COURT DECISIONS AS THE FOCUS OF STUDY

BY

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In the conceptual world of the jurist, court decisions lie in a way between written and unwritten (customary) law. Using cases in argumentation is an everyday part of jurisprudence.[1] Normative generalizations are derived from these "semi-legislated norms".[2] In the strongly expressed words of Eugen Ehrlich, without generalization there can be no legal dogmatics.[3]

Despite the importance of cases in argumentation, quite often no special interest has been expressed in the way in which they are used. The discussion has revolved more around questions concerning the extent to which so-called precedents are *binding* and *useful*. Once and for all, the question of the position of court practice (decisions) as a *source of law* is one of the fundamental topics of discussion in legal theory. If, as is the case in Scandinavia, court practice is not accorded the position of a binding source of law, interest is directed at its actual significance.[4]

Also when carrying out individual studies in legal dogmatics one must naturally know what position court practice has as a source of law. A researcher who is prepared to contest the significance of legal theory in practical research in this way unavoidably comes up against legal theory. A point that is even more important for anyone engaged in legal dogmatics is *the knowledge of how he can or should use cases in his research*. As a sector of legal theory, theory in legal dogmatics should address itself to this question.[5] For some reason, however, the subject has been of interest to but a few researchers.

In this paper I shall deal with certain alternatives in using cases and with their limits in legal dogmatic research. I will not be dealing with the *interpreta-*

[1] "The rules emanating from case law are not laid down in the same way as e.g. statutory law, but they do not, on the other hand, entirely belong to unwritten law. They occupy a position in between." Torstein Eckhoff and Nils Kristian Sundby, *Rettssystemer*, Oslo 1976, p. 121.

[2] The original term used by Eckhoff and Sundby is "semifastsettelse". Cf. *ibid.*, pp. 120 f. See also Stig Strömholm, *Rätt, rättskällor och rättstillämpning*, Lund 1981, pp. 452 f.

[3] Eugen Ehrlich, "Die richterliche Rechtsfindung auf Grund des Rechtssatzes", in Ehrlich, *Recht und Leben*, Berlin 1967, p. 216.

[4] For example, the binding nature of cases is not recognized in Finland. Even so, the decisions of superior courts have considerable significance. A factor which has been conducive towards this is the reform of the provisions on appeal in 1979. As the highest instance which deals with civil and criminal cases—the Supreme Court—today deals with fewer cases than before, its decisions have begun to approximate precedents in the proper sense of the word. A similar development clearly began in Sweden, in turn, with the reform of 1971.

Regarding the binding nature of cases in general, see for example Aulis Aarnio–Robert Alexy–Aleksander Peczenik, "The Foundation of Legal Reasoning", *Rechtstheorie* 1981, pp. 149 ff.

[5] Regarding the partial sectors of legal theory, see for example Aarnio, *Denkweisen der Rechtswissenschaft*, Vienna, New York 1979, pp. 33 ff., and Vladimir Kubeš, "Rechtstheorie und Rechtsphilosophie", *Rechtstheorie* 1982, pp. 207 ff.

tion of cases *per se*. This paper has developed over several periods when I have found myself considering basic problems in practical research. It was first published in Swedish in 1981.[6] For this present publication, I have in several respects made the paper more exact and augmented it. Due to the nature of the subject, more recent writing has been included only to a limited degree.

1. HJERNER'S CLASSIFICATION

Lars Hjerner is one of the few researchers who have attempted to analyze the use of cases. Also for him, however, precedents are the limit of his analysis. His analysis is connected above all with the doctrine on precedents.[7] The *factual interest* that he has selected is thus somewhat different from the one chosen in this paper.[8] Even so, the basic classification that Hjerner has presented offers a preliminary basis also for this study, and there is reason to turn our attention to it.

Hjerner distinguishes between four different ways of using precedents in legal dogmatics. The first one he mentions is the *synthetic* method. Especially for those preparing a doctoral dissertation, this is the typical way of gathering all the precedents in the field of inquiry in question. This method is also undertaken in those legal systems where precedents do not have the status of a binding source of law. The second method that Hjerner mentions is the *selective* method. In using this method the researcher is interested only in precedents which are regarded as representative and authoritative. He himself selects the cases or utilizes data already selected by someone else. The available but less widely known cases are not studied. According to Hjerner, this method is typical of monographs. The third method, that of *example cases* or the *descriptive* method can already be clearly distinguished from the first two. In this method, the cases are no longer as closely connected with the text as in the first two methods. They are not so much tools to be used in argumentation as demonstrations, examples of the position which is being presented. Hjerner observes that this method was usual in the older literature. The fourth and last method that he presents is the *comparative* method. Cases from different periods or different legal communities are compared with each other in order to find

[6] Ahti Saarenpää, "Om rättsfall som forskningsobjekt", *FJFT* 1981, pp. 337–62.

[7] Lars Hjerner, *Om rättsfallstolkning*, Stockholm 1969, pp. 10–12. Hjerner's classification has later been utilized also by Aleksander Peczenik, also here in connection with the doctrine on precedents. Cf. Peczenik, *Juridikens metodproblem*, 2nd ed. Stockholm 1980, p. 134. Cf. also Richard A. Wasserstrom, *The Judicial Decision*, Stanford 1961, pp. 39 ff., in which the author presents some modes of discussion related to the matter.

[8] Regarding the concept of factual interest, cf. in general Jürgen Habermas, *Erkenntnis und Interesse*, 4th ed. Frankfurt am Main 1977, pp. 234 ff., especially p. 242, and in Finnish legal theory for example Juha Pöyhönen, "Om forskning om rättsvetenskap", *FJFT* 1976, pp. 456 ff.

similarities or differences. As is natural enough, this method is the one most commonly used in the field of private international law.

As a description of methods of using cases, Hjerner's classification does not give rise to counter-arguments. It is in precisely this way that Scandinavian legal dogmatics works. On the other hand, it does not reveal anything of the *requirements for the use* of cases. In each of the four methods, the preliminary assumption has been made that the case is clearly a *causal* result of the activity of the courts. The researcher knows how the court has acted.[9] In so doing, the limits of the study of cases in the theory of knowledge are, as it were, bypassed on the basis of a general agreement. Also this is a typical and, perhaps, permissible approach in ordinary legal dogmatics.

2. A MORE PRECISE CLASSIFICATION

If cases are taken as the focus of study, we must allot the requirements for use some status in the delimitation of the points of departure for the study. In a way, the analysis must be continued in the direction of the requirements for use. From this point of view, Hjerner's classification is only preliminary, and orientational.[10] In supplementing it, there seems to be reason to distinguish at least between the following ways of using cases according to the purpose for which the cases are used.

2.1. *The description of cases*

A case is the raw material of legal dogmatics when and only when the researcher has access not only to the decision but also to the complete court records of the proceedings. This means that the court decision is raw material comparable to a legal provision only when it is in its archival form. Even a description of the case which is intended to be causal alters the nature of the

[9] The matter may perhaps be expressed most clearly if the methods of use being described are transformed into corresponding *interpretative statements*. In a simplified form, they would look rather as follows:

(*a*) synthetic statement: on the grounds of p^1, p^2, p^3 and p^4, and as the Supreme Court in its decisions x^1, x^2, x^3 and x^4 has taken the position that ..., the heirs are to be considered to be ...

(*b*) selective statement: on the grounds of p^1, p^2, p^3 and p^4, and as the Supreme Court in its decision x^1 (which is still to be regarded as establishing a precedent) has adopted the position that ..., the heirs are to be considered to be ...

(*c*) example statement: on the grounds of p^1, p^2, p^3 and p^4 the heirs are to be considered to be ... Also the Supreme Court, for example, in its decision x^1 has come to the same conclusion.

(*d*) comparative statement: as at the time decision x^1 was made the valid set of norms did not include a corresponding norm, and as the Supreme Court has now taken the position that ..., the previous decision is no longer valid.

[10] Hjerner himself illustrates in an interesting way the problems of the *interpretation* of cases. His interest is directed at the interpretation of individual cases. This subject has been studied in Scandinavia primarily also by Karl August Fleischer in his book, *Anvendelse og fortolkning av dommer*, Oslo 1981.

data. For example, the most typical case descriptions used in legal dogmatics, the published decisions of the Supreme Court, are, in this sense, refined material. The descriptions are given the form determined by the *court*. Not only does the court determine the decision, the court also determines the form in which the decided case is presented to the audience, the legal profession. From the point of view of the researcher and of research, the description may even be essentially defective or misleading.

The description of a case in itself is demanding work for lawyers. Description is not usually successful without *preliminary legal knowledge*. As a task of research, however, pure description is a fairly modest, although important task. The marginal use level of such research is soon met. In order to describe the case, the researcher has more to say in its analysis than the research objectives would require. Even so, there is no reason to deride the significance of such research.[11] Reliably described cases are constantly required in order to meet the needs of legal dogmatics and practical legal work. As examples they serve later decision-making and illustrate the variety of legal problems in practice. Man seeks examples—at times to excess.

On the other hand, we must recall that along with the development of data systems, the constantly expanding use of described cases in legal activity also places legal dogmatics in a new position. We have traditionally become used to the fact that cases have, for the most part, come to the attention of the legal profession fairly rapidly through legal dogmatics—and thus in an interpreted form.[12] However, the use of data systems is leading us in another direction. The relative number of cases which come to the attention of the legal profession through legal dogmatics is diminishing. The practical lawyer primarily utilizes descriptions of cases available through data systems, and searches for *similarities* between these cases and the cases he himself is dealing with. In this, then, the cases are often compared with each other so that the *rules* which are to be applied are relegated to a secondary position in favour of the description of external circumstances.[13] Here lies one of the elements of danger in so-called legal information science connected with the development of data systems. The growth in empirical knowledge easily shunts aside knowledge of rules. For this reason alone the researcher in legal dogmatics should be interested in the development of legal information science in more than just a purely technical sense.[14]

[11] Cf. also Eckhoff, *Rettskildelære*, 3rd ed. Oslo 1980, pp. 146 ff., in which the author begins his analysis of the significance of court practice precisely on the basis of examples and illustrations.

[12] Cf. also Fleischer, *op. cit.*, pp. 19 ff.

[13] Cf. also Robert Lewis Birmingham, *Law as Cases*, Pittsburgh 1977, pp. 185 f., in which the author comments on a similar observation by H. L. A. Hart.

[14] In Scandinavian legal writing the relation of legal information science with practical legal activity has been examined most widely by Peter Seipel. Cf. for example Seipel, *Computing Law*, Stockholm 1977, especially pp. 246 ff.

2.2. *Cases as statistical data*

In compiling statistics on court cases and in carrying out statistical analyses of them, the questions of the determination of the *statistical unit* and of the significance of numbers are the primary problems. In principle, these questions are normal problems in statistics, but especially in the field of private law they are guided by legal factors and factors related to the court system.

The history of legal statistics, as is well known, is primarily the history of statistics on *crime and criminality*.[15] Correspondingly, it would appear that the legal statistics in the various countries continue to lay heavy emphasis on criminal law. There are many reasons for this, not the least of which is the significance of the prevention of crime in social policy.[16] Another contributory factor has surely been the difficulty in compiling statistics on private law matters, a factor to which frequent reference is made. Judgments in civil cases do not fulfil the requirements of the keeping of statistics to the same degree as do measures related to criminality. The degree to which phenomena in civil law can be measured is very limited. There are few so-called *hard facts*, or else such facts turn out to have insignificant information value.

One of the basic ideas in the compiling of legal statistics from the point of view of private law studies has been the study of the *practical* significance of different legal fields and groups of cases. It has been thought that the number of cases reflects the significance of and need for study of the field in question. This was the basic idea in which Arthur Nussbaum's demands for the study of legal facts (*die Rechtstatsachenforschung*) found root.[17] According to Nussbaum, the study of legal facts, the compilation of statistics on legal events, could release misused mental capital to more productive work.[18]

There is no reason to deny the significance of this approach. Being near to practical life is a vital condition of successful legal dogmatics, and the compilation of statistics on legal phenomena is one way of testing this proximity. All of this is undeniable. As such, however, such a point of view is quite one-sided.

[15] On the earlier history of legal statistics, cf. V. John, *Geschichte der Statistik*, *Teil* 1, Stuttgart 1884, and Veli Verkko, "Miten maailman vanhin väkivaltarikostilasto sai alkunsa", *Lakimies* 1947, pp. 80 ff. The first statistics on violent offences were to be found in the first demographic statistics of Sweden–Finland (the first such statistics in the world), which were published during the 1750s.

[16] Cf. also Saarenpää, "Oikeudellista tilastointia", *Oikeus* 1972.

[17] Nussbaum presented his programme and created the term "Rechtstatsachenforschung" in his paper entitled "Die Rechtstatsachenforschung. Ihre Bedeutung für Wissenschaft und Unterricht", Tübingen 1914. He was certainly not the first proponent of practically-orientated or sociologically-coloured legal dogmatics, but he has left his name in history as the first person to design, and in part also to carry out, a detailed programme for empirical research. As a point of comparison, it may be mentioned that for example Eugen Ehrlich's well-known study of legal customs, "Das lebende Recht der Völker der Bukowina", appeared in 1912 (in *Recht und Wirtschaft* 1). Regarding the entry of empirical science in legal science, cf. for example Dieter v. Stephanitz, *Exakte Wissenschaft und Recht*, Berlin 1970, pp. 16 ff.

[18] Nussbaum, *Die Rechtstatsachenforschung*, Berlin 1968, pp. 24 f.

Legal dogmatics would be a monstrosity if its limits were established by statistical units and the number of legal cases. It was not sought by Nussbaum despite the eloquence of the declaration of his programme. The study of legal facts should *supplement* legal dogmatics.[19] Thus, later on he proceeded to a consideration of the problems of compiling statistics from the point of view of legal dogmatics.[20] The declaration was followed by its analysis. The present *Rechtstatsachenforschung* has diverged considerably from the ideas of Nussbaum, and, in the name of this approach, much statistical knowledge on different aspects of legal life has been produced which serves the interest of the sociology of law in knowledge but which is unproductive for legal dogmatics.[21]

A requirement for the compiling of statistics on legal cases which are significant from the point of view especially of legal dogmatics is the meeting of the condition of *quantifiability*. Both the statistical units and their number should be significant from the point of view of legal dogmatics. This establishment of limits, in itself quite difficult, gives rise to the following observations.

The present Finnish legal statistics are based, in respect of private law, on rather general headings of legal cases. Many of them, such as "statutory legal portion of an inheritance", "protest against the distribution of a decedent's estate" and "protest against a will" are very close to *institutional facts*. This means that they assume general knowledge of the institutions in question, for example of the distribution of a decedent's estate, but they do not assume special legal knowledge.[22] Consequently, the significance of these statistics for legal dogmatics remains relatively slight. They are predominantly satisfied primarily with *the pedagogical need for knowledge*, if even that.[23] For example with

[19] Cf. for example Nussbaum, *ibid.* In much the same way, although in greater detail, Lee Loevinger has characterized the tasks of his research orientation, *jurimetrics*. For him, jurimetrics is a new and purely positive science. It is the scientific analysis of legal phenomena. Thus Loevinger joins the ranks of those researchers who emphasize the difference between "is" and "ought". However, jurimetrics does not compete with, but instead supplements legal dogmatics. Loevinger writes: "Jurimetrics is not concerned with a debate as to whether the metaphorical life of the law has been logic or experience. Jurimetrics is concerned only with investigating the structure and dimensions of all experience that is relevant to the law." Loevinger, "Jurimetrics: The Methodology of Legal Inquiry", *Jurimetrics* (Baade ed.), New York, London 1963, p. 35. Cf. also Loevinger, "Jurimetrics—the Next Step Forward", *Minnesota Law Review* 1949, pp. 455 ff. Cf. Dag Victor, *Rättssystem och vetenskap*, Stockholm 1977, pp. 167 f.

[20] Nussbaum, "Fact Research in Law", *Columbia Law Review* 1940, pp. 189 ff. The same paper has later appeared in German in a slightly revised form (*op. cit.*, footnote 18 above, pp. 57 ff.).

[21] Cf. Klaus F. Röhl's interesting presentation, Röhl, *Das Dilemma der Rechtstatsachenforschung*, Tübingen 1974, especially pp. 5 ff. and 252 ff.

[22] Regarding the concept of an institutional fact, cf. John R. Searle, *Speech Acts*, Cambridge 1969, pp. 50 ff. Searle's presentation is based on the distinction between *raw* and *interpreted* facts. Especially with an eye on juridical information content, Searle's presentation can be made more specific by dividing institutional facts into two groups, general and juridical; the latter group would require special legal knowledge. In both of these it is a question of constitutive norms, following Searle's approach. Regarding the suitability of this distinction for legal research, see especially Tomasz Gizbert-Studnicki, "Hart on Ascription of Responsibility", *Archivum Iuridicum Cracoviense*, Vol. IX 1976, pp. 133 ff., and Ota Weinberger, "Das Recht als institutionelle Tatsache", *Rechtstheorie* 1980, pp. 427 ff.

figures on the selection of actions on wills we can, to a degree, describe their level of controversy in comparison with other disputes regarding the estates of decedents. Similarly, general statistical figures may be of significance in legal policy, for example in the organization of the administration of justice.

We thus come quite soon to the marginal benefit of the compilation of statistics which limit themselves to the headings of legal cases. In order to progress any further we must generally limit ourselves to legal cases where the *content* is quantifiable. Examples of such cases which are based on hard facts and which are measureable to a degree are decisions on maintenance payments to children and on the material consequences of divorce, which affect the economic position of the spouses. To mention some Finnish studies, Matti Mikkola and Markku Helin have compiled statistics on these and have been able to demonstrate *regularities* which are also of significance for legal dogmatics.[24] Similarly, Åke Saldeen, in a study which he has characterized as jurimetrics, has used statistical analysis to study court decisions regarding the awarding of damages in connection with the dissolution of marriages in Sweden.[25] The result of the studies supplement the normal research data of legal dogmatics. They describe the stable nature of summary results of legal cases as well as their distribution. In these studies, the researchers have been able to describe certain features of legal life which have benefitted legal dogmatics without being diverted to quasi-causal explanations.

If, on the other hand, the study limits itself, for example, to the number of divorces or, on a level of greater detail, to the marriage legislation grounds applied in these divorces, the danger of quasi-causal explanations is apparent. Statistics on the extent to which a certain norm or norms are applied and possibly also statistics describing the users of the norms are taken—as is often done—as the factor which explains the making of the choice as well as the social situation preceding the application of the norm. With a disregard of the limits of description, the data receive significance as exact basic data for causal explanation.[26]

[23] What I understand by the need for pedagogical information in this connection is interest in the communication of knowledge satisfying the need of the audience for knowledge; this is an unavoidable part of research. Thus, it is not conceptually directly connected with the concept of interest in knowledge as used by Habermas. Cf. Alexy, *Theorie der juristischen Argumentation*, Frankfurt am Main 1978, p. 331.

[24] Regarding these studies, which do not have a summary in another language, see Aulis Aarnio-Urpo Kangas, "Le ricerche nel campo del diritto di famiglia e le riforme legislative in Finlandia negli anni settanta", in Valerio Pocar-Paola Ronfani, *Famiglia, diritto, mutamento sociale in Europa*, Milan 1979.

[25] Åke Saldeen, *Skadestånd vid äktenskapsskillnad* (with an English summary), Uppsala 1973.

[26] A good example which can be mentioned is a Finnish study in which it was assumed that alcohol does not cause any social problems in the highest social classes. This assumption was based on the observation that in the highest classes no divorces had been granted on the basis of the misuse of alcohol; the utilization of these grounds in Finnish marriage legislation is predominant among the lowest social classes. Cf. Päivi Elovainio, *Mikä särkee avioliiton*, Helsinki 1977, pp. 20 f.

In this respect the methodological development which is apparent in the early stages of Max Rheinstein's extensive study of divorce is of interest.[27] As is well known, the focus of Rheinstein's study was the effect of marriage legislation on the stability of marriages. The divorce legislation of various countries formed the basic data for this almost global study. It was thought that these statistics could be used to quantify to a high degree the significance of legislation in divorce proceedings. As a counterweight to this view the executors of the German portion of the study project, Ernst Wolf, Gerhard Lüke and Herbert Hax presented their own methodological point of view. As they put it, the reasons for divorce cannot be analyzed "mathematically".[28] Each marriage is a unique, non-repeating and irreplaceable relationship. The entry into marriage and its dissolution are the result of the behaviour of the spouses, either of one or of both. It cannot be defined mathematically.

This point of view of the authors, which they followed in their own work, signified an opening in the direction of *human (behavioural) sciences*. The research took on an *understanding* approach. Understanding in this connection meant the acknowledgement of the legal assumptions of the system, it meant an *internal* point of view. The point of departure was provided by Dilthey's basic ideas on historically bound hermeneutics, but in divergence from these ideas the authors accepted causal explanations on certain conditions—when understood from within the system.[29]

There is no need to continue here the analysis of the research approach of Wolf, Lüke and Hax, an approach which is interesting in itself. What has been said above is in my opinion enough to demonstrate how easily the compilation of statistics on legal data leads from description to explanation. Statistical deduction becomes mechanical and diverges from the material commitments (rules) of the data if insufficient weight is placed on the reliability of the statistical unit. This, in turn, requires knowledge of the rules. It is only rarely that a legal case or the detail which has been entered into the statistics is an unambiguous statistical variable. Legal cases must also be explained. Along with this observation, it is time to move on to the problems of explanation. The statistical description of legal cases alone does not aim to become the only or even a central theme of research which is intended to benefit legal dogmatics. On the other hand, the development of legal statistics so that they are better able to serve legal dogmatics is a task that should be of greater interest to those engaged in legal dogmatics than it is today.

[27] Cf. for example Max Rheinstein, *Marriage, Divorce and Law*, Chicago 1972, which is the summary of a research project lasting almost two decades.

[28] Ernst Wolf–Gerhard Lüke–Herbert Hax, *Scheidung und Scheidungsrechts*, Tübingen 1959, especially pp. 9 ff. and p. 13.

[29] *Ibid.*, pp. 22–26. Wolf, Lüke and Hax attempt to emphasize the difference of their method with antipositivist hermeneutical concepts; for them the limit of "is" and "ought" does not signify the limit of science.

2.3. *Legal cases as the subject of explanation*

The *explanation* of court decisions has certainly been one of the core questions of legal theory. Especially since the later years of the historical school, the time and energy spent on this subject has been one of the most extensive demonstrations of the capacity of legal theory. There is no cause to repeat here the discussion on the subject. However, the fruitful contribution of the representatives of various social sciences in this discussion during the twentieth century and especially during the most recent decades is deserving of mention. The discussion on the application of the methods of social science to legal research, a discussion which originally was concentrated in Germany and the United States, has, primarily with the rise of system theory and the behavioural sciences, become even more extensive.[30] The representatives of fields of science which are heavy with methodology but which lack a fixed focus of research have considered the activity of the courts and, in general, the legal system a suitable subject for *scientific* study. Also Finland has its examples of this search for identity, as researchers with a training in the social sciences have attempted to deal with subjects of research which are typically legal.[31]

From the point of view of legal research and legal theory, the important results of the new attempts at research have not so much been the concrete outcome of the studies undertaken (measuring results, etc.). This is due to the fact that these studies have predominantly been empirical. The more essential influence can be seen in legal theory in itself. Once those engaged in legal research had to take a position on the views that social scientists lacking preliminary legal knowledge have presented on legal decision-making activity and on the scientific nature of legal research, they had to justify their views

[30] In the German discussion there are several different schools and individual theoreticians who serve as a counterpart to conceptual legal dogmatics, and they have not always been aware of one another's views. Important schools proper from the point of view of our subject are the *free law school* and the *interest legal dogmatics* school. The earlier tendency in interest legal dogmatics has also been called the *Tübinger school*. Individual theoreticians who have not had a wider following are for example Eugen Ehrlich, Alfred Nussbaum and Rudolf Müller-Erzbach. For a cross-section of the German discussion, see for example Bernhard Dombec, *Das Verhältnis der Tübinger Schule zur deutschen Rechtssoziologie*, Berlin 1969.

In the United States the discussion has been left primarily to the representatives of sociological jurisprudence and so-called American realism. Each tendency, however, had concealed in it a number of different points of view. Ultimately, it is a very long way for example from the "social engineering" approach of Roscoe Pound to the views of Herman Oliphant. Regarding the American discussion, see for example W. E. Rumble, *American Legal Realism*, Ithaca 1968, pp. 9 ff. and 48 ff., and Robert S. Summers, "Pragmatic Instrumentalism and American Legal Theory", *Rechtstheorie* 1982, pp. 257 ff. Norbert Reich, on his part, has analyzed the sociological and the realist tendency on the basis of his knowledge of the German discussion, and, in doing so, seeks in part points of contact with this German discussion. Cf. Reich, *Sociological Jurisprudence und Legal Realism im Rechtsdenken Amerikas*, Heidelberg 1967, pp. 44 ff.

[31] Cf. for example Esko Riepula, *Eduskunnan perustuslakivaliokunta perustuslakien tulkitsijana*, Vammala 1973, and Seppo Laakso, *Hallituksen muodostaminen Suomessa*, Vammala 1975. The prototypes of both studies are clearly to be found in the United States research tradition, and especially Riepula appears as a methodological monist in his strong criticism of legal research.

even more clearly than before. For example, in Finland the work of Professor Aulis Aarnio over the most recent years must to a great extent be seen against this background.[32] It is presumably not incorrect to state that especially in his analysis of legal dogmatics Aarnio has attempted to justify (legitimize) legal dogmatic research as research. What is therefore involved here is an answer of a kind to the legal dogmatic nihilistic criticism presented in Finland, especially during the early 1970s; in its most radical form this criticism attempted to return legal dogmatics to the so-called social sciences.

This phenomenon is certainly not solely Finnish. On the contrary it would seem as if the discussion on the relationship between legal dogmatics and the empirical sciences which examine society—and on the justification of legal dogmatics—regularly arises when the theoretical foundations of legal dogmatics become the focus of broader critical analysis. This has been the case in the Nordic countries along with Scandinavian realism, in Germany due to the influence of Kantorowitz, Ehrlich, Hirsch and their followers, and in the United States in many different connections.[33] A completely separate question which will be bypassed in this connection is naturally that of the discussion concerning the relation between the sociology of law and legal research in general. In that discussion the fundamental question is that of the incompatibility of different research traditions and interests in knowledge.

It has been customary to divide the different forms of explanation into two main groups, *causal* and *finalistic*.[34] As is well known, the difference between the two is connected in the theory of knowledge to the difference between is and ought, something which has acquired central significance. This distinction is a suitable guiding light also when attempting to illuminate questions connected with the *explanation* of legal cases.

Causal explanations have their natural place in some of the natural sciences. However, it should be remembered that not all natural sciences are quantitative and experimental, nor are all of the explanations presented in them causal. Even so, causality is still one of the firmest distinguishing features of the

[32] Aarnio himself has not especially emphasized this aspect of his work. He has preferred to refer to the criticism that has been directed against him from within Finnish legal research. Cf. also Aarnio, *Denkweisen der Rechtswissenschaft*, pp. 1 ff. and 33 ff.

[33] An example of the discussion in the United States which can be mentioned is Glendon Schubert's work, *Judicial Policy-Making*, Glenview 1965. The criticism that Schubert presents in this work is directed, among others, at Theodor Becker, who, from a lawyer's point of view, has tried in his work to correct some views of social scientists. Cf. Becker, *Political Behavioralism and Modern Jurisprudence*, Chicago 1965.

It is apparent that part of the divergence of opinion, especially between Becker and Schubert, is due to a confusion between the concepts of *act* and *action*. Becker is primarily interested in explaining an act, while Schubert is interested in describing action. However, this outline is too rough to do justice to the discussion, which is coloured by various exaggerations.

[34] Regarding the forms of explanation, cf. for example Georg Henrik von Wright, *Explanation and Understanding*, London 1975, pp. 18 ff.

natural sciences. In the same way, *positivistic* social sciences have relied on causal explanations. For example, the sociological tradition is constructed to a high degree on positivism.[35] Within sociology, *naive empiricism* has, quantitatively speaking, been at its strongest, and an attempt has been made to make it also, for example, a general method for explaining the activity of courts and judges. However, causal explanations as such do not appear to be suitable for explaining this activity, in other words, for explaining legal cases. A legal decision is an *act* in which the *following of a rule* is of decisive significance.[36] There is no causal law connecting the cause and the consequence in the same way as there is with natural phenomena or with human *action.*[37] In the individual case it is always a question of the following of a rule and, when trying for generalizations, of regularities in the following of a rule.

However, to be precise, what is said above is not a sufficient demonstration for us to shut out causal explanations in the study of legal cases. We must also clarify what it is that we mean by the word "explanation" in this connection. In order to illustrate this I shall make use of the way in which Stuart S. Nagel has approached legal behaviour. Nagel distinguishes between four different approaches. He characterizes ordinary legal dogmatics as *legal-verbal.* The typical feature of the *legal-quantitative* approach, in turn, is the description of the decision-making practice of courts, especially votes, without any attempt at an analysis of the causes and consequences of different decision alternatives. The third approach is characterized by Nagel as *causal-verbal.* A researcher adopting this approach is interested in, for example, the influence of various interest groups on the behaviour of the courts, but he is satisfied with *describing* them

[35] The following words by a central figure in sociology, Emile Durkheim, are illustrative: "Sociology does not need to choose between the great hypotheses which divide metaphysicians. It needs to embrace free will no more than determinism. All that it asks is that the principle of causality be applied to social phenomena." Durkheim, *The Rules of Sociological Method,* 8th ed. New York 1966, p. 141.

[36] With reliance on Peter Winch, Aulis Aarnio has especially emphasized the significance of following norms: see Aarnio, *On Legal Reasoning*, Turku 1977, pp. 145 ff. Luis Recasens-Siches, in turn, when dealing broadly with the divergence of legal thinking from traditional logic, has emphasized the significance of the following of norms in general in legal thinking. He concludes by emphasizing the special nature of legal thinking, its uniqueness, and observes: "It seems to me that my doctrine of the *logic of the reasonable* or the human overcomes the traditional plurality of method of legal interpretation." The author also notes that "The legal domain is a field with its own logic, the field of purposeful human action"; see Recasens-Siches, "The Logic of the Reasonable as Differentiated from the Logic of the Rational", *Essays in Jurisprudence in Honor of Roscoe Pound,* Indianapolis 1962, especially pp. 217 ff.

[37] This is presented by Aarnio in *On Legal Reasoning*, pp. 139 ff. Kaarle Makkonen, in turn, in dealing with *normative propositions* adopts a generally reserved attitude towards their causality, but admits that there are cases where the norm can be seen to express societal invariances which may even be permanent. Cf. Makkonen, *Zur Problematik der juridischen Entscheidung*, Turku 1965, pp. 38 ff.

Often it is considered sufficient to express in general the noncausal nature of concepts in legal research and of legal concepts. For example, v. Stephanitz notes the degree to which legal research and its concepts are tied to how life in society is organized. Cf. v. Stephanitz, *Exakte Wissenschaft und Recht*, pp. 7 f.

without using quantitative methods. And finally, the fourth approach, used by Nagel himself, is *causal-quantitative*. This is the application to legal behaviour of the methodology and the set of concepts of the behavioural sciences.[38]

Nagel uses the set of concepts of *social psychology* and observes that it involves certain differences compared with, for example, system theory. A description of the relation between cause and consequence using social psychological concepts (stimulus–response) contains the reservation that the analysis tends more clearly to human behaviour than to the activity of institutions. On the other hand, it is also more causal than is the set of concepts in system theory (input–output), and is more revealing of the reasons for behaviour.[39]

These comments by Nagel are somewhat disturbing. They would seem to represent an extremely causal understanding of human behaviour. On the other hand, Nagel is prepared to admit that the causality he is referring to differs from the causality of the natural sciences and, what is most important, he emphasizes the significance of legal knowledge in the study of legal behaviour.[40] Nagel is prepared to say that no social scientist has the possibility of truly understanding society without sufficient knowledge of the legal system.

In my opinion, these observations alone give us cause to note that, ultimately, Nagel's method is not the causal explanation of legal behaviour but rather the *heuristic* description of legal behaviour using the methods of social psychology.[41] Thus, he himself emphasizes the significance of the heuristic value of the subject chosen in the planning of the research. Nagel's causal-quantitative approach to research is primarily heuristic description in which statistical methods which are characterized as causal have a significant role. From the point of view of the theory of knowledge it is the description of activity rather than the explanation of an act. Taking into consideration this reservation, Nagel's empirical research results are a natural part of the series of legal information that has been produced for a good many years, especially in the United States. However, this in itself does not free the approach of its problems. On the contrary, it demonstrates the kind of difficulties one ulti-

[38] Stuart S. Nagel, *The Legal Process from A Behavioral Perspective*, Homewood 1969, pp. vii f.

[39] *Ibid.*, pp. 2–4.

[40] *Ibid.*, pp. 14 and 32 f. As regards the concept of causality, it should be noted that, following Nagel, the concept is often used to refer to probable causality instead of what I would call unambiguous, certain causality. On this point, cf. for example Patrick Suppes, "A Probabilistic Theory of Causality", *Acta Philosophica Fennica* 24.

From the point of view of sociological jurisprudence and the sociology of law the subject has been considered especially by Ernst E. Hirsch in his study *Die Rechtswissenschaft und das neue Weltbild*, which was first published in 1948. Cf. Hirsch, *Das Recht im sozialen Ordnungsgefüge*, Berlin 1966, pp. 65 ff.

[41] Regarding heuristic examination as description in legal research, see for example Gerhard Struck, *Zur Theorie juristischer Argumentation*, Berlin 1977, pp. 76 ff., and Hannu Tapani Klami, "Legal Heuristics", *Oikeustiede* 1982, pp. 7 ff. Regarding heuristics in the logics of invention, cf. H. A. Simon, *Models of Discovery and Other Topics in the Methods of Science*, Boston 1977, especially pp. 286 ff.

mately meets when explaining and describing legal behaviour by means of the methodology of system theory and of the behavioural sciences.

A second similar example can be found within legal research proper.[42] By this I refer to Rudolf Müller-Erzbach's causal legal thinking. Müller-Erzbach's earlier work can be connected with interest jurisprudence, but he quite soon broke away and later on presented his own approach, which he characterized as causal.[43] In this approach, not only interest but also power (*Macht*) and trust (*Vertrauen*), as elements of life, influence the fulfilment of law.[44] Müller-Erzbach's construction in itself is rather difficult to understand, and in this connection a closer analysis is not in order.[45] The only essential point worth noting is that even for him causality was not ultimately strict causality as found in the natural sciences, but *indirect*. Karlheinz Knauthe has indeed quite aptly characterized this theory rather as a *structural-functional* one.[46] The fact that Müller-Erzbach emphasized the empirical study of legal facts, of facts that must be taken into consideration in legal life, is connected as an essential part of this functional approach.

It is precisely in this connection that, in my opinion, there is particular reason to recall that the attempt to seek methodological monism is an ostensibly simple method of attempting to eliminate the divisions between sciences —and this method is enticing in its simplicity. However, science is not solely methodology, even though at times there has been a desire to make even this claim. The *research tradition* in each field of science is a combination of methodology, the science of history, cultural history and material familiarity with the field in question. It is obviously with this in mind that Aulis Aarnio, Robert Alexy and Aleksander Peczenik aptly observe that the connection between legal dogmatics and the empirical social sciences is not methodological but *instrumental*.[47] For example, the sociology of law in certain situations produces or, to be more exact, can produce interpretively useful information for legal dogmatics, but it does not offer legal dogmatics a methodology.

Once we rebut the possibility of causal explanation, we are left with the other side of the dichotomy of explanation, the possibility of *teleological* or *finalistic* explanation. Merely rebutting causal explanation, however, is not

[42] It should be recalled that Nagel is a social scientist who also has had a basic education in law.

[43] For example Franz Wieacker considers Müller-Erzbach a representative of interest jurisprudence and even a member of the so-called Tübinger school. Cf. Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd ed. Göttingen 1967, p. 341.

[44] Cf. Rudolf Müller-Erzbach, *Die Rechtswissenschaft im Umbau*, Munich 1950.

[45] Regarding causal legal thinking in greater detail, see Karlheinz Knauthe, *Kausales Rechtsdenken und Rechtssoziologie*, Berlin 1968, in which the author analyzes Müller-Erzbach's ideas in detail.

[46] Knauthe, *ibid.*, pp. 55 ff.

[47] Aarnio–Alexy–Peczenik, "Grundlagen der juristischen Argumentation", in *Metatheorie juristischer Argumentation*, Berlin 1983, p. 61.

enough to justify acceptance of the teleological explanation of legal cases as a method in their study. First, we must weigh the latter's relation to the interest in knowledge which guides the work. On the other hand, in this connection we should also make a preliminary reservation regarding the dichotomous relationship between causal and finalistic explanation. This question is one of the central problems of the theory of knowledge. In the present analysis, as has already become apparent in the foregoing, the distinction is of significance above all as a technical means of presentation. There is no intention to use it to deny the possibilities of utilizing causal explanations in some form also in the explanation of legal behaviour.

It has often been observed that *intentional* or *finalistic* explanations are suitable for the explanation of the behaviour of courts and judges.[48] In contrast to the heuristic description of decision-making, intentional explanation seeks to answer the question of the reason a certain decision was made and the reason it received a certain content. Usually, however, the question is posed in what seems to be a more natural form: why was a certain decision made, and why did it receive the content it had? With the shutting off of the possibility of causal explanation, however, there is the danger that the discussion will remain on a quite general level. The infinite variety of factors influencing the decision of a court, an aspect emphasized by Kaarle Makkonen, renders finalistic explanation a very vulnerable tool.[49] The levels of analysis and the matters being dealt with get mixed up with one another, and the discussion remains on an overly general level.[50] A person interested in legal theory can easily see that a very large number of those who have studied the behaviour of judges and, in general, legal research, are satisfied with a reference to the significance of *valuations* or *goals* in legal decision-making. Their role in decision-making has successfully been demonstrated, but it is not often that one has been able to go much further. The simultaneous, intentional influence of several factors has appeared to be insurmountable. The discussion has quite obviously needed a greater degree of precision in the set of concepts. One of the first to take a most important step in this direction was Aulis Aarnio and he did so by relying on the *theory of the act* from his own point of departure.[51]

[48] In modern analytic philosophy the concept of intentionality is generally connected with Miss Anscombe's famous work *Intention*, and the later linguistic usage.

[49] Cf. Makkonen, *Zur Problematik der juridischen Entscheidung*, p. 212.

[50] Regarding the different levels of explanation of a legal decision and on their relation with theoretical models of decision-making in greater detail, see Jerzy Wroblewski, "Games of Explanation and Justification of Judicial Decisions and Their Theoretical and Ideological Background", in Peczenik–Uusitalo (eds.), *Reasoning on Legal Reasoning*, Vammala 1979, pp. 108 f.

[51] In this connection, however, there is reason to recall Jerzy Wroblewski's commendable work, "Legal Syllogism and Rationality of Judicial Decision", *Rechtstheorie* 1974, pp. 33 ff., in which he examined the limits of various attempts at justification in a way which has since become of great value in research.

In his work, Aarnio has demonstrated quite convincingly that the theory of the act and *practical decision-making* which is connected with this theory can be applied as tools in the explanation of the behaviour of the judge.[52] Using them, we are in a position to better understand the structure of a decision. We are offered a theoretical framework, an abstraction, which helps us to approach the complexity of the choices that influence the activity of the judge. Aarnio has been termed an analytical hermeneutic, sometimes even an advocate ("a partisan") of this tendency.[53] The idea of using practical syllogisms in explaining the behaviour of judges, however, has aroused interest even in quarters not connected with hermeneutics.[54]

As a method in the study of legal cases serving legal dogmatics, intentional explanation would seem to have some significant limitations. First of all, we must recall that in court decisions it is ultimately a question of *the following of a norm*. This necessitates interpretation, knowledge of rules, but on the other hand awareness also of the limited nature of norms. In other words, the data being studied must be limited to a relatively few norms. In addition to this limitation on the technical aspect of research, we must recall two factors intimately connected with explanation as such: first, the problem of the compatibility of motives and beliefs, and secondly, the role of societal goals in decision-making. Each of these factors has an important place in the explanation of individual court decisions. Depending on the case, the premises vary, but their significance in decision-making cannot be denied. On the other hand, it is precisely the differences between decision-making situations, as well as their *family resemblance* in the interpretation even of the same norm, that make it extremely difficult to explain a broader set of cases. Motives, beliefs and societal goals cannot be added together along the same scale. Another aspect that presents its own limitations is that it is not always clear which act one wishes to explain. A court decision may be composed of several different acts, while in the study of the decisions of superior courts, the decisions of inferior courts are different acts.[55]

These aspects demonstrate that intentional explanation can best serve legal dogmatics as a form for the explanation of *individual* legal cases.[56] When going

[52] Aarnio relies on the theory of an act in the manner in which G. H. von Wright has analyzed it in various connections. Cf. Aarnio, *On Legal Reasoning*, pp. 163 ff.

[53] This is presented by Wroblewski, "Games of Explanation and Justification", p. 108.

[54] See for example Alexy, *Theorie der juristischen Argumentation*, pp. 273 ff., and Joseph Raz, "Reasons for Action, Decisions and Norms", in *Practical Reasoning* (Raz ed.), Oxford 1978, pp. 128 ff.

[55] Cf. also Aarnio, *op. cit.*, pp. 211 ff.

[56] Aarnio, *op. cit.*, pp. 205 ff., deals broadly with the possibilities of using institutional explanations in individual cases contra in the examination of the activity of institutions. He concludes that the emphasis should be on the serviceability of the method of explanation in the study of the actions of collective agents, and notes at the same time that in *legal research* there is scarcely any need for explanation of individual cases. With an eye to the needs of *legal dogmatics* this conclusion

from the individual to the general, to a set of legal cases—on a broader level, to the study of court *practice*—intentionality reveals its limits. All in all, it easily remains on the level of *structural description* or it even acquires quasi-causal features when it analyzes the factors which, within the limits of family resemblance, differ somewhat from one another. However, it is precisely court decisions in the ordinary sense of the work that occupies a central position from the point of view of legal dogmatics. The study of court practice is one of the tasks of legal dogmatics, but on the other hand knowledge of various practice (lines of decisions) is a necessary precondition for the solving of many interpretive situations.

When attention is shifted from the individual decision to sets of decisions, to court practice, a feature appears which is significant from the point of view of the study of legal cases. Court practice is court practice due to the fact that the authorities and individuals wielding different levels of decision-making power who make decisions follow certain *rules*. As a matter of fact the study of court practice is the study of the rules followed by the authorities, and knowledge of court practice is knowledge of those rules. This observation, in turn, helps us to understand on a more general level the position of intentional explanation in legal dogmatics.

Those who engage in legal dogmatics are *not* generally interested in the intentional explanation of individual court decisions. In this sense individual decisions of the Supreme Court are not generally the subject of research in legal dogmatics. The report of court proceedings, with all its social and human detail, is not after all the subject we wish to have explained as fully as possible with intentional explanations. This is because legal dogmatics is the study of rules. The study is directed towards an examination of *what rules are expressed* by court decisions. We can also say that legal dogmatics is specifically interested in court practice in the sense used above.

If I have understood him correctly, Aarnio, too, in his analysis of intentional explanation has used this as his point of departure. He has emphasized that in all types of explanations *rules* are of considerable significance, although rules, as it were, lie in the background when the explanation refers to motives and causal beliefs. Aarnio's interest in the basic problems of justification, however, assumes quite easily such an important position in his work that it may be that the significance of rules and court practice does not receive sufficient emphasis. When Kauko Wikström criticizes Aarnio for leaving the concept of court practice in an overly inferior position, he does not sufficiently understand these

presumably does not quite hit the mark. That the limits of explanation often deprive attempts at explanation of their usefulness is quite another matter. Cf. also Kauko Wikström, *Oikeuskäytännön tulkinnasta*, Vammala 1979, pp. 172–74, in which the author clearly demonstrates the significance of practical deduction in explaining individual cases.

features in Aarnio's work. On the other hand, it is Wikström himself who has undeniably been able to make an important contribution to the discussion by demonstrating more clearly than Aarnio in his own work the *theoretical* difference between the examination of an individual case and the study of court practice.[57]

In this connection there is also reason to deal with what significance intentional explanation actually has in legal research, if it cannot be considered a part of the methodological tools of legal dogmatics proper. Aarnio observes that the form of intentional explanation is of significance in two directions. First, it is with the assistance of a conception of this type that we can in general understand the decision-making activities of courts as social *behaviour*. It is a feature that belongs as it were to the structure of human language. On the other hand, the intentional explanation model is of significance when we attempt to answer *why* court practice has developed as it has. The intentional explanation model, it would seem, works its way in *behind* the rules and the court practice which expresses these rules, and into the deep structure of legal activity. As has been pointed out, such examination is not a matter for legal dogmatics, though if we so desire, research utilizing the intentional explanation model can be considered part of *theoretical* legal research. Good legal dogmatics is based on theoretical legal research. So far, it is my understanding that there has not been any very extensive work in Scandinavia in the systematic study of court practice along the lines of these principles. Ultimately, theoretical legal research is weighted heavily in the direction of the traditional subjects of legal theory.

2.4. *Legal cases as the subject of generalization and prediction*

As methods in legal dogmatics, inductive generalization and prediction would appear at first sight to be very far from each other. Generalizing on the basis of a legal case, primarily a precedent, has long been a method in traditional legal dogmatics. This has already been dealt with in the foregoing. Predicting on the basis of legal cases, however, has been seen as the empirical alternative to this method. The name of Alf Ross in particular is commonly mentioned in connection with this approach. At times there has also been a wish to speak of *induction* and of *inductive generalization* on the basis of legal cases. However, induction as a concept is not entirely free of problems, even in connection with the study of legal cases—indeed, it is quite the reverse.

If any attempt has been made at all to justify the inductive approach,

[57] Wikström, *op. cit.*, especially pp. 153 ff. and 193 ff.

support has been sought by referring to the study of *induction logic*.[58] It has been thought that through this, a common, albeit very loose framework can be found for legal induction and prediction in legal research. A point of connection which is even more essential from the point of view of our subject arises when we direct our attention once again to the nature of legal knowledge.

Both induction and prediction are based on the idea of the prevalence of a certain *rule*. A precedent is considered to express a general legal rule, and a prediction is thought to state something about the existence of such a rule now and in the future. However, the problem lies in the fact that we do not know what that rule is. It cannot be reasoned out on the basis of the legal case with the help of immediately verifiable propositions.[59] As Aleksander Peczenik has aptly said, such propositions in legal research are of a quasi-empirical nature.[60] Not even prediction theory offers a solution to the analysis of court practice that would be any better than ordinary induction. The limits of both methods in the theory of knowledge are the same.

In the study of legal cases we may of course be satisfied with noting, for example, the quasi-empirical nature of predictions. This means that we admit that they are quasi-predictions, but even so we continue to create predictions. Thus, it is possible that theoretical basic observations do not influence the research results. Someone may perhaps be prepared to say that there is not even any other model for action and in a certain sense this is indeed true. A well-justified proposition in legal research does not become something else even if we were to call it a predictive proposition.[61] However, at the same time it is here that one can clearly see the reason why induction and prediction—or, to be more exact, quasi-induction and quasi-prediction—are not suitable as methods in *the study of legal cases*. They lead to a false or, rather, imprecise picture of the true method being employed. The way in which the propositions pertaining to the case are verified to the audience in legal research is not taken into consideration. Induction and justification become mixed with one another. By saying that legal induction is very similar to other forms of induction, the researcher does nothing other than open his own set of questions.

In this connection we should note that the understanding that lawyers have of induction may need quite a bit of clarification. We use induction as a general

[58] Regarding the extensive literature on the different forms of inductive logic, see for example Jaakko Hintikka–Patrick Suppes (eds.), *Aspects of Inductive Logic*, Amsterdam 1966, and Nicholas Rescher, *Induction*, Oxford 1980.

[59] The problems of legal induction are clearly brought out in Aulis Aarnio, *Denkweisen der Rechtswissenschaft*, pp. 199 ff., and Kaarle Makkonen, *Zur Problematik der juridischen Entscheidung*, pp. 95 ff. They are especially interested in the possibility of inductive generalization from norms to general principles. Both come to a strictly negative conclusion.

[60] Peczenik, "Empirical Foundations of Legal Dogmatics", *Essays in Legal Theory*, Lund 1970, pp. 51 ff.

[61] Regarding legal prediction, see Aarnio, *On Legal Reasoning*, pp. 262–65.

expression to denote a generalization from an individual case. It is also customary to say at the same time that induction is the opposite of deduction. This expression, familiar already from school logic, is misleading if we wish to study how induction is reasoning which expands knowledge, and what the relation between premises and conclusions is in our reasoning. The extensive debate that has been carried out on inductive reasoning, with all its offshoots, clearly demonstrates that we cannot follow Aulis Aarnio in saying that the only factor connecting legal induction and "induction proper" is the same name.[62] In so saying we are quite obviously warding off something that we do not know and which, as a matter of fact, no longer exists. On the contrary there would seem to be reason to go into more detail in our analysis of the various forms of induction logic which have come up against the same type of problems as in the rebuttal of the possibility of a basic model in legal induction. It would be equally interesting to deal with the nearness of so-called *abduction* or retroduction to legal generalizations and predictions. However, given the scope of our present subject, this observation can only be mentioned.

2.5. *Decision-making practice as the subject of systematization*

Court practice may be the subject not only of description and explanation, but also of *systematization*. An attempt is made to place legal cases in the correct categories in the legal system. However, we have to remember that the systematization of legal cases is not something that is entirely unambiguous. There are many ways of placing cases in order, just as there are many purposes in doing so. In all cases, the key concept is that of *system*.

Systematization in itself is one of the central characteristics of scientific research. It is also used as a general term for the explanation, prediction and description carried out with the help of scientific theories.[63] In legal science, it would appear that systematization has a somewhat more specific significance. Usually it is used to refer to the organization of legal data in different groups and subgroups in a coherent way. This has been seen as one of the fundamental tasks of legal dogmatics, at times even as its main task. Kaarle Makkonen undoubtedly states a generally acceptable fact when he says that systematization is necessary.[64]

Despite the great amount that has been written about systematization, it is still difficult to find two matching views of what is meant by system and systematization. Claus-Wilhelm Canaris' well-known study of systematization

[62] Aarnio, *Denkweisen der Rechtswissenschaft*, p. 207. Compare this with Birmingham, *Law as Cases*, pp. 124 f.

[63] As a concept, scientific systematics has been developed by Carl Hempel.

[64] Makkonen, *op. cit.*, p. 156.

is perhaps the clearest demonstration of this.[65] Due to the divergence in views I shall begin by presenting my own view of the central questions of systematization.[66]

A legal system is a set of concepts organized in accordance with a certain basis (key). From another point of view, it is a set of propositions. In a legislative system, the basis and point of departure of the system are the laws. A law text, as a written provision, is generally a part or chapter of a law (e.g. Act of Parliament), and the law in turn is connected with other laws, ordinances and other official decrees. Ultimately this system culminates in the norms of the Constitution. It is with reference to this feature of the system of norms that one can speak of law-systematic connections. However, this general systematic feature, the idea of rational texts, is only a part of the systematics of our system of norms; it is its manifest embodiment. From the point of view of legal dogmatics the fulcrum is elsewhere. It is the systematics of *matters*. Every law text organizes some matter. These, in turn, form together a more or less loose system. Thus, for example, the winding up of the estate of a decedent is not a random combination of various human actions, but a whole which can be conceived as such from a certain point of view. Furthermore, in the system of inheritance the distribution of an inheritance is a systematic whole that follows both in time and as a matter the winding up of the estate. Behind the legislated system is a systematic understanding of how (and, in our example, in what order) matters are to be arranged. This is part of the demand for the rationality of legislation.[67] The legislative arrangement of matters is a *goal-orientated activity*.

Thus, a law text provides information on the (normative) arrangement of matters. It is the natural point of departure for interpretation and for the formation of the normative proposition. Beginning with the law text, and with the support of other sources of law—primarily the *travaux préparatoires*—one must attempt to obtain an understanding of the legislated norm. This understanding must be in harmony with the purpose of the law, the arrangement of the matter. In a way, the researcher is seeking the practical norm intended by the legislator—it is true, however, that he never quite pins it down. Thus, generally the law text must unavoidably and *knowingly* be situated in the systematic network of matters and the provisions that arrange these matters. This means the reconstruction of a sensible and systematically logical set of

[65] Claus-Wilhelm Canaris, *Systemdenken und Systembegriff in den Jurisprudenz*, Berlin 1969. Cf. also Alexy, *Theorie der juristischen Argumentation*, pp. 310 ff.

[66] I have dealt with this subject in greater detail in Saarenpää, *Tasajaon periaate*, Vammala 1980.

[67] Regarding rationality as a distinctive sign of systematics see also Werner Krawietz, "Rechtssystem und Rationalität in der juristischen Dogmatik", in *Methodologie und Erkenntnistheorie der juristischen Argumentation, Rechtstheorie, Beiheft* 2, Berlin, 1981, pp. 229 ff., especially pp. 306 ff.

legislative norms. The researcher must attempt to find the elements of the system that would turn the provisions into an acceptable whole which can be sensibly justified. It is within this framework that it is possible to turn a sentence or sentences in a text of law (a legislated norm in the wide sense) into a normative proposition.

A set of normative propositions, a normative system, may also be described as a kind of network. Keeping in mind the limits of knowledge, this network could be called *an intended system.* It is a justified understanding of the rational arrangement of the law text and the matters dealt with in this text.

With an eye to systematization, an intended system is a *basic system.*[68] Legal dogmatics must further develop this basic system and, if needed, alter it. The same basic system may be replaced, reformulated many times in accordance with the relevant situation in society and the development of theory. The legal theory which is the basis of systematization gives new interpretive results which accord with the law.[69] As a matter of fact this is one of the vital conditions of legal dogmatics. Legal dogmatics is in a state of continuous circular motion, in which a vital condition is the reformulation of the system so that it accords with the present situation. Following Arthur Kaufmann, I wish to emphasize the importance for legal dogmatics of new theory and systematization according to this new theory. Because of its ties to the system, non-renewing legal dogmatics is in danger of becoming a perversion, a monstrosity.[70]

In the systematization of legal cases, it is not a question of a reformulation of the basic system. Court practice does not form a system in the sense expressed above. On the other hand, a legal case is raw material for legal dogmatics to the same degree as are the provisions of law. Every legal case expresses some rule. Thus, also a legal case must be placed in the appropriate systematic connections in order to be used. Here again the basic system is of assistance, as it is the natural source of the basis for systematization.

If the systematization takes place on a very general level, it could be characterized as institutional. For example, distinguishing between decisions on the law of contracts and decisions on the law of inheritance is systematization on this level. In this case, the division according to fields of law is used as the basis for systematization. As is well known, the legal order and, according-

[68] Also Aarnio uses the expression basic system for the system referred to; see Aarnio, *Denkweisen der Rechtswissenschaft,* p. 55, and *Oikeussäännösten tulkinnasta,* Helsinki 1982, p. 140.

[69] Regarding the concept of legal theory, see Pöyhönen, "On the Role of Theories in Legal Dogmatics", in *Methodologie und Erkenntnistheorie der juristischen Argumentation, Rechtstheorie, Beiheft* 2, Berlin 1981, pp. 127 ff.

[70] This is presented in Arthur Kaufmann, "Recht und Gerechtigkeit in schematischer Darstellung", in Arthur Kaufmann–Winfried Hassemer, *Grundprobleme der zeitgenössischen Rechtsphilosophie und Rechtstheorie.* Frankfurt am Main 1971, p. 293.

ly, legal activities are divided into public law and private law; these in turn are divided into several subsectors, and so on. Depending on how general a view one takes of the validity of such classifications, it is a fact that some such fundamental division is needed in order to visualize legal matters in general. It is the key to pre-systematization. However, when working on this level the degree of complexity of the systematization is not very high.

As a matter of fact the theoretical basic problematics of systematization do not appear at their clearest until we go on to organize a specific section of the framework mentioned above, for example the law of inheritance. We need a fundamental set of concepts in order for us to understand the *connections* between different decision-making situations. One set of systematics can be found already in inheritance legislation. The *order of matters* established by the chapters in the Inheritance Act describes one way of viewing the connections. The approach used in the Act, however, is not enough for the needs of court practice. One must, as it were, go behind the systematics of the Act. This means that we are dealing with the same problem as is met with in systematization in general. In the present situation, the system itself accords with the law in the manner described above, but it does not necessarily follow that a legal case which we try to fit into this system accords with the law.[71]

From the point of view of the study of cases it does not matter what systematics we use. What is essential, however, is that the arrangement of every case, no matter if this is done in official collections of cases or by an individual researcher, requires the use of *some* background system. In this sense the presentation of legal cases in a manner going beyond complete casuistry is always bound to a system. For this reason we are justified in saying that systematization is also one of the central tasks of the study of legal cases.

2.6. *Legal cases as data for argumentation*

In the Scandinavian legal tradition, court decisions have always been granted the position of a *source of law*. On a more general level, this is the case in European legal orders, to say nothing of the central role which legal cases have as the manifestation of the *ratio decidendi* in the common law systems. The question of how *strong* a position as a source of law legal cases have depends on the source of law doctrine accepted in the legal order in question. It is

[71] By the identicalness of systems, which has been discussed to some extent, I understand identicalness from the point of view of accordance with the law. The reformulation of the system stays according to the law, while on the level of general doctrine we may depart from positions according to the law. Similarly, a legal case may or may not prove to be in accordance with the law.

generally not settled once and for all in legislated law; instead, the answer gradually develops in connection with the development of the legal tradition.[72]

Following Peczenik, Aarnio has formulated the significance of court decisions as sources of law as the following rule: one must refer to a court decision if a decision applicable to the situation is available. Robert Alexy stated the matter even better when he formulated what amounts to a principle on the burden of proof regarding the use of court decisions: the interpreter must justify his position if he refrains from taking into consideration a court decision which deals with the matter. Thus, when expressed in this way, the "obligation" to refer to the decision, something to which Aarnio and Peczenik also refer, is an obligation to justify a negative position.[73]

However, there are considerable problems involved in referring to a court decision. When we try to uncover what the legal cases may be which deal with the matter in question, we often have to face the entire scope of legal argumentation. The raw material must be sifted carefully in order to find those cases to which the rule on the burden of proof refers. In this connection it is not possible to deal with these questions in any detail. On the other hand, in my opinion there is reason to draw up certain rules of the game as basic requirements for any study that refers to court decisions and which serves argumentation. The following three requirements, which I believe are often bypassed, establish the foundation for the study of cases serving argumentation.

1. The decisions must be *described* carefully. It is generally not enough that the short outline of the case taken into the official collection of cases is summarized. An attempt should always be made to describe the case specifically from the point of view of the problem in question. This means that the factual side of the case must be sifted in order to justify in a valid manner the comparability of the decision and the interpretive situation at hand.

2. An attempt must be made to understand each decision in its characteristic *systematic connections*. As has been noted in the foregoing, each case expresses some legal rule. The rules, in turn, form a systematic whole, a network of norms, in the legal system. A case that is separated from this system receives an arbitrary interpretation and loses its justificatory value as material for legal argumentation.

3. Court practice is a long way from being always stable and uniform. Even within a short time the decision-making policy followed by a court may vary.

[72] In this respect I refer to Martin Kriele's apt analysis in *Theorie der Rechtsgewinnung*, Berlin 1967, pp. 243 ff.

[73] Cf. Alexy, *Theorie der juristischen Argumentation*, pp. 333 ff., Peczenik, *Juridikens metodproblem*, pp. 48 ff., and Aarnio, *Denkweisen der Rechtswissenschaft*, pp. 135 f.

For this reason, as every lawyer knows, in interpretive situations one can find court decisions both for and against a certain position. The rules of the game of *the ethics of science* require open justification in this situation. The researcher must also present the decisions which speak against the interpretive alternative he has chosen.

Undoubtedly these three rules may appear simple and very familiar to all. However, in practice it has been demonstrated that these rules are often followed in an impermissibly loose manner. For this reason also the type of study of legal cases which, in accordance with these guidelines, only produces analyzed commentaries of legal cases, has a clearly defensible position in the range of duties of legal dogmatics.

2.7. *Legal cases and the comparison of norms*

Legal research may utilize court decisions also in other ways. I shall conclude by taking up one of these alternatives. I shall term this the comparison of norms. This approach to research forms the basis for my work on the law of inheritance, *Tasajaon periaate* (1980), to which the reader can turn for more details. In this connection I will only take up some general aspects.

In the legal writing the question of the law-creating role of the courts has long held an important position. At times, for example in the doctrine of the exegetic school soon after the French Revolution, the courts have been seen to apply the law almost as mechanical automatons. At times, however, the judge has been considered almost a free agent in the application of the law, an agent to whom the letter of the law is only a pointer as to how he should act. Between these two extremes lie many shades of doctrines and thinking. In this connection there is no need to present the different trends of thought. On the other hand, the problem itself of the role of the courts in developing the law deserves attention. One can simply ask in what way the decisions of the court direct legislation in different fields of law. I shall not attempt to present my evaluation of what the function of the courts is *in general* in developing the law. In my study I have selected as my example data only the law of inheritance, and even here I have only selected certain problems, those which in some way are connected with the fulfilment of the principle of equal distribution in inheritance, a principle which has an important position in the Finnish law of inheritance. The way in which one "measures" the development of law is the methodological problem. For example, what entitles us to say that the court has created legal rules which were not contained in a law when it was passed? The question is a most difficult one, but to my mind one aspect can be presented in the following manner.

When a law is passed, it is given with a certain content. Roughly speaking, the law text and the *travaux préparatoires* together demonstrate the contents of the law immediately after it is passed. On the basis of this material, and in the way already described above, it is possible to trace the *intended system*. It is well known that, for example, the law and the *travaux préparatoires* are far from providing an answer to every conceivable interpretive problem. In this sense the law contains a gap. On the other hand, there seems to be some justification for suggesting that, on the basis of the material just referred to, we formulate our opinion of the *fundamental basic principles of the system*. These form the framework inside which the interpretive decisions, through the use of different arguments in individual cases, can and must be found. With the help of, above all, the *traveaux préparatoires* the researcher thus primarily seeks a *system*, not a set of individual answers to interpretive problems.

After this the task is to uncover *in what way the intended system has been fulfilled*. How has it been augmented and what changes have there been in the individual parts during the application stage? In order to undertake this task, we must form our opinion of the *practical system*, by which I mean the system formed on the basis of court decisions. As has been noted above, the decisions are always the expression of some rule. They are also always a part of some systematic connection. We cannot explain with very great precision what rule the judge had been thinking of, but on the basis of the intended system we can develop a *norm hypothesis* with which we can compare our understanding of the practical norm expressed by the legal case.[74] As a matter of fact the practical norm is, correspondingly, a norm hypothesis which explains the court decision in a sensible manner. The comparison of the intended norm and the practical norm is the comparison of norm hypotheses. It is for the scientific community alone ultimately to consider whether the opinion of the researcher of the system of intended norm propositions upholds, rejects or alters the practical norms.

It is, above all, when there are a considerable number of decisions from some field that they offer important signposts for those tracking down the system. *If* one is able to uncover the practical system—depending on the representativeness of the cases—the researcher is provided with tools which can be used in the description of the development of the system; the intended system and the practical system. This uncovering process involves comparing these systems with each other.

In practice, research which follows this basic approach is very similar to ordinary legal dogmatics. It is a question of shedding light on different methods of presenting arguments for various interpretive alternatives, on the

[74] In this respect my approach has received an undeniable influence from Martin Kriele's ideas.

basis of the available sources of law. However, with an eye to the utilization of legal cases, to the study of legal cases, there remains an essential difference in respect of ordinary, commentating legal dogmatics. The difference lies in the *study approach*. The legal cases are taken *because* it is hoped that they will make it possible to carry out the comparison of systems referred to above. The *intention* of the utilization of systems—to use this term—is not the same as it is in many other studies. One can also say that the approach is highly system-orientated in that the source of law material is understood as the expression of a system.[75] From this point of view the method can also be termed systematic interpretation of the law, although we must bear in mind that this term also has another significance in the writing on the theory of law, or at least has other shades of meanings than the one presented here.

3. REGARDING THE NEED FOR STUDY OF LEGAL CASES

I shall conclude by returning to the challenges that the development of information systems presents to legal dogmatics. Within a short space of time the amount of legal information has grown enormously. This has meant and will mean a change in the position of legal cases both in legal dogmatics and in legal life. It is easier to use legal cases than it was in the past. Many persons, for example the clerks in superior courts, note this with obvious relief. However, there is also another aspect involved which I believe has been almost entirely neglected, for example, in Finland. With the increase in the number of legal cases there has been no change in the prerequisites for their use. On the contrary, increasing use is being made of legal cases regarding which the only available information is the bulletin formulated by the court itself or some other such brief commentary. Researchers who use such cases easily depart from *following rules*—instead, they only follow cases. The essential element in legal activity is bypassed.

It follows from the above that legal dogmatics should devote increased resources to the study of cases. We need cases above all in an analyzed format. There is clearly a gap between, on the one hand, systematizing theoretical legal dogmatics and, on the other hand, system-bound legal dogmatics which is interested in legal cases but not in their study. This endangers the fulfilment of the basic tasks of legal dogmatics in a time of rapid increase in legal information.

[75] This, for example, is not seen by Hannu Tapani Klami when he states that the idea I presented on the comparison of norms is defective. In so doing, Klami on his part sets as his goal a model based on the explanation of behaviour, the problems of which I have dealt with in the foregoing. He does not recognize that the comparison of norms is a method in the field of legal dogmatics for studying legal cases, and is not the activity of judges. See Klami, "Analysis of Judicial Practice", *Rechtstheorie, Beiheft* 3, Berlin 1981, p. 250.