

**DOCTRINE OF THE SOURCES OF LAW OF
A SCHOLAR AND OF A JUDGE**

BY

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I. INTRODUCTION

This paper will discuss the division into three of the sources of law presented by Aulis Aarnio and Aleksander Peczenik. According to these authors this tripartition covers all interpretative activities in the field of law. The reasoning of the legal scholar as well as that of the judge is based on a common doctrine of the sources of law. Here, however, an attempt will be made to prove that scholars and judges actually refer to different source doctrines.¹ This argument presupposes that the reasoning of the scholar on the one hand and of the judge on the other do not run on identical lines.

For this criticism to do full justice to its subjects, it must be stated that this difference is based on a different way of presenting a question: Aarnio and Peczenik are trying to form an ideal doctrine of the sources of law, one which meets the criteria of acceptability as well as possible.

This pattern of ideal does not consider the problems and limitations related to the realization of the idea, nor does it differentiate between dissimilar points of view. The conventional doctrine of the sources of law does not admit that there are differences between the positions and duties of the legal scholar and of the judge. It aims at attaining the best legal interpretation as an idea, general and free of limitations. The legal scholar and the judge have similar roles as interpreters, and their way of realizing the doctrine (the ideal of a good argument and a good interpretation) is also common. Hence both the argumentation model and its realization are idealized. The present approach is rather more concrete, i.e. to present the actual roles of the legal scholar and of the judge as well as the ideal way of realizing these roles. With this as the basic idea, the dissimilarities in the bases of the scholar's and of the judge's practi-

¹ The closing chapter (p. 116) of the present author's *Ennakkotapaukset ja niiden merkitys oikeuslähteenä* (Precedents and Their Meaning as a Source of Law), Mänttä 1987 (hereafter *Precedents*), sketches the way of thinking now presented. In addition to detailed source references, that work will be referred to in its entirety. *Oikeussäännösten tulkinnasta* (Interpretation of Legal Rules), Helsinki 1982 (hereafter Aarnio, *Interpretation*), and *The Rational as Reasonable*, Dordrecht 1986 (hereafter Aarnio, *Rational*), constitute the basis of the present arguments. For Peczenik's contentions as to doctrines of the sources of law, see his *Juridikens metodproblem* (Problems of Juridical Method), Stockholm 1974, and *Rätten och förnuftet* (Law and Reason), Lund 1986.

cal work on the one hand, and of the tasks of legal science and decision-making on the other, are taken into account.²

Because of this difference in the way of framing the question, the presentation will apply and develop Aarnio's and Pecznik's views rather than affording a real critique of them,³ with the aim only of developing further one part of a larger theory that leads to a more realistic doctrine of the sources of law. The other basic factors in the theory also come nearer to a more concrete juridical thinking through this more realistic doctrine of the sources of law.

2. THE SOURCES OF LAW AND THE SOURCES OF RESEARCH

The analysis of the doctrine of the sources of law is based on assessments of what material is relevant for one single interpretation, and of its instructions. Questions about what material the legal scholar or the judge must, in fact, know or be able to deal with should be distinguished from the assessments, and should be regarded mainly as indicators of expert knowledge.

The question of what source material the legal scholar is assumed to use in his research in general is linked to the standards of the scientific community as well as to its views concerning the tasks and goals of science. In adjudication, these matters lack direct connection with the doctrine of the sources of law proper, and may be characterized as a kind of practical utility or practical necessity. The judge has to make an individual decision, which for the legal scholar is the equivalent of how to solve an individual problem of interpretation.⁴

² As to dissimilarities in the way of framing the question, see also *Precedents*, pp. 125 and 128. This does not, however, imply acceptance of Aarnio's and Pecznik's model as the best possible alternative.

³ The present examination is aimed expressly at those parts of Aarnio's that concentrate on the doctrine of the sources of law, and hereafter his views only are referred to.

⁴ To draw a parallel between the legal scholar and the judge is very problematic even using the doctrine of the sources of law. For the legal scholar to produce and to argue a single individual interpretation is in practice very often only a secondary function, when compared with systematizing. On the other hand, for science as for courts, interpretation is no doubt a common function. The dissimilarities can be outlined, and this supports the present examination. Aarnio always connects the meaning of the sources of law expressly with interpretation—see for instance *Rational*, pp. 77 ff. In practice the consequence of limiting the doctrine of the sources of law only to interpretation is that the meaning of contentions as methodological instructions of legal science remains quite limited. On the other hand it may be asked whether it is possible to work out instructions for systematizing legal dogmatics, which would be at the same tangible level as the ones for interpretation. The present examination, however, will be limited to the point of view under criticism.

The preconditions for comparing the source material in the judge's and in the legal scholar's work are so different that comparison is not fruitful. Therefore the paper will concentrate not on the reasoning procedure in general but on the instructions framing an individual decision or interpretation. From this point of view, two problems need closer analysis: first, what interpretative material is to be used (the arguments) and secondly, how to use this material in the interpretation. The recognition, interpretation and volume of the sources of law are of importance to the doctrine. The sources of law needed when solving an individual interpretation problem and the source material used by a legal scholar are not comparable.⁵

3. LEGAL DOGMATICS AND ITS RESEARCH GOAL

At first sight, the traditional definition "Legal dogmatics carries out research into prevailing laws" seems very clear. However, closer analysis still leaves many questions open. One approach is to use what is termed the matrix of legal dogmatics. Understood in the way adopted by *Thomas S. Kuhn* in his latest presentations, the concept of matrix means a kind of guiding principle for a branch of science. For scholars, this concept defines a loose common basic idea of the methodological basis, the research goal and the way of posing questions characteristic of this branch of science.⁶

The concept of paradigm is often mentioned together with matrix, sometimes as an alternative. Kuhn has also given this concept a very different kind of content, especially in the social sciences: in a way, matrix defines the branch of science itself, whereas paradigm defines various alternatives within that branch. At the same time it seems, for Kuhn, that a matrix is an essentially weaker conceptual instrument—i.e. as a conceptual tool for the description of scientific revolution.⁷

⁵ For definition of concepts, see more closely *Precedents*, p. 117. The most essential thing is that the two following presuppositions relating to the argument and to the sources of law, which are applied in argumentation, are strictly distinguished: the contents and the demands of the external form. It is evident that as to the external form, the demands on the scholar and on the judge differ very much. This difference does not relate to the questions of the doctrines of the sources of law, but more to the practical matters mentioned before.

⁶ See Aarnio, *Rational*, pp. 17 ff.

⁷ This deterioration is the price Kuhn had to pay for adopting the concept of matrix instead of paradigm. On the other hand, this was the result of trying to avoid criticism both of the ambiguity of the concept of paradigm and of the description of scientific

According to *Markku Helin*, Kuhn draws a parallel between the significance of paradigm to the scholar and the significance of precedents to the decision-maker. “Although paradigm, like precedents, marks off some decisions, it does leave room for a certain creativity in the form of reinterpretation and specification.”⁸ The significance of a matrix of legal dogmatics can mainly be characterized by stating that it forms a kind of basic frame within which research—here legal dogmatics or at least most of it—is situated. Within this frame there are numerous schools and research methods with their own emphasis and approach.

These schools and research methods can be called paradigmatic ones and *consequently the paradigms of legal dogmatics can be placed within the matrix of the branch of science*, as an interpretation or modification of the basis elements of the matrix.⁹ Thus the differences characteristic of legal dogmatics can be related both to paradigmatic disparities and to the matrix; different ideas regarding the objects and character of the science.

According to Aarnio, the matrix of legal dogmatics consists of four essential factors:¹⁰

I. The matrix contains the idea of the objects of study of legal dogmatics, in other words the subject matter of interpretation of legal dogmatics. This idea is not necessarily explicit, as the essential factors of the research are in fact certain starting points.

The prevailing idea of the objects of study of legal dogmatics is tinged

development through paradigmatic revolutions. See Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 2nd ed. Chicago 1970, especially “Postscript-1969”, p. 174, “Second Thoughts on Paradigms”, in Frederick Suppe (ed.), *The Structure of Scientific Theories*, 2nd ed. Chicago 1977, pp. 459–482. The parts written by the editor give a general idea of the critique and its contents, see Frederick Suppe, “Exemplars, Theories and Disciplinary Matrix”, *op.cit.*, pp. 483–499, and the parts concerning Kuhn in the preface (pp. 135–151), and in the concluding words of the book (pp. 643–649).

⁸ See Markku Helin, *Lainoppi ja metafysiikka* (Legal Dogmatics and Metaphysics), Vammala 1988, pp. 7–10; as to quotation, p. 9.

⁹ See more closely Aulis Aarnio—Jyrki Uusitalo, “Paradigms in Legal Dogmatics”, in Aleksander Peczenik—Lars Lindahl—Bert van Roermund (eds.), *Theory of Legal Science*, Dordrecht 1984, pp. 25–38, especially p. 28 to the reciprocal relation between matrix and paradigm defined above. At the level of research starting points, the differences can both be amongst paradigms and reflected directly in the matrix. In accordance with this thinking a part of those factors that for instance Helin (*op.cit.*, pp. 7–9) places within “paradigm” have a direct effect on the matrix of legal dogmatics, consequently on the idea of legal dogmatics as a science.

¹⁰ See more closely Aarnio, *Interpretation*, pp. 28–30, and *Rational*, pp. 17–19, on which the following specification and the contributory factors of matrix are based. The quotations without references concerning the text of Aarnio which appear in the specification are also taken from the aforementioned part of the book.

with legal positivism. Further, legal dogmatics expressly interprets law, and the interpretation “has to remain within the limits of laws”: it must be possible to argue the interpretation on the plea of law. Aarnio calls this engagement to the law of interpretation “a weak legal-positivistic hypothesis”.

II. The matrix consists of a group of *commitments concerning the doctrine of the sources of law*. In other words, those who study legal dogmatics have at least a loosely similar idea about the sources to which they are supposed to refer and those to which they may refer.

III. The matrix includes the most essential *methodological rules and principles* of legal dogmatics. Those rules and principles “show roughly how the sources of law might be, and should be, applied in reasoning”.

IV. The matrix contains an idea of *whether the values and evaluations may belong to legal-dogmatic reasoning*, and how they do so. As far as legal dogmatics is concerned, values and value judgments have an essential role in two different respects:

a) value judgments are a necessary part of the subject matter of legal dogmatics¹¹

b) legal dogmatics either uses values as the basic elements for its interpretation or at least refers indirectly to value judgments in its arguments. According to the above, legal dogmatics is evaluative even with reference to its results, and not only to the subject matter.

Aarnio points out that the matrix of legal dogmatics makes it possible for various trends to have different suppositions about the meaning of values. He also emphasizes that “The supposition that values and evaluations have an important role in interpretation does not imply that certain values and evaluations leave a mark on legal dogmatics”. Hence, the matrix does not require legal dogmatics to bind itself to such values or subject matters as affect legislation.

When trying to outline the starting points of a more realistic doctrine of the sources of law in legal dogmatics, one may refer to such a matrix. Especially the idea of legal dogmatics as research in valid law, and its evaluative character, are factors which even the doctrine of the sources of law must consider. Before studying the doctrine of the sources of law itself, it is, however, best to specify the signification of the validity of law.

¹¹ This corresponds to Jaakko Hintikka’s view of the social sciences “as a science which carries out research on values but which does not present any contentions of values”, to which Aarnio refers; see more closely Jaakko Hintikka, “Arvokäsitteistä sosiaalitieteiden methodiopissa” (On Value Concepts in the Doctrine of Methods in the Social Sciences), *Ajatus* XX 1957, p. 27.

4. THE CONCEPT OF VALIDITY

The statement that legal dogmatics is tied to research in valid law is understandable only when seen in relation to a clear concept of valid law. The following will summarize the tripartition of validity such as Aarnio presents it.¹² It is an application of certain ideas presented by Jerzy Wróblewski. In this tripartite division the formal validity, efficacy and acceptability of the norm are distinguished from each other.

I. The four criteria for what is termed the *system validity* of the norm are completely formal. They can be described as follows:

- a) the norm has been accepted and promulgated in due form
- b) the norm has not been repealed
- c) the norm does not contradict another norm in force in the same system, or
- d) if there is a contradiction, there is an accepted rule for resolving the conflict.¹³

The system is either free from contradictions or—when a contradiction exists—there must be *an accepted* rule to resolve it. In the latter case, this existence of a resolving norm is set as a criterion for the validity of the system. The mere systemic value is thus supplemented by an external criterion. However, this view to some extent leaves open the real import of system validity. According to Aarnio system validity refers to those standards (a term used by him) which prescribe the order of internal priority of norms within the law.¹⁴

Acceptance of this kind of external standard must be based on efficacy. The efficacy of one norm in relation to another would therefore determine its validity; but still there is the problem that even this does not eliminate the problem: that as a criterion of system validity, one has to turn to some other validity alternative. The basis for evaluation should here, too, be *acceptability, and not concrete acceptance*.

The contents of Aarnio's presentation are based on Wróblewski, but here they differ. Wróblewski determines criterion d) as follows: "if it is inconsistent, then it does not lose its validity according to the accepted rules of conflicts of law".¹⁵ In other words it is not a matter of solving a conflict by means of a standard, but of the fact that the norm according to these rules

¹² The following presentation is based on Aarnio, *Interpretation*, p. 42, *Rational*, p. 33.

¹³ Aarnio, *Rational*, p. 34.

¹⁴ See Aarnio, *Rational*, p. 98.

¹⁵ Jerzy Wróblewski, "Verification and Justification in the Legal Sciences", p. 207, in *Argumentation und Hermeneutik in der Jurisprudenz, Rechtstheorie, Beiheft 1*, Berlin 1979, pp. 195–213. Aarnio's presentation there appears only a question of a difference of meaning caused by translation, though in the English version of *Rational*, p. 34, he uses the same wording: "If there is a contradiction, there is an accepted rule for resolving the conflict". On the other hand Aarnio uses a form "according to Wróblewski" when setting the criteria, but does not argue the difference.

does not *lose its validity*, i.e. is not repealed. That is to say, Wróblowski's criterion links even this criterion only to system validity. According to his concepts, system validity cannot be lost on the basis of efficacy.

II. *Validity as efficacy* cannot be completely defined by formal criteria. Aarnio refers e.g. to the following alternatives:

a) Citizens follow the norm regularly in, and as indicated by, their own behaviour,

b) The authorities apply the legal rules in general. In other words, if one deviates from a norm, a reaction from the authorities is to be anticipated.

This criterion connects the efficacy of law with the following way of thinking: law is markedly a compulsory system and this compulsion is also used. Quoting from the terminology of Kaarle Makkonen, it could be said that when reasoning like this the efficacy of the norm of behaviour is based on the fact that the norm of reaction is also efficacious.¹⁶

c) The real sign of efficacy is that the decisions of courts, for instance the Supreme Court, are based on a norm, or that the courts regularly follow a norm according to its contents.

Here it can be a question about either the general efficacy of the norm or the efficacy of various alternative interpretations.

III. According to Aarnio, the general criterion for the *acceptability of a legal norm* is that it is not "contrary to the generally accepted sets of values prevailing in a society". This is expressly a question of acceptability, not of a concrete acceptance. The criteria of acceptability will be dealt with later on, especially in connection with the basic rules and principles of the doctrine of the sources of law.

Acceptability can be defined as follows:

1. The norm is acceptable if (most) citizens can accept it.
2. The norm is acceptable if courts, or at least the Supreme Court, can accept it.
3. The norm is acceptable if legal research, or at least "prevailing opinion", can accept it.

System validity is unambiguously the criterion against which the validity of a norm within statutory law can normally be evaluated. The Finnish Code of Judicial Procedure (OK), ch. 1, sec. 1.1, expresses the norm as

¹⁶ The connection between the *validity* of behaviour norm and reaction norm cannot be found directly in Makkonen's presentation. It can, however, easily be deduced from his statements regarding the mutual relation between the behaviour norm and the reaction norm. See for instance *Zur Problematik der juristischen Entscheidung*, Turku 1965, p. 29: "The behaviour norm requires the reaction norm and vice-versa. The behaviour norm confirms a kind of behaviour. The reaction norm concerns a reaction on the part of the authorities where a person deviates from this behaviour."

follows: “The judge has to study the real meaning and the basis of the law carefully as well as to judge according to law, and not against the law, at his own discretion”.

Legal dogmatics as interpretative research is also linked with the same idea of validity.¹⁷

The situation concerning the doctrine of the sources of law does not seem to be as unambiguous. The relevance of the material included in the catalogue of the sources of law rests on either validity, efficacy or acceptability. For the present author, this should also affect the rules and principles included in the doctrine of the sources of law. This means that *the doctrine of the sources of law must be related to different types of validity. The sources of law may assume different relevance in adjudication and in legal dogmatics, depending on the way the framing of a question and its interest of information are determined.* In other words, it is not self-evident that for instance the interpretation alternative adopted in court practice (expressing validity based on efficacy) should have a schematically determined significance for the scholar whose aim is to recommend the best interpretation. Briefly, the doctrine of the sources of law must consider validity alternatives in the research on valid law. In addition, the mutual relation between various validity concepts needs to be analysed at least regarding the interpretation of legal dogmatics. It is not a happy starting point for the doctrine of the sources of law to consider valid law as an unanalysed whole with fixed contents, either without these concepts of validity or emphasizing one of them.

5. LEGAL DOGMATICS AS THE INTERPRETATION OF VALID LAW

Even if people were unanimous about the function of legal dogmatics in the interpretation of valid law, there are still many different ways of defining the objects of this research.

The background assumption of this paper is that the object of legal science is to formulate the best possible solutions and consequently to seek a “normative ideal world”.¹⁸ The framing of the object of legal dogmatics is thus quite close to that of the social sciences as presented by Johan Galtung. According to him, the object of the social sciences is

¹⁷ See for instance Aarnio, *Rational*, p. 18.

¹⁸ For the term “normative ideal world”, see Georg Henrik von Wright, “Is and Ought”, in Eugenio Bulygin—Jean-Louis Gardies—Ilkka Niiniluoto (eds.), *Man, Law and Modern Forms of Life*, Dordrecht 1985, p. 272, and Aulis Aarnio, “Tuomioistuinratkaisujen ennustamisesta” (On Prediction of Court Judgments) in Ilkka Niiniluoto—Heikki Nyman (eds.), *Tulevaisuus* (Future), Keuruu 1986, p. 262.

dual: to *describe* society truthfully, to present its functions, practices and so forth; and also to *estimate* the optimal society. In other words, the scholar is also obliged to try to influence the development of society in the direction he finds best. For legal science, the best direction is towards the “ideal world envisaged by a system of norms”.¹⁹

To preclude misunderstandings it must be emphasized that this framing of objects is based on the general views of the community governed by law, in other words on a view of society. From the point of view of parties to a legal conflict, the object of legal dogmatics tends to be that of producing most probable predictions about how to resolve it. Equivalent points of view are possible, but the most essential thing is to note the tension resulting from these differences. The framing of the object of the activity system necessarily influences the evaluation of its own functions and consequently also what we consider as a rationally acceptable function. *This framing of object also revolutionizes the terms of rationality, as they are interrelated.*

The relation between the object of legal dogmatics and the sources of law can be illustrated by means of the following figure:²⁰

	Describing society	Forming the ideal
<i>de lege lata</i>	I	II
<i>de lege ferenda</i>	III	IV

Figure 1. *Typical situations in framing the object of legal dogmatics.*

In the figure, legal-dogmatic alternatives I and II are the interesting ones. As to the doctrine of the sources of law, these situations can shortly be characterized as follows:

I In legal dogmatics, describing the valid set of norms and its function in practice is equivalent to describing society. This task is linked to validity based on system validity and efficacy. Even the presentation of the contents of other sources, for instance, explaining what is termed valid opinion on legal literature, may be part of a description of subject matter.

II Forming the ideal *de lege lata* is the same as forming the “normative ideal world” subordinated to law. This requires—as did the matrix of legal dogmatics—that the scholar does not question the contents of valid

¹⁹ See also *Precedents*, pp. 70, 137–141.

²⁰ Regarding the figure and the general characterization of various situations, see *Precedents*, p. 146.

law. He cannot interfere with the validity of statutory law; he has to take it “as given”.²¹

Forming the ideal *de lege lata* can be characterized as employing legal dogmatics based on acceptability. In accordance with *de lege lata*, law is the only binding authority for the scholar. All other sources are substantive, their meaning being based only—or at least principally—on contents.²² The most important factors are those which relate to the validity based on system validity and acceptability. Efficacy factors such as the function of the set of norms at the moment of examination have no crucial importance.

The description of a valid and efficient set of norms and the presentation of recommendations as to interpretation are both normally included in legal research. These are not, however, separated through the doctrine of the sources of law. This doctrine consists both of the catalogue of legal sources, containing those based on system validity, efficacy and acceptability, and of rules and principles regarding how to connect these factors.

In this connection one may ask, how strongly does the description of the society influence the forming of the ideal? (the forms “may influence” or “should influence” express two different kinds of attitude). In other words, to what extent do legal sources other than those based on acceptability influence the contents of the best recommendation as to interpretation? The influence which the view adopted expressly by legal practice has on the interpretation contention of legal dogmatics is summarized in the following question: is it quite justified to say that, according to the legal-dogmatic doctrine of sources, the valid situation is accompanied by an obligation to take the adopted interpretation as a basis for the contention that even an equivalent interpretation should be adopted as the best interpretation?²³

²¹ The binding element “as given” is relative and even the significance of legislation as a source of law may be “palatalized” (for instance, an interpretation which essentially widens or limits the formulation may be acceptable, even if one corresponding exactly to the formulation would not be). See for instance Juha Pöyhönen, *Sopimussoikeuden järjestelmä ja sopimusten sovittelu* (The System of Contract Law and Conciliation of Contracts), Vammala 1988, pp. 29–37. Also, Judge’s Rule No. 9 refers to the relativity of the binding element: “What is not fair and just may neither be the law: because of the fairness which is stated in the law, it is acceptable”.

²² The differentiation between authority arguments and substantive arguments appears totally unsuccessful, especially when they are mutually exclusive alternatives. See more closely *Precedents*, p. 130.

²³ In this context the ambiguous “should” illustrates that the so-called instruction included in the tripartition of legal sources is based on obligation: the precedents are a weakly binding legal source; that is to say, if there are no arguments for deviation, one must refer to precedents.

On what basis does efficacy influence acceptability? At the end of this paper the doctrine of the sources of law proper will be examined only in the light of this specific question.

6. ON THE RATIONAL ACCEPTABILITY OF THE SOURCE NORMS

The following rule, defined as regulative by Aarnio, illustrates the concept of rational acceptability and its position in his way of thinking: “legal dogmatics should aim at such legal interpretations as could be accepted by the majority of a rationally considering community governed by law”.^{24,25}

Consequently, rational acceptability has the same position as has the truth of statements presented in empirical research and in our normal everyday thinking. The results of legal dogmatics, in other words norm contentions, are related to their acceptability and not to whether they are true or not. The concern here is acceptability, not a concrete acceptance in a concrete situation. Acceptability is an ideal phenomenon in an important respect, rational consideration by the acceptor being required as an extra criterion.

Such being the case, rational acceptability is the basis of legal dogmatics, in other words of legal dogmatic standpoints concerning valid law. This also forms a basis for criticism of legal-dogmatic interpretation.

The corresponding requirement of acceptability is transferable—and must be transferred—to concern theoretical research as well. With respect to legal dogmatics, we only change to meta level, to study legal dogmatics itself and other similar activities. The factor which distinguishes research at meta level from legal dogmatics is that at meta level research concerns, for instance, theoretical analysis of rules and principles of the doctrine of the sources of law and not the interpretation of substantive law.²⁶

Rational acceptability as a regulative principle can be criticized for being somewhat indefinite. Further, it does not offer such absolute support as the true—untrue distinction does, at least for our everyday

²⁴ See *Precedents*, pp 122–129, upon which this chapter is mainly based. The same subject is repeated rather widely, since it is central to the argumentation of the main statement of the paper.

²⁵ See Aarnio, *Rational*, p. 227. The chapter after the quotation is also based on the text.

²⁶ On transferring the acceptability requirement to concern the doctrine of the sources of law, see also *Precedents*, p. 57.

thinking. Setting acceptability as a basis of research activity, however, relates a certain theory of truth to the concept of validity. It is crucial that research on norms and regulative principle derives its legitimacy just from this.

In the consensus theory of truth, “truth” is defined as an ideal limit, to which “infinite research” or “undistorted communication” would finally lead the scientific community”.²⁷ It is easy to see that an equivalent idea of obtainable consensus or at least the idea of mutual consensus of the majority is included in Aarnio’s definition: the preconditions of rationality presented in his, and especially in Peczenik’s, works aim at making possible an (absolute or qualified) consensus of this kind. To achieve rational acceptability, these terms could more precisely be characterized as *necessary but not sufficient conditions*.²⁸

Rational acceptability is firmly related to validity as acceptability. When these are combined with the basic factors in Aarnio’s conception, it is easy to find the crucial point: i.e. in argumentation, the transition from acceptance to acceptability is at the same time a *transition from influence to conviction*. Commitments to the criteria of acceptability excludes factors related to influence manipulation, persuasion, and, in general, to “rhetoric”. The person of the interpreter, his prestige, possibilities of exerting pressure, and so forth, are no longer important for the final result.²⁹

On the basis of the foregoing, two questions can be formulated. The starting points for a rationally acceptable doctrine of the sources of law may be found in the answers:

1. What kind of conditions must legal dogmatics fulfil, both methodologically and regarding its sources, if it is to guarantee the acceptability of its interpretative standpoints: in other words what character should the legal-dogmatic doctrine of the sources of law have?

On this view, the rules and principles of the doctrine of the sources of law are equivalent to the terms of rationality; it is a matter of conditions which are necessary but not sufficient. Fulfilling these conditions admits, but does not guarantee, acceptability. At meta level the doctrine of the sources of

²⁷ Ilkka Niiniluoto, *Johdatus tieteenfilosofiaan* (Introduction to the Philosophy of Science), Keuruu 1984, p. 112. The quotation is a part of a chapter in which various theories of truth are studied and compared (p. 108). See also Heikki Kannisto, “Ymmärtäminen, kritiikki ja hermeneutiikka” (Understanding, Criticism and Hermeneutics), in Ilkka Niiniluoto—Esa Saarinen (eds.), *Vuosisatamme filosofia* (The Philosophy of Our Century), Juva 1986, p. 198, esp. p. 203.

²⁸ See especially Peczenik, *Rätten och förnuftet* (Law and Reason), pp. 122–123.

²⁹ Correspondingly, setting the requirement of rationality is “undemocratic” in that it marks off a certain section of each real community. See *Precedents*, pp. 115–126.

law is compared with legal dogmatics. These rules can thus be evaluated independently regarding rational acceptability, and according to the standards of both rationality and acceptability.

2. *To what factors is acceptability proportioned* and in what form is it assessed? Does evaluation take place within a scientific community (within the limits of one group of legal sources) or has the norm formulation been compared with other legal sources and does this offer standards for its acceptability?

According to Aarnio, the general framework for considering acceptability is a rationally discriminating legal community. Following this line, the rational acceptability of the rules of the doctrine of the sources of law is considered in the whole legal community. What is considered rational by the (idealized) legal community and acceptable is estimated from the same point of view. The basis of evaluation will now be limited more concisely to the position of a lower court judge and to that of the scholar as a part of a scientific community. Are their positions as interpreters of law equivalent in such a way that their operations are measured with the same criteria? If not, what does this mean for our concept of legal community? Different kinds of uniting supposition are evidently needed on the general tasks of legal dogmatics and decision-making from the view of the legal community. The basis of these presuppositions has already been presented.³⁰

7. COURT DECISIONS AS A SOURCE OF LAW

In this context, we shall leave aside the catalogue, and the doctrine of the sources of law, and merely recall the scheme describing the role of the sources of law. The presentation in Figure 2 overleaf is based on a revised version of Aarnio.³¹

If court decisions are regarded as weakly binding authoritative sources they must consequently be regarded as binding when it is not possible to state arguments for disregarding them.³² The only obligation argument

³⁰ These “uniting suppositions” seem to offer the only way of uniting the various concepts of validity and approaching the doctrine of the sources of law. To be able to rationally analyse, for instance, the meaning of precedents as a group of sources of law, which illustrates validity based on efficacy for the evaluation of acceptability, we need support from the idea of the objects of legal dogmatics as well as from the idea of the relation between legal dogmatics and court practice.

³¹ See Aarnio, *Interpretation*, p. 97, *Rational*, p. 93. As to framing the arguments in the figure, see *Precedents*, pp. 134–145.

³² See *Precedents*, p. 133, for criticism on the division between authoritative and substantive sources.

	strongly binding	weakly binding	permitted sources of law
Authoritative justification (Authoritative sources of law)	LAW TEXTS CUSTOM	–TRAVAUX PRÉPARATOIRES –COURT DECISIONS (PRECEDENTS)	LEGAL DOGMATICS
Substantial justification (Substantial sources of law)			–GENERAL PRINCIPLES OF LAW –MORALITY –REAL ARGUMENTS

Figure 2. The tripartition of the sources of law based on obligation.

is that the obligation is less than what stems from the strongly binding sources. The source value of decisions is based mainly on the authority of the decider, not on the contents of the decision.

The evaluation in relation to the scientific community (from the scholar's point of view) takes account both of the description of society and of the framing of an ideal as objects of the doctrine of law. The bases for evaluating a judge's decision-making are on the one hand the general task of courts and on the other his own position with regard to the parties to an individual case.

7.1. *Court Decisions and Later Decision-making*

It is possible to divide the basis for evaluating acceptability into three categories, from the point of view of those concerned (7.1.1.), or, more widely, from that of the scientific community either from the point of view of legal security (7.1.2.) or from that of the contents and realization of the normative ideal world (7.1.3.).

7.1.1. *Evaluation of Acceptability from the Point of View of Those Concerned*

In chapter 3 of the present author's "Precedents and their Meaning as a Source of Law" it is argued that it is well-founded to require the lower courts to follow Supreme Court of Finland precedents even where the decision-maker would not himself accept the legal rule. The justification can be expressed in one sentence. When the judge is weighing a decision which deviates from the precedent, he should consider parties who may be affected by the inconvenience caused by delaying the potential

conclusion. At least sometimes, the judge may be presumed to present arguments which are nearly as strong as written law.³³

Further, it was stated that the basis for following precedents is expressly the authoritative position of the decision-maker. It is also evident that solutions adopted by the Supreme Court of Finland will be repeated later on. When an authority can assess its own activities, it in fact strengthens itself and makes others take this into consideration. (To admit this is not the same as to accept it.)

When there is a conflict between decision and precedents, the crucial point is to deal fairly with the parties concerned. The more likely it is that the decision will change, the stronger influence this should have on the judge's activities. When he uses his right to deviate from precedent, he exposes the parties to extra inconvenience, thus postponing an anticipated decision.

From the point of view of the parties to a legal conflict, especially the precedents of the Supreme Court of Finland have on some occasions been closer to the strongly-binding than to the weakly-binding doctrine of the source of law (as for the obligation to state grounds, it is not possible to connect impeachment or other criteria with this).³⁴ From the affected parties' point of view, the obligation to state grounds in cases of deviation is markedly higher, as the possible adverse consequences affect them directly.³⁵

7.1.2. *Evaluation of Acceptability from the Point of View of Legal Security*

When emphasizing the significance of the interest of legal security, the whole legal community would concur in classifying court decisions as a weakly binding authoritative source in the later decision-making process. It is possible to adjust the strength of the obligation to state

³³ This statement describes very markedly the point of view of the parties concerned. It cannot be regarded as a totally separate factor, but changing the standpoint essentially alters the contents of the obligation to argue. See more closely *Precedents*, pp. 67–71, 90–95.

³⁴ In criminal cases, however, the legal security of those concerned is assured through prosecuting counsel in the court of appeal, amongst others. Consequently the decision-maker risks impeachment if the decision does not meet legal requirements (obligation to state grounds, and so on). In this connection, security is not realized, as deviating from precedent does not entail impeachment. See more closely *Precedents*, pp. 81–82.

³⁵ Even here, some individuals might be prepared to accept such ill effects. This manner of proceeding is socially beneficial. Thus evaluation of acceptability approaches the same kind of definition of an ideal world that is one of the independent bases for assessment.

grounds that may be required in cases of deviation from earlier decisions. The crucial point is the level of evaluation of legal security in relation to the other elements of fairness.

The ability to deviate from a precedent is a value itself, although it is an obligation to follow precedents in the absence of other arguments. Reconciliation of these is equal to the definition of a kind of ideal world, and depends essentially on the definer's starting points.³⁶

7.1.3. *Evaluation of Acceptability and the Normative Ideal World*

If the operations of the decision-maker are assessed from the point of view of the legal community and the realization of a normative ideal world (defined by the assessor), the decision-maker must try to attain this idea. The basis of the evaluation is the contents of the best possible interpretation alternative. No other solution can meet the requirement of acceptability. Only in certain special situations is it possible to find a basis of acceptability which is common to the criteria stated. From the point of view of the normative ideal world, the research is abstract. There is no need to consider the possible tension between legal security and fairness of contents, nor should the latter be sacrificed to the former.

7.2. *Court Decisions in Legal Interpretation*

If court decisions are not taken into consideration in legal research, the reasons for this must always be argued.³⁷

It is questionable whether this also holds true when motivating the result of the interpretation, where the following statement, however, would be acceptable:

³⁶ See also *Precedents*, p. 60. In this connection it is easy to see the dissimilarity between Aarnio's and Peczenik's framing of the question. The ideal world, or construction of the ideal world, contains a presupposition that reconciliation removes the dissimilarities between points of view. At the same time the model diverges from the concrete operations of society and its institutions, which raises problems of application and consistency. A model whose meaning is to function as a norm or as an attainable ideal must be independent of practice. However, to be relevant as a norm or as an ideal, the model must be attainable—at least in principle. Various "models" may be criticized either for their contents or their realisability. For the realization of a model, see also *Precedents*, chapter 8.

³⁷ This argument could for instance relate to a study that can sometimes be so limited as to leave legal practice without significance. A typical situation could be a study of a new law. To disregard legal practice could be based on a change whereby prior legal practice cannot be used as an instruction.

The scholar must hold to the norm contention or to the recommended interpretation, which is equivalent to the legal rule, unless he explicitly disregards these and states his arguments for so doing.

In addition to this, the position of court decisions as an authoritative source would presume that the scholar's obligation to argue arises from the requirements applying when the authority of the decision-maker is to be disproved. Such being the case, court decisions would derive their doctrinal significance not so much from their contents as from the status of the decision-maker.

It is characteristic of the subject matter that it is assessed primarily within the scientific community and on evaluation grounds current within that community.³⁸ Hence it is questionable whether the above statement is accepted as a part of the grounds of internal community assessment. An exhaustive answer would require a detailed analysis of these grounds, which is impossible here. Describing society and forming an ideal will be considered in the following.

(1) When legal research describes its goal—a set of norms and the function of these norms—the position of court decisions is quite strong. The so-called valid legal situation is based on the fact that the present presuppositions rest on previous interpretations. These presuppositions are a kind of quasi-prognosis of how the legal problem would be solved in subsequent court proceedings.

The strongest bases for the future operations of the court system are, especially, the precedents of the Supreme Court of Finland, and these are based on authority. Such being the case, the description of valid law and the legal situation may have a crucial position, which is emphasized in different ways in various branches of science.³⁹ From the standpoint of this kind of description, the obligation to argue that the contents of a precedent or precedents have not been considered is at least at the level of weakly binding sources in general.

(2) The scholar need not bother about reasons that influence the operations of a judge, i.e. those that relate to the rights of the parties concerned. Hence, the evaluation grounds here are much nearer those of the legal community. Legal study has to concentrate on factual

³⁸ See for instance Niiniluoto, *op.cit.*, p. 13. At least part of the tensions relating to the social tasks and the evaluation grounds of science are especially connected with the question of evaluation grounds in general. Similar matters differ in significance for the scientific community and for the rest of society.

³⁹ For the emphasizing of the significance of precedents, see more closely Pekka Timonen, *Ohjeita lainopillisen tutkielman kirjoittajille* (Instructions for Writers of Theses on Legal Dogmatics), Helsinki 1987, p. 36, and the literature mentioned on p. 26.

arguments and not on authorities, when aiming at approximations of “the normative ideal world”, in other words when research is carrying out the critical task of the social sciences. From the point of view of this kind of imposition of a task, the best division of legal sources is as follows: *first a law text, which is an authoritative source of law and has a strong significance in determining the character of legal dogmatics and also in task imposition, and secondly, other sources of law which are subordinated to the law text and are exclusively of substantive character.* This does not free the scholar from the obligation to argue: he must argue why legal practice does not represent the best possible standpoint, and how practice should be changed. *These arguments, however, are factual and not authoritative.* From society’s point of view, one of the tasks of legal dogmatics is to criticize, to prevent the function of the set of norms from becoming too rigid, and to avoid emphasizing legal security at the cost of fairness in each individual case.

Such being the case, the basis for evaluation in legal dogmatics is acceptability in so far as written law permits this, and within the limits of the legal text. For the whole legal community, legal study has a totally different kind of task than the courts have.

Returning to the starting points of the doctrine of the sources of law, this also means that the imposing of a task and its standards must be proportioned to each other. When the basis of evaluation is rational acceptability, rationality has to be proportioned to the same evaluation basis as acceptability. The terms of rationality are influenced by acceptability and the factors influencing acceptability are determined very differently. On the other hand, the instructions in legal sources are comparable with the terms of rationality, they are a “necessary, but not sufficient term” for acceptability. In other words, *the doctrine of the sources of law, which is proportioned to the imposition of a task, makes acceptability possible but does not guarantee it.*

The above starting point must be connected with legal dogmatics as a science, which produces value contentions as result statements. At the same time, legal dogmatics studies valid law with various factors (validity, efficacy and acceptability). It is not necessary that these alternatives be combined. As a consequence of all these points, as far as the result statements of legal dogmatics are concerned, written law is the only authoritative source of law. Legal dogmatics based on acceptability is subordinated to law. Other argumentation in this research is related to contents, not based on the authority of the sources. The most essential condition for the relevance of final statements is their relation to the “proper” description of the valid legal situation. Legal dogmatics has

quite a strong obligation to consider legal practice. However, the consequence will not be an “ought-to” argument in the case of acceptability, but *the task of legal dogmatics is to critically evaluate the legal situation with arguments based on acceptability.*

8. CONCLUSION

The conditions determining the attitude of a decision-maker and that of a scholar towards court decisions as a source of law are quite different. Consequently, the background to the doctrinal attitude can be expressed in the following sentence. These different kinds of condition have an essential influence both on research in legal dogmatics and on court decision-making. In addition, the starting-points of the doctrine of the sources of law may be formed so that these conditions are taken into consideration. At the same time, it is also possible to meet the requirements of rational acceptability. The doctrine of the sources of law so determined does not correspond to the ideal determined by Aarnio and Peczenik (“the best possible doctrine of the sources of law in the best possible world”). It corresponds much better to the needs of studies and decision-making in the modern legal community than does the doctrine of the sources of law, which is in accordance with that ideal.

Aarnio’s theory concerns the application of conditions. *John Rawls* also admits the influence of these conditions in his *Theory of Justice*. The crucial starting point of his four-stage succession is that social justice can only be realized in stages, and the requirements of every previous stage must be met. Prerequisites are the fairness of the constitution and the basic institutions of society. After this may be placed substantive legislation, and only then come the judges and the administrative officials as the ones who apply the rules, and lastly the citizens as the ones who follow these rules. In the hierarchy, the fairness of any lower stage may be realized only when the fairness of every higher stage has already been realized.⁴⁰

Even in the doctrine of the sources of law, it is possible to attain the ideal only in stages. The requirements of ideal argumentation, which Aarnio tries to attain, cannot be met with the present conditions.

In the present author’s opinion, the present legal community and the valid tasks and roles of legal practice and court system do not correspond to the

⁴⁰ See John Rawls, *Theory of Justice*, Oxford 1976, pp. 195 ff. (para. 35), especially p. 200: “... each point of view inheriting the constraints adopted at the preceding stages”.

so-called *ideal and particular audience*. On this audience Aarnio has formed his theory—and consequently also the doctrine of the sources of law.⁴¹

Such being the case it is well-founded to pose the following question: does the doctrine of the sources of law meet with the requirements of rational acceptability if it must be applied separately from the conditions expressly set for it? The answer given in this paper is, No. The approach aims at a doctrine of the sources of law which would meet the requirements in the present evaluation. Expressly in this significance it is possible to talk of a realistic doctrine of the sources of law as a contrast to that of Aarnio and Peczenik.

⁴¹ See Aarnio, *Interpretation*, pp. 193–197, *Rational*, pp. 225 ff. In the same connection one may well ask whether Aarnio's presentation is free from conflicts at the stage of ideal, after all. The tripartition of the doctrine of the sources of law, which is based on obligation and the argued bipartition (they unite in Figure 2), do not correspond to relevance in the ideal situation presented by Aarnio: "Relevance is not based on the argument of persuasion or on authority but on the rational power of the argument". For the present author, the doctrine of the sources of law in the study of legal dogmatics as outlined above corresponds to this ideal much better than does the doctrine sketched in Figure 2.