HOW TO IMPROVE LEGAL TECHNIQUE

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I

1. Politicians and contracting parties have ideas about the substantive contents of a statute or of a contract. These ideas have to be moulded into legal form in order to fit the statute or contract for operation in society. The technique used for this moulding process can be called *legal technique*.

We are constantly revising the contents of our statutes and our contracts. But it is rather seldom that we scrutinize our legal technique to see whether it needs to be changed. The purpose of this article is to discuss how our legal technique could be improved.

2. The discussion will take as its point of departure two main considerations. The first originates from the philosophy of law. During the last half century many philosophers of law as well as many legal scholars in Scandinavia and elsewhere have made great efforts to show that hitherto law has been influenced by metaphysical and natural-law notions and that the contents of a legal rule could not be established with the help of ordinary scientific methods. They maintain that law is created by man and has to serve practical ends. It can be changed by man and there are in theory no limits to the changes that can be made. What is valid for law in general is *a fortiori* valid for legal technique.

This new approach to law has caused a certain change in the technique of legal argumentation, at least in Scandinavia. Lawyers use arguments based on the purpose of the legal rule rather than arguments based on an analysis of legal concepts or general principles of law. Apart from this, however, little interest has been shown in gathering the practical fruits of the painstaking work of the scientists.

As a matter of fact, it is theoretically possible for every legal system to abolish its existing legal technique and replace it by a different one which might be better suited to the needs of present-day society. If we were thus to subject our legal technique to critical examination, it would certainly be revealed that large parts of the technique are rational, based as they are on long experience. However, certain improvements would no doubt be found appropriate, perhaps even sorely needed.

3. The second consideration is of an economic character. In our days the sector of society which produces and distributes goods and services is the object of continuous rationalization. All costs have to be kept down as

much as possible. Among these is the cost of employing skilled manpower. This is where the legal system comes into the picture. It costs money to legislate, to sue in courts and to recover debts by enforcement orders. It costs money to conclude contracts and to interpret and apply them. It also costs money to educate lawyers and to carry out research work in the legal field. And legal manpower is very expensive.

The legal organization of economic life is not an end in itself. It should therefore be subject to the same endeavours to cut costs as are other elements. Lawmaking and legal administration should not cost more than society and the contracting parties reasonably ought to pay for them. Art for art's sake is not a plea open to lawyers to make. Many private parties may find legal costs marginal. What matters, however, is the importance of low legal costs for society as a whole.

There are some signs that people are becoming aware of the unduly high level of legal costs today and that a process of rationalization has started in order to improve the situation. I should like to point to three such signs.

First, parties in Sweden nowadays bring their disputes to court to a much lesser extent than before. There are some exceptions, e.g. as regards the law of torts, where insurance companies seem to have preserved a certain interest in test cases. Be that as it may, very few cases reach the main instance for the making of precedents, the Supreme Court.

Many contracts exclude court procedure by an arbitration clause. Arbitration seems, however, to be utilized to a rather small extent, except within special areas like construction projects in the building industry.

As a matter of fact, practically all commercial disputes nowadays are settled by the attorneys of the parties. There are three reasons for this development. The first and main reason is that both court procedure and arbitration are considered too expensive. The parties have to take into account not only the direct expenditures, but also the loss of time, and time is money. A second reason is that many disputes have to be settled speedily and that court procedure normally drags out over a long period. A third reason is that court procedure is in principle public and may entail negative publicity. The publicity given to a dispute can harm a bank in its relations with a customer or an enterprise in its relations with another enterprise; both parties are eager to settle their dispute since they do not want to break off business relations with each other.

A second sign that people have become aware of legal costs is that standard forms are increasingly used for most transactions in the same line of business. Properly handled, standard forms can save much money and time and thus assist the nation's economy.

There is a third sign, too, although it is not very noticeable. In recent years, some Swedish laws, even quite modern ones, have been revised with a view to simplifying them. Thus, some parts of the Company Act of 1944 were revised in 1970 through the adoption of an act on simplified dealing in shares. The 1944 Act was replaced altogether in 1975 by a new, simplified statute.

4. In what follows an effort will be made to suggest some improvements in legal technique in a wide sense. The three main parts of the legal system will be scrutinized, namely (1) *lawmaking,* which here will be taken to cover not only *legislation* but also *contract-making* and other activities of a similar kind, (2) the *implementation* of laws, including *interpretation* in general and *application* in specific cases, and (3) *legal science* with its two components, *research* and *teaching.*

I shall limit my survey to private law in the Swedish sense of the word, that is to say broadly the field covered by the two great codifications, the French *Code civil* and the German *Bürgerliches Gesetzbuch.* (Family law and succession law, however, will be excluded.) Private law in this sense can be judged from an economic point of view. It is true that other parts of the law may also depend upon economic factors, but in those parts there exist additional factors, such as social considerations and the interest in the rule of law, which have to be carefully weighed against the interest of reducing costs. It is therefore simpler to examine private law exclusively.

II

5. Lawmaking is founded on inherited basic concepts and certain general principles related to them. In Sweden the drafters of laws seldom define such concepts in the text of the statute.

The core of several of these concepts is undoubtedly made up of such constant companions of legal technique as the legal person, the legal act, the contract and the concept of tort. My statement is valid only in relation to the core of the concept. The details of the definition must continually be reconsidered in the light of their expediency in the society of today.

Sometimes there will be a need for a statutory definition, since the meaning of a concept often gives rise to disputes, and conflicts normally result in a loss for the community. Often, however, there will seem to be no need for a detailed statutory definition. The private-law system appears as a large mass without any distinct dividing lines. The main reason why there is no need for such boundaries is the fact that the contracting parties are able to give their legal relations almost any shape they want. Thus transi-

tion from one type of contract to another may take place almost imperceptibly; it may be produced by a small shifting of the centre of gravity of the contract. In such a case it is preferable to be satisfied with a more general idea of the core of the concept and to leave it to the practitioners to make the distinctions in the special case. The drawing of a more complete boundary would not serve any meaningful purpose.

Another question of "legal economy" concerns the matter how the text of a statute should be drafted. During the lawmaking procedure the drafter decides what the substance of a rule is to be. Certain prerequisites have to be fulfilled. In the preparatory work these prerequisites are defined and placed in a certain logical order. Often the text will not directly reflect this order because the drafter has been at pains to phrase the text in ordinary language like a literary text. Sometimes this leads to difficulties. After all, it may not be possible to express the best solution in a stylistically pleasing text. Where there have been difficulties in finding an adequate "literary" expression for the exact meaning intended by the legislator, at some future time the text may be read in a way that was not intended. Even where the text does give a correct expression of the aims of the legislator, it may still be the case that a future interpreter will only be able to find out this meaning with great effort after having studied the preparatory works in order to extract from them the necessary prerequisites and place them in their logical order. The interpreter could be saved all this labour if the prerequisites were numbered and placed in the right order in the text, as English and American drafters often do. A lawyer working under stress will probably appreciate above all being able to grasp the meaning of a provision instantly, the enjoyment of a "literary" text being for him of secondary importance. Think of the generations of lawyers and law students who will have to wrestle with a difficult statute text! Then you will realize that considerable costs can be saved if texts are phrased more straightforwardly.

In many fields, and above all within the area formed by the Part on Commerce in the Swedish Code of 1734, the existing legislation is out of date; there may even be no legislation at all. Relevant precedents and legal writing, too, may date back a long while. Interpretation of law within this field is therefore a time-consuming task and the practitioner needs some form of guidance. The most effective solution would no doubt be for the legislator to throw himself into the task of sweeping out from the statute book all those parts which are out of date, as was done within one sector when the new Swedish Interest Act was introduced in 1975. But the legislator of today has so many other duties which he finds more urgent than the preparing of drafts about optional rules for various types of

contracts, particularly so when no direct consumer interests are involved. In any case the legislator can scarcely offer more than a framework, which afterwards has to be supplemented in one way or another.

This "framework" legislation could be supplemented by standard contracts. There is, however, a tendency to abstain from framework legislation where the field is well covered by standard contracts. (In this respect labour law and consumer laws constitute exceptions.) Standard contracts have spread more and more, and they have certainly come to stay, for they represent legal economy. They save a lot of individual bargaining. As is generally recognized, however, the weak point is that standard forms are normally the product of only one of the parties. I do not intend to discuss how this problem should be solved; one way, however, is mandatory legislation, of the kind adopted within the field of consumer law.

Instead I should like to call attention to the fact that in those fields where there is no modern framework legislation standard contracts tend to be very voluminous. This is not good legal economy. A party who has to observe a standard contract which has been drafted by the representatives of the other side often will not have sufficient time to consider all implications of the various clauses, and the contract may therefore give him unpleasant surprises in the future. And even supposing he could find the time, he could certainly make a better use of it. A person who examines a standard form should need only to look at those clauses which are specific for the field in question and therefore differ from clauses which are commonly used in most fields. However, this presupposes that there is a set of general optional rules which apply even in the absence of a framework legislation for the contract type in question. These rules, one would imagine, might advantageously be presented in an authoritative handbook.

Besides standard contracts there exist a large number of individual contracts. Some lawyers who draw up such contracts like to make them long and detailed, a practice which seems to be particularly common in the United States. They maintain that detailed contracts reduce the number of disputes between the parties. This may sometimes be true, but there are disadvantages which may outweigh the advantages. Usually it is good legal economy to make contracts as short as possible. It will then take less time to draw up the contract, to read it through, and to come to a decision about it. There will be less cause for disputes during the negotiations and less scope for an imbalance in the contract arising because a superior party sees to it that all the conditions are in his favour. A system of short contracts presupposes the existence at the same time of a framework legislation or some substitute therefor.

6. The second part of the legal system under scrutiny is the *implementation* of laws, including the *interpretation* of a statutory text, i.e. statements of its meaning in general, and its *application* to specific cases. In the following discussion, interpretation and application will normally not be kept apart.

With very few exceptions, the rules of interpretation are not embodied in statutory law. They have developed since ancient times in legal usage. When in the course of time they have undergone a change, this change has not infrequently been influenced by works of legal science or by the teaching in the law faculties.

It is common knowledge that many important legal decisions of a kind earlier made by courts are today taken outside the courtroom. This development makes it necessary that the technique of interpretation shall be the same irrespective of the person who applies it. All categories of lawyers – judges, attorneys, legal scholars – ought to arrive at the same answer to a legal question, though, of course, they have the same possibility of diverging as a judge has when he sets aside a precedent by expressing a different opinion from his colleagues. In this context I am referring only to questions of law. A judge sitting in court is usually better placed than any other category to decide questions of fact. That this is so is above all because of the court's right to hear witnesses.

If all categories of lawyers are to apply the same technique, the choice must be the technique used by the courts. According to Swedish traditions this will mean that the material which can be taken into consideration is rather limited. Legal writing from earlier periods is as a rule of no interest. With some exceptions, as for example land law, there are very few relevant precedents more than a generation old which have not been invoked later on in preparatory works for legislation or otherwise. In any case one has to consider that old precedents originate from a different society and from a somewhat different system of law. It is seldom worth while to undertake research to find cases which have not been classified as precedents in the *Nytt Juridiskt Arkiv* (the Supreme Court Reports), a publication of a semi-official character.

A scholar, when making a comprehensive analysis of a case, sometimes finds more questions decided by the court than the court can have intended to decide upon. This is so in particular for the reason that the court did not have time to venture upon so many decisions. However, the scholar may have made such a comprehensive analysis because he was eager to find a uniform line in case law. Another possibility, which may have dangerous implications, is that the scholar may have sought to use the case as support for an opinion of his own. It would be better if he stated that the court did not take up any position with regard to an important legal

question where there is no actual evidence from the text of the decision that it did in fact do so. Since cases come up at random as and when individual disputes happen to be brought to court, it is unrealistic to imagine that cases from different courts and different times would fit into a uniform pattern. It is preferable that a scholar should state that his opinion coincides with one case but not with some other cases or that his opinion is contrary to case law. The present author submits that there is no reason for us in Sweden to move in the direction of an Anglo-American case-law technique, which is very time-consuming and cumbersome and therefore hardly compatible with the demand for legal economy.

Since old cases can only rarely be invoked there may often occur situations where there is no guidance to be found in case law. This will be the case in fields which are not governed by modern legislation as well as in fields which are so governed. One often finds in the preparatory work of a statute the statement that a certain question is one that will have to be solved some time in the future by the courts. Such statements are ineffective gestures, since few if any cases will in fact appear. How, then, should the situation be coped with?

There are several possible ways of breaking the trend and inducing parties to bring cases to courts. One is to introduce simpler and therefore cheaper court proceedings. For a limited field this was tried in 1974, when the Swedish Parliament adopted the Small Claims Act. Another possibility is to reduce the number of judicial instances from three to two. For the moment this idea seems not to be particularly favoured, in spite of its advantages as to costs and time. Yet another possibility, which likewise seems attractive but is hardly likely to be realized, would be to allow questions of law on important matters to be decided by courts at the public expense. As a matter of fact, it is rather strange that the necessary development of private law should ordinarily take place at the expense of such private parties as feel inclined and can afford to take upon themselves the burden of carrying on lawsuits.

The present subject can be approached from quite another angle, too. Properly speaking, it would be more advantageous for the national economy if the expensive court procedure were used only in special cases. From that point of view no measures should be taken to induce people to return to court. Instead, most disputes should be settled outside the courtroom by the attorneys of the parties. To help the attorneys with their tasks, different fields of private law should be intensively studied by legal writers with a view to providing the general public with books giving a clear account of the law concerned.

The technique of interpretation is seldom said to be in need of reform.

It is easy to get the impression that this technique is a sacred cow that must not be touched. But as with every other part of the legal system the technique should be considered only as a practical device which ought to be examined from the point of view of its efficiency. It is scarcely probable that the courts have much time to devote to improving the techniques of interpretation. That task, therefore, falls upon legal scholars.

7. We shall now pass on to consider the third and last part of the legal system, namely *legal science*. Several important tasks for legal science have already been indicated. One of these is the writing of textbooks which may serve as substitutes for case law.

It is not unchallenged that legal science should have such a task. Professor Knut Rodhe[1] has put forward the view that legal science should, like other sciences, limit its activities to the observation of real facts. Legal scholars, he holds, should abstain from value judgments; a scientist interpreting law should in principle only register the actions of the legislators and the courts.

The policy recommended by Rodhe has never been applied in an absolute form and it does not seem to be very suitable for adoption in the present situation, when the courts do not contribute very much to the development of private law. It also has another drawback. Unlike the judge, who has only to penetrate a single case at a time, the legal scholar has the opportunity to move over the whole field of law. For the community it would be unpractical and uneconomic to suggest that the scholar should abstain from taking up a position on questions which have not been dealt with in case law. Why should not a legal scholar, applying the same technique of interpretation as the courts, be able to reach a solution of the same quality as that arrived at by a judge? It is another matter that the legislator has not given the legal scholar the same formal authority as the judge.

In order to be able to fulfil this task of providing a substitute for case law, the scholar must have a continuous contact with practical life in the field within which he is active. It would be preferable if, like many medical scientists, he had some sort of clinic to work in. The legal scientist must be able to write in a way which can be understood by ordinary practical jurists, so that these persons can profit from his results. In my opinion the only purpose of legal science is to facilitate the function of law in practice. By legal science, I mean in this connection such legal science as applies ordinary legal technique. A legal study of a certain practical field may be elaborated with extraordinary acumen and refinement. Yet unless some

[1] The most detailed statement is to be found in *Ekonomen* 1944, pp. 3 ff.

category of practitioners can make use of the results, these have no other value than that of "art for art's sake".

III

8. There is not much hope that the programme outlined here will be realized within the near future. Three factors, in particular, may stand in the way. I call them the *inertia* factor, the *international* factor and the *economic* factor.

By the "inertia" factor I mean the resistance to changes in the existing system that is manifest everywhere. Many consider the existing legal system to be sufficiently well tried and well balanced and also at least tolerably coherent. In their opinion the only practicable way to improve the system is to carry out partial reforms. But is it really possible to take one piece of the system here and another piece there and replace or amend them without causing the whole system to break down or creating a lack of coherence?

In answering this question I should like to call attention to the fact that Swedish law has not, like the great Continental legal systems, been the subject of a general codification comparable to, say, the *Bürgerliches Gesetzbuch* or to the French *Code civil*. Today, Swedish laws derive from different epochs. They are therefore of varying character and they need to be adjusted to one another. It is hard to imagine anything more difficult to handle than such a mixed system. If revised, this mixed system will not be more difficult to handle than before.

Another reason for "inertia" is the unwillingness found both among lawyers and among laymen, once they have been accustomed to a certain system, to learn a new one. Two proverbial expressions will illustrate this form of inertia: "You can't teach an old dog new tricks" and "Better the devil you know than the devil you don't know".

The "inertia" factor tends to have the effect of putting a stop to any reforms whose advantages are not strikingly obvious.

9. We have now come to the international factor. In the foreseeable future, reform efforts will be a matter of Swedish or possibly Scandinavian concern. Can Sweden and the other Scandinavian countries carry through any substantial reforms of their legal technique without running the risk of isolating themselves from other countries in an unfortunate way?

Some of the Swedish problems mentioned here exist, of course, in other countries as well. One example is the flight from the courts. This is

perhaps especially noticeable in the United States, where the costs of litigation are extremely high and the winning party has in principle to pay his own costs.

At the same time it is evident that there are very great differences between the two great legal systems, the Anglo-American and the Continental. I submit that the Swedish legal system, in spite of its intermediate position, is in many respects closer to the Continental system. There is no doubt that a great saving of costs would result for all countries involved if greater uniformity in legal technique between the two great systems could be brought about.

Such a uniformity cannot be attained without rather far-reaching reforms of both systems. It is hard to believe that such reforms can be based, as sometimes has been suggested, on the civil-law system exclusively. Civil law originates, after all, from the quite different Roman society. A greater degree of unity will not be achieved until both sides realize that the legal regulation in private law is mainly a problem of practical organization. Only then is it conceivable that the discussion about uniform solutions may overcome the excessive regard paid to traditional thinking and national prestige. Are rules which have a distinct commercial character necessarily an indispensable part of a nation's legal and cultural heritage? I do not think so, but I fear that there will be no consensus on this matter. The Continental system must modify its penchant for highly abstract principles, the Anglo-American system must take another look at its unwieldy and expensive case-law method.

The legal techniques of different countries, although very different, often lead to a similar result when applied to a practical case. From that point of view there would thus be no danger of international isolation for small countries such as Sweden, it they were to act as pioneers in this field. As regards legal economy we should embrace neither the Continental nor the Anglo-American system.

10. The last of our three factors, the economic one, may stop many reform efforts in today's society. It will certainly be said that we have not the economic and personnel resources to carry out a reform of legal technique within a reasonable time and that priority must be given to other more urgent matters. In this paper the present author has submitted that reform schemes may entail some not inconsiderable savings for the national economy. If experts affirm that this assumption is correct, such schemes should be given the grade of priority justified by the savings and other advantages expected. As to personnel resources, it should not be impossible to enlist the services of legal scholars in doing much of the necessary work, perhaps in accordance with a long-term plan.