ON THE EVOLUTION OF ARGUMENTATION IN FINNISH PRIVATE LAW RESEARCH, 1920–1960

BY

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1. INTRODUCTION

1.1. There is a rather common view that research in legal dogmatics is tightly connected with positive law; its results tend to be more reproductive than productive and its ties with statutory law render it to a great extent immune from academic trends. This conception is, if not wrong, at least definitely one-sided.

It can be argued that research in legal dogmatics is considerably less associated with positive law than is generally thought. This is especially so for private law. Scholars seeking challenging and difficult problems are likely to select their subject from a field in which written law is of little importance.

An even stronger argument against the close connection is that positive law does not offer researchers the ontological, epistemological and methodological assumptions on which legal dogmatics is necessarily based.[1] This implies that legal dogmatics can develop autonomously, independently of the changes in positive law, and that many research results presented as valid law may significantly change though the written law remains the same.

In this paper the evolution of argumentation in Finnish private law research from 1920 to 1960 will be analysed. An attempt will be made to establish how the changes influenced the nature of the results produced by legal dogmatics, i.e. of the positions taken on the contents of legal norms (*interpretative statements*).[2]

1.2. At the beginning of this century the doctrinal study of law in Finland was very open to foreign influence. It had few traditions of its own and the gaps were filled using models from abroad. The stimuli came mainly from Germany and from Scandinavia, Sweden in particu-

[1] By these assumptions I mean answers to the questions "What is law?", "What is knowledge in law?" and "What methods are used to obtain knowledge about law?"

[2] This paper is based on my book *Lainoppi ja metafysiikka. Tutkimus skandinaavisen oikeusrealismin tieteenkuvasta ja sen vaikutuksesta Suomen siviilioikeuden tutkimuksessa vuosina 1920–1960* (Legal Dogmatics and Metaphysics. A Study on the Scientific Approach of Scandinavian Legal Realism and Its Influence on Finnish Private Law Research in 1920–1960), Vammala 1988.

lar. Initially these currents reinforced each other because of the German influence on private law research in Sweden.[3] This situation soon changed. In Sweden a new tendency manifested itself which was very critical of what were called conceptual legal dogmatics (*Begriffsjurisprudenz*). This line of thought eventually became internationally known as Scandinavian Legal Realism.

As a result of this development, two very different research models were available to Finnish private law researchers in the 1920s. One was founded on the tradition of conceptual legal dogmatics, which had been imported from the 1880s onwards. The studies representing this approach formed the framework of Finnish private law research. The other model was the new school of thought which had come into existence in Scandinavia.

The differences between the two frames of reference were great. Conceptual legal dogmatics regarded the legal system as a systematic unity based on two fundamental categories: legal institutions (for example sale, tenancy, guarantee) and subjective rights (for example ownership, the right to claim). The legal order was considered to be a system of legal institutions and subjective rights.

The task of jurisprudence was to study the nature and mutual relations of these categories and to elaborate general theories connecting legal consequences with these categories. The theories could be used to find solutions to concrete juridical problems by assigning the problematic case in question to the most suitable category, after which the legal consequence could be determined by means of the general doctrine connected with this category.[4]

Characterizing research based on the conceptual approach to a higher level of abstraction we can say that it conceives of legal dogmatics as a *rational* and *dogmatic* science founded on principles.

There is a close relation between legal dogmatics and the legal cultural tradition, where principles play an important role. Concrete legal rules are deductive, particular applications of principles laid down by general doctrine.

According to that view the method of a legal scholar consists in elucidating old, sophisticated tradition. The special skills required to solve concrete juridical questions are based on a good command of the

[3] See Jan-Olof Sundell, *Tysk påverkan på svensk civilrättsdoktrin 1870–1914*, Lund 1987, *passim*.

[4] Of the Scandinavian articles presenting the method of conceptual legal dogmatics special reference should be made to Francis Hagerup, "Nogle ord om den nyere retsvidenskabs karakter", *TfR* 1888, pp. 1 ff.

whole system. Only the legal order as a whole provides the principles in the light of which the case should be examined, as well as the frame of reference of juridical criticism of judicial decisions.

The approach of *Scandinavian Realism* was entirely different. It affirmed that the law is not a logical system but an empirical phenomenon. Therefore the deductive method favoured by conceptual legal dogmatics is not an adequate means of studying the law. This standpoint was strongly supported by the philosophical theories of *Axel Hägerström*.

Hägerström maintained that the juridical basic categories such as the concepts "(subjective) right" and "duty" were part of practical metaphysics with which legal science was intertwined in numerous ways. He believed he could prove that these concepts were mere empty shells, words devoid of any connotation or denotation.[5] This meant that an argument justifying a solution by referring to a legal category could not be defended because it was impossible to found anything on nonexistent elements.

According to Scandinavian Legal Realism the law consists of legal rules which are regarded as relations between legal facts and legal consequences. Legal regulation is *social engineering*.[6] By connecting legal effects with appropriately selected sets of circumstances, it is possible to change the social behaviour of people in a suitable manner and to develop society in conformity with a calculated design. Legal dogmatics should take into account the function of legal norms as instruments of social engineering.

When legal dogmatics is used to solve a case where there is a gap or ambiguous point in positive law, the solution should be based on the fact that its effects fulfil the objective concerned. In other words so-called *practical considerations* should be emphasized in juridical argumentation much more than previously. The role assigned to these arguments was the same as that of general doctrines in the model of conceptual legal dogmatics.

In Scandinavian Realism more importance was also attached to legal practice and precedent. The validity of a legal norm meant the probability that it would actually be applied by the courts. Therefore a scholar

[5] See e.g. Axel Hägerström, *Inquiries into the Nature of Law and Morals*, Uppsala 1953, pp. 1 ff.

[6] The idea of social engineering put forward by Scandinavian Realism is clearly to be found, for example, in Lundstedt's method of social welfare, Ekelöf's teleological interpretation method and in Alf Ross's approach to the role of legal policy. See e.g. Vilhelm Lundstedt, *Superstition or Rationality in Action for Peace*, London 1925, pp. 129 ff., Per Olof Ekelöf, "Teleological Construction of Statutes", 2 *Sc.St.L.*, pp 75 ff. (1958), and Alf Ross, *Om ret og retfaerdighed*, Copenhagen 1953, pp. 417 ff.

aiming at research results corresponding to valid law cannot omit legal practice. This view, too, was in sharp conflict with the conception underlying conceptual legal dogmatics. The latter affirmed that the solution of a juridical problem should be derived from the legal system. In this perspective it was entirely wrong to try to solve a question by studying judicial decisions, because these are made by jurists who are well versed in legal practice but have no profound knowledge of the sophistications of the system.

After this brief outline of the two models which have had a considerable impact on Finnish private law research, we shall try to elucidate how the tension between them manifested itself in juridical argumentation and in the research results obtained. The period under examination covers 1920–1960.

In the 1920s the conceptual approach had already assumed its definitive shape, whereas the ideas of Scandinavian Realism were only at the outset of their development.[7] Consequently the tension between the two theories was not yet clearly manifest. It seems nevertheless appropriate to start from the 1920s because this allows us to study the process of change from the start.

2. ARGUMENTATION IN LEGAL DOGMATICS AT THE BEGINNING OF THE 1920s

In the 1920s the heyday of conceptual legal dogmatics had already passed in Germany. It had been severely criticized by adherents of the "Freirechtsschule" and "Interessenjurisprudenz", the jurisprudence of interests, for emphasizing the systematic structure of the legal order at the expense of other important aspects. According to the critics, it was unthinkable that life could be reduced to the patterns determined by concepts and that the world could be mastered by means of concepts and definitions.

Finnish jurists were aware of the criticism levelled against the conceptual frame of reference, and it even met with some favourable response in writings dealing with the methodology of legal dogmatics. Indeed, against the conceptual approach was argued that it derives legal consequences from the system of juridical concepts without taking into con-

[7] The Scandinavian Realists had different views on the relationship between their thoughts and traditional Scandinavian legal culture. Lundstedt regarded his approach as a revolutionary innovation, while Ross considered that his own theory took up the old Danish tradition originating with Ørstedt but discontinued during the period dominated by conceptual legal dogmatics.

sideration how the results fulfil social, moral or economic needs. However, the merits of conceptual legal dogmatics with regard to systematic clarity and legal safety were accentuated. These viewpoints were thought so important that it seemed impossible to abandon the conceptual method.

Kivimäki, a prominent figure in Finnish private law research,[8] stated that "legal dogmatics is and should be *principally* conceptual". Well-founded criticism of the method of conceptual legal dogmatics could be taken into account by subjecting the results obtained with this method to a scrutiny based on the criteria developed by the "Freirechtsschule" and "Interessenjurisprudenz".

As to concrete legal dogmatics, its characteristics corresponded, to a rather high degree, to the views adopted in the methodological writings. The approach prevailing in legal dogmatics was fundamentally conceptual. Among the issues raised there were considerable categorization problems.

The question of determining to which juridical category a legally problematic phenomenon belonged was considered a real scientific subject. When the phenomenon was classified, its legal consequences were established by deriving them from the legal principles peculiar to that category. However, the analysis did not always extend to the legal effects. Indeed, in many cases mere categorization was thought a sufficient result because it would enable the informed reader to infer the legal consequences involved.

Finnish private law research differed, for example, from the conceptual legal dogmatics represented by *Puchta* in that it did not regard juridical constructions as *a priori* entities beyond the sphere of influence of the legislator. On the contrary, it was maintained that the categories should be derived from positive law.[9] This requirement amounted, in most cases, to nothing else than lip service. Actually the categories were drawn from results obtained in German studies of private law, while the casuistic provisions of positive law provided but little support.

Yet Finnish legal dogmatics showed respect for positive law in the sense that it did not approve deductions which clearly led to solutions incompatible with positive law. If results deduced from the system and from the legal provision clashed, the latter ought to prevail. This limited

[8] T.M. Kivimäki was Professor of Private Law at Helsinki University from 1931 to 1956. Until the end of the Second World War he held important public offices and was Prime Minister of Finland 1932–37.

[9] *Inter alia* Ilmari Caselius, *Panttioikeuden käsitteestä Suomen oikeuden mukaan* (The Concept of the Right of Lien under Finnish Law), Helsinki 1925.

the use of the conceptual method to problems which could not be solved by applying positive law.

In practice this restriction was not very significant because there were many gaps in private law legislation, some of which even concerned major questions. As Kivimäki stated, it would have been self-deception to assert that the principal legal rules of private law were founded or even could be founded on written law, "which did not even mention the most common and most significant legal phenomenon in business, i.e. the contract between absent parties".[10]

Naturally, gaps in positive law can be filled by other means than by resorting to the conceptual doctrine. As was explained above, Scandinavian Realism stressed the importance of practical, substantial arguments and of legal cases. These demands did not, however, gain support in Finland at the beginning of the 1920s.

Doctoral dissertations and other academic treatises generally contained very few references to court practice.[11] Usually precedents were cited only as illustrations, seldom used as arguments to substantiate an interpretative statement, and it was more common that they were targets of criticism.

Recourse to practical considerations was also very rare. From the point of view of the methodology of legal dogmatics it was not advisable to justify solutions by pointing out their instrumental qualities serving given purposes. Naturally, the scholars of that time were not blind to instrumental aspects, but results had to be defended in another way, preferably by deriving them from the private law system.

This point can be illustrated by referring to the law of torts. According to the general doctrine of this field of law, liability for damages required negligence on the part of the damaging party. Liability without negligence could only be created by special grounds provided for in legislation or in an undertaking. Consequently research concluding that there was liability for damages without negligence had to be justified by indicating the special grounds concerned.

It was difficult, however, to find such grounds in all cases in which legal policy principles demanded liability without negligence. The problem was solved by the adoption of the notion of *tacit declaration of intent*, which permitted the basing of liability without negligence, for example,

[10] T.M. Kivimäki, "Uusia virtauksia siviililainopin alalla" (New Trends in Private Law Legal Dogmatics), *Defensor Legis* 1921, p. 376.

[11] There were also exceptions, such as Kyösti Haataja, *Vuokran käsite* (The Concept of Tenancy), Porvoo 1921, and Ilmari Caselius, *Omistajan kiinnityksestä Suomen oikeuden mukaan* (On Mortgaging by the Owner under Finnish Law), Helsinki 1924.

on a tacit guarantee given by the damaging party and binding him to strict liability.[12] It is obvious that this argumentation was founded on a pure fiction and that the concept "tacit declaration of intent" contained an inherent contradiction; but in this way the structure of the justification remained acceptable, and overt use of practical considerations could be avoided.

Nevertheless, it would be incorrect to state that the arguments used in legal dogmatics were completely devoid of practical considerations. Legal scholars are often pragmatically oriented and regard the usability of the results as more important than methodical consistency. If a solution turns out to be impractical and there is no methodologically permissible means of eliminating this defect, the method is covertly adapted to the situation. Consequently, practical considerations can be found, and sometimes they were even used, to rectify conclusions reached by applying the conceptual method.[13]

It is, however, clear that the "officially" weak position of practical considerations delayed their elucidation and prevented open and systematic reflection on means and ends. The arguments used were rather loose and would, in many cases, have failed to meet the requirements set by Scandinavian Realism.[14] *Lundstedt* and *Ross*, in particular, drew a sharp distinction between practical and equity arguments. They maintained that the former were based on knowledge of the societal effects of legal norms and judicial decisions, whereas there was a partly irrational factor underlying the latter, i.e. the sense of justice.[15] The open arguments employed in Finnish legal dogmatics were formulated in such a manner that most of them would have been classified in the latter category, which was rejected by the Scandinavian Realists.

3. THE REALIST EPISODE AT THE END OF THE 1920s

The situation described above changed at the end of the 1920s, when the principal ideas of Hägerström and Lundstedt became known to Finnish private law jurists. One of their main proponents was *Sainio*.[16]

[12] See e.g. T.M. Kivimäki, *Asianajajan siviilioikeudellin vastuu* (The Civil Liability of the Advocate), Helsinki 1924, p. 200.

[13] Thus e.g. Caselius, *op.cit.*, pp. 223 f.

[14] A researcher would, for example, refer to the legitimate interests of a party to a given legal relationship without justifying why precisely the interests in question should be protected in the case concerned.

[15] Thus *inter alia* Vilhelm Lundstedt, *Legal Thinking Revised*, Uppsala 1956, pp. 53 ff., and Ross, *op.cit.*, pp. 461 ff.

[16] Viljo Sainio, "Eräitä oikeuden olemusta käsitteleviä teorioja" (Some Theories on the Essence of Law), *Defensor Legis* 1928, pp. 93 ff.

Sainio tried to put these thoughts to use in his doctoral thesis on intromission under Finnish private law. He repudiated the conceptual method, "deduction from concepts". In his view, the legal order was not a system of juridical constructs and principles connected with them but consisted of the set of norms effectively observed by the authorities.

In this respect Sainio was of the same opinion as Lundstedt. Such a position is not a very suitable frame of reference for research on legal dogmatics. Traditionally, this research does not deal with the regularities typical of social behaviour but with the norms *regulating* this behaviour.

If we take a closer look at Sainio's research, we can see that Sainio was in this sense a representative of traditional legal dogmatics. His programmatic statements emphasizing realism and empiricism do not completely match the ideas expressed in his concrete research. In his book he in fact tacitly abandoned his purely empirical starting point. To him "effective law" finally meant the same thing as "living law", a notion opposed to the dusty legal principles of the conceptual approach which did not adequately serve modern society. Living law was to be found in positive law by interpreting the latter in a novel way without looking at it through the spectacles offered by the conceptual frame of reference.

In this manner Sainio's research programme actually had something in common with legal positivism. Its main argument against conceptual legal dogmatics was that the latter constituted an *alien* system which was not based on Finnish positive law. Therefore its method was unreliable. If a solution was derived from the conceptual system this did not guarantee that it conformed to the spirit of positive law. The principal argument of the so-called Uppsala School, according to which conceptual constructs were metaphysical and did not grasp any phenomenon belonging to the realm of reality, became secondary.[17]

In spite of the emphasis he placed on legal positivism Sainio was naturally aware that there were many gaps in positive law. He maintained that in these cases one should examine the purpose of legal regulation. When a question is not covered by the law the jurist should, by using practical considerations, try to develop norms which are appropriate from the point of view of social engineering.

The ideas presented above began to have an effect at the end of the 1920s. The significance of practical considerations changed consider-

[17] Sainio seemed to approve the idea in itself. See Viljo Sainio, *Elinkeinon harjoittamisesta johtuvat suhteet naapureihin Suomen yksityisoikeuden mukaan* (On the Relations with Neighbours Arising from Carrying on Buisness according to Finnish Private Law), Tampere 1929, pp. 21 ff.

ably. The change concerned the number of these arguments and also, to some extent, their nature. The open, substantial arguments used earlier were mostly what *Summers* has called rightness reasons.[18] Briefly stated they are arguments aiming at equal and fair treatment of the parties to a legal relationship and drawing their justificatory power from their conformity to a conception of justice. As such they were examples of the "justice method" severely condemned by Lundstedt in particular.

Sainio and some other scholars such as *Kauppi*, on the contrary, used, in addition, goal reasons as arguments: they justified their interpretative statements by advancing that adoption of the norm put forward would further the achievement of certain societal goals. The objectives in question were usually connected with business life and industrialization.[19] The same kind of argumentation was employed in some lesser articles.

The Scandinavian method emphasizing practical considerations reached its first culminating point in 1931 with the publication of *af Hällström*'s doctoral thesis,[20] which dealt with the significance of what is called error in declaration of intent in contract law. His research method clearly presented the following characteristics typical of Scandinavian Realism: (1) the notion of the legal order as an instrument of social engineering and, consequently, (2) the view that legal effects should be connected with concrete facts and circumstances instead of with conceptual constructs, (3) the opinion that safeguarding common societal interests is more important than protecting individual interests and meeting equity requirements, and (4) the principle that in argumentation recourse to fiction is not allowed.

Proceeding from this starting-point af Hällström concluded that in contract law the interest of trade, business life and exchange should prevail. A mistake made by a contracting party when expressing his intent could be taken into consideration only if this did not conflict with the exchange interest. The latter objective could be achieved by elabo-

[18] See on this point Robert S. Summers, "Two Types of Reasons of Substance in Common Law Cases", *ARSP, Beiheft* no. 11 (1979), pp. 218 ff. The distinction is also briefly explained by Aulis Aarnio, *The Rational as Reasonable*, Dordrecht 1987, p. 94.

[19] In Sainio's argumentation one can intermittently detect a sort of admiration for machines and functional efficiency, expressions of the same attitude that can be found in the fine arts, the literature and architecture of that time. Sainio wrote: "If somebody builds for example a cottage or lays out a garden plot near rapids with potentially valuable water power, he should be prepared to tolerate the water power being exploited and factories being built nearby." In his view, under such circumstances, not even excessive nuisance caused by intromission is illegal because it cannot be regarded as unexpected.

[20] Erik af Hällström, *Om villfarelse såsom divergens mellan vilja och förklaring vid rättshandlingar på förmögenhetsrättens område*, Helsinki (Helsingfors) 1931.

rating legal rules protecting the reasonable reliance which the (verbal) behaviour of one party caused in the relying party (the so-called reliance theory). The main purpose of the study was to establish the relevance of the error in the declaration of intent when legal norms on the matter are formulated on the basis of that theory.

4. BACK TO CONCEPTUAL LEGAL DOGMATICS

4.1. The orientation toward Scandinavian methods of private law research did not last. The approach used in the majority of academic studies completed in the 1930s was clearly conceptual. The jurists who had introduced the new technique of argumentation in Finland did not publish any major research before the Second World War.

It is difficult to define the causes of the change. Maybe it was associated with the increasing conservatism of that time. It is also possible that the growth of the political power of Germany led to a revival of its cultural influence and made researchers turn to Germany and its old culture.[21] The Scandinavian doctrine was most strongly opposed by *Caselius*, who in response to Sainio's research criticized the views of the "Hägerström-Lundstedt School" in several articles.[22] Caselius' articles seem to have produced some effect.[23]

When investigating the reasons for the change, one should take into account that mere chance could have played an important role. At that time the community of legal researchers was very small in Finland. In the 1930s the output of private law research consisted mainly of the writings of about ten scholars. Under these conditions a few productive researchers were able to influence the whole field. The most consistent representatives of the conceptual frame of reference, *Hakulinen* and *Heikonen*, were prolific writers.[24]

[21] It is true that there was no such trend in popular culture (in music, the cinema and literature). See on this point Olli Jalonen, *Kansa kulttuurin virroissa* (The People in the Middle of Cultural Currents), Keuruu 1985, pp. 108 ff.

[22] Ilmari Caselius, "Den Hägerström-Lundstedtska skolan i Finland", *FJFT* 1929, pp. 177 ff. See also the memorandum Caselius wrote as official opponent of Sainio's doctoral thesis, *Lakimies* 1929, pp. 329 ff. Caselius was Professor of Private Law at Helsinki University from 1936 to 1956.

[23] Probably af Hällström's rejection of Lundstedt's ideas in his *lectio praecursoria* (introductory lecture) given during the public debate on his doctoral thesis was a reaction to these articles. Actually there were no major differences between Lundstedt's and af Hällström's approaches to the methodology of legal dogmatics. See Erik af Hällström, "Något om juridiska begrepp, deras uppgift och berättigande", *FJFT* 1931, pp. 355 ff.

[24] Hakulinen covered, in his research, a wide range of branches of private law. He was a member of the Supreme Court 1937–52 and President of the Court of Appeal of Helsinki

When we examine the method prevailing in private law research in the 1930s we can see that matters of categorization had again gained an important position. This appears most clearly in Heikonen's book on issues relating to undistributed estates of deceased persons. Actually this study does not offer any solutions to practical juridical problems but deals with questions such as "Is an estate a legal person?", "Is an estate a private-law partnership?" and "Is an estate an object?".

The book had for the most part a favourable reception, which reflects the established position of the categorization approach in the research community.[25] It was considered to be of great practical importance though it did not directly offer solutions to practical problems.[26] The view predominated that it was impossible to solve practical cases appropriately without elucidating first the nature and essence of the estate. This reflects the conception that categorization is a means to find and justify the relevant norm.

As stated above, the adherents of conceptual legal dogmatics recognized the predominance of written law over doctrine. This attitude seemed to imply the methodological requirement that the categorization concerned should be *tested* with the aid of written law. In other words it seemed that a categorization was regarded as a kind of hypothesis which was falsified when it conflicted with positive law and confirmed when it proved to "predict" accurately the contents of a positive norm.

When we examined how far such tests were *de facto* carried out we observed that they were performed sometimes but certainly not always.[27] More importantly, we discovered that the interpretation of the test did not always correspond to the basic principle of the Finnish conceptual approach, according to which positive law should be respected. The categorization involved was not necessarily deemed to be falsified by the existence of a provision of written law which clashed with

1952–1971. Heikonen started his career as a researcher in the field of the law of inheritance and branched into commercial law later on. He was Professor of Commercial Law at Helsinki University from 1949 to 1961.

[25] It is true that the author's research results were severely criticized by Hakulinen, but the discussion remained within the conceptual frame of reference. Hakulinen did not disapprove of the method used but of the results obtained, which in his view were wrong constructs. The debate between Hakulinen and Heikonen has been dealt with in detail by Aulis Aarnio, *Perillisen oikeusasemasta* (The Legal Position of the Heir), Porvoo 1967, pp. 97 ff.

[26] This was the opinion of Caselius in his capacity as official opponent of Heikonen's doctoral thesis, *Lakimies* 1937, p. 286.

[27] It is possible, however, that researchers who did not explicitly refer to the contradiction in question, nevertheless mentally carried out a corresponding test.

the legal rule drawn from a category. On the contrary, the contradiction sometimes weakened the position of the legal provision. It was now regarded as a special norm subject to narrow interpretation. A provision again conforming to the conceptual construct could be elevated to the position of a principal rule applicable also to other cases than those it directly covered.[28]

These observations give an interesting picture of the conception of the relationship between positive law and general doctrine prevailing in the 1930s. According to Finnish legal traditions the primary significance of legislation was accepted, but it was interpreted within a frame of reference formed by theories based originally on the Pandects. This implied that the status of a legal provision as a principal norm or an exception was determined by its *doctrinal appropriateness*. With the aid of the general principles concerned, jurisprudence was able partly to control the development of statutory law.

4.2. A corollary of the approach described above was that, in the 1930s, *precedent* played only a very modest part in argumentation. It was not considered to be an actual source of law except when the solution it contained became established in legal practice and changed into so-called customary law.

The importance attached to precedent, however, varied from one researcher to another. In Hakulinen's and Heikonen's studies the role of precedent was the most restricted. Heikonen's two-volume monograph on the law of inheritance contains virtually no references to legal practice. Moreover, the use of legal practice seems to have been asymmetrical in that it was accepted for corroborating a scholars's view but not in opposite cases for invalidating research results achieved by other means.[29]

Scholars such as Caselius who took a more eclectic attitude to methodology paid more attention to precedent, though its weight in argumentation varied. In general Caselius did not seem to care whether a case he reported conformed to his own standpoint or not. This shows

[28] *Inter alia* Y.J. Hakulinen, *Perusteettoman edun palautus* (Repayment of Unjust Enrichment), Helsinki 1931, pp. 140 and 269 compared with pp. 175, 210 and 251.

[29] This asymmetry accords with the scientific approach of conceptual legal dogmatics. The argument was that precedent has no significance of its own in the justification of solutions because this should be based on systematic elements internal to legal science. Hence precedent cannot falsify a result. If, on the contrary, a researcher and a court have reached the same conclusion independently of each other, the result has got support because the similarity of the two solutions proves that the inference has been made in the proper way.

that precedents were primarily used as illustration and not as proper sources of law.

4.3. In the 1930s much less importance was attached to *practical considerations* than during the realist episode. In this respect Hakulinen and Heikonen held extreme views. Hakulinen distinguished between legal and factual arguments justifying a legal rule. According to him practical factors belonged to the latter group and, consequently, did not form part of juridical argumentation. They could, therefore, not be used to evaluate results drawn from conceptual constructs, either.

In legal writing there are indeed cases where results which, although admittedly questionable from a practical viewpoint, were approved as corresponding to valid law because they followed from a conceptual construct.[30] This reflects the idea that only the legislator can make an exception to a solution determined by the system; but a researcher is not allowed to do so because of practical considerations. Such arguments may be used only when no others are available.

The majority of jurists adopted a more eclectic attitude. *Caselius*, *Noponen*, *Raninen*, *Rekola* and *Sipilä*, for example, did not regard the conflict between the utilization of practical considerations and inference from concepts as insoluble but applied both methods depending on circumstances. From their writings it seems impossible to draw a general principle indicating where one technique or the other should be applied. On the whole the constructive method certainly played a considerable part.

Because of the strong position of conceptual legal dogmatics the legal rules put forward by jurists as research results were rather abstract. In them, usually, the legal consequences were not connected with concrete facts but with juridical constructs, especially with various subjective rights. As the number of constructs was very limited compared with the large variety of situations occurring in everyday life, the law created by the researchers appeared schematic. Legal questions which did not seem to have anything in common were solved according to the same pattern.

4.4. The conceptual approach, however, was not left in peace for long. At the end of the 1930s it once again became the target of criticism. Kivimäki voiced a moderate opinion against a radical conception of the

[30] *Inter alia* A.R. Heikonen, *Perinnönyhteydestä* II (On the Death Estate), Helsinki 1937, p. 219.

conceptual frame of reference. He took a basically positive attitude to the conceptual approach in the same way as he had done in his article of fifteen years earlier. He stressed its advantages of system and its capacity to perceive similarity in apparently different phenomena.

In his judgment, the importance of these characteristics would increase because society would become more and more complex and legal regulation would expand, which would require a more systematic monitoring of law. Kivimäki also emphasized the merits of conceptual legal dogmatics from the point of view of the development of legal culture. In his view, the approach had permitted the elaboration of whole sets of new norms that written law did not even mention.[31]

However, Kivimäki was also aware of the drawbacks connected with the application of the conceptual method. He thought the conceptual approach had led to the petrification of legal principles and to the transformation of jurisprudence into dogmatism. When one deduced legal consequences from constructs, the historical and social aspects of legal phenomena did not receive enough attention and, consequently, the results obtained were alien to real life. He believed the reason for this was that socially oriented views were becoming more general, whereas the conceptual doctrine was based on individualistic Roman law or on legal systems founded on it.

Kivimäki did not consider that the conceptual approach in itself was outworn. He asserted, on the contrary, that categorization and deductive inference were still useful instruments. Change was only needed to adapt the categories to the new societal circumstances.

Haataja's and af Hällström's criticism of conceptual legal dogmatics was more severe and more fundamental. Neither published his views in a comprehensive and systematic form. Their critical remarks are to be found in reviews of legal writing concerning applications of the constructive method.

Haataja can be regarded as an adherent of historical jurisprudence of interests. He maintained that valid law was the organic result of historical evolution. From this starting-point he criticized the German influ-

[31] T.M. Kivimäki, "Lainkäytön ja oikeustieteen oikeutta kehittävästä merkityksestä" (On the Significance of the Administration of Justice and of Legal Science from the Point of View of the Development of Law), *Lakimies* 1937, pp. 480 ff.—There is no doubt that Kivimäki was right on this point. The Finnish conceptual approach deserves credit for having developed the legal culture. By conceiving individual, casuistic norms as manifestations of general legal principles, the adherents of this school to an extent gained permission to introduce foreign doctrine. This made it possible to develop private law independently of legislation, which would otherwise have been difficult because of our legalistic traditions.

ence which the conceptual category approach had transmitted to the interpretation of statutory provisions. According to him, juridical patterns proceeding from the Nordic tradition cannot be put into categories derived from foreign law without, to an extent, adversely affecting Finnish law.

Moreover, he stated that in Finnish legal dogmatics deduction is not an appropriate method and should be replaced by induction. Concrete juridical problems cannot be solved by drawing conclusions from categories, but by studying our own tradition and positive law with the aid of historical interpretation. Only after concrete questions have been settled in this manner is it possible to elaborate a construct that meets the needs of systematization by using inductive generalization based on these concrete results.

af Hällström placed less emphasis on tradition. His main point was the demand that legal rules should serve social purposes in an optimal fashion. His practical conclusions, however, were similar to Haataja's.

He claimed that the method of deducing new legal rules from constructs should be rejected even when the construct had been induced from Finnish law material. In his view, constructs were important only from the angle of systematization and could not be used to justify positions in legal dogmatics. Justification should be founded on written law and above all on practical considerations. To handle the latter required a thorough knowledge of the practical aspects of the legal system.

The critics of the conceptual approach also included *Otto Brusiin*. In his book on the judge's discretion in the case of a lacuna in the law Brusiin accentuated the significance of practical arguments and factual knowledge of society for elaborating juridical solutions. He, like the Scandinavian Realists, regarded the law as an instrument of social engineering and rejected the "justice method", which resorted to equity to find solutions instead of applying means-and-ends reasoning.[32] In his writings there is also an argument which, to some extent, resembles the ontological argument used by the Uppsala School against conceptual legal dogmatics.[33] In general this argument was not appreciated in Finland.

[32] Otto Brusiin, *Tuomarin harkinta normin puuttuessa* (The Judge's Discretion in the Absence of a Norm), Vammala 1938, pp. 165, 190 ff. and 204 ff.

[33] By ontological argument I understand the view that juridical constructs are metaphysical, nonexistent entities and that interpretation through construct means inferring legal consequences from nothing.

5. THE PERIOD OF CHANGE

5.1. The Scandinavian influence on Finnish private law research considerably increased during the 1940s. The line of thought which was earlier to be found only in the writings of a few pioneers now achieved a breakthrough on a wide front and was integrated in concrete research activities. The methodological focus shifted to instrumental jurisprudence which centred on social engineering and practical considerations.

The change, undoubtedly, was caused partly by factors external to legal science. The most obvious of these elements was the collapse of Germany at the end of the Second World War, which put a temporary stop to that country's cultural influence. However, even before that, when the outcome of the war was causing anxiety and fear in Finland, there were attempts to draw support from Scandinavia and its cultural heritage instead of from Germany. The Scandinavian orientation offered a natural alternative, especially to Swedish-speaking intellectuals. This is also shown by the juridical periodicals of that time. The *FJFT*, a publication in Swedish, was marked by Scandinavian influence, as it emphasized Scandinavian relations and the Scandinavian roots of the legal system. No such bias can be found in the *Lakimies* journal, which was published in Finnish.

The scientific arguments used to justify the change were, to a great extent, already known from the theoretical writings of the end of the 1930s. In concrete research the historical factors stressed by Haataja were, however, left aside and the analyses concentrated on the goal rationality of legal rules. It was not the lack of historicity of the legal construct method that was subjected to criticism but its impractical character. According to the critics, the systematics of the Pandects led to the placing of little-connected legal phenomena in the same category, and, on the other hand, separated matters which functionally belonged together.[34]

The criticism of the conceptual frame of reference received new stimuli when the empirical philosophy of science, developed by logical positivism, started to affect legal dogmatics. The deductive method was now reprehended for being *non-empirical*,[35] for neglecting the statutory

[34] E.g. Erik af Hällström, *Verkan av ägareförbehåll på rättsförhållandet mellan säljaren och köparen*, Turku (Åbo) 1942, p. 97.

[35] E.g. af Hällström. *op.cit.*, pp. 13 f., Lars Erik Taxell, *Aktiebolagsstyrelsens kompetens att rättshandla*, Turku (Åbo) 1946, pp. 6 ff., C.H. Ek, *Bidrag till läran om utomobligatoriskt skadeståndsansvar vid rättsenlig farlig verksamhet enligt Finlands gällande civilrätt*, Helsinki (Helsingfors) 1943, pp. 3 ff., and Berndt Godenhielm, "Några ord om juridiken som vetenskap", *Defensor Legis* 1948, pp. 12 ff.

material which formed "the nature of legal dogmatics", and for using general doctrine instead. The latter was regarded as a kind of prejudice which prevented jurists from analysing the contents of written law with sufficient precision.[36]

Consequently, many private law specialists started to eliminate general doctrine and conclusions drawn from it. The precursor of this school of thought was af Hällström in his study concerning conditional sale, and he was followed by many other Swedish-speaking researchers.[37] At that time, the division of opinion on the methodology of private law coincided largely with the boundary between the two linguistic communities.

The new realist tendency forbade the inference of legal consequences from principles and categories which emanated from conceptual jurisprudence. As examples can be mentioned the distinction between the law of property and the law of contracts, the principle according to which subjective rights are indivisible and the inherent assumption that they are transmitted as undivided entities at a given moment. To the same group belonged many fundamental rules concerning the right of lien, e.g. the principle of its accessory nature, as well as principles relating to matrimonial law, the law of inheritance and company law.

In prohibiting these constructions and the dogmas connected with them, the new school in fact resembled Lundstedt's views which totally rejected concepts. However, Lundstedt's theories were not directly used as a model—he was still considered a jurist whose ideas ought not to be taken seriously—but the pattern adopted originated with Scandinavian research on legal dogmatics.[38]

5.2. The diminution of the importance of general doctrine influenced both the choice of research subjects and juridical argumentation. The

[36] It is well known that the Uppsala School drew from its own empirical viewpoints the conclusion that juridical constructs are metaphysical concepts which have no counterpart in reality. Although the empirical approach became prevalent, this postulate did not gain acceptance. The private law researchers did not want to take up the inherent challenge which would have forced them to elucidate the foundations of their science.

[37] af Hällström was (Swedish-speaking) Professor of Private Law at Helsinki University from 1940 to 1951.

[38] T.S. Kuhn has stressed the similarities between scientific work and handicraft. According to him researchers do not usually learn their trade by studying abstract methodogical rules. They rather receive their training by carrying out concrete research tasks in the same way a journeyman learns from his master. In other words, a researcher uses other research in the same field as a model and tries to apply some of its features analogously to his own work. Kuhn has developed his theory within the frame of reference of the natural sciences, but at least in the case concerned it also holds in legal dogmatics. See T.S. Kuhn, *The Structure of Scientific Revolutions*, Chicago 1970, p. 44.

categorization of legal phenomena was no longer regarded as a relevant legal problem. Relevant juridical information was not knowledge about categories but knowledge about the relations between legal facts and legal effects.

As an example we can again refer to af Hällström's study on conditional sale. In this treatise the development of the legal relation between the seller and the buyer is conceived as a process in the course of which the right of ownership is *gradually* completely transferred to the buyer. af Hällström's purpose was to establish what legal consequences are connected with the different stages of the process, e.g. with the conclusion of the agreement, the delivery of the goods to the buyer, the maturity of the purchase money claim and the payment of the purchase price. The *legal effects* constituted the unknown factor in this scheme.

Taxell proceeded in the same way in his book on the pledging of a bond. He did not investigate the nature of the right of lien created by the pledging of a bond but tried to elucidate the legal consequences that follow from such typical facts as the conclusion of the contract of pledge, the transfer of the bond as a pledge and the maturity of the debt. The legal consequences were, also in this case, the unknown factor.[38a]

5.3. Let us now examine *argumentation*. Because the relevance of general doctrine from the point of view of argumentation was rejected, a gap came about which had to be filled. To this end practical considerations were used. Swedish-speaking private law researchers jointly emphasized the significance of these arguments. They claimed that practical considerations should be fully recognized as a source of law, not merely serve as an extreme means of permitting the judge to find a solution to a particular case about which the law was silent.

The most radical demands were put forward by af Hällström. He required that practical considerations always be given a decisive part when the law does not directly prevent this. In his opinion, practical considerations could, under certain conditions, even supplant positive law: "A legal provision which has been enacted under different social and economic circumstances should be abandoned, although it is still formally valid, and replaced by a legal rule the contents of which are determined by the other source of law I have mentioned".[39]

The same view was held by *Gunnar Palmgren*. He argued that the

[38a] Lars Erik Taxell, *Panträtt i skuldebrev*, Turku (Åbo) 1949, pp. 1 ff.
[39] af Hällström, *op.cit.*, p. 19.

legislator cannot always keep pace with rapid societal changes. Therefore jurisprudence should adopt a new role and, if necessary, create law instead of clinging to outdated legislation.[40]

The advocates of the realist method aimed at changing the nature of the legal rules elaborated by research on legal dogmatics. These norms should be practical and appropriate and they should further societal progress.

af Hällström characterized the technique he applied in his study on conditional sale as an attempt to evaluate the procedure developed in business life in the light of its societal effects. He maintained that the business procedure should be backed up by legal dogmatics if it was proved to promote social and economic development, to stimulate production and trade or to fulfil well-founded credit needs. If these ends were not achieved no support should be given and the procedure would cease to exist.[41] Similar ideas about the relations between business life and legal dogmatics can be found in writings by some other scholars.[42]

If we use these rather brief characterizations as a basis for a general definition of the scientific approach adopted by the researchers involved, we can say that they were adherents of pragmatic instrumentalism in about the same sense as is employed by *Summers* in his monograph on American Realism.[43] According to this frame of reference, legal rules and legal dogmatics are instrumental in reaching given societal goals. By using practical considerations and the teleological interpretation method to solve juridical questions, the values concerned can be realized to the advantage of social and economic life.

In the research of the 1940s, the requirement that practical considerations should be taken into account was not a mere theoretical demand but was, to a great extent, implemented in practical studies. The subjects selected were suitable for the application of practical arguments. af Hällström's investigation of conditional sale permitted him to analyse the dynamic aspects of rights, which had caused difficult problems to jurists proceeding from the traditional starting-point. Because there was

[40] Gunnar Palmgren, "Några synpunkter på rättsvetenskapens arbetsuppgifter", *Nya Argus* 1940, p. 178.

[41] af Hällström, *op.cit.*, pp. 13 f.

[42] *Inter alia* Taxell, *op.cit.*, pp. 6 f.

[43] Robert S. Summers, *Instrumentalism and American Legal Theory*, Ithaca 1982, pp. 60 f. and 146 f. There is no causal relation between American Realism and Finnish legal dogmatics. The latter originated with Scandinavian models.

little statutory law regulating this matter, he was able to refer widely to practical considerations and to criticize the old doctrine.

Ek chose a theme relating to compensation for damages which offered him about the same advantages. The Companies Act was old and full of gaps, which provided Taxell and Olsson with the opportunity to test their strengths in elaborating arguments based on practical considerations.[44] The same pattern can also be found in minor papers.

A variety of goals served as practical considerations. Some ranked high in the hierarchy of means and ends, as for example "the interests of trade", "the security of trade" and "the interests of business life". More concrete examples were "the prevention of damages", "securing compensation", "preserving company property" and different procedural ends such as "simplicity and cheapness in the sale of an object pledged".

In the legal writing concerned, no justification was provided for the choice of objectives selected for promotion. This was possible because the jurists involved seemed to be unanimous in the matter. When goals conflicted the problem was solved by weighing the interests involved. In this process preference was usually given to reasons relating to the furtherance of trade or other business interests. *Advancing trade* was definitely the central objective of private law research at that time. The value judgments underlying argumentation were purely bourgeois in the original sense of the word. Arguments such as social equality or the protection of the weaker party were not taken into account.

5.4. The researchers who stressed the significance of practical considerations also laid more emphasis on *precedent*. In their view, Finnish legal dogmatics should stop dismissing precedent and start to give it serious attention, as was already the case in the other Nordic countries.

These researchers did not, however, demand that precedent be given the status of an authoritative source of law. Their claim that jurists should know precedent was based on the idea that legal dogmatics should be practical and close to real life. They maintained that precedents and other legal cases contained information on practical matters which permitted relevant questions and sensible answers.

More importance seemed to be attached to practical considerations than to precedent. Indeed, in the 1940s, there was no "judicial positivism" assimilating a decision of the Supreme Court to valid law. The

[44] Taxell, *op.cit.*, Curt Olsson, *Aktieförvärvares rätt i förhållande till bolaget*, Helsinki (Helsingfors) 1949.

scholars concerned did not want to subjugate science to legal practice. On the contrary, they thought that practical considerations could be used to subject precedents to due criticism.

5.5. The consequences of the application of the new, realist method were that, in analyses of legal norms, the significance of subjective rights diminished considerably. Legal effects were no longer connected with subjective rights nor with any other categories, but with legal facts which were different in kind, i.e. more casuistic and more commonplace.

In this way, the demand of Scandinavian Realism that legal consequences should be connected with real, practical legal facts and not with metaphysical constructs was satisfied. Though this change fits in well with the realist approach it seems to have originated with practical rather than philosophical factors. The problematic ontology of rights was not used as a justification for the new frame of reference.

Two main tendencies can be distinguished in the writings in which the new method was applied. The first, with Taxell as its principal representative, was a reaction against the rigidity of conceptual legal dogmatics. The ideal of this trend was to find a tailor-made solution for every particular cases, allowing its individual characteristics to be taken into account. This implied that the number of juridically relevant facts increased considerably. In principle all casuistic features of the case were transformed into facts which, to a greater or lesser extent, influenced the decision.

Setting casuistic solutions as an ideal causes problems in legal dogmatics. The latter cannot centre on reflections concerning the juridical relevance of the unique characteristics of particular cases. To gain more general significance legal dogmatics should concentrate on types of cases, on categories largely stripped of their individual elements.

Taxell was aware of this difficulty and to solve it he stated that legal dogmatics should not create rules imposing too many limitations on jurists applying the law. Research results should be formulated as flexible *general clauses* leaving the judge free to consider the individual characteristics of the case. Taxell observed this postulate in his own research and was later followed by others.

Apparently, general clauses were introduced in Finnish private law mostly through legal dogmatics. The general clauses included in written law constituted only a fraction of those presented to the community of jurists as results of legal dogmatics.

af Hällström used practical considerations in a definitely different

way. Although practical factors also led him to broader analyses, the rules he elaborated were precise and left only the usual degree of discretion to the jurists applying them. His aim seems to have been the formulation of clear rules based on practical considerations.

He probably, to a certain extent, still valued the rigidity of norms. When determining the contents of a norm, he argued, the focus should be not only on whether it is flexible and permits an optimal solution in a particular dispute. The guiding function of the rule from the viewpoint of legal practice should also be taken into account, i.e. its ability to *prevent* controversies. This requires that the norm should have a certain degree of rigidity.

According to af Hällström this rigidity should not be imposed by the principles of the Pandects but should follow from practical considerations. In this respect as well as in his negative attitude to arguments referring to equity, af Hällström's views did not differ much from those of, for example, Lundstedt.

5.6. The breakthrough of legal dogmatics founded on social engineering did not lead to a rapid disappearance of the conceptual school of thought. The researchers who had earlier embraced constructive procedures continued to work in the same way. The most prominent among them remained Hakulinen and Heikonen. In their works numerous problems were solved by means of categorization and inferences from categories. The severe criticism to which deduction from concepts had been subjected did not seem to have influenced them.

The strength of the conceptual tradition was, however, weakening because it had almost no new followers. *Hannikainen* was a significant exception. His book *Pidätysoikeuden rakenteesta* (On the Structure of the Right of Retention) was founded on a strongly constructive frame of reference.

The adherents of the conceptual approach could no longer manage a thorough debate with the supporters of the new method. The suspicion aroused by the realist method manifested itself as pinpricks in book reviews and other minor writings. The criticism was levelled primarily against two characteristics of the new method, namely its heavy stress on practical considerations and its avoidance of the connection between systematics and casuistics through one-sided advocacy of the latter.

Maybe the most interesting comment on the change blamed it for the *deterioration of legal culture* in the Nordic countries. To quote Caselius: "In the same manner as in the building trade the know-how of a master builder is considered superior to the knowledge of an architect, the

intelligence of the lay member of a circuit court is often said to be more valuable than book learning. Judges of the past are admired who did not mix theory with their logic but based their decisions on their conscience and on the 1734 Act, the best of all Acts, if they needed written law at all. The same line of thought underlies the now-fashionable tendency to reject all concepts and constructs and to solve all problems by referring to 'practical considerations' ... Thus a centuries-old evolution of jurisprudence is disregarded, and—what a relief for the scientist—it has become unnecessary to study it. All questions raised are easily solved in the way required by the 'economic factors' and 'practical viewpoints' which happen to be involved." Hakulinen voiced the same concern, in less peremptory terms, in an article emphasizing the importance of Roman law and of the Pandects as sources of a fundamental European legal culture.[45] He claimed that by rejecting these sources private law cut its European roots.

6. THE PERIOD OF CONSOLIDATION

6.1. The 1950s did not basically contribute any new elements to the discussion on juridical argumentation. The general debate on the proportional significance of different sources of law seemed to wither away. The adherents of the new method saw no point in continuing it because they believed the breakthrough had already taken place. This breakthrough had acquired considerably more importance since the new generation of Finnish-speaking researchers, who started publishing in the 1950s, adopted the realist method and its epistemological postulates. Only a few jurists of the older generation remained faithful to the conceptual approach.

The epistemological principles of the new school of thought stated that juridical knowledge is *knowledge about norms*, in other words about the relations between legal facts and legal consequences. This view was confirmed by the results gained during the Scandinavian discussion on subjective rights. According to these results, subjective rights did not exist as independent entities but were reduced to legal facts or legal effects, or in some cases should be regarded as terms without reference,

[45] Ilmari Caselius, Memorandum of the Official Opponent of Hannikainen's Doctoral Thesis in *Lakimies* 1948, p. 477, Y.J. Hakulinen, "Latinankieli ja lainoppi" (Latin and Legal Dogmatics), *Lakimies* 1949, pp. 341 ff. Of the other critics of the new method should be mentioned B.C. Carlson, *inter alia* "Reella övervägande", *Defensor Legis* 1944, pp. 191 ff. and 320 ff.

permitting the combination of several relations between fact and consequence for the purpose of technical presentation.[46]

Consequently, knowledge of private law could not concern subjective rights and their nature. Reflections on the essence of these rights could lead only to indirect and schematic study of actual juridical problems, whereas the new approach wanted to tackle them directly. The issues which the preceding frame of reference had connected with each other were broken down into numerous minor questions and solved independently from each other. It was stated that "now was the time to make analyses".[47]

The dichotomy legal fact—legal consequence also determined the formulation of research problems.[48] Either the legal consequences or the legal facts were chosen as the unknown factor. Usually the focus was on the *legal facts* or part of them as prerequisites for the legal effects. This is natural because in private law the facts are relatively complex compared with the consequences.

In the treatment of these questions practical considerations played an important—maybe even the key—role. The new method implied that legal dogmatics was argumentation based on practical considerations within the broad framework constituted by positive law and precedent.

When these ideas were applied to concrete research the repudiation of general doctrines continued. The first task of a jurist examining a new question was to challenge the dogmas and principles earlier considered relevant in the evaluation of the problem. After this, the road was clear for the application of arguments referring to goals.

The ends put forward were about the same as in the 1940s. Examples of general objectives frequently mentioned in the literature are "the

[46] The discussion on subjective rights was one of the most notable achievements of Scandinavian Realism. It originated in attempts to develop or criticize Hägerström's assertion that subjective rights do not exist and that any assumption concerning their existence is metaphysical.—Of the significant writings on this subject at least the following should be mentioned: Ingemar Hedenius, *Om rätt och moral*, Stockholm 1941, Karl Olivecrona, *Om lagen och staten*, Lund 1940, Per Olof Ekelöf, "Juridisk slutledning och terminologi", *TfR* 1945, pp. 213 ff., Ivar Strahl, "Till frågan om rättighetsbegreppet", *TfR* 1946, pp. 204 ff. and *TfR* 1947, pp. 481 ff., Alf Ross, "Tû-Tû", *Festskrift till Henry Ussing*, Copenhagen 1951, also in 1 *Sc.St.L.*, pp. 137 ff. (1957), Anders Wedberg, "Some Problems in the Logical Analysis of Legal Science", *Theoria* 1951, pp. 246 ff.—An excellent survey of the discussion has been given by Nils Kr. Sundby, "Legal Right in Scandinavian Analyses", *Natural Law Forum* 1968, pp. 72 ff.

[47] *Inter alia* Pertti Muukkonen, *Muotosäännökset* (Provisions on Form), Vammala 1958, p. 133, and Simo Zitting, "Omistajan oikeuksista ja velvollisuuksista" (On the Rights and Duties of the Owner), *Lakimies* 1952, pp. 530 f.

[48] This distinction was explicitly used by e.g. Zitting, Ylöstalo, Olsson, Lahtinen, Vuorio, Muukkonen, von Bonsdorff and Godenhielm.

promotion of production and trade", "increasing flexibility and practicality", "saving time and labour", "encouraging free enterprise" and "the freedom, security and continuity of trade".

In other words the purpose of regulation was to act as a lubricant for eliminating friction from the wheels of the economy. Suitable *minor goals* which could be used to back up the general ends were, among other things, rewards for activity and the protection of confidence. In an exchange relation *bona fide* and efficient parties were considered to deserve special protection.

6.2. According to the new way of thought the implementation of the idea that law is social engineering leads to an augmentation of practical knowledge of society. Starting from the general goals, the hierarchy of ends and means should be elucidated proceeding downwards from the top. This should be continued until the level of analysis achieved permits use of the goal (or means) as an operational element in a legal rule. A thorough execution of this task requires resorting to the social sciences.

The realization of these thoughts in legal dogmatics usually fell short of the exacting objective set. Generally the researchers did not go through the whole hierarchy of means and ends but passed directly from the general goals to the selection of operational facts. Sometimes the opposite procedure was followed: the relevant facts and circumstances were determined with regard to concrete minor goals which were not compared to the general ends.

It would be wrong, however, to state that there were no serious attempts to carry out the research programme concerning law as social engineering. Certain studies deal at great length with the causal relations included in the hierarchy of means and ends.[49] Moreover, the new style of argumentation is considerably uprated when the viewpoint is shifted from the demanding objective set to how previous research on legal dogmatics had been conducted.

6.3. In addition to general doctrine the position of *written law* also underwent changes. Its significance became relative—or at least its relativity was more openly admitted. If a legal provision and practical considerations led to different solutions the former should, according to the new approach, be preferred only if its wording was unambiguous.

[49] Thus e.g. Curt Olsson, *Om köpares borgenärsskydd vid köp av lös egendom*, Helsinki (Helsingfors) 1954.

If it left room for interpretation, the choice among alternative solutions should be based on the consequences of these.

This offered practical considerations a wide field of action because the fact that legal provisions were open to various interpretations was increasingly considered a normal feature. Although the research results of analytical philosophy of language had not yet been widely used in legal dogmatics at that time, the notions of "vagueness" and "ambiguity" had, to a certain extent, become familiar.

These characteristics of language lent support to the new method of interpretation which attached much less importance to the wording of provisions. Instead of concentrating on the wording, the teleological method of interpretation, which derived the contents of a provision from its purpose, was used. This technique had, of course, been used earlier, but now it became more clearly part of normal legal dogmatics.[50]

The prevalence of the teleological interpretative approach was not the only factor that changed the role of statutes as a source of law. Another element was the fact that the relevance of statutory law in so-called *hard cases* was rejected. If written law gave only scarce and uncertain support to a given solution the new school of thought demanded that practical considerations be used directly. It was considered an unreliable procedure to have recourse to analogy by referring to another provision which was remote from the legal phenomenon concerned—this method was called synthetic and generalizing.[51] It was time to make analyses and *in casu* solutions.

6.4. It would be too narrow to conceive the evolution which took place in the 1950s as only a move away from a systematic frame of reference. There were also jurists who shared the Scandinavian critical attitude to *Begriffsjurisprudenz* but who, nevertheless, were inclined to deal with juridical problems from the point of view of the legal system.

Of these researchers we should give special mention to *Zitting*. He approved of the structural analysis of the legal system put forward by Scandinavian Realism, for example the breakdown of subjective rights

[50] In Scandinavian Realism the teleological method of interpretation was in particular developed by Ekelöf. See *inter alia* Per Olof Ekelöf, "Teleological Construction of Statutes", 2 *Sc.St.L.*, pp. 75 ff. (1958). Ekelöf's articles on the subject were also known in Finland, but it is difficult to establish precisely their influence on private law research.

[51] Later this view was defended in detail by Kaarle Makkonen in his work *Zur Problematik der juridischen Entscheidung. Eine strukturanalytische Studie*, Turku 1965, see especially pp. 195–206.

into relations between legal facts and consequences. However, unlike the "pragmatic realists" mentioned above he did not widen the sources of law by massively introducing practical considerations, nor was he enthusiastic about the method of solving legal problems *in casu*.

Zitting was very interested in the internal structure of the legal system. His ultimate aim seems to have been the elaboration of a system reflecting better than the conceptual approach the hidden structure of positive law and making it again possible to derive legal consequences from the system. Consequently, he believed that the phase during which the deficiency of the conceptual system made it impossible to draw reliable conclusions was only a temporary stage of development.

Zitting, to an extent, shared the views of the conceptualists as far as the significance of systematic structures in legal dogmatics was concerned, but disagreed on the contents of the system. His system was based on Scandinavian Legal Realism—in particular on the research of Alf Ross.[52] Zitting replaced the system of the Pandects with one more suited to the Scandinavian tradition.

Like the system based on the Pandects, Zitting's scheme was directly applied to concrete juridical questions. This is because it provided new criteria for evaluating the similarities and differences between legal phenomena. Phenomena which under the old system had no connection with each other now seemed to have the same structure and vice versa.

This offered new arguments for applying statutory provisions analogously or rejecting inference by analogy. Zitting mainly concentrated on repudiating analogies established by the old system. However, unlike the pragmatic realists he did not eliminate inference by analogy as a juridical method but trusted in the power of systematic arguments and applied them in many different connections.

Zitting added new elements to the heritage of Scandinavian Realism and also, through him, this school of thought in Finland was divided into two tendencies. One consisted of *pragmatic realism*, a research approach emphasizing the importance of equity and of the diversity of real life, relying on *in casu* solutions and freely selecting arguments to

[52] Zitting's principal work is his book on the transfer of the right of ownership concerning real estate. See Simo Zitting, *Omistajanvaihdoksesta* (Change of Ownership), Vammala 1951. He has subsequently developed the same ideas in several books and articles. See *inter alia* "An Attempt to Analyse the Owner's Legal Position", 3 *Sc.St.L.*, pp. 227 ff. (1959). On Alf Ross's views which constitute the basis of Zitting's work, see *Virkelighed og Gyldighed i Retslaeren*, Copenhagen 1934, pp. 182 ff., *Ejendomsret og Ejendomsovergang med saerligt Henblik paa dansk Retspraksis*, Copenhagen 1935, *passim*, and *Towards a Realistic Jurisprudence*, Copenhagen 1946, pp. 175 ff.

justify its results. Later this method was strongly represented in research on contract law and commercial law.

The other tendency was "*analytical realism*",[53] which tried to develop the legal system with the aid of the results obtained by Scandinavian Legal Realism, and to deal with concrete juridical problems by using the improved system. These ideas have since been largely realized in research on the law of property (*Sachenrecht*), in which Zitting's system formed the framework of a research programme.

Examining the duality of the tradition described above at a higher level of abstraction shows that, despite the radical changes occurring in legal dogmatics, the dilemma referred to at the beginning of this paper still survived. The duality reflected conflicting views on how far the results of legal dogmatics should *a*) be instrumental in realizing the goals set and *b*) be deducible from doctrinal principles. In other words, the point is whether legal dogmatics should primarily observe the method of *utilitarian* ethics or of *deontological* ethics.

In legal theory, the discussion on juridical argumentation has shifted, especially after the important contributions of Dworkin, to issues more or less closely connected with these problems. There is, however, a long way to go from legal theory to concrete applications in legal dogmatics —as the example of Scandinavian Realism proves. It is easier to propose changes in argumentation than to realize these changes in concrete research. Therefore, the question of what consequences this discussion will have in the long run remains an open one.

[53] The line of thought elaborated by Zitting has often been called analytical realism. This expression is misleading in the sense that the use of analysis was not peculiar to him. Also the pragmatic realists were analysts, who tried to break down problems into smaller questions for separate examination. Zitting differed from them by his systematic approach, i.e. his attempt to build a system starting from the solutions obtained in subordinate questions.