NEED-RATIONALITY IN PRIVATE LAW?

BY

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I. THEORIES ON NEED-RATIONALITY IN LAW

Scholars debating theoretical/historical rationality structures in law often present a notion of evolutionary development in different stages.[1] The aim of the analysis is in many cases to show that law is approaching a new stage, traces of which may already be found in the legal system. The theories usually also contain an element of normativity: the new stage is something that law and legal scholars should be striving for.[2]

In Finland one such theory has been presented by the Marxist scholar Lars D. Eriksson.[3] In his theory, which concerns primarily the development of *models of legal argumentation* in the capitalist society, he distinguishes three stages:

(a) The exchange value rationality of early capitalism forms the basis of the argumentation model of subsumptional logic. Here the legal norm itself is the starting point for the argumentation and the foreseeability of legal decisions is a central element.

(b) In late capitalism, use value rationality has reached a dominating position. This kind of rationality, however, forms the basis of two different models of legal argumentation. The first is the *goal-rational* model (or system-oriented goal-rational model), in which the social content of legal decisions comes to the fore. One starts from the goals of the legal regulations and evaluates the social consequences of various possible decisions. The decision-maker strives at socially balanced results which can contribute to the preservation of the system.

(c) Use value rationality also lies behind the *need-rational* model (or

[1] For a general critique of such evolutionary theories, see, e.g., Hubert Rottleuthner, "Theories of Legal Evolution: Between Empiricism and Philosophy of History", *Rechtstheorie, Beiheft* 9 (1986), pp. 217 ff.: "The price for the elegance of a model of evolution is a partial fade-out" (p. 226).

[2] Of course, there are also scholars warning against the new features of the legal development. From the Scandinavian point of view could especially be mentioned Thomas Mathiesen, who, along with many others, diagnoses a development from a closed method of regulation (based on legal certainty) towards a more open-ended method; in his view the decline of legal certainty will make the law a still more effective instrument for oppressing the weak groups of society. See Mathiesen, "'Styringsjuss', 'rettssikkerhetsjuss'—og det gode samfunn", *Retfærd* 28 (1985), pp. 12 ff.

[3] See Lars D. Eriksson, "Utkast till en marxistisk jurisprudens", *Retfærd* 11 (1979), pp. 40 ff., and *Marxistisk teori och rättsvetenskap*, Helsinki 1980, pp. 108 ff.

need-oriented goal-rational model) of argumentation. The social content and consequences of a legal decision are also emphasized in this model. The aim, however, is not to care for the needs of the system (its cohesion), but for the needs of the members of society. In evaluating the rationality of a decision the crucial question is what effects the decision has on the concrete and real needs of members of society.

This last stage is presented partly as a description of a new rationality structure already discernible in some elements of the law. It is, however, predominantly a theory with a normative content. A "progressive" lawyer should, according to this theory, strive at strengthening the need-rational elements of law. Need-rationality, in fact, is presented as the key concept for an "alternative" jurisprudence.

The theory of need-rationality seems to have some interesting similarities with Gunther Teubner's[4] much-debated theory of "reflexive law": both theories (like many others[5]) divide the development of law during the capitalist era into three stages, of which the last is just evolving. At first glance, Teubner's and Eriksson's last, in a way Utopian, phases do not resemble each other very closely: while need-rationality presupposes and accepts law with a substantive content, reflexive law does not seek substantive solutions but tries to guarantee the structural premises for genuinely reflexive (self-regulative) processes. The parties (groups) concerned should themselves have the possibility of deciding the normative content of their relations. The law only has to "decide about decisions, regulate regulations, and establish structural premises for future decisions in terms of organization, procedure and competencies".[6]

A closer look at the theory of reflexive law will, however, reveal some material content, too, at least in a shorter time-perspective. Teubner writes about a "reflexive logic" within the doctrine, a logic which means "simulating" reflexive processes in cases where social asymmetries of

[4] See, e.g. Gunther Teubner, "Substantive and Reflexive Elements in Modern Law", *Law & Society Review*, Vol. 17 (1983), pp. 239 ff.

[5] See, e.g., Eike Schmidt, "Von der Privat- zur Sozialautonomie", *Juristenzeitung* 1980, pp. 153 ff. (Privatautonomie—Materialisierung—Sozialautonomie), Gert Brüggemeier, "'Wirtschaftsverfassung und Staatsverfassung'—'Mischverfassung des demokratischen Interventionskapitalismus'—'Verfassungstheorie des Sozialstaates', Drei Modelle der Verflechtung von Staat und Wirtschaft?—Eine Problemskizze", *Rechtsformen der Verflechtung von Staat und Wirtschaft*, Volkmar Gessner and Gerd Winter eds., Opladen 1982, pp. 60 ff. (contract I—contract II—organization), and Rudolf Wiethölter, "Entwicklung des Rechtsbegriffs", *Rechtsformen der Verflechtung von Staat und Wirtschaft*, pp. 38 ff., and *Materialisierungen und Prozeduralisierungen von Recht*. Zentrum für Europäische Rechtspolitik (Bremen) Mat 4 (1984), pp. 25 ff. (Formalisierung—Materialisierung—Prozeduralisierung).

[6] Teubner, *op.cit.*, p. 275.

power and information may resist genuine reflexivity. This logic can be implemented through general clauses, which use standards such as "good faith" and "public policy". With the help of these general clauses law may create particular "reflexive" norms with a material content: "This means that, in the case of 'interaction deficiencies' between contracting parties, objective purposes and duties are defined authoritatively by virtue of law; in the case of 'market deficiencies', commercial customs are replaced by the judicial definition of market behavior rules; and in the case of 'political deficiencies' the judicial process defines standards of public policy."[7] In this simulative process—which seems to be a kind of short-term strategy of reflexive law—it is obvious that some emphasis must be laid on the concrete needs of the parties. One—but just one—argument for increasing the participation of the parties (or the interests) involved in the norm-giving process is to give them new possibilities to articulate their concrete and real needs. The theory of reflexive law could in this way be interpreted as advocating an increased need-orientation in law.[8]

Different persons and different social groups have different needs. A legal order which takes into account the concrete and real needs of members of society must therefore, *inter alia*,[9] accept the possibility of different rules for different persons (*person-related rules*). In many fields of law, e.g. social law, such a possibility is self-evident. In other fields the abstract "person", with no qualifications referring to the world outside the law, is still thought to be the normal agent in a legal norm. This paper will discuss, on the basis of concrete legal material from Finnish law, some aspects of the development of private law, especially tort law and contract law, towards open recognition of the differing needs of different parties as relevant in legal argumentation.[10]

II. PERSON-ORIENTED CONCEPTS IN PRIVATE LAW

During the twentieth century, what has been termed the materialization of law has already brought about a style of regulation which to a greater

[7] Teubner, *op.cit.*, pp. 277 f.

[8] The parallelism (to some degree) between Eriksson's and Teubner's ideas may partly be explained by the fact that both scholars, in building their theories, are referring to Jürgen Habermas. Eriksson, *Marxistisk teori och rättsvetenskap* (see footnote 3 above), p. 113, claims that his need-rationality is connected with the communicative rationality which, according to Habermas, prevails in the groups outside the market economy system.

[9] Although this paper is primarily concerned with personal differentiations in law as one aspect of need-orientation, an overall discussion concerning need-rationality in law cannot and should not focus only on this aspect.

[10] The paper is based on the author's *Social civilrätt*, Vammala 1987.

extent than before differentiates between persons. Many examples of this tendency are discussed in legal writing. One example is given by the West German author Manfred Rehbinder, who discusses the development of the legal structure using the trichotomy status-contract-role. While the central concept of individualistic law (formal law) was the individuality-free concept "person", the more recent law of the social state differentiates between people on the basis of their place in the social system.

In other words, new law thinks in social roles. Man no longer appears in law as an abstract person, but as employer or employee, as industrial- or white-collar worker, as one-time criminal or recidivist. The more differentiated social life becomes, the more such roles must be developed.[11] In Scandinavia, many authors have noted the growth of person-related legal disciplines such as the law of children, the law of foreigners, the law of prisoners, patient law, consumer law and women's law.[12]

The examples of personal differentiation—which vary from author to author—are often presented in a rather unanalytical fashion. Closer analysis and typification of the specialized concepts are therefore needed.

Person-related norms are often introduced in the legal system with the aim of protecting the "weaker party" in a legal relation. The present analysis therefore concentrates on the concepts by which such weaker parties are described in the norms:

(a) *Formal concepts*. The protection of the weaker party is often implemented by norms which use formal person-related concepts. The content of the regulation is an expression of a material rationality, but its methodology is still formal. The field of application of the norms protecting the weaker party is delimited with the help of the differentiation between different types of contract. The policy-holder in an insurance contract is protected whether he is weak or strong, a private person or an enterprise. Although such regulations in legal writing are often called "person-oriented" they only *seem to* differentiate between different persons. The persons protected are completely inter-changeable.

[11] Manfred Rehbinder, "Status—Kontrakt—Rolle", *Berliner Festschrift für Ernst E. Hirsch*, Berlin (West) 1968, pp. 141 ff. See also, e.g., Bernd Rebe, *Privatrecht und Wirtschaftsordnung*, Bielefeld 1978, pp. 54 f., who describes the structural changes in private law under the heading "Vom universalen Menschenbild zur sektoralen Rollenerwartung".

[12] See e.g. Tove Stang Dahl, "Innledning til kvinneretten", (Dahl ed.), *Kvinnerett* I, Oslo, 1985, pp. 29 f., and Torstein Eckhoff, "Kan vi lære noe af kvinneretten?", *Retfærd* 31 (1985), p. 84.

(b) *Function-related concepts*. During the last few decades concepts have been developing which refer to the purpose for which a party makes a contract and what function he plays in the market. The most important function-related concept of this kind is the *consumer*. This concept—at least in the law of the Nordic countries—is beginning to gain the status of a central starting point in the systematization of contract law. Since every (physical) person can act as a consumer, however, this concept is still not a really person-related one. It does not yet express the creation of need-oriented private law in the sense that it would aim especially at supporting economically and socially weak groups in society.

(c) *"Real" person-related concepts*. There are norms for which the applicability is delimited to certain classes of person. As criteria for such limitations one could mention e.g. the following: expertise, profession, wealth, social class and sex.

Such person-related criteria may be given relevance for different reasons. In some cases one may attach importance to some properties of a person because these give him a certain ability (or, in the case of weaker parties, lack of ability). In other cases, however, some properties of a person are taken into account where these are thought to reflect some special need of that person. In other words, one may distinguish between *ability-oriented concepts* and *need-oriented concepts*. Misusing a well-known phrase, one could say that the former are connected with the first part and the latter with the second part of the principle that everyone should be judged according to his ability and allotted according to his needs.

Ability-oriented concepts are not very new in private law. The traditional notions of *culpa*, *bona fides* etc. cannot be applied to a concrete case without reference to the abilities of the party whose behaviour is being judged. The development of private law, however, has led to a growing emphasis on arguments involving ability orientation. To take just two examples: the rules concerning incorporation of standard clauses in a contract or those concerning the duties of a party to give information to the other party when concluding a contract differ in many legal systems between inexperienced persons and experts. The development of the concept "Berufsrecht" in West German law[13] is also mainly a consequence of the growing differentiation of abilities in private law.

[13] See, e.g., Klaus Hopt, "Nichtvertragliche Haftung ausserhalb von Schadens- und Bereicherungsausgleich. Zur Theorie und Dogmatik des Berufsrechts und der Berufshaftung", *Archiv für die civilistische Praxis* 183 (1983), pp. 608 ff.

The focus here, however, is on those person-related concepts which are need-oriented. By using such concepts one does not refer to the behaviour of a party, e.g. in concluding a contract; the concepts point out a special need of the party as the ground for granting him legal protection. As examples of need-oriented concepts one could mention poverty, low income, unemployment, illness etc. May such concepts really be used in private law argumentation?

III. TWO CONCRETE CASES

A study of the documented legal material (legislation and the *travaux préparatoires*, court cases and legal writing) in Finnish and Scandinavian law, from the 1970s and especially the 1980s, reveals many fragments of person-related, need-oriented patterns of argumentation. In these cases explicit reference is usually made to the *economic circumstances* of the party (or to factors thought to affect his economic circumstances, such as unemployment). Needs other than economic ones are not very often taken into account in this context (see, however, example 2 below).

Not all the various details of this development can, or should, be dealt with in this paper,[14] which is addressed to those readers primarily interested in legal theory. The purpose of citing two concrete cases from Finland is just to start the discussion. The cases are in no way unique; many more could be mentioned.

Example 1. The Finnish Act on Torts contains a general clause which allows the court to adjust the amount of damages if paying full compensation would be unreasonably burdensome for the person liable to pay.[15] This provision was meant as a "safety-valve" which would enable the courts to adjust the damages when "small" negligence had caused extraordinarily large damage.[16] The Supreme Court, however, has used the provision more as a general principle of fairness and has also adjusted quite limited amounts of damages (some thousand Finnish marks, e.g. when an insurance company has sought to recover from an individual person with a low income).[17] In other words, court practice concerning this provision offers a good basis for creating need-oriented

[14] For these details, see Wilhelmsson, *op.cit.*, ch. 3.

[15] *Vahingonkorvauslaki* (31.5.1974/412) 2:1.2. A similar provision is found in the Swedish *skadeståndslag* (1972:207) 6:2.

[16] This is clearly stated in the *travaux préparatoires*, see *Hallituksen esitys Eduskunnalle vahingonkorvausta koskevaksi lainsäädännöksi*, HE 187/1973, p. 13.

[17] The table below shows the cases in which the Supreme Court has adjusted damages referring to the general clause mentioned in the text during the years 1979–1985:

concepts; the "poor debtor" is to some (in lower court practice very limited) extent *explicitly* (and not just covertly by using proper juridical techniques) protected by the courts in tort law. This is especially the case when the counter-party is wealthy, e.g. an insurance company using its right of subrogation.

One of the cases mentioned above in which the need-orientation is very clear is *KKO 1979 II 14*. In this case A drove against a red light and caused injury to a person. The damages were paid by A's traffic insurance company, which according to sec. 20 of the Finnish Traffic Insurance Act has a right of subrogation against the person causing damage, if he has acted with gross negligence. The insurance company joined the criminal action in which A was punished for reckless driving and claimed from A the amounts paid. The Supreme Court found that the insurance company in this case had a right of subrogation (a rather obvious result), but it adjusted the amount of A's liability, referring expressly to only two arguments: A's *low income* and his *duty of maintenance*. Interesting in this case is that neither a low level of *culpa* (A had been grossly negligent) nor an exceptionally high amount of damages (the amount claimed by the insurance company was only FIM 6 409, about USD 1 000) could have been used as arguments for adjustment. The adjustment from FIM 6 409 to FIM 3 204 was based *solely* on the person-related, need-oriented arguments concerning A's low income (which varied between 1 800 and 2 800 FIM/month) and his high costs of maintenance (he had four children).

Example 2. The Finnish Contracts Act contains a general clause under which an unfair contract may be adjusted by the court.[18] Similar general

	Full compensation/ FIM	Adjusted amount/FIM
KKO 1979 II 14	6,409.01	3,204.50
KKO 1980 II 50	62,248.62	10,000.—
KKO 1981 II 10	10,000.—	4,000.—
KKO 1981 II 23	93,250.—	62,167.—
KKO 1981 II 102	11,572.77	4,000.—
KKO 1981 II 124	6,000.— + 750.—/month	3,000.— + 250.—/month
KKO 1982 II 103	15,782.—	2,000.—/5,000.—
KKO 1982 II 107	35,000.—	12,000.—
KKO 1984 II 47	2,057,396.84	500,000.—/300,000.—
KKO 1984 II 182	7,577.35	3,788.65
KKO 1985 II 51	220,000.—	120,000.—
KKO 1985 II 82	1,055,181.34	527,590.67
KKO 1985 II 154	149,472.49	50,000.—

[18] *Laki varallisuusoikeudellisista oikeustoimista*, sec. 36 (as amended 17.12.1982/956). Similar provisions are to be found in the Contracts Acts in the other Scandinavian countries.

clauses exist in some special legislation, e.g. concerning the renting of flats. Such general clauses may form a useful path for need-oriented arguments to sneak into private law also.

Our example here stems from the Appeal Court of Helsinki: *Hels.HO 29.6.1977/81.* A, who owned a flat, rented it on 18.9.1976 to B and C. The contract according to its conditions should have been in force until 1.1.1980. For this period, A moved to live as a subtenant in another family. Some time after conclusion of the contract A wanted to move back to his own flat. The appeal court found that A, who was *old* (born in 1896), could not adapt to living as a subtenant in a family with four children under 10 years of age, and referred to a statement by a doctor that living in this way *endangered A's health.* On this ground the contract period agreed between A and B/C was considered unfair to A and he was given the right to terminate the contract before 1.1.1980. In this case a contract provision, which in general would be quite acceptable, was set aside because of A's person-related special needs (stemming from high age and illness).

IV. DISCUSSION

As shown by the examples given and many others, a person-related, need-oriented argumentation is already possible within the prevailing structure of private law. On the other hand it is, of course, easy to point out many difficulties connected with a possible increase in the need-orientation of private law. These difficulties often increase as we move from the field of tort law, from which most of our examples could be taken, to the central part of private law, namely contract law. Two central problems will be discussed here:

(a) A traditional private law relationship normally prevails between two parties whose interests, where a dispute arises, are opposed. What one party wins, the other party loses. The fulfilment of one party's needs, in this field, is always effected at the other's expense. A person demanding a need-oriented solution is therefore obliged to argue why and in what situations the other party should *finance* the fulfilment of the first party's needs. This in turn means that need-oriented arguments can succeed only in certain cases, in which the said burden of argumentation can be fulfilled. When need stands against equal need, a need-oriented solution is not possible.

In the first case cited above the counter-party was an insurance company known to be very wealthy; in many (but not all) of the other

adjustment cases in tort law, the situation was the same. One could say that the most typical relation in which a person-related, need-oriented solution would be possible in private law is the relation between a physical person and a (large) enterprise (or the state or some other public organ). Most of the concrete cases and other material from other parts of private law also (e.g. from contract law) in which need-oriented argumentation can be traced deal with relations of this kind.[19]

Some of the well-known arguments concerning enterprise liability in the doctrine of private law could also easily be used for imposing a "duty to take into account the other party's needs" of the kind mentioned above on the part of (at least large) enterprises and other corresponding bodies. This is not the place to deal with these arguments in detail; some notes may suffice in this context:

- the bureaucratic image and economic power of large enterprises; there should be some connection between power and responsibilities,
- dispersal of needs; an enterprise may often, through price mechanisms, arrange for the loss to be borne by a large number of clients (consumers);
- responsibility for problems caused by enterprises; e.g. if the developing "credit card society" causes problems for persons not able to function properly in that society, then the finance companies, which have made this development possible, should have some responsibility for the problems.

(b) The problem dealt with above was a normative one. More difficult to cope with is the second problem, which concerns the effectiveness of need-oriented regulations and especially their problematic side-effects. The problem which will be touched upon here is not acute in tort law (which may explain why need-oriented regulations seem to be rather common in that field).[20] It is primarily in contract law that the following problem must be considered: the relation between need-oriented rules and the *market*.

How is it possible to avoid the negative effects of person-related, need-oriented principles on the ability to conclude contracts of the very persons the principles are intended to protect? How for example may a regulation which protects unemployed debtors be prevented from mak-

[19] The traditional need-orientation in family law (e.g. in the rules concerning alimony) cannot be analyzed in this context.

[20] In the concrete need-oriented material from Finnish law, examples from tort law form a predominant part, see Wilhelmsson, *op.cit.*, pp. 84 ff.