THE PRINCIPLE OF LEGALITY AND TELEOLOGICAL CONSTRUCTION OF STATUTES IN CRIMINAL LAW

BY

HANS THORNSTEDT

Professor of Criminal Law and Jurisprudence,
University of Lund

14 — 60144004 *Scand. Stud. in Law IV*

I. INTRODUCTION

THERE SEEMS TO be general agreement in Sweden on the principle that the judge, when interpreting a statute, should pay attention to what is understood to be the purpose of the legislation, and to the social consequences which may be the practical result of a given construction.[1] In itself, this method does not seem to involve any novelty: practical considerations have always been decisive for the construction of statutes. There is, however, a difference between modern "teleological" principles and older methods of construction inasmuch as, earlier, the consideration of practical consequences either took place unconsciously, or was concealed behind the screen of formal logic which was held to furnish the *ratio* of the results of the process of interpretation. The characteristic feature of modern teleological methods, on the other hand, is that the judge openly takes purposes and practical results into consideration. However, no uniform teleological method has been developed by legal scholars, and there is disagreement both on the extent to which methods of statutory construction and application of the law in general should be determined by teleological considerations and on the manner of introducing the method. Moreover, the theoretical discussion is hampered by lack of precise knowledge of the manner in which the construction of statutes and the general application of the law is actually performed by Swedish courts. Statements on the method which a court has seen fit to apply in a certain case are scarce, and even where such statements are made, it is far from certain that the court has actually used the method indicated.[2]

It is obviously impossible to expect the debate on questions of methods to produce more far-reaching results than general directions for the choice of suitable methods of statutory construction. This is not due only to the difficulty of reaching agreement in the discussion of these problems. A more important reason is that, in many respects, the various fields of law are so entirely

[1] For some recent Swedish contributions on general problems of construction of statutes, see, e.g., Schmidt, "Construction of Statutes", *Scandinavian Studies in Law* 1957, pp. 156 ff., and Ekelöf, "Teleological Construction of Statutes", *ibid.* 1958, pp. 77 ff.

[2] Cf. Ekelöf, *op. cit.*, p. 78.

different from one another that it is not likely that any given method of interpretation will be useful in all of them. As regards Swedish law, there is definitely a use for a diversified system of principles concerning statutory construction. The law must be applied in *one* manner within a department of the law characterized by a systematic, exhaustive, and detailed legislation, e.g. large portions of family law and the law of procedure. A second manner of interpretation is called for where different special cases are governed by a great number of isolated rules but important questions involving general principles are left unsolved, e.g. in the law of torts and important parts of administrative law and criminal law. A third manner of interpretation is to be recommended where statutory rules have the character of a programme rather than a detailed regulation of the field of activity they are intended to govern, as is the case in the law of contract. Moreover, it would seem likely that the methods of construction follow the changes in legislative technique, and that they are consequently different where the statutory text is casuistic and where it is general and abstract. A final example of circumstances affecting the development of methods of construction should be mentioned: it may be apparent that, in one field, the courts are less strictly bound by the directives of the legislature than in another; it obviously follows that their attitude to legislation will differ from one field to another.

If it is consequently reasonable to presume that the problems of construction are different in different fields of the law, a discussion of methods of construction in general would seem to be of small practical value unless the discussion is founded upon investigation of different departments of the law. On the other hand, there would be a risk that such specialized investigation would become one-sided and superficial unless it was performed with proper consideration of research on questions of method within other fields of the law. As it seldom occurs, however, that one scholar has sufficient command of the necessary material from various branches of the law, the proper solution seems to be for the examination of problems of methods to be carried out both by analysis of those questions of interpretation which confront the scholar within his particular branch of the law and by a common discussion of such problems as appear fundamental to all or most departments of legal science. These two types of research should be carried out in parallel; they could then enrich each other.

The present paper is intended as a contribution to the debate

on construction of statutes as seen from the viewpoint of criminal law. In criminal law, the problems of construction assume a particular character, owing to what will here be called the "principle of legality" adopted in this branch of the law—a principle which has been expressed in the twofold maxim coined under the impression of Feuerbach's theories: *nulla poena sine lege, nullum crimen sine lege.* It is therefore appropriate to begin by attempting to define the impact of the principle of legality with particular regard to modern Swedish criminal law. A subsequent section will deal with the question how a principle of legality thus defined affects the methods of construction in criminal law, and particularly in what relationship it stands to a teleological construction of statutes. However, this study is partly intended to cover more than the branch of criminal law alone.

Thus the present study aims at finding certain norms. It constitutes an attempt to make clear how methods of construction should be developed in certain respects in order to fulfil the requirements which may presumably be conditioned by observance of the principle of legality. As Swedish criminal law is in principle entirely governed by statute law—though there are a few exceptions concerning a number of fundamental questions, e.g. *mens rea,* which have been left for the courts to solve—the problem is somewhat different from that found in Anglo-American law.[3]

II. THE PRINCIPLE OF LEGALITY IN CRIMINAL LAW AND ITS IMPLICATIONS TODAY

1. From an historical point of view, the principle of legality in criminal law has been founded upon two considerations. One of these is chiefly inspired by constitutional law, whereas the other is entirely concerned with criminal policy.

When the claims for an administration of criminal law strictly bound by statute were first seriously put forward on the European continent, they were based upon considerations of constitutional law. The aim was to secure the freedom of the citizen by putting a bar to the discretion of courts and abolishing their dependence upon the Royal authority, which had a tendency to use the

[3] See Williams, *Criminal Law. The General Part,* London 1953, pp. 434 ff., and Hall, *General Principles of Criminal Law,* Indianapolis 1947, pp. 19 ff.

may imply that the authorities applying the law undertake a new and independent balancing. This seems to go too far. In that case, the administration of the law tends to develop to a judicial control over legislation. When undertaken by a scholar, such an investigation is susceptible of being concentrated on evaluations which are easy to formulate and account for in a rational way, whereas he may neglect seemingly irrational points of view which are not necessarily devoid of importance or value from the point of view of legislative policy. It may result from such a development that the activity of the legislative bodies when formulating the text of the statute and its *travaux préparatoires* appears to be inconsistent and that an unfavourable light is unjustly thrown upon it only because the authorities have not had sufficient time, scope, or competence, to develop in the form of reasoning the considerations of purpose which underlie their decisions. It is possible that the judge does not run the same risk as the theorist of trying to appear more intelligent than the law-giver but, nevertheless, it does not seem practical that the judge should undertake by himself a new appreciation of the kind which the law-giver considers himself to have effected. At any rate, where a purely objective method, which is not based upon the *travaux préparatoires* of the statute, is being used, there seems to be little security that the appreciation of the judge will produce the same results as those reached either by other judges or lawyers consulted by the public, or, indeed, by the legislative bodies. In itself the last-mentioned case of disagreement is of little importance, but it may impose unnecessary political burdens upon the courts.

In inexperienced hands, an application of the law along the lines sketched above can easily assume a puzzling likeness to the programme endorsed by certain of the jurists numbered among the advocates of the so-called "free law theory" *(die Freirechtsschule)*. It implies, indeed, that legal scholars and judges take a very independent attitude towards the law. Among other things, they would be in a position to follow their own opinions on legislative policy, not only in supplying an incomplete or unclear statute text, but also in correcting bad or inconsistent legislation. Such a wide freedom for the courts does not seem compatible with time-honoured principles concerning the division of powers between the legislative and the judicial organs of society.

3. It would appear from what has been said above that a

[2] Cf. Ekelöf, *ibid.*

teleological method is based upon certain sets of values.[2] The essential problem when applying a teleological method is the question how to determine the purpose, whatever this may imply. The method will assume a particular character where it is objective and it is consequently held that statements upon the purpose of the statute in the *travaux préparatoires* shall not be considered.

In what follows, two interesting attempts, one by a Swiss and the other by a Swedish scholar, to solve this problem within the framework of an objective teleological method will be discussed more closely.

a. The method proposed by the Swiss, Germann, is concerned chiefly with the application of criminal law. According to Germann, the construction of the statute text should be founded upon the *ratio legis*. He has given detailed directions as to the finding of this *ratio*.[3]

Even though the *ratio legis* cannot be immediately read from the text, Germann holds that the statute itself—quite apart from the *travaux préparatoires*—provides clues to the finding of the *ratio*. The author makes particular mention of two means besides "systematical" interpretation, i.e. the determination of *ratio legis* with regard to other enactments in the same statute and to other products of legislation. In the first place, Germann considers that the sanctions prescribed for various crimes can be used as auxiliary instruments for that evaluation which must take place in the application of the law. Germann shows in an instructive way how the sanctions of the law, and particularly the maximum and minimum penalties, can be used in certain cases as elements in the process of interpretation, e.g. when exemption from responsibility is pleaded on the grounds of necessity or superior orders.[4] However, this method presupposes that the legislature has indicated in detail the degrees of social blameworthiness of different punishable actions by means of different maximum and minimum penalties. In modern criminal legislation, with its emphasis upon prevention of further crime by treatment of the individual culprit, the penalties do not provide such good clues to the construction, as the latitudes of penalties have been made wider and now cover large groups of crimes, and moreover there is the possibility of replacing punishment by preventive measures designed chiefly with regard to the individual criminal's need for treatment. In the light of this development, the method must

[3] Germann, *Kommentar*, pp. 52 ff.
[4] See Germann, *Methodische Grundfragen*, Basle 1946, pp. 78 ff.

be used with a certain caution, and it cannot be considered under any circumstances as a universally applicable means.

The second method recommended by Germann is a teleological application of the law based upon the "object of protection" *(Schutzobject)* of the legal provisions concerned.[5] This method deserves attention because it is usually presented with particular emphasis by the advocates of objective methods of construction upon a teleological basis, especially by writers on criminal law in the German-speaking countries. It is stated in such connections that the purpose of a penal enactment, its *ratio,* is found by determining the object of protection. That object is defined in this context as the interest *in abstracto* or the "value" which a penal enactment is intended to protect. Consequently, it means neither the immediate object of the punishable act nor the concrete human interest violated by a crime. As illustrations of objects of protection are often cited property, life, physical integrity, honour, liberty, *publica fides,* the general peace and security of society. etc. These objects of protection can be construed and used in different ways. The object of protection may be only a general characteristic of a criminal enactment, which is used for the systematization of criminal rules in legislation or in a text-book. In such cases, the object of protection is only a technical concept derived from the text of the statute, and from the point of view of interpretation it has no greater value than the text itself, apart from the fact that it may serve as a technical means of representation. It would seem that the drawing of conclusions on the meaning and field of application of the enactment from the object of protection when it thus serves only as a label—a proceeding which occasionally seems to take place without support in the text—is a method of the same kind as the so-called "conceptualistic jurisprudence", which is generally rejected nowadays.

When the object of protection is invoked as a means of teleological construction, however, it is usually characterized as an abstract of that which the criminal enactment is intended to protect.[6] It seems possible to set about determining the object of protection for this purpose in several ways. It can be postulated *a priori* or determined in a purely conventional way.—Thus, a proposition such as "larceny is an offence against property" may

[5] See Germann, *op. cit.*, pp. 125 ff., and *Kommentar*, p. 57.

[6] Cf. what has been stated above on the summing up of the purpose of an enactment into a short formula.

be repeated from one writer to another without the slightest attempt at critical examination of this statement.—In both cases, it seems to be devoid of any value as a means of determining *ratio legis*. The most common proceeding is probably a method which implies that the person who interprets the text of the statute looks for a rational explanation of it and chooses, for that purpose, a number of hypothetical or real effects of the application of the statute which seem socially desirable to him. As we have pointed out above, this method involves a certain risk of discretion and of disagreement between the opinions of different judges on the *ratio legis*. However, when the method is practised as it has been in the case of the indication of objects of protection, this risk does not seem to materialize to any great extent. The inconvenience is rather that the objects of protection are so vaguely indicated or so standardized that they provide no real guidance for the application of the enactment without being supplemented by other considerations of purpose of which no detailed account is given and which are stealthily put into the concept of the object of protection when the need arises. Thus, for instance, a definition of the object of protection as an interest *in abstracto*, e.g. property and human life, and not interest *in concreto*, i.e. certain property or the life of a certain person, can be used as a decisive argument for the punishability of attempts to perform abortion upon a woman who is not pregnant or to kill a person who is already dead; and this punishability can indeed be read into a statute which does not pronounce upon these questions at all.

Moreover, in spite of its vague and schematic character, the object of protection as an abstract of *ratio legis* may easily become too narrow and one-sided, like all statements on *one* single purpose of an enactment, and consequently give insufficient scope to all those points of view which may account for a penal rule. This is due, *inter alia*, to the facts that different descriptions of crimes often relate to different parts of the same object of protection or aim at different kinds of offences against the same object, and that the objects are seldom protected against offences of all kinds by means of penal enactments. A one-sided description of the defence of a certain object of protection as the *ratio legis* of a penal rule may therefore easily divert attention from the characteristic elements of that particular rule and from the fact that the protection offered by criminal law is fragmentary. Courts and writers may thus be tempted to fill "gaps in the law" which the

legislator has consciously left open because he has wanted to restrict the punishable area in a certain manner.

What has been said above does not mean that the indication of a certain object of protection or protected interest may not help to make clear those aspects of legislative policy which underlie a certain enactment or its application in a certain way. The present writer merely wishes to point out, on the one hand, that if a purely objective method of construction is used, these aspects of legislative policy must be chosen by the interpreter (the judge or legal writer), and that by formulating an object of protection, the underlying evaluations may be concealed; and, on the other hand, that by operating with objects of protection, one may restrict the legislative purpose.

b. The second type of objective teleological method to be discussed in the present paper has been developed by Ekelöf and is possibly intended in the first place for the application of modern procedural legislation.[7] According to this method, the determination of the purpose of an enactment is performed by two consecutive operations. First, those cases upon which the enactment is undoubtedly applicable are determined. A case belongs to this category if it is of a type that arises so commonly that the author of the statute ought to have had it in mind when framing the text. These "certain" cases regularly seem to be clearly covered by the wording of the enactment. The method may also be described thus: the starting point is an "inner word-limit" which embraces all those cases which may safely be subsumed into the meaning of the statute. The purpose of the enactment is subsequently determined by an investigation of the function which the statute performs with regard to these "certain cases". When a case arises which does not belong to this category of "certain" cases, the enactment should be applied to the case if such application would contribute to the achievement of its purpose. Otherwise the statute should not be applied.[8]

This method, expounded by Ekelöf on several occasions in a very interesting and stimulating manner, would seem to diverge from the teleological methods which are occasionally used by Swedish courts and writers. As a rule, these do not seem to be so clear-cut as Ekelöf's method is; nor are they always so elaborate and so consciously conceived.

Nevertheless, Ekelöf's method seems to involve certain diffi-

[7] Ekelöf, *op. cit.*
[8] See further Ekelöf, *op. cit.*, pp. 84 ff.

culties. In the first place, it gives no clear answer to the questions how to decide what cases are safely covered by the wording of the statute, or what cases are so common that it is safe to assume that the authors of the statute had them in mind when framing the text. To a Scandinavian lawyer, it is a natural solution to decide these questions with the support of the *travaux préparatoires* of the statute. However, an objective method such as that now under discussion is based upon the idea that the contents of the law shall be derived only from the law and not from the preparatory work. Under these circumstances, the intention would seem to be that the question whether a case is "certain" or not shall be established by an investigation of the proper meaning of the text. Ekelöf seems to hold that this investigation must remain within rather narrow limits. If it is carried too far by means of subtle analysis, it is indeed easy to fall back into a traditional method of construction which implies that the operation of construction is performed by means of an analysis of the text without giving consideration—or, at any rate, attributing independent importance—to teleological points of view. It is not clear, however, where the limits of the analysis should be drawn. The intention is possibly that the interpretation should not proceed too far beyond a lexical and grammatical analysis towards the fixation of the meaning from the point of view of legal technique. It should be observed, however, that considerations of value are very difficult to avoid even when determining such a vague meaning of the text, and that special habits of legal interpretation and teleological considerations will influence, consciously or unconsciously, the choice of even "certain" cases, at least if effected by a trained lawyer. Indeed, any subsuming of facts under a verbal description must imply an evaluation. Upon the whole, it is difficult to conceive how an interpreter holding a teleological attitude will ever be able to determine what cases are covered by the wording of an enactment without making certain teleological remarks—at least in the form of some thought upon the consequences of the application of the rule in the cases in question. Apart from this, however, we are confronted with another question. If the text of the statute is to be the basis of the determination of the purpose, it seems unsatisfactory that the analysis of the text should not be carried as far as possible, so that the judge can profit from the work—in most cases both intensive and laborious—which the framers of the law have given to the wording in order to provide directions which are as clear as

possible. As a matter of fact, Ekelöf presupposes that the statute is formulated with a view to his method of interpretation. However, it is doubtful whether modern Swedish legislation is really framed in such a manner that the text is chiefly concerned with certain clearly typical cases.

Furthermore, as Ekelöf seems to realise, the deduction of a purpose from the enactment in the light of these certain cases and of the place of the enactment in the legal system is a very difficult task. It is possible that this method is best suited for the application of an elaborate and systematic statute where the relations between the different enactments have been thoroughly analysed by the framers of the statute and where the individual rules are created at the same time. The new Swedish Code of Procedure offers a good illustration.[9] In that context, a comparison between different enactments may provide a firm basis for an analysis of their purpose. The situation seems to be different in fields where the legislation does not constitute a harmonious system but consists of rules which have come into existence at various times and in different contexts, or where the statutory regulation is only fragmentary in the form of isolated rules on specific details, or very vague because it has been framed as highly abstract enactments. In those cases, it may be more difficult to base the determination of the purpose upon an idea of the function of the enactment concerned within the legal system.

IV. OUTLINE OF A METHOD OF CONSTRUCTION WITH TELEOLOGICAL INSPIRATION IN CRIMINAL LAW

1. The claims of the principle of legality upon the methods of application have been defined above as requiring that the methods shall be both easy to handle for the average lawyer, so that decisions will become uniform and predictable, and also be such that the results of the process of construction will appear reasonable to the public, and distrust of the administration of the law is prevented.

Can it be said that the objective teleological methods treated

[9] The examples of the application of his method cited by Ekelöf, *op. cit.*, pp. 102 ff., are indeed all concerned with the construction of the Code of Procedure.

above satisfy these claims? It should already have appeared from what has been said in the discussion of the different methods that, in the view of the present writer, this question must be answered in the negative. If the text of a statute is chiefly used as a source of information on the purpose of the statute, and its meaning in other respects is relegated to the background, the person who has to apply the law becomes too independent, inasmuch as he has to use points of view of legislative policy at an early stage of the process of interpretation in order to perform the task imposed upon him by the method, i.e. to choose and to weigh against one another the various aspects of social finality which may merit attention in the application of an enactment. The uncertainty of the method is no doubt compensated for by the fact that the judge is in many respects bound in the values he adopts by consideration for other legislation and generally acknowledged social evaluations, the general standard of civilization of the society in which he lives, and professional traditions, etc. But nevertheless the uncertainty seems so great that there is a risk of violations of the principle of legality unless other means of stabilizing the application of the law are found.

2. For this purpose, there are chiefly three means which deserve consideration, namely a more efficient use of the text of statutes, recourse to the *travaux préparatoires* of the statute concerned, and attention to precedents.

As stated above, it is difficult to believe in the possibility of limiting the analysis of the text of a statute to deal merely with a narrow "inner word-limit". Moreover, the present writer is not convinced that it would not be possible to attain greater uniformity and predictability in the decisions of courts by looking for the basis of application in a detailed analysis of the text from semantic, syntactic, pragmatic and logical points of view. It is probably inevitable that certain evaluations should be made in the course of the semantic analysis, but this does not seem to entail any great risks with regard to the principle of legality, as the values used in this context are likely to be common to the majority of lawyers. There seem to be no reasons for refraining from an analysis of the text aiming at the technical language of legal science, particularly as texts of statutes are usually framed in technical language. It is obvious, on the other hand, that too much subtlety should be avoided in this analysis, as it may result in solutions entirely out of touch with real life.

In many cases, the problem of construction would seem to be solved by this analysis. Quite often, however, it is probably necessary to check the result of the interpretation, e.g. in order to verify that it is not incompatible with other statutes or with leading principles in the relevant field of the law. If this operation gives rise to any doubt, or the meaning of the text is otherwise doubtful, it will be necessary to look for guidance in considerations of legislative policy. The *travaux préparatoires* seem to have their most important function in this connection by supplying information on the political points of view which were decisive at the framing of the text. Indeed, it would seem that, if the aims of the legislative bodies themselves as reported in the *travaux préparatoires* are adopted in the application of the law, this would supply in many situations what an objective teleological method needs more than anything else, i.e. a set of values embodied in a legislative policy, which are independent of the opinions of the individual interpreter, whether he be a legal writer or a judge. These considerations of purpose embraced by the legislature are occasionally expressly indicated in the *travaux préparatoires,* but they may also appear indirectly, e.g. by descriptions of deficiencies in the law previously in force, which the legislature has tried to remove by introducing the enactment which the enquiry concerns.

It should be pointed out, however, that there are also other ways in which the legislative history may furnish guidance for the application of the law, e.g. by supplying examples or other directions concerning the meaning of the statute. In the view of the present writer, there is no reason to refrain from making use of the auxiliary means thus offered, unless some special circumstance is present.

This paper is not a plea for a method of construction in which the subjective element has been carried to the extreme, and where an historical method is used to determine by all means the intentions of the authors of the statute in order to make them the basis of its application. In consideration of those claims for uniformity and predictability in the administration of criminal law which are embodied in the principle of legality, attention should be paid only to statements in those *travaux préparatoires* which are readily available to any practising lawyer, i.e. mainly such as have been printed and published. Thus, the present writer advocates a standpoint intermediate between that adopted by the partisans of extremely subjective methods of construction and that taken up by those who favour extremely objective

methods. Such intermediate opinions, though with various shades, are probably embraced by the majority of Continental writers on criminal law in our days.

Various objections are generally raised against such a modified subjective method. Thus it has been observed that the purpose of an enactment is often not indicated at all in the legislative material, or indicated only in parts or in vague terms, and that many complicated questions of construction are not discussed in the *travaux préparatoires*. This is true, but it is no argument against using the *travaux préparatoires* in the application of the law, in so far as these can provide any guidance. It is further argued that this material is mainly intended for the process of legislation, and is consequently written in order to convince the legislative bodies of the advisability of introducing the proposed enactment. This is obviously an important task but it does not exclude the possibility that the material will supply guidance for the application of the statute. One may add that in modern Swedish legislative practice, the *travaux préparatoires* are often written as comments on the proposed enactment, and directly envisage its future application.

Indeed, in the framing of proposed enactments, it is occasionally considered a question of purely technical arrangement of secondary importance whether a certain problem which may be raised in the application is to be treated in the actual text of the statute, or only mentioned in the legislative material. Of course, such a legislative technique may be considered objectionable. Nevertheless, it does not seem to contribute to a uniform and predictable interpretation of the law to refrain, without particular reasons, from following the directions which are given in the legislative material in this way. In view of the character which Swedish legislation—particularly criminal legislation—has actually assumed, it may be pertinently asked whether it would not be too heavy a burden upon the judge to subject the directions of the *travaux préparatoires* to a critical examination in all situations. To this should be added another argument connected with general considerations of public policy. In so far as those who decide upon legislative questions, i.e. ministers and members of parliament, try to form an opinion about the effects of proposed statute texts, this is certainly done mainly upon the basis of commentaries in the legislative material; in many cases, the actual text is not likely to give them much guidance. If the courts were subsequently to take too indifferent an attitude towards statements in the

travaux préparatoires, those who have passed the statute would have some reason to feel disappointed.

However, the principal objection to a modified subjective method of construction is that the courts should be bound by the law, and not by the legislative history of statutes. Only the text as actually enacted is binding upon the courts—not the intentions and desires of the individuals who have made the decision. This claim, founded upon the ideology of dividing the power of legislation from the power of adjudication, goes back to those days when it was still believed to be possible to give unambiguous directions in statutory texts. Nowadays, the development of science and growing insight into the extremely complicated structure of modern society has deprived us of this faith, and it is submitted that, apart from the arguments expounded above in favour of a modified subjective method, there is no reason to uphold this claim in all its severity; conversely, it seems reasonable to allow that the genesis of an enactment and the rationale underlying it influence its interpretation.

This is not to say that the application of a statute must follow slavishly those directions which may be found in the legislative material. It would take us too far to develop in detail in what ways this material should give guidance for the application of a statute. Only a few hints will be given in what follows.

If the *travaux préparatoires* are obscure or contradictory, or if they contain statements that are incompatible with the text of the statute or extend the punishable area beyond the limits clearly set by the text of the statute, they should be set aside. Similarly, no importance should be attached to the *travaux préparatoires* if their application would produce results repugnant to other legislation or to fundamental principles within the relevant branch of the law, unless it appears clearly that this divergent result has been consciously intended for some reason. It further seems indispensable that the dependence upon the *travaux préparatoires* decreases when these become older and the statute has consequently to be applied in social surroundings or under technical conditions different from those prevailing when the legislative material was prepared.

To sum up the present author's standpoint, the legislative material should not be disregarded without particular reasons. It should be admitted, however, that the limit between those cases where decisive importance should be attached to this material and those where it may be disregarded is a floating one and is

dependent upon a discretionary judgment. On the whole, however, the system advocated in the present paper—and probably also applied to some extent by Swedish courts—seems designed to create considerable firmness and predictability in the application of the law.

Apart from those teleological considerations which may have assumed importance already in the linguistic analysis of the text, it is obvious that teleological considerations must also be permissible, and indeed necessary, in the final determination of the area within which an enactment is applicable. Regard to teleological points of view seems to be of importance particularly as a pragmatic test of the results of a construction. This implies that the person applying the law tries to survey the practical social consequences of his construction, and that he takes the question of interpretation into reconsideration if he finds that the hypothetical application is repugnant to what may be presumed to be the intention of the penal enactment or to the set of social values which characterizes the legal system or the body of legislation at issue.

On the other hand, teleological considerations should not be allowed to produce any constructions incompatible with the undoubtful meaning of the text of the statute. At any rate, a deviation from strict principles of construction caused by consideration of the presumed purpose of the enactment or other evaluations must not be allowed to produce an *extension* of the punishable area beyond what appears from the text of the statute or the *travaux préparatoires*. If criminal policy requires an extension of punishability in some respect, it is for the legislature to intervene. In view of the principle of legality, it is better to do this than to let the courts extend the punishable area. Criminalization and aggravation of penalties by the practice of courts are always retroactive measures.

A *restriction*, upon teleological grounds, of the applicability of an enactment as determined in the text of the statute, does not encounter the same objections as an extension. Particularly if the text of a statute is so vague that it admits the assumption of a field of applicability without precise limits—as is often the case in Sweden nowadays—there may be some reason to recommend a construction which is limited with regard to the purpose and hypothetical social consequences of the enactment. This consideration of the social consequences of a certain construction may also be a reason for a more limited application of a penal enact-

ment than is recommended in the *travaux préparatoires*, particularly if, as occasionally happens, these recommendations are not supported by the text of the enactment.

If there are precedents concerning the construction of a penal enactment in a certain respect, it is natural even in a country like Sweden, where precedents are not binding upon the courts, that they should make it a rule to follow the decisions of superior courts. In this way, the application assumes a firmness which satisfies the requirement of the principle of legality for predictability and freedom from discretion. However, the problems arising in the interpretation and application of precedents fall beyond the scope of this paper. It will only be observed that teleological points of view may also be asserted in the interpretation of earlier decisions and in deciding whether a precedent ought to be followed.

Finally, it may be worth mentioning that particularly complicated situations may arise when certain problems concerning the construction of an enactment have been solved by precedents, whereas other questions of interpretation regarding the same enactment have not yet been treated by any court whose decisions have the authority of precedents. In such a situation, it may sometimes be necessary to consider simultaneously both precedents and a statutory text with regard to the same problem of interpretation. Teleological considerations would seem to have a function to perform in these cases also, particularly as a pragmatic check on the results.

By way of conclusion, it should be pointed out that in this paper the questions concerning a suitable method of construction have been discussed chiefly with a view to making clear, albeit in a rather schematic way, in what manner and to what extent there is a place for teleological considerations in the application of penal enactments. As a result, many important problems have had to be left aside. Among other things, I have not treated the question whether analogies are permissible, a question which, by the way, seems to have assumed excessive dimensions in the discussion about the methods of criminal law. Indeed, if a method influenced by teleological considerations is used, there seems to be no need for maintaining the distinction between analogies and an extensive application of the law. There has been no place in this study for the application of the law with regard to questions not governed by statutes, and in those branches where there is no written law. It is obvious that, in such connections,

there is much more scope for teleological considerations than in the mere construction of criminal legislation.

It is readily admitted that no method of construction can give full security against uncertainty and discretion, and that it is impossible to establish, without detailed research, what method brings the greatest predictability and uniformity in results. In the view of the present writer, however, it seems preferable to relegate the teleological method somewhat into the background, as has been done in this paper, and rather to combine different methods of construction in order to attain an equilibrium between the claim for legality and the need for an application which is satisfactory from a social point of view. However, such a solution, which is by no means original, lacks the theoretical harmony which is an attractive feature in, e.g., the method outlined by Ekelöf and treated above. Nevertheless, in all practical activities —among which the application of the law must presumably be numbered—a compromise between different methods and a certain amount of intuitive judgment seems to be preferable to an absolutely logical reasoning, so long as it must be founded upon uncertain or arbitrarily chosen premises.

on construction of statutes as seen from the viewpoint of criminal law. In criminal law, the problems of construction assume a particular character, owing to what will here be called the "principle of legality" adopted in this branch of the law—a principle which has been expressed in the twofold maxim coined under the impression of Feuerbach's theories: *nulla poena sine lege, nullum crimen sine lege.* It is therefore appropriate to begin by attempting to define the impact of the principle of legality with particular regard to modern Swedish criminal law. A subsequent section will deal with the question how a principle of legality thus defined affects the methods of construction in criminal law, and particularly in what relationship it stands to a teleological construction of statutes. However, this study is partly intended to cover more than the branch of criminal law alone.

Thus the present study aims at finding certain norms. It constitutes an attempt to make clear how methods of construction should be developed in certain respects in order to fulfil the requirements which may presumably be conditioned by observance of the principle of legality. As Swedish criminal law is in principle entirely governed by statute law—though there are a few exceptions concerning a number of fundamental questions, e.g. *mens rea,* which have been left for the courts to solve—the problem is somewhat different from that found in Anglo-American law.[3]

II. THE PRINCIPLE OF LEGALITY IN CRIMINAL LAW AND ITS IMPLICATIONS TODAY

1. From an historical point of view, the principle of legality in criminal law has been founded upon two considerations. One of these is chiefly inspired by constitutional law, whereas the other is entirely concerned with criminal policy.

When the claims for an administration of criminal law strictly bound by statute were first seriously put forward on the European continent, they were based upon considerations of constitutional law. The aim was to secure the freedom of the citizen by putting a bar to the discretion of courts and abolishing their dependence upon the Royal authority, which had a tendency to use the

[3] See Williams, *Criminal Law. The General Part,* London 1953, pp. 434 ff., and Hall, *General Principles of Criminal Law,* Indianapolis 1947, pp. 19 ff.

administration of criminal law for purely political ends. The claim for legality in criminal law was therefore intimately connected with the endeavours to divide the power of the state. The most important expression of these endeavours is possibly Montesquieu's doctrine of the division of powers. It was held to be an indispensable condition for maintaining the division of powers between the judiciary and the legislature that the courts should apply the law according to its wording and should not expound it. To use the famous expression of Montesquieu, the judge should be only *la bouche qui prononce les paroles de la loi*.[4] Even those who realized—as Beccaria did—that the claims for a literal interpretation might create practical difficulties, held these to be less obnoxious than a free administration of the law, which would bring the citizens under the "yoke of the judge".

In Continental doctrine, Feuerbach's theory of psychological constraint gave to the principle of legality a rationale based upon considerations of criminal policy. According to this doctrine, crimes should be prevented by the threat of punishment embodied in the penal code. The sensual desires which, according to Feuerbach, are the psychological explanation of transgressions could be defeated by the knowledge that the deed would necessarily be followed by a punishment which would bring a discomfort greater than the frustration created by the non-satisfaction of the sensual desire.[5] To enable a presumptive culprit to undertake this psychological balancing of discomforts of different intensity, it was necessary that he should know what was punishable and what punishment could follow upon his action. He could obtain this knowledge only if the conditions for inflicting punishments were set out in statutes binding upon the judge. However, Feuerbach—a lawyer, unlike most of the writers of the period of "enlightenment"—did not reject as categorically as his contemporaries the idea that the judge could make use of construction of statutes in order to free himself to some extent from bondage to the letter of the law.

Thus the principle of legality in its original shape implied that both the action constituting the crime and the penal consequences of the action should be settled by statute in such a way that a study of the law would enable the citizen to determine with certainty whether a given action was punishable and what punish-

[4] Montesquieu, *Esprit des lois*, livre 11, chap. 6.
[5] Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen Peinlichen Rechts*, 14th ed., Giessen 1847, p. 38.

ment could follow upon it. This involved certain demands both upon the legislature and upon the courts. The demands on the legislature were that the statutory rules should be formulated in such a manner that they did not oblige the courts to make discretionary decisions, and that criminal legislation should not be made retroactive to the detriment of the culprit. The demands upon the courts concerned the methods of applying the law. The endeavours of the period of enlightenment to prohibit any interpretative activity were inspired by distrust of the courts, and it is true that this phase soon came to an end and, in principle, the usual construction of statutes was admitted in criminal law. On the other hand, the doctrine of "positive law" prevailing in the nineteenth century tied the courts narrowly to the statutory text in all branches of the law, and, upon the whole, admitted construction only by means of philology and formal logic. Under these circumstances, it is only natural that in consideration of the principle of legality, the demand for a restrictive construction was even more severe in criminal law than in other branches. The discussion on the administration of criminal law chiefly concerned the question whether it was possible to extend the number of punishable actions beyond the letter of the law by means of analogy.

2. The principle of legality is officially adopted both by legal science and legislation, as well as in judicial practice. It is pertinent to ask, however, whether this is only lip-service or whether the principle is always allowed to govern the acts of the persons concerned. Another relevant question is whether this principle, derived from the hey-day of the liberal theory of the state as a mere dispenser of mathematical justice, has any conceivable function to fulfil in our modern society—the regulation or welfare state.

It is possible to point to several facts which reduce the importance of the principle and raise serious doubts as to its power of conviction.

a. The principle of legality is based upon the idea that it is possible to direct human actions—whether on the part of public bodies or of private individuals—in a purely intellectual way by providing verbally defined patterns of behaviour. It was discovered at an early stage that such directions can become insufficient because they do not cover all the variations that appear in human life; consequently, as mentioned above, it became necessary to

allow a measure of interpretation in criminal law. However, modern semantics has demonstrated the fundamental difficulties attached to language as a means of conveying ideas from one individual to another. A statement has no objective meaning: to put the matter in simple terms, it has one meaning for the person making it and another meaning for the person who apprehends it. These two meanings may be more or less in agreement with each other, but they rarely seem to coincide completely. The interpretation of the statement by the person apprehending it is conditioned by his personality, his experience, and his feelings. On account of the imperfections of language as a vehicle of thought it is therefore in principle impossible to secure, by means of verbal rules, an exactly defined sphere within which the citizens are at liberty to act without any risk of incurring penal sanctions.[6]

b. Nowadays, it is generally acknowledged that, in some respects, the theory of criminal policy underlying Feuerbach's claim for legality is unrealistic. Indeed, it seems to be only in particular situations that a person refrains from committing a crime after a conscious and careful comparison between the hypothetical discomfort of a punishment and the frustration of having to give up a planned action. We know very little about the mechanism of law-abidingness, but there seems to be general agreement that, normally, the relative general law-abidingness of a society is conditioned by much more complex processes of social psychology than those conscious calculations upon which Feuerbach counted. It is hard to assess the part played by statutory texts in this connection. The mere fact that the public has only a diffuse and fragmentary knowledge of the law would seem to make it obvious that no great effect of general prevention can be attributed to the details of statutory texts.

c. Moreover, the capacity of the principle of legality to hold its own has been reduced by certain phenomena in modern criminal legislation concerning both the manner of defining the criminal act and the development of the system of sanctions.[7] With regard to the definitions of criminal acts, the casuistic legislative technique of earlier days has been generally abandoned; partly with a view to avoiding "gaps in the law", the legislators

[6] Cf. Ekelöf, *op. cit.*, pp. 79 ff., and works quoted in his text.

[7] The writer is chiefly concerned with Swedish criminal legislation. However, it is possible to observe the same phenomenon in the other Scandinavian countries.

have adopted generic descriptions of criminal acts. It often happens as a result of this technique that the descriptive elements of the definitions of various crimes are set aside, and the legislature has to limit the punishable area by decidedly normative expressions, indicating a certain legal standard which the courts have to define in detail. As an example drawn from modern Swedish criminal legislation may be mentioned the great number of enactments in which punishability depends upon the question whether a certain manner of acting is "improper".[8] It is obvious that, in such cases, the courts are bound by the law chiefly in a formal way, and that it is very difficult for the citizen to form an opinion of the limits to his freedom of action.

Within the system of penal sanctions, the development has gone so far as to make it extremely difficult for a presumptive lawbreaker to foresee with any certainty the sanction which a certain transgression may entail. Absolutely fixed punishments in the penal code are a condition *sine qua non* for the implementation of Feuerbach's idea that the citizen should be deterred from crime by facing him with a comparison between the suffering brought by punishment and the frustration caused by refraining from the criminal act. Even a system which gives the court a certain latitude in fixing the punishment renders predictions about the kind and degree of punishment more difficult, since all meting out of punishments is discretionary in character, even if it follows certain standards. If the principle of legality has thus been diluted even in the determination of ordinary punishments, this is even more true of the sanctions introduced in the twentieth century for purposes of individual prevention. In the nature of things the indications recommending such sanctions must be vague, since they are mainly intended to meet needs for special treatment and are but rarely embodied in formal criteria of a descriptive kind, such as the offender's age, or earlier criminal behaviour. As these sanctions are intended, not to inflict a certain measure of penal suffering upon the accused, but to reform him or make him harmless, it is inevitable that questions concerning the duration and details of the sanction will have to be solved to a considerable extent by discretionary decisions.[9]

d. Certain tendencies in the social development of the last

[8] See, e.g., Swedish Penal Code, Ch. 10, secs. 2, 6, 7, Ch. 21, secs. 4 and 6. Cf. Agge, "Abstrakt norm och konkret verklighet", *Festskrift tillägnad G. Eberstein*, Stockholm 1950, pp. 16 ff.

[9] Cf. Strahl, "Några reflexioner angående rättssäkerheten i den moderna

few years are apt to deprive the principle of legality in criminal law of some of the political importance it had when originally asserted. There are so many ways in which the political powers of today can interfere in the life of the individual citizen that the administration of criminal law offers only one possibility out of several. It would seem to follow from this that the same claim for legality should be raised with regard to all actions taken against the individual, whether they are effected by criminal proceedings or otherwise. However, many of these measures are of such a character that neither the conditions for undertaking them nor their implications can easily be determined in a statutory text but have to be administered more or less at the discretion of the authorities entrusted with their application. It should be added that the principle of legality cannot provide security for the individual citizen against interventions in the form of legislation. In these days, when the apparatus of legislation in the Scandinavian countries has been used for a radical remodelling of society, it often appears indifferent to the individual whether actions which he conceives to be interferences with his vested rights are performed by public authorities without the support of written law or are carried out in the form of legislation by the leaders of a parliamentary majority. It is a paradoxical truth that in a semi-Socialist welfare community the feeling that the law should provide security is blunted. The citizens grow accustomed to the thought that security means the freedom from want and from fear for the future which the community guarantees to its members by various administrative arrangements. The individual gets into the habit of being subjected to various discretionary measures, both in the distribution of "social benefits" and with regard to restraints upon his freedom of action. The welfare state has become a "guardian state". This being so, the time may easily arrive when it no longer appears absolutely essential that the activity within such a narrow sector of public life as the administration of criminal law shall be strictly bound by rules. Many people are also likely to take the view that it is more "realistic" and efficient to inflict punishments in those cases which are punishable according to a "reasonable" judgment. To such people, a claim for strict legality is only an expression of "unpractical" formalism.

As we have mentioned above, the principle of legality was

kriminalrättsskipningen", *Festskrift tillägnad H. Sundberg*, Uppsala 1959, pp. 334 ff. and 424 f.

originally attached to the idea of a division of powers. The fusion of executive and legislative powers which has taken place with the victory of parliamentary government consequently weakens the foundations of the principle. If the executive power commands the legislature, the principle of legality can protect the individual against arbitrary treatment only if the legislature respects certain limitations on its own sphere of action, either because it feels bound by enactments in fundamental statutes or by rules supposedly derived from the law of nature, or because it submits voluntarily to certain restrictions. If there are no guarantees for such moderation, the principle of legality gives a protection of limited value to the individual. There is accordingly no reason to suppose that it would be upheld with any enthusiasm by the man in the street. To those who are not lawyers, regularity often appears to be of small value. The layman appreciates the doings of authorities from one case to another and is often just as revolted if a decision which he finds incorrect or "unjust" is rendered on the authority of the law as when it is made without that support. Particularly where punishments are used—as they are today—as means of enforcing statutory provisions which are intended to carry out vast structural changes in economic life, it is comprehensible that the opponents of these changes should find small comfort in the fact that punishments are inflicted upon refractory persons with the support of written law.

3. Can it be, then, that the principle of legality in criminal law has already had its day in the courts? To assert this would be to be guilty of exaggeration.

In many countries on the European continent the principle is expressly enacted. In others, e.g. Sweden, it is held to be in force as customary law. It should further be observed that in the last few decades it has undergone a remarkable regeneration as an ideology. Under the influence of experience from the authoritarian states—perhaps above all from Germany—before and during the Second World War, the liberal ideal of the state as an organization founded upon justice has indeed developed towards a renascence in Western civilisation. Thus, for example, the leading international movement for social defence has emphasized how important it is that human rights shall be respected and that a strict legality shall be observed in the administration of criminal law.[1] However, the most important expressions of this increased

[1] See the minimum programme of the movement, adopted in 1954, II: 3, cf. Ancel, *La défense sociale nouvelle,* Paris 1954, pp. 13 and 128 ff.

emphasis upon the principle of legality are the U.N. Declaration of Human Rights and the European Convention for the Protection of Human Rights, both of which have been drafted on the model of the famous declarations of rights dating from the American War of Independence and the French Revolution. The claim for legality in criminal law takes an important place both in the U.N. declaration and in the European convention. The latter document is obviously of particular importance to signatory powers who have no explicit statutory rules on the principle of legality. Article 7, sec. 1, of the Convention of the Council of Europe, which is closely modelled upon the U.N. Declaration of Human Rights, provides that no one shall be punished for any act or omission which was not a crime under either national or international law at the time when it was committed; nor should a more severe punishment be inflicted than was applicable at the time of the commission of the crime. It is true that, in its wording, this rule aims chiefly at a defence against retroactive application of the law to the detriment of the accused. Nevertheless, it must also be understood as a claim for legality. Indeed, the absence of a requirement for the support of written law for each punishment would seem to be conditioned by a regard for Anglo-Saxon common law. As the rule must be held to prohibit the creation of descriptions of crimes and punishments by the courts—a creative activity which easily tends to become retroactive —its implication for states like Sweden, which unlike Great Britain had no such customary criminal law at the coming into force of the convention, must be an assertion of the principle of legality with regard to the description of crimes and maximum penalties. The convention further provides that special international organs shall be created in order to secure the performance of the duties undertaken by the signatory powers. These organs shall be entitled to try whether a contracting power or any of its authorities have violated protected human rights.

4. However, the convention rules and the customary formula *nulla poena sine lege* are too vague to be of any guidance for the everyday business of courts without being made more precise. In order to attain the necessary precision, it would seem desirable to undertake an inquiry—which must also give consideration to the negative findings discussed under section 2 above—into those features of modern society which may serve as a *ratio* for the claim that the courts shall inflict punishments only with the

support of written law. It seems equally appropriate to make an effort to find out how these claims can be satisfied.

In attempting this task, one will soon find that in a modern society governed upon democratic and parliamentary principles, there are two main points of view which may provide a reason for the observance of the principle of legality.

The principal viewpoint is that *discretion should be ruled out* from the administration of the law. The claim for freedom from discretion implies, in the first place, that the law shall be administered objectively and in accordance with fixed principles. Even if it is impossible to defend oneself from the discretion of the legislature, as we have pointed out above, it appears essential that the courts shall render decisions based upon generic and objectively formulated rules and not upon the individual judge's opinion of what is harmful to society and therefore punishable. This wish for objectivity and regularity in the administration of criminal law is only one aspect of the general claim for formal justice which is part of our ideology and a characteristic feature of the legal system of the Western world. This claim has a value of its own, but it can also be founded upon certain practical considerations. In spite of what has now been said about the public's resignation in face of the measures of public authorities, there would seem to be—in Sweden at least—so much left of this feeling for formal justice that the respect felt for the authorities entrusted with the administration of the law, and *ipso facto* for the legal system itself, will depend largely on the extent to which the impression is gained that the authorities are following the law and existing statutes in their decisions. Confidence in the courts is an important social interest, *inter alia* because there is reason to presume that lack of confidence has a detrimental effect upon the law-abidingness of the general public. In England, where the general trust in the legal system seems to be mainly attached to the courts and their proceedings, criticism of procedural mistakes is often founded upon the maxim "Justice should not only be done but manifestly be seen to be done".[2] If it is interpreted in the sense that the courts shall not only apply the law but also manifestly appear to do so, this maxim is also applicable to Swedish conditions. When discussing the regard which should be paid to the reactions of the public, however, it is impossible to

[2] This expression seems to have been coined by Lord Hewart, C.J., in *R.* v. *Sussex Justices* [1924] 1 K.B. 256, 259.

overlook the fact that, in his attitude to problems of this kind, the non-lawyer tends to be ambivalent. His first claim is for substantive justice, i.e. that the decisions of the courts on the matter at issue shall agree with his opinion of justice. Consequently, the fact that a judgment which is considered unjust has been rendered in full and obvious agreement with written law is not always likely to suppress all criticism of the courts or to increase public confidence in the legal system.

The second point of view is that the *decisions of courts should be predictable*. It is obviously impossible to attain a stage where the individual has a detailed knowledge of what is permissible or prohibited, and, as mentioned above, it is uncertain to what extent men are deterred from committing crimes because they know what acts are punishable. However, even superficial insight in social psychology makes it justifiable to assume that criminal law and its regular administration have a considerable educational influence upon the public, and that the risk of crime being committed consequently decreases in proportion to the spreading of knowledge among the general public about the sanctions against criminal behaviour. If that knowledge is to fulfil a useful purpose, it is not sufficient that it should embrace only what has already taken place in legislation and precedents; it is also necessary that the public shall know that the law will be applied in the same way in the future. Apart from this purely practical point of view, it must be considered a requirement of common decency in public affairs that a citizen who wants to get prior information of the limits of permissible actions and of the sanctions against transgressions shall be able to do so.

It has been objected that too far-reaching concessions to the claim for a predictable administration of the law confer an undue advantage on those who consciously stick to the limit of what is lawful. This objection may possibly be justified with regard to actions which are clearly repugnant to the general sense of justice and are exempted from punishment only because of imperfections in legislative technique. The case is different both with the far-reaching and highly technical criminalization which has taken place within commercial and industrial legislation, and with the penalizing of activities attended with undesirable effects which characterizes modern Swedish criminal legislation. In these cases, which are often considered with indifference from a moral point of view, the argument that those who stick to the margin of the permissible area should do so at their own risk would seem to

neglect reasonable claims for legal protection of the individual.[3]

It seems justifiable to raise these claims for predictability and freedom from discretion within all branches of the law. Indeed, it is astonishing that they are not voiced more often and with greater insistence than they are in other departments than criminal law. It should be admitted, however, that these claims have a particular weight within criminal law. Penalties and other sanctions of the criminal law are among the most serious forms of interference which a society can undertake against its members, and they should consequently be surrounded by efficient guarantees. The seriousness of such penal sanctions as deprive the culprit of his liberty is beyond discussion, but other sanctions also—even trifling fines—must be considered as serious because they are expressions of social disapproval. Moreover, the administration of criminal law differs from other judicial activities in one important respect. In a civil action, the judgment normally implies that either party receives something at the expense of his opponent or that he is exempted from a performance to the opposite party. Conversely, in criminal proceedings, the judgment subjects, or exempts, the accused from a sanction which is of no profit to the prosecutor or civil plaintiff. In other words, the opposing interests are not of equal value: on the one side, the public interest that transgressions shall be punished, on the other side the interest of the individual that he shall not be subjected to the momentous interference, or at least the painful and socially deleterious branding, caused by a criminal verdict. In this conflict between the interest of suppressing certain kinds of actions in a society by means of penal sanctions and the individual interest of escaping from suffering or discomfort, humanitarian points of view would seem to suggest that, in doubtful cases, the public interest should yield. It might be objected that such a liberal attitude could reduce the efficiency of criminal law. This, however, does not seem to be the case in any measurable degree. In the first place,

[3] The answer to the question how such swaying around the limit of the permissible area should be considered in the administration of the law depends upon the manner in which mistake of law is treated. In Swiss law, Germann holds that when determining the field of applicability of the law, no consideration need be given to the question whether the culprit has been in a position to realise the unlawfulness of his action, as he is protected by the rather liberal rules in sec. 20 of the Swiss Penal Code on exemption from punishment owing to mistake of law. (*Kommentar zum Schweizerischen Strafgesetzbuch*, Vol. I: 1, Zürich 1953, pp. 59 f.) In countries like Sweden, where mistake of law *(error juris)* is only exceptionally considered as a defence, the situation is different.

the general deterrent effect does not seem to be dependent upon details in the administration of the law. Indeed, the conceivable effect of the administration of criminal law upon general law-abidingness would seem to be more efficiently supported by the knowledge that, on the whole, the provisions of the law are being enforced by the authorities, than by a harsh treatment of those cases which are brought to the knowledge of the authorities. If inconveniences arise in any case because condemnable actions escape from liability, there is always the possibility of interfering for the future by means of legislation. The preventive effect of criminal law upon the individual culprit, on the other hand, is hardly likely to be reduced by the principle of legality. Since the transgression as such must be interpreted, from the point of view of individual prevention, as an indication for a need of treatment or preventive detention in the forms provided by criminal law, this need cannot be allowed to exercise any influence upon the method of determining whether a transgression has actually been committed. If a need for treatment is found to exist in cases where it is not certain whether the person concerned has committed a punishable act, it should be met by social or medical attention on other indications than criminality.

5. In order to achieve the predictability and the protection against arbitrariness that must be held to be the chief aims of the principle of legality in our day, it is necessary to satisfy claims that point in three different directions: namely, criminal proceedings, legislation, and the actual application of the law.

As to *proceedings*, the first condition is that the courts shall be independent and manned by competent, well-trained and morally irreproachable persons, and that their salaries and other conditions of work shall be such that they are able to penetrate without haste or anxiety the problems of law and of fact which are submitted to them. It is a further requirement that proceedings before the court shall be organized in such a manner that the investigation of facts is as exhaustive as possible and that the parties are allowed to plead freely.

In order to prevent the maxim *nulla poena sine lege* from being degraded into an empty formula, it is further necessary that the *legislation* shall aim at the greatest possible restriction of the scope left to the discretion of the judge and to the use of his own moral standards in the application of the law. In this respect, it is desirable that the definitions of crimes shall whenever possible

be given the form of actual descriptions, and that the legislature shall avoid sweeping clauses and expressions which are vague or indefinite because they refer to general standards.

However, the present paper is primarily concerned with the claims of the principle of legality on *the actual application of the law* and particularly on the methods of construction of statutes.

It is obvious that conscious arbitrariness, which makes light of all rules, cannot be eliminated even by the most accomplished methods of construction. What is needed to inspire the judges with a *will* to pronounce identical judgments in identical cases must be done by such measures for the recruitment and training of judges as we have mentioned above. Conversely, the methods of construction are of importance for the *capacity* of the courts to create a uniform application of the law. The ideal is that the construction of statutes shall take place in such a manner that different judges will arrive at the same result in any question of interpretation independently of one another. Any lawyer will realise that this ideal is unattainable: when applying a product of legislation, whatever it may be, it is necessary to envisage situations where different lawyers disagree upon its correct application. However, the number of doubtful cases can be increased or reduced as a function of legislative technique and the choice of method of construction. It seems likely that, to produce the greatest possible uniformity, the methods of construction must be easy to handle for the average lawyer. Consequently, they should not be conceived so as to require exceptional acumen, at least not in trivial cases. Even with this aim, there is no reason to fear that the construction of statutes will become an indifferent activity, since it is obviously impossible to avoid the occurrence of difficult situations which require a great store of legal knowledge and penetration. The aim of the method, however, should be to avoid complicated reasoning in normal cases.

As mentioned above, the method of construction should also secure predictability. Nevertheless, it is harbouring an illusion to believe that it is possible to create a system which places legally untrained persons in a position to discern beforehand and without assistance whether a certain action is punishable or not. This is partly due to the fact that the social conditions governed by the law are altogether very complex and difficult to survey. The principal reason, however, is that those considerations concerning criminal policy and legislative technique which must attend the penalizing of a certain type of action are of so many different

kinds and so complicated that it is impossible to formulate the statute text in such a manner that all its implications will be discernible by a layman. Indeed, certain problems of central importance to criminal law are so difficult to condense into a short formula that the framers of the law have renounced any attempt to draw up rules in the form of statutory provisions. Several of the questions concerning causation and *mens rea* might be cited as examples. Against the background of these facts, it is impossible to demand that the methods of construction shall be conceived in such a manner that a layman can form an opinion of the result which the courts will arrive at in different cases.

What can be demanded, on the other hand, is that the methods of construction shall be formulated in such a manner that a trained lawyer will be able to foresee with some certainty the decisions of the courts. If that condition were fulfilled, a layman could get an answer to the question whether a certain action is punishable by applying to counsel or to other lawyers. Thus the claim for a predictable application of the law would seem to be realised in a reasonable way. This reduced predictability, conceived with regard to what is actually possible to realise, should be promoted in the same way as uniformity in the decisions of the courts, i.e. by use of methods of construction which are easy for the average lawyer to handle. In other words, the methods should be such that the majority of judges and counsel will arrive at the same result when interpreting the law. There is no need to emphasize that in many cases, it is impossible to attain such uniformity in legal analysis. Nevertheless, where a choice between two different methods is possible, the preference should be given to the one which is likely to secure the greatest possible predictability and freedom from discretion.

It has been pointed out above how important it is for general confidence in the courts and the legal system that the public shall have the impression that the courts are judging objectively and in accordance with the law and the words of the statutes. It is true that even in a country where the law is largely codified, it is impossible to create a legal system which makes it possible for laymen to predict the decisions of courts solely on the strength of their own studies of the words of the code. However, confidence in the courts is such an important social interest that it is not permissible to surrender without resistance in face of the difficulty of making the application of the law comprehensible to the public and its representatives in the press. A feasible compromise with the

unattainable ideal that every act of adjudication should be fully understandable to the public would seem to imply a constant endeavour to arrive at decisions which are such that a layman with a normal intellectual and emotional equipment and free from private interests in the case and from other influences which might have prejudiced him beforehand will at least find the result of the court, as accounted for in the judgment, to be reasonable on the basis of the provisions of the law.

It consequently appears, from the present attempt to determine the realistic claims which the principle of legality as understood in this paper may raise upon the methods of construction of the courts, that these methods should fulfil two conditions: they should be easy for the average lawyer to use, and they should be such that the results of construction appear reasonable to the public. The following pages contain some reflections on the problem of how to conceive methods of construction likely to fulfil these conditions.

III. TELEOLOGICAL CONSTRUCTION OF STATUTES

1. The teleological methods of construction will now be confronted with the claims which may be held embodied in the principle of legality. As mentioned in the introductory pages, no methods of construction are likely to be entirely free from considerations of expediency. Whether the courts have embraced a method decisively influenced by the doctrine of "positive law", which considers the logical and grammatical analysis of the text as the essential element in construction, or have constructed legal rules upon the basis of general concepts in accordance with the method of conceptualistic jurisprudence, they have certainly never been able wholly to refrain from conscious or unconscious attention to considerations of purpose. In most cases, this has probably taken place in a manner which should be characterized as pragmatic rather than teleological: instead of making the purpose of the law the starting point of the reasoning underlying an interpretation, the courts seem to have tested, and to some extent corrected, the result of literal construction by means of an analysis of its practical reasonableness in the light of certain sets of political values.

The tendency towards conscious pragmatism or teleology which

is thus asserted in modern legal science and in the decisions of courts is, as we have already intimated, supported by the increased knowledge we possess of semantics. That knowledge shows that often words are ambiguous and more or less vague, and that the precise meaning of words in a given case cannot be determined without regard to the context in which they appear. Therefore, no text is so clear that its meaning cannot give rise to doubt (possibly with the exception of statements of names and numbers). Consequently, the semantic interpretation cannot be a mechanical process, and evaluations and considerations of purpose need to be given some scope, if only to give the text a "sensible" meaning.[4]

However, the development of the details of a teleological method encounters certain difficulties. If a teleological method is defined as a method of constructing an enactment in such a manner that it fulfils its purpose in the best possible way, several questions confront us when we try to describe the method more precisely: What is the meaning of "the purpose of an enactment"? How is that purpose determined? What relative importance is to be given to the purpose in comparison with other elements of interpretation?

2. This discussion must begin with a few words on the opposition in continental European legal science between the advocates of objective and subjective construction of statutes.

a. In its extreme form, subjective construction purports to determine the intention of the "historical law-giver", whereas objective construction pushed to the extreme sets out to find the meaning of an enactment from the enactment itself as isolated from its historical genesis. There is no absolute opposition between subjective and objective construction: the difference is due to the choice of elements of interpretation.[5] Subjective interpretation makes use of an historical method and investigates all those circumstances which may throw light upon the meaning of the "law-giver", e.g. intentions or opinions expressed by persons who formulated the text of the enactment or passed decisions upon its wording, the situation which gave rise to the legislation, etc. Objective construction, on the other hand, is very restrictive in the choice of elements, and in principle sticks to the text of the statute itself, as it has been enacted and published. As a rule, legal theory has shown a predilection for objective methods whereas

[4] Cf. Ross, *Om ret og retfærdighed*, Copenhagen 1953, p. 158.
[5] Ross, *op. cit.*, pp. 143 ff.

the courts—particularly in later days—have tended to apply modified subjective methods, inasmuch as they have paid great attention to the *travaux préparatoires* of legislation.[6] For the purpose of the present paper, it is of importance to establish that the different opinions on objective and subjective construction of statutes are also relevant for the determination of the purpose of an enactment within the framework of a teleological method of interpretation.

Thus, writers holding a subjective attitude contend that the purpose of a law is identical with the intention of the law-giver at the passing of the enactment. To these writers, the task of finding the purpose of the law is consequently a matter of historical research, and the most important source is obviously the *travaux préparatoires* of the law.

b. Conversely, writers holding an objective standpoint consider it possible to determine the purpose of an enactment independently, regardless of the intentions of the law-giver. To these writers, therefore, it ought to be an important problem to decide how to determine the purpose independently. As a rule, this problem has been evaded by the use of general locutions, but interesting attempts to solve the problem have been made.

In the first place, attention should be drawn to certain endeavours to arrive at a strictly theoretical determination of the purpose in accordance with a number of objective principles. To those who have preferred not to investigate and follow the intentions of the law-giver, it has been a natural solution to hold that the purpose of an enactment coincides with its "actual social functions".[7] What they have in mind is most likely one or several actual effects of the enactment. It follows that a teleological interpretation would maintain and possibly reinforce these effects, or in other words render the enactment more efficient in a respect where it has already a certain effect. It is doubtful, however, whether this is really the intention of the advocates of this school of thought. Indeed, if a number of effects of an enactment constitute its function, and consequently its purpose, the first stage of an enquiry into the purpose should be a sociological investigation of the actual effects of the enactment in society. It is seldom, however, that such an investigation can be

[6] See Schmidt, *op. cit.*, and Ekelöf, *op. cit.*, pp. 89 ff. and 97.

[7] See Ekelöf, *Är den juridiska doktrinen en teknik eller en vetenskap?* Lund 1951, pp. 23 and 28 f. Cf. Germann, *Methodische Grundfragen*, Basle 1946, p. 39.

effected in those situations where experience shows that questions of interpretation are commonly raised, i.e. in the daily work of the authorities entrusted with the administration of the law. Moreover, there are many cases where such a course of action would not produce the desired result. It would appear, in the first place, that rules which have not yet been applied have no function and consequently no purpose. Such a result is opposed to the very basis of a teleological method, which is to presume that every single enactment has a definite purpose. Secondly, it is highly probable that it would often be difficult or impossible to establish with any certainty a specific social effect of a legal rule. In this respect, it is sufficient to point to the unending discussion concerning the preventive effects of punishment upon the individual culprit or upon the general public, and to the difficulty of obtaining, by empirical methods, any reliable knowledge of the effects of punishment upon human behaviour. Moreover, there are reasons for expecting the social effects of an enactment to become far-reaching, partly opposed to one another, and consequently difficult to overlook. In this way, a teleological method which makes the actual effects of legislation its starting point would be practically eliminated until sociology has much greater possibilities than it now possesses of providing an answer to questions concerning the influence of legislation upon human behaviour.

For these reasons it seems probable that the advocates of the theory outlined above intend the "social function" of an enactment to mean its hypothetical effects. If this is the correct meaning, we are immediately confronted by the question how to choose between several hypotheses of equal probability. Is it not likely that the decision will depend upon general experience of life and attitudes towards things in general, temperament, prejudice and political opinions? The discussion between the partisans of different opinions upon the "function" of punishment would seem to provide an example in this case too.

Thus the function of an enactment must constitute one or several out of an undetermined number of hypothetical or actual effects of the enactment. It is obvious, however, that the function of the enactment cannot be just any effect of its operation. For instance, it may be an effect of a rule of criminal law that a transgressor is subjected to blackmailing by someone who knows of the transgression. Nevertheless, it would not occur to anyone to call this effect the social function of the penal rule. On what grounds,

then, are we to pick out the effects which are to be considered as the function of a rule? It has been said that the effect which is characterized as the function of a given rule must have a social value, i.e. be important for the satisfaction of the needs of the public.[8] This definition suffers from the weakness that it does not indicate how to determine what is socially important or what public needs should be satisfied. It is obvious that these can be both various and opposed to each other. Indeed, it seems impossible to find any objective criterion of a "function" which is suited to become the basis of a teleological application of the law.[9] In that case, the function of a legal rule does not seem to be susceptible of any other definition than as hypothetical effects of a certain application of the rule which appear desirable from a certain point of view. The description of the purpose as an "actual function" consequently seems to be a tautology.

It is hardly surprising that the attempts to define the function as outlined above should result in the statement that it is impossible to escape from an element of finality in the definition of the purpose even though it is attached to the already existing actual effects of the legal rule. Consequently, to a lawyer engaged in the application of the law or writing about it without recourse to sociological methods, it appears that the purpose of an enactment can never be anything else than the future realization of certain possible effects which are considered desirable.

In the discussion on teleological methods, it is often not made clear whether the "purpose" should be taken to mean the realization of one or several permanent effects or the achievement of all socially desirable effects of the enactment, hypothetical or real. Occasionally, it would seem that certain scholars prefer to make a uniform and undivided purpose the basis of application. In

[8] Ekelöf, *Straffet, skadeståndet och vitet*, Uppsala 1942, p. 12, and Fauconnet, *La responsabilité*, Paris 1920, p. 282. Cf. Durkheim, *De la division du travail social*, Paris 1893, pp. 49 ff.

[9] A definition of the term "function" which is somewhat different from that discussed in the text appears in modern works on sociology and has been used by Aubert, *Om straffens sosiale funktion*, Oslo 1954, pp. 2 and 8 f. Aubert characterizes those effects which actually contribute to increase the probability of the continued existence of an institution as "institutional functions", whereas effects likely to reduce that probability are called dysfunctions. By this proceeding, Aubert considers himself able to determine the function without making it dependent upon the opinions or ideas of purposefulness which are entertained by legislatures, judges, or other individuals. In opposition, Ross contends, in what seems to be a convincing manner, that this conception of the purpose is normative inasmuch as only such effects as are evaluated positively from some point of view are characterized as functions. (See Ross, "Et retssociologisk forsøg", *T.f.R.* 1954, pp. 368 ff.)