. But if owing to lack of means he has been given free legal aid, the cost of his defence is defrayed by the Treasury. The same is the case if the accused is acquitted owing to lack of evidence, whereas if he had had a private defence counsel he would have had to pay his fee even in such a case.

Let us now assume that a business man has been indicted on a serious charge of fraud. When he is apprehended on this charge and the prosecutor is clearly considering asking for his formal arrest, he engages a lawyer as a private counsel. The latter at once goes to the police station where the man is being detained. The lawyer, knowing that his client has little money, suggests to him that he file an application for the lawyer to be appointed as public defence counsel. The man assents and an application to this effect is submitted to the court. Is this application to be approved?

This question is connected with certain other questions with which we will also concern ourselves in what follows. Assume that a private counsel dies during the case or retires from the case, for example because he has fallen out with his client. Or assume that the client withdraws his commission because he is dissatisfied with his counsel. Can the client get the services of a public defence counsel even in such circumstances?

These matters have to be decided in accordance with a provision which reads as follows:

"If the defendant has not procured a defence counsel or such a counsel has been rejected as incompetent, and if it is found that owing to the nature of the case or for other reasons his rights cannot be safeguarded without assistance, a public counsel shall be appointed for him. If the defendant has been detained or arrested such a counsel shall be appointed if the defendant so requests, even if the circumstances are not as just stated."[9]

What *the intention of the legislator* may have been with respect to the eventualities described above I do not know, for they are not dealt with at all in the *travaux préparatoires*. But what about *the meaning of the statute*? What does it mean that *"the defendant has procured a defence counsel"*? Does it mean *only* that this has happened, or *also* that the defendant is assisted by the counsel whom he has procured? The second meaning is doubtless the more common one, but against the assertion that this is the meaning of the provision in question it may be argued that then the provision is inconsistently expressed. When the court had found a private counsel incompetent and had rejected him, the accused would not, according to this conception, have "procured" any such counsel. And of the two alternatives stated at the beginning of the provision one would in such circumstances fall within the scope of the other.

However, one may ask whether there is any reasonable cause to refuse the accused a public counsel, for example when a private counsel has died during the case.[1] If he has once procured his own counsel he may in general be presumed to be financially able to afford private defence. And of course one ought to be careful of public money! On the other hand, however, it may be observed that the financial position of the defendant is not accorded any importance in the provision quoted above. Even a millionaire who out of pig-headedness refuses to procure a private counsel must be given a public one if the case is so involved that he cannot conduct his own case in a satisfactory way.

As one can easily see, the different elements of the context of the provision *contradict each other* as proofs of its meaning. Possibly one interpretation has stronger reasons in its favour than the other. But I, at least, am not in a position to decide whether such

[9] The Swedish Code of Procedure (Rättegångsbalken, RB) Ch. 21, sec. 3 (3).

[1] Cf. above, p. 103.

is the case. I thus consider the situation which has arisen through the death of the private counsel to be one which falls between the inner and outer word-limits of the provision.[2]

Let us now pass to the case originally presented, in order to see how it is related to the meaning of the statute. Assume that the lawyer has said to his client at the police station: "If the court does not appoint me public defence counsel I can no longer assist you in this action." This case seems to me to be analogous with that where the private counsel has died. The defendant has procured a private counsel, but this counsel is not going—at least in his capacity as such—to assist him during the remaining part of the action. Assume, however, that instead the lawyer says: "I am not going to abandon you merely because I am not appointed public defence counsel." I wonder whether there are not convincing reasons for saying that this case is not covered by the meaning of the statute. The defendant has procured a counsel who—even if he is not appointed public defence counsel—will assist him during the whole action. He will thus be able to enjoy the benefit of a proper defence without any intervention of the court.

Let us now proceed to reason in accordance with *the teleological method*. It is then necessary, as pointed out in the second section of this article, to start from cases to which the statute *without any doubt* applies or does not apply. There can be no question whatsoever that the statute applies when there has been no private defence counsel in the case at all. But in what circumstances is it quite clear that a public counsel must not be appointed? This would seem to be the case when the defendant is assisted by private counsel and there is no suggestion that *this* counsel shall be appointed as public counsel. But what reason can be put forward for saying that in this particular case no such appointment must come into question?

It is not altogether certain that a public counsel would have no task to perform. The case may, of course, be complicated and the private counsel may not be very well qualified to deal with it. In Norwegian law the court may in such an eventuality appoint a public counsel *in addition to* the private one.[3] The Swedish legislator, it appears, has not wished to do anything of this kind. Under another provision in the same chapter of the Swedish statute the appointment of a public counsel must in principle be with-

[2] See above, p. 82.

[3] The Norwegian Code of Criminal Procedure, sec. 101.

drawn if the defendant procures a private one during the action.[4] By taking this provision together with the one cited earlier one can deduce a reasonable justification for the requirement that the defendant shall not have "procured a defence counsel". If he has done so, his interests are considered to be sufficiently safeguarded. And if a private counsel clearly proves to be incompetent he should, of course, be dismissed. But as we have seen, it is expressly stated in the provision quoted above that precisely in this case the court can appoint a public counsel.

The purpose which we have thus arrived at clearly lacks any relevance when a private defence counsel has died, has retired or is about to retire from the case.[5] Here, of course, it is not a question of appointing a public defence counsel *in addition to* a private one. In evaluating these cases we have only to pay attention to the fact that a public counsel can be appointed even if the defendant is in a position to engage a private one. If in normal cases *the exigencies of procedure* are the only deciding factor this should also logically be the case when the defendant has had a private defence counsel but that counsel has for some reason ceased or is about to cease to function as such. The special circumstances which here exist do not of course affect the *need for a defence counsel.*

But what is the situation in the case originally presented if the private counsel will remain even in the event that he is not appointed by the court? Here, too, it is not a question of appointing a new counsel in addition to one procured earlier. There is not in itself any reason why the counsel should have jeopardized his chances of receiving the appointment of the court by his declaration that he will in no circumstances abandon his client. Such generosity on the part of the lawyer would appear to be something which the legal system should encourage, not combat.

However, the following objections might be made. As pointed out earlier, a departure from the meaning of the statute should come into question only when there are obviously convincing

[4] RB Ch. 21, sec. 6 (1).

[5] The purpose concerned also deserves to be noted in the application of the last sentence in RB Ch. 23, sec. 3 (3); see above, p. 104. From a purely linguistic point of view the words "even if the circumstances are not as just stated (*även eljest*)" may be regarded as giving dispensation from the requirement not only that the case must be complicated but also that "the defendant has not procured a defence counsel". But this meaning should not be made the basis for the application of the provision. There is, of course, no reason why the defendant should have the right to have a public counsel in addition to a private one merely because he has been arrested.

reasons in favour of doing so.[6] Is that really the situation in the present case? If the defendant needs a counsel he can always ask the court to appoint a public one. Is there any reason why he should be able to use the services of a private counsel while he is waiting for a decision on this point?

In my opinion there is. An arrested person may need to get in touch with his lawyer immediately. Or let us assume that a defendant who has conducted his own case before a court of first instance has been found guilty. He feels uncertain whether he should appeal against the sentence but just before the time for appeals expires he decides to do so and approaches a lawyer. It may be that there is no time to obtain an appointment by the court before the appeal period expires.

From this it will be seen that it should be possible to appoint a private counsel as public counsel for precisely the same reason as such an appointment should be made without paying regard to the financial circumstances of the defendant; a person who is in need of a defence counsel should always have access to one. In support of this opinion one cannot, it is true, cite the *meaning* of the provision quoted above, but certainly its *purpose*.[7]

Although the Swedish Code of Procedure has only been in force for a few years the question whether a private defence counsel can be appointed as a public one has arisen several times. In the first place one may refer to a letter addressed by the Board of the Swedish Bar Association to the *Justitieombudsman,* and to the latter's reply thereto.[8] In its letter the Board states that the provision quoted above should be interpreted in such a way "that a court may refuse to appoint a public counsel only if the defendant has procured a competent person who is willing to continue to assist him even if not appointed as a public counsel".[9]

In his reply the *Justitieombudsman* associates himself on the whole with the opinion expressed by the Bar Association.[1] When

[6] See above, p. 87.

[7] It has been proposed that the provision should be altered in such a way that it is made clear that a private counsel can be appointed a public one (*Tidskrift för Sveriges advokatsamfund (T. S. A.)* 1949, pp. 213 ff.). There is no reason for this if the statute is applied in accordance with the teleological method. In my opinion the formulation of the statute does not give rise to any objection at all (cf. *supra,* pp. 84 f. and p. 88).

[8] The "*Justitieombudsmannen*" is a high legal official who is appointed by the Swedish Parliament and whose main duty is to watch over the way in which the judges and the civil service officers carry out their tasks.

[9] *T. S. A.* 1950, p. 140.

[1] *T. S. A.* 1950, pp. 175 ff.; see also *Justitieombudsmannens ämbetsberättelse* 1951, pp. 160 ff.

the defendant has come to an agreement with a lawyer that the latter shall assist him the *Justitieombudsman* considers that "a defence counsel cannot be said to have been procured if the agreement contains such conditions that the lawyer has stipulated as an expressed or understood prerequisite for his participation that he shall be appointed as public counsel". But he adds that "the condition stated must be seriously intended" and discusses when this can be considered to be the case. In conclusion he points out "that the defendant must be considered to have himself procured a defence counsel if he has made an agreement with another person that that person shall assist him in his defence without the agreement having been made subject to conditions in the way stated above".

Let us assume now that in our example the detained person, who is in a bad financial position, asks the lawyer how he will act if the court should reject the application for a public counsel. The lawyer, who is of a generous nature, answers that in no circumstances will he abandon his client. When this statement comes to the knowledge of the court the application is rejected because the agreement between the lawyer and the defendant has not been made conditional in the manner required by the Bar Association and the *Justitieombudsman*.

How have these authorities felt able to put forward an opinion which, from the practical point of view at least, appears so strange? Probably for the reason that, if they had gone further, *they would have come into conflict with the meaning of the statute.* As pointed out, the *Justitieombudsman* considers that "a defence counsel cannot be considered to have been procured" if the agreement between him and the client is made conditional in the way referred to above. At the same time, however, he thinks it to be irrelevant whether the counsel later wishes to refer to the condition or to abstain from doing so.[2] Let us assume that when the application of the defendant is to be considered, the court asks the lawyer whether he will rely on the condition and retire from his task if the application is rejected, and the lawyer replies that in spite of everything he will remain as private defence counsel. It would be possible in this case to appoint the lawyer as public counsel. The requirement that the agreement must be made conditional in the way mentioned above cannot in such circumstances fulfil any function other than that of *ensuring agreement with the meaning of the statute.*

[2] *T.S.A.* 1950, p. 177.

As far as *the practice of the courts* is concerned, there are three precedents which are of interest in the present connection. In the first case the defendant made a request at the trial that the lawyer who had prepared his defence and had also appeared before the court should be appointed as public defence counsel.[3] This request was rejected on ground of the circumstances now mentioned. Whether the text of the statute alone was regarded as decisive thus cannot be determined.

In the next case a request was made during the hearing in the Supreme Court, by a lawyer who had assisted the defendant as private counsel in the court of second instance, to be appointed as public counsel.[4] This request was granted without opinion of the court. But, of course, there is no reason to suppose that when the lawyer assumed the task in the court of second instance this was done subject to the condition that he should receive the appointment in the Supreme Court!

In the third and last case a lawyer, at the same time as on behalf of his client he appealed against the decision of the court of first instance, applied to be appointed as public defence counsel.[5] The Supreme Court granted the application although the lawyer "had not *intended*[6] to leave the accused without further assistance if such appointment was not obtained". Here the Supreme Court seems to have acted against the opinion of the Bar Association and the *Justitieombudsman* that a private counsel can only be appointed as public counsel when his earlier assumption of the task has been made conditional in a certain way.[7]

However, in this decision it is pointed out as a relevant circumstance that already when the lawyer appealed against the sentence of the lower court it was "implied that the lawyer should secure appointment as public counsel". Possibly this pronouncement is a last relic of the opinion with which otherwise the Supreme Court appears not to wish to be associated. At least I cannot find any reasons why the defendant should have decided, when engaging the lawyer, to *attempt* to have him appointed by the court. Let us assume that under pressure of work the lawyer has forgotten the whole problem, eager as he is to get started on his client's defence without delay. Later he will think about it

[3] *Re Ericsson and Berglöf*, 1948 *Sv. J.T.* 735 (Umeå Court of Appeal).
[4] *Ekelund* v. *The King*, 1953 *N.J.A.* 461.
[5] *Re Gille*, 1954 *N.J.A.* 25.
[6] My italics.
[7] Cf. Olivecrona, *Rättegången i brottmål enligt RB*. Supplement 2, Lund 1957, p. 4.

and the defendant will submit his application to the court. Is there any reason in such a case to penalize the forgetfulness of the lawyer by rejecting the application?

(*b*) The second example by which I wish to demonstrate different ways of applying a statute to concrete cases also relates to criminal procedure. Let us assume that a warehouse has been broken into on several occasions. Some persons are accused, one of them with participation in only one of the burglaries. This person denies having any part in the matter. Before the trial, however, the prosecutor addresses a statement to the court in which he declares that he has now established that the man in question did not participate in the burglary mentioned in the indictment but in one of the others. A supplementary police report states that the man has confessed to this burglary and that the truth of the confession is supported by further evidence. On these grounds the prosecutor states that he will alter his indictment so as to refer to the latter burglary instead. Is he justified in doing so? This has been contested by some writers. I do not know of any precedent in the matter.

The legal provision applicable to such a case reads as follows: "An indictment once made may not be changed. The prosecutor may, however, extend the indictment against the same defendant to include another criminal act if the court, having regard to the inquiry and other circumstances, deems it suitable to do so."[8]

In the legislative material of this provision some examples of such extension of the indictment are given. There it is stated: "The prosecutor should be able to extend the indictment to refer to another offence than that stated in the summons. Such extension may be specially requisite when the new offence has certain elements in common with the one first cited, e.g. when a charge has been made of causing the death of another person by negligence and it is subsequently found that the offence is manslaughter, or when there is a charge of fraud in relation to certain persons and it later proves that the defendant has also defrauded other persons by the same steps. Sometimes, however, it may be desirable that the indictment should be extended to include another offence not connected with the old one, e.g. a new offence admitted by the defendant during the procedure."[9]

Let us first examine the *dictionary* meaning of the word "ex-

[8] RB Ch. 45, sec. 5 (1).
[9] *N. J. A.*, Second series, 1943, p. 568.

tend". If something is extended this must result in its becoming greater in its extent or in its contents. Thus, there may be an extension even if at the same time a certain reduction is undertaken. But in that case what is added must exceed what is taken away.

Can an extension consist in the replacement of what already exists by something different and greater? For my part I can only feel that it is in conflict with ordinary linguistic usage to express oneself in this way. And quite obviously this is the case when the new element is not greater but of the same extent as, or even perhaps smaller than, what has been taken away.

Then as far as concerns the *context* in which the expression "extend the indictment" occurs in the statute, I cannot find that this gives any help in establishing the meaning of the statute. But what about the legislative material quoted above? So far as I can see the originators of the statute have apprehended "extend" in its ordinary meaning. In particular I would mention that when speaking of fraud against several persons there is a reference to the defendant having been found to have defrauded "*also* other persons".

Perhaps someone will object that the example first mentioned in the legislative material is an argument in the opposite direction. Let us assume that a pedestrian has been killed by a motorcar and that it is not until during the action that circumstances emerge which point to this killing having been done intentionally. If the prosecutor in this case were to make the charge of manslaughter only as an alternative and thus retain the original charge of causing another person's death by negligence, this would be an "extension" in the sense mentioned above. But let us now assume that the prosecutor withdraws the last-mentioned charge and replaces this by a charge of manslaughter.[1] I think the statement cited above is in such general terms that it covers this case as well. The prosecutor, it is true, does not base himself on a *larger* number of criminal acts than previously, but the result will be that the defendant is charged with a far *more serious* crime than previously. For this reason it seems that one could say that an "extension" of the charge arises in this case too.

What has just been said seems to me give support to the assumption that the case here discussed is not covered by the

[1] In a case such as the present one, causing another person's death by negligence and manslaughter constitute, according to the *travaux préparatoires,* different criminal acts.

meaning of the statute. But let us then pass on to reason in accordance with the *teleological method.* As an ordinary case let us assume that the prosecutor in our example extends his charge to include, *in addition to* the burglary first alleged, the one which the accused has later admitted. Reasons of expense justify allowing something of this kind. If the later crime cannot be dealt with in the existing procedure, it will have to be made the subject of a separate action. This means a waste of time and increased costs and trouble for the court, the prosecutor and the defendant.

On the other side, however, we must weigh the inconvenience of introducing new material into the case after it has begun. An adjournment of the proceedings may be necessary and this in its turn may cause inconveniences of various kinds. As is shown by the text of the statute the court must weigh these inconveniences against the advantages of trying the new charge in the case already in progress. As, however, the defendant has admitted the new offence the risk of delay is as a rule very small.

Similar considerations apply in the more unusual situation here discussed, in which the prosecutor *withdraws* the original charge. If the defendant has confessed to the new crime the advantages already referred to will weigh heavily, while at the same time there is no need to fear that there will be any delay in the case. If, on the other hand, he has denied committing this crime and new evidence is therefore required, it may be better if the prosecutor makes a new indictment. From the point of view of purpose it is obviously of no importance whether *the prosecutor withdraws the original charge or maintains it.*

In undertaking a *teleological* construction of the statute one therefore comes to the result that the changing of the charge is permitted. This is not the case if one bases oneself on the *meaning* of the statute alone. Even if in that case one pays regard to considerations of purpose it seems to me to be nothing but a fiction to say that the expression "extend the indictment to include another offence" also includes the case where the offence alleged has been *replaced* by an entirely different one.

(*c*) Our third example concerns incompetence of counsel in civil procedure. Swedish law has no correspondence to the distinction observed in England between barristers and solicitors. Moreover, a party is not obliged to have a lawyer and there is no monopoly exercised by the lawyers. Thus, he can, if he wishes, conduct his own case or entrust it to somebody who is not a mem-

ber of the bar or even without any legal training at all. The latter is what happened in a case which came before the Supreme Court.[2] The person chosen, however, was found to be extremely unsuitable as a counsel. Among other things, he had been convicted of various crimes, one of which involved the embezzlement of money. He had previously by another court been rejected as a counsel and had also been convicted after that.

The provisions which are of interest in this connection may be found in RB, Ch. 12, and read as follows:

Sec. 2.

> No person may be used as a counsel unless the court finds him suitable to appear in the case, having regard to his honesty, knowledge and earlier activities.

Sec. 5.

> If a counsel shows dishonesty, want of skill or imprudence or is otherwise deemed to be unsuitable, the court shall refuse to accept him as a counsel in the case; the court may also, if there are reasons therefor, declare him to be incompetent to act as a counsel in the court for a certain period or until further notice.

As will appear from this, the court of first instance in the case mentioned above had to make up its mind on the following question: Could the court only *reject* the counsel or could it also *declare him incompetent to be used as a counsel in the court?* The lower courts found the latter to be the case, but the Supreme Court considered that only rejection could come into question.

Let us first look at the *meaning* of the statute. It will be seen from Sec. 2 that a counsel whose unsuitability has been manifested *before* the action can be denied the right to appear in the case in question. On the other hand, this section does not say that the court can also make a pronouncement on the person's future right to be a counsel. This is dealt with only in Sec. 5. And as this clause contains the word "shows", the meaning seems to be that the unsuitability in this case must have manifested itself *during* the action or, in other words, through the way in which the representative is conducting his client's case. Otherwise the statute would have said instead "If a counsel shows or has previously shown . . .". On the other hand, it is not altogether incompatible

[2] *Re "Urban H."*, 1950 *N.J.A.* 359.

with ordinary linguistic usage to make the word "shows" cover both these eventualities. The present tense can also be used to refer to events belonging to the past. A third possibility is that the word "shows" has the meaning first stated but that the phrase "or is otherwise deemed to be unsuitable" refers also to the case where the unsuitability has manifested itself before the action.

Now let us also study the two provisions *together*. If we apprehend Sec. 5 in the wider sense, Sec. 2 appears superfluous, for even in the case there described rejection may take place in accordance with the first clause of Sec. 5. If, on the other hand, we take this provision in its more limited meaning it becomes, at least partly, superfluous instead. A rejection in accordance with Sec. 2 may of course also arise *during* the action. As an example we may take the eventuality that the unsuitability of the counsel has not come to the knowledge of the court until then. Moreover, the wording of Sec. 2 seems not to exclude the eventuality that the unsuitability has manifested itself after the suit has been filed or even during the proceedings. In general, of course, it is a matter both of a before and a after. By way of example we may mention the eventuality that a counsel who is known for his troublesome character reveals this also when conducting his client's case in the action in question.

However, it is not necessary to assume that the statute contains such a duplication as has been dealt with above. If we wish to limit the use of the more rigorous consequence, or in other words the deprivation of the right to appear as a counsel in the future, this must be stated in some way in the statute. The first clause of Sec. 5 might be thought to fulfil this function *only*. In that case the statute would be lacking as regards *elegantia juris*—but this possibility too must of course be taken into account. This much is clear: if this provision has the function now referred to it must be regarded as limiting the application of Sec. 5 to the cases in which the unsuitability of the counsel has become manifest through his conduct in the case.

There are further views to be put forward in this question. Thus, the legislative material of Sec. 5 gives a certain support for the view that the persons who drafted it did not have in mind cases where the unsuitability of the counsel manifests itself only before the action. For reasons of space, however, I shall not go into this. I must confine myself to declaring that, in an intuitive evaluation of the various arguments for and against, I come to the con-

clusion that the restrictive interpretation has most to be said for it. Sec. 5 would therefore have the same meaning as if it had read as follows: "If during the action the counsel . . ."

Let us now pass to reasoning according to *the teleological method*. First we must find out for which reason a court may declare a counsel incompetent for the future too. Why is it not sufficient that he can be dismissed if his conduct of the case has proved unsatisfactory? In the legislative material it is stated that the more rigorous consequence "may be especially called for in regard to a person who carries on work as a legal representative by profession".[3] As a reason for this it may be said that the court should be freed from the trouble of having to consider the suitability of the person in question time after time. Moreover, the risk that he will be employed by future litigants is diminished and these ligitants will be safeguarded against the dismissal of their counsel by the court.

These views, however, apply with the same force also when the unsuitability of the counsel has manifested itself independently of his conduct in the case. Indeed, under such circumstances it seems to be particularly desirable that the more rigorous measure can be taken. For the unsuitability of a counsel will seldom manifest itself in the action so strongly as has occurred in some of the cases here referred to. In these cases one can pay regard to anything that he has previously done.

Moreover, it may be observed that when the unsuitability of counsel has manifested itself before the action, he cannot in accordance with the restrictive application of Sec. 5, however incompetent he may be, be declared unsuitable for the future. For we cannot allow him to continue the case in the hope that he will soon do something outrageous, so that he can be declared incompetent. Such a procedure would be in conflict with Sec. 2. According to that section the counsel must immediately be dismissed.

The reasons just stated may appear to be overwhelming. But there is a counter-argument to be dealt with. The fact that a man is declared incompetent to conduct cases of other persons at a court, either for a certain period or until further notice, has some similarity with the situation where an official is suspended from his post. One would thus be able to regard Sec. 5 as a kind of *penal*

[3] *N. J. A.*, Second series, 1948, p. 137. It is assumed that the counsel in question is not a member of the bar.

provision, and it is generally regarded that such provisions should be interpreted restrictively, in the interests of public security. Now it is true that the meaning of the principle *nulla poena sine lege* is disputed and that it does not appear to be taken very seriously in modern criminal justice.[4] But this much at least is clear, that if this principle is to be accorded any significance in the present case, that significance must be that Sec. 5 only applies when the unsuitability has manifested itself *during* the action. That this case is covered by the wording of the statute is beyond all doubt, whereas it is at least doubtful whether such is the case when the unsuitability has manifested itself apart from the action.

However, it must be noted that the principle *nulla poena sine lege* is of greatest importance for the distinction between what is criminal and what is not. The citizens should be able to decide without too much difficulty what actions fall within the scope of the criminal law. In our case, however, it is not a question of this. And is there any reason to protect unsuitable counsels from mistakenly believing that they can only be dismissed from the case and not declared incompetent for the future also? If the court is only able to apply the first consequence, the counsel will certainly be dismissed every time he appears before the court in question. The reason we are now discussing for a restrictive interpretation therefore does not appear to carry any great weight.

In his interesting work *Law in the Making* C. K. Allen concludes his treatment of the problems of interpretation with the following words: "What seems to be needed most of all is a more scientific consistency of principle." If in this short essay I have been able in any way to contribute to this, I have succeeded in my task. I would, however, emphasize that I am not particularly expert in the questions here dealt with. My speciality is the law of procedure and I cannot claim to have read exhaustively in the methodological literature. My conception of the most suitable method of interpretation is therefore essentially based on the experience I have gained during my study of problems of application in the Swedish law of procedure. It may further be stressed that anyone who wishes to go deeply into the questions here dealt with must make use of the results of research in several other sciences, such as semantics, philosophy and psychology. This I have not been able to do. Finally, in order to avoid any possible

[4] Cf. Allen, p. 502.

misunderstanding I would point out that I am no prophet in my own country. Several of my Swedish colleagues have expressed dissent from my opinions regarding the proper application of statutes.[5]

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[5] Those readers who know Swedish may be referred to articles by Ph. Hult and Å. Malmström in *Festskrift för A. V. Lundstedt*, Sv. J. T. 1952, and by H. Thornstedt in *Festskrift för N. Herlitz*, Stockholm 1955.