RELIANCE ON AUTHORITIES OR OPEN DEBATE? TWO MODELS OF LEGAL ARGUMENTATION

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A. CRITICISM OF LAWYERS AS AUTHORITARIANS

Lawyers are not always so highly regarded by the rest of the community as they would wish to be. This is perhaps partly because they tend to talk in a complicated and strange way of problems that other people generally consider from the point of view of "common sense" and because they are thought to be overfond of rules, statutes and precedents. Lawyers always seem to have authorities to rely on and to regard themselves as minor prophets endowed with a special ability to find out—by means of interpretation—the true intentions of these authorities.

Should we lawyers take such criticisms seriously? Certainly we should. For one thing, if we want to be useful in our profession we must pay attention to our public image. But there are other—and more important—reasons why we should concern ourselves with the views of non-lawyers. As a part of social science, and as a field of learning, law must not be isolated from psychology, sociology, statistics, political science, etc. Nor can law be kept aloof from the "common-sense" debates on social matters that are carried on in the press, on the radio or through other mass media.

One consequence of this reasoning would seem to be that our models of argumentation ought to be the object of constant re-examination—leading, if necessary, to readjustment. In this paper two kinds of argumentation models will be presented and evaluated. The first kind, which is here called "the model of adjudication", is intended to illustrate such modes of argumentation as are very often used by courts, as well as by lawyers who in a non-judicial capacity have to make decisions on legal matters. The second kind—"the model of open debate", is intended to illustrate an alternative method of argumentation, a method which may perhaps offer certain advantages if we want to go some way towards meeting the need for good relations with various groups of non-lawyers.

B. MODELS OF ARGUMENTATION

1. The model of adjudication

Fig. 1 is intended to illustrate a method of argumentation that is very common in Nordic juristic debates. Here a statute serves as a basis for a comprehensive evaluation. This presupposes, of course, that there exists a statutory provision which *prima facie* seems to be relevant to the issue. If that is not the case, it may happen that the problem will be reformulated as a problem of interpretation of judicial decisions or of legislative materials.

Let us assume that there does in fact exist a statutory provision which appears to be relevant. Let us further assume that the problem with which we are confronted seems so important and so difficult that it cannot be solved as a matter of routine after a brief look at the text of the statute. Traditionally in such a case we ask the following question: How is this provision to be interpreted? And in seeking to answer this question we often not only try to get as much information as possible from the text as such, but also to have recourse to other sources of information. We ask ourselves what is the meaning of the provision in the light of judicial decisions, or we may make "subjective" interpretations of the provision concerned by means of investigations into its legislative history, i.e. what has been said by law revision commissions, by the responsible Minister, by members of the legislative assembly, and so on. Or we may take a "teleological" approach to matters of interpretation and search for points of view that could indicate the "real purposes" of the statute.

A special explanation ought perhaps to be given of the symbol "methods of weighting" in Fig. 1. The idea is that every act of interpretation of law must, whether we are aware of the fact or not, contain an evaluation of the relative weights to be given to statutory texts, judicial decisions, materials from the legislative history (assuming that such materials are to be accorded special weight, which is, indeed, a debatable point), and other kinds of arguments.

One interesting question in this connection is that of the role played, within such a framework of argumentation, by sociological data and by common-sense points of view. We can assume that it probably often occurs that arguments based upon the language of the statute, judicial decisions, and the legislative history on the whole speak in favour of the same decision as that

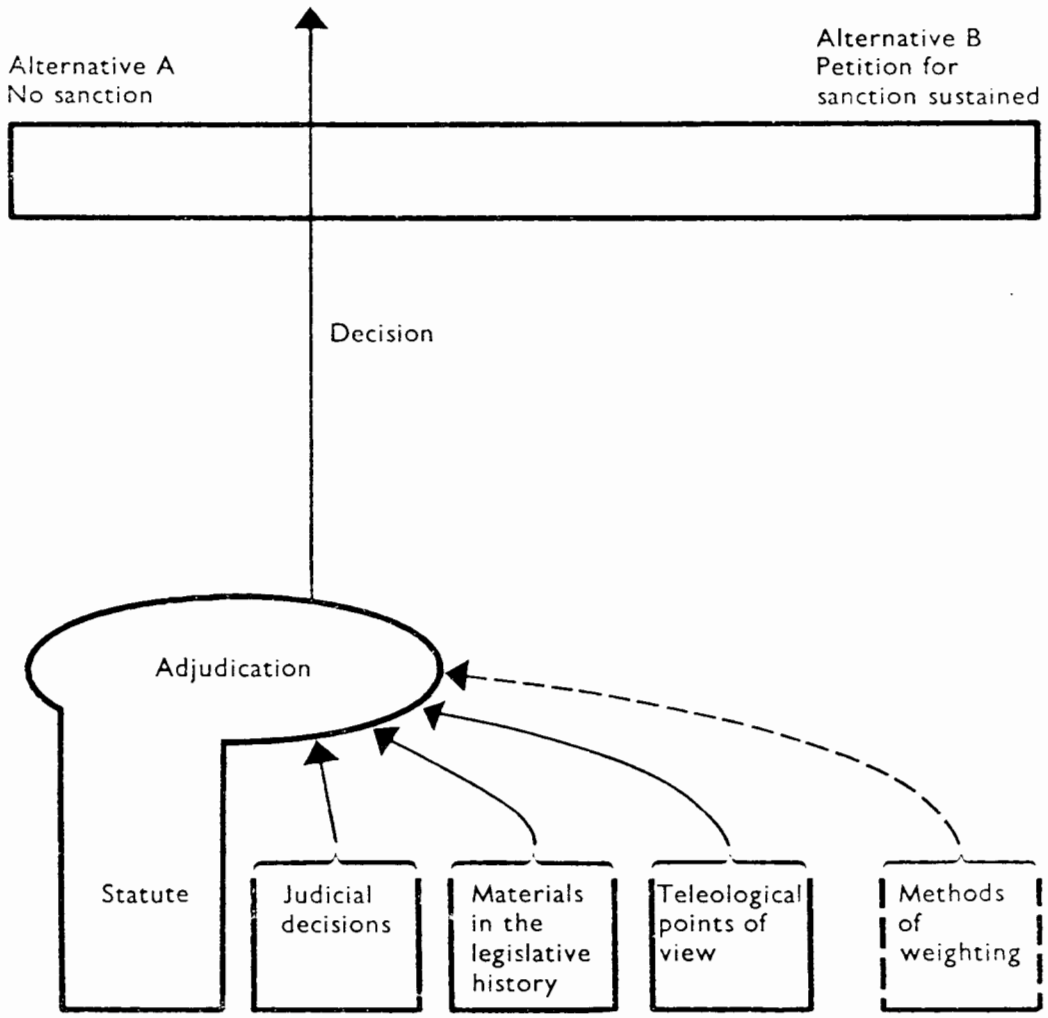

Fig. 1. The model of adjudication.[1]

indicated by arguments based upon the results of social science and on the common sense of dominant groups among ordinary people. Consequently it must very often be the case that there is no objection against a decision from the point of view of sociological data and common sense, even though judges do not consciously endeavour to take such views into consideration. Further, we can assume that sociological data and common-sense points of view have bearing when a teleological approach is applied. But do we really pay *unprejudiced* regard to sociological data and common-sense points of view? It hardly seems so. We use teleological arguments as a last resort, that is to say, in situations—this is our difficulty—where no specific answers can be deduced from the text of the statute as such. And when we choose between different teleological arguments we are inclined to give preference

[1] It has been assumed that there are only two alternatives: no sanction, and petition for sanction sustained.

to those arguments that we have already met when studying the text of statutes, judicial decisions and—assuming we pay regard to such materials—the legislative history.

There are some other points that I should like to make with reference to Fig. 1. In the course of the adjudicative procedure a legal norm can be said to have been laid down. If we express ourselves in this manner, it is very important to observe that our legal norm cannot, in its turn, be made the object of further interpretations. The norm is a product of our decision-making. It indicates how we solved our problem. It does not deserve to be referred to as an argument. We can, if we like, refrain from talking of legal norms and say instead: This is the way the problem should be solved.

Another important point is that often the legal norm—or the position we took in our decision-making—will, as the figure illustrates, be inconsistent with the words of the statute. Sometimes it may even seem offensive to label the result of our argumentation as an interpretation of the statute. Actually, we sometimes allow ourselves to justify, on very weak grounds, our decision with the authority of a statute—or of "the law". If someone takes a sceptical view of our decision, we may answer: "The decision is based on an interpretation of the law." It is not easy for a layman to see how empty such an answer is.

A recent decision by the Swedish Supreme Court, 1962 N.J.A. 172, may serve as an illustration.

> A car owner had left his car with a garage for repair. One of the mechanics started the engine but failed to observe that the car was in gear. The vehicle begun to move and another mechanic, by the name of Karlsson, got his leg crushed. Karlsson sued the owner of the car for damages. He was successful. The Court found that the injury was caused "by motor traffic" (*'i följd av automobiltrafik'*).

One may ask: Was not the car taken *out of* traffic when it was handed over to the garage?[2]

But there are further reasons—and probably more important ones—for scepticism concerning the adjudication model. Sooner or later, whether we like it or not, we have to accept the fact that technological devices—computers and the like—will play an important role within the field of law as well as in other spheres.

[2] It should be mentioned that in Sweden "cars in traffic" are covered by a compulsory third-party insurance scheme. By sustaining the claim the court allowed Karlsson compensation from the insurance company.

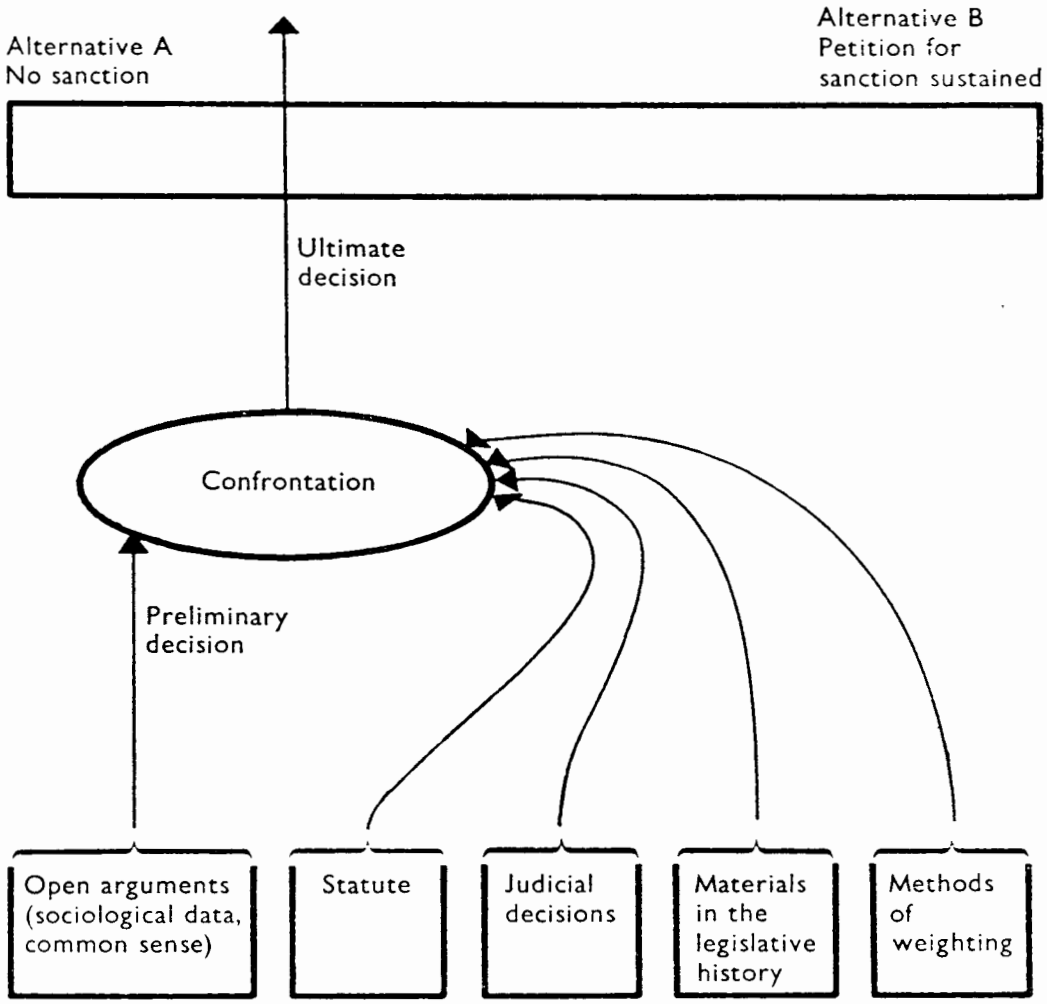

Fig. 2. The model of open debate.[3]

As a consequence we must have a system of legal argumentation which contains an elaborate scheme of weighting. It seems very difficult to use distinctive principles when weighing against one another sociological data and traditional legal arguments. There seem to be, on the whole, very good reasons for inquiring whether we cannot find a more suitable model of argumentation than the one we have now been discussing.

2. *The model of open debate*

Fig. 2 illustrates another mode of approach. Here the procedure starts with an open and unprejudiced debate of such a kind that not only lawyers but also sociologists and in general people of ordinary common sense are able to take part in it and express

[3] It has been assumed that there are only two alternatives: no sanction, and petition for sanction sustained.

opinions about such facts as are within their own fields of knowledge. This does not mean, of course, that such a debate—or for that matter any debate—could start from zero. We all have to subordinate our actions to the evaluations prevailing in the society in which we live. But undoubtedly it would be possible to organize debates that would be open at least to the extent that our discussions would not primarily be governed by any "sources of law".

Further, I wish to emphasize that the procedure in an open debate should lead to a preliminary decision through which there would be laid down what we may call a preliminary norm. This norm would then have to be confronted with the "sources of law": statutes, judicial decisions and—possibly—preparatory materials. Here one point of special importance should be made: the symbol "teleological points of view" is not part of the enumeration of the sources of law. These points of view ought to be methodically investigated and definitely evaluated already within the framework of the open debate. The confrontation with the "sources of law" will take account only of such types of arguments—authoritative arguments—as, according to the weighting principles adopted, are to be deemed more important than open arguments and will, consequently, serve as correctives with regard to the result of the open debate.

It is probably worth observing that this model also presupposes that the "sources of law" shall serve as correctives without having been made the object of any kinds of interpretations (apart from purely linguistic interpretations). If a statute, regarded as a verbal phenomenon, happens to agree as well with one way of resolving the problem as with another, this ought to be regarded as irrelevant to the choice between the two solutions which are offered as alternatives. And the same goes for judicial decisions and materials from the legislative history (assuming such materials are to be regarded as in any way authoritative).

Why, then, is the open model to be preferred to the adjudicative model? Here are some brief suggestions. If we use the adjudicative model, there is a risk that we shall concentrate too much on technical questions which are incomprehensible to non-lawyers and which are, in reality, fictional and unnecessary ingredients of any adequate argumentation; in consequence, relevant sociological data will tend to be disregarded. The use of the open model, on the other hand, would mean that we might become more inclined than has hitherto been the case to look upon socio-

logy, psychology and other social sciences as foundations of the law.

The use of the open model would make it possible for lawyers to take a more effective and adequate part in current social debate. And, for reasons already stated, it seems necessary that we should engage in this debate not only as individual members of society but also in our capacity as lawyers.

C. LAWYERS AS PARTICIPANTS IN AN OPEN DEBATE

What lawyers do in their professional capacity will often be observed and will sometimes be discussed by those who take part in the current debate on public affairs. It would seem that the courts are of especial interest in this connection, and in the following discussion we shall look into the role that the judge may play as a participant in an open debate.

A judge should, if he wishes to do so, be allowed to call himself an author. There are probably few judges who do not write at least a thousand pages in the course of every year, in addition to the copious form-filling that may fall to their lot. It is true that a judge is strictly confined to what is material to the case at bar, but he is relatively free to give expression to his own personal ideas and to do this in the manner that he finds most suitable from a stylistic point of view.

To whom is the judge's writing addressed? Primarily, of course, to the parties and their counsel. To them the judge has the duty of explaining why he has acted as he has. It is necessary to put them in a position to estimate the chances of obtaining a reversal upon appeal to a higher instance. The judge also has to make clear what impact the judgment will have in the future upon the relations between the parties and with reference to matters of *stare decisis* (in those legal systems which apply such principles).

But the judge also writes with other readers in mind. There is a wide public which is interested in his activities, and there are many people who as legal counsel or in some other professional capacity use judge-made law to construct models upon which they rely when settling disputes out of court.

We may take a step further. Let us assume that the reasons for judicial decisions should be presented in such a way that a

judicial opinion will become as useful as possible to large groups of people, including the kind of people we usually have in mind when talking about the ordinary citizen or the public reached by mass media. How are such judicial opinions to be produced?

It certainly does not seem satisfactory that in judicial opinions only those arguments should be accounted for which support the conclusion ultimately reached by the judge. Certainly we cannot feel wholly satisfied with opinions which have the kind of structure illustrated in the following passage (such opinions, drafted in the French style,[4] were very common in Swedish practice until a few decades ago):[5]

> "... has been proven, whereas ...; whereas ...; whereas ...; and whereas ...; and although ...; nevertheless, because ...; inasmuch as ...; accordingly and with reference to ... the court deems it, regardless of ..., just to order ....

Under such a régime, however debatable the case may have seemed during the deliberation, the issue was made to appear crystal-clear when presented in the opinion of the court. There was no room for arguments *pro et contra*; the opinion simply stated what was right.

Fortunately, today we can find a new tendency at work in Swedish courts. This is an example of a district court decision:[6]

> "The question is now, whether. ... On this point the court finds .... Against this it may be objected that .... Before the court takes up a position on the question of ... it is necessary to investigate whether .... The court—which cannot, of course, make its own evaluation of ....—In this respect there would seem at first sight to be good reason to say that .... This argument, which would have been pertinent if ... cannot, however, be applied to the case, because .... For these reasons the plaintiff's suit cannot be sustained."

Assuming that the courts ought to state reasons *pro et contra* (at any rate in cases which are not so simple that they can be disposed of as matters of routine), we may further ask what

[4] See, with regard to different styles of writing opinions, Folke Schmidt, *The ratio decidendi. A comparative study of a French, a German and an American Supreme Court decision,* Uppsala 1965.

[5] The citation is from a remarkable Swedish case, 1876 N.J.A. 458 (one dog, "Kalkas", had killed another dog, "Bylander's dog", by holding it on a railway track just as a train was passing).

[6] The case was decided by Frosta och Eslövs domsagas häradsrätt (presiding: Judge Björling) on September 24, 1964.

models the courts ought to use in producing their opinions. Here we may return to the question of a choice between an adjudicative model and an open model.

It does not seem necessary in this connection to exemplify the adjudicative model, since it is familiar to every lawyer. It is more interesting to ask whether judges sometimes use the open model of decision-making. We can certainly find instances of this, but it is difficult to know whether they are in any way typical. The following is an example from an English law report (a case concerning the validity of a will):[7]

> "When I read the relevant clauses of this will without regard to authority—and that, I think, is what a judge should always do in the first instance—I find . . . ."

Here it seems as if the judge is making use of an argument which indicates the use of an open model. As a preliminary step the judge forms an opinion without regard to authority. After that he must, of course, make a confrontation with such statutes and previous judicial decisions as seem to him to be relevant to the issue.

A recent Swedish case[8]—which cannot, to be sure, be taken as an example of what usually occurs in Swedish practice[9]—may be mentioned as a demonstration of an intentional use of the open model as a means of expression of opinions. The case concerned a matter of family law. A husband, A, was able to prove that one of the children, borne by his wife during their marriage, was the issue of another man, B. The husband sued B for reimbursement of his costs for the child. The court sustained the claim by three votes to one. It is the dissenting vote that is of interest here:

> "When suspicion arises or it seems to be evident that a husband is not the father of a child that his wife has conceived during their marriage, the matter ought to be settled in such a way that there will be as little injury as possible to the child. From this point of view I very much hesitate to apply a rule which would entitle the husband to have recourse in court against the real father, concerning the maintenance of the child. When a man and a child are living together the man should not be regarded as the sole donor

[7] 1964 The Law Reports, Chancery Division, 143.

[8] Malmö Court of Appeal, 2nd division, June 20, 1967. The majority decision was approved by the Supreme Court, *vide* 1968 N.J.A. 183.

[9] The dissenting opinion, mentioned below, was given by the present writer while he was temporarily serving in the court.

> just because he pays for the child's maintenance. From this it already follows that a claim of recourse against the real father, who has had no relations with the child, rests upon a weak foundation. It seems, further, important that the husband should not be placed in a position where he can use the threat of a claim of recourse against the real father as a means of pressure. There seems to be a risk of such occurrences. The husband can make it a condition for continuing to live together with his wife that the wife shall support his claim against the real father of the child. This may have bad consequences for the child, who may thereby become, though completely innocent, the focus of disputes between adult people. These reasons ought, in my opinion, to lead to the preliminary decision that the claim of the husband in this case should be dismissed. It remains to be investigated whether this decision can be maintained after a confrontation with statutory provisions and the opinions of legal writers.
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> "The statutes, as has been pointed out by the district court, do not give any clear indications. Nor can any definite arguments be derived from previous decisions. Certainly there is one case, ... similar to the present, where a claim of recourse was sustained, but that decision is not very persuasive because it is a decision by a court of appeal which was not published in the reports. Nor does it seem possible to find any strong arguments from previous decisions concerning problems which are similar to the present one or from statements by legal writers. To be sure, in one of the cases in our reports ... the father of a child was ordered to pay maintenance *post factum,* but in that case the child was the plaintiff, and the claim related to a time after a break had occurred between the mother and the presumptive father. In the case at bar the situation is different. Only the husband is in a position to raise a claim. It seems more open to objection to grant the husband a right of recovery in the present case than it was ... to sustain a claim of the child in the case just referred to.
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> "For these reasons I find ...."

Such a way of arguing a matter of law may be considered questionable from many points of view. I do not pretend to have presented an overall discussion of the advantages and disadvantages of the open model of argumentation as compared with the adjudicative model. I propose to conclude by pointing to certain important advantages of the open model, a model which, I submit, would repay thorough investigation in the future.

First of all, by using the open model we could simplify our technique of legal argumentation. We should no longer need to distinguish between "subjective" and "teleological" methods of

interpretation. It would no longer be necessary to scrutinize statutory texts, judicial decisions and any other "source" material with the traditional sophisticated methods of interpretation. The procedure would start with open argumentation leading to a preliminary decision, which would be followed by a check as to whether this result of the open argumentation could be regarded as consistent with the source material.

Further, use of the open model would enable us to cooperate with representatives of the social sciences better than we can now. If the courts wrote their opinions in accordance with the open model, the important consequence would follow that social scientists could easily use judicial decisions as points of departure when they wanted to find suitable hypotheses for their own research work.

Yet another advantage may be mentioned. If in court opinions open arguments and juridico-technical arguments are distinguished from one another—as illustrated in the dissenting opinion quoted above—the decision will not only be more understandable but will also be more interesting and more suitable as a starting point for a debate among laymen. In the open part of the argumentation statements can be made and points of view can be presented which are of a kind likely to spark off useful debates on matters of public concern. And as far as the lawyer is concerned it may well be an advantage to find, concentrated in a separate part of the decision, a survey of judical decisions and, possibly, legislative material—which the court considered for the purpose of confrontation.