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HOW TO PROVE PROPOSITIONS IN LEGAL DOGMATICS

KAUKO WIKSTRÖM
Finlandia

Legal dogmatics is one sector of legal science. Doubtlesss one may consider the major portion of the legal literature as falling within its sphere. Legal dogmatics can be distinguished from the other sectors of legal science above all by the fact that the central question in legal dogmatics is valid law. I shall not deal with the other sectors of legal science, for example with legal history or legal theory.

In the study of the valid legal order it is possible to distinguish between two partly different sets of problems. One possibility is to study the question which I shall refer to as *the normative content of the legal order*. The other possibility is to study the question which I shall refer to as *the material content of the legal order*.

In the study of the legal order from the point of view of the *normative content*, one's interest is focused on the question of the exact content of legal norms. What do legal norms command, prohibit, promise or authorize? The following types of questions can be selected as subjects for study: the difference between murder and manslaughter in accordance with criminal law, the content of the obligation to report income in accordance with taxation law, and so on.

In studying *the material content of the legal order*, the basic problem is posed by the question, in what way does the legal order correspond to or reflect the rest of society? Questions such as the following may be selected as the subjects for study: taxation law and the volume of investment in the economic system, the influence of prevailing moral beliefs on criminal law, the reflection of the organizational needs of economic activity on the legislation on joint stock companies, and so on.

Propositions in legal science can be classified in many ways. One example which can be mentioned is Aulis Aarnio's view of legal science. His view includes a classification of the propositions to be presented. According to Aarnio, legal science is the interpretation and systematization of legal norms. Doubtless his classification varies

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from the one used in this paper. On the other hand, one should not exaggerate the significance of the differences. One can argue that the classification adopted by Aarnio and the classification used here both point in the same direction. To a great extent, the interpretation of legal norms and propositions regarding the normative content of the legal order involve the same matters. The systematization of legal norms can be understood as a proposition about the construction of a part of the legal order. In studying the basis for such constructions, one comes, as a matter of fact, very close to the problem of the material content of the legal order. Under no circumstances are the classification used here and the classification adopted by Aarnio opposing.

On the basis of the classification, the problem referred to in the title can be divided into two questions. In what way can one prove propositions on the normative content of the legal order? In what way can one prove propositions on the material content of the legal order? Before a detailed examination of this, I shall present the outlines of the philosophical basis of my views. I shall present this basis in the form of theses.

There is no immediate knowledge. Our knowledge of reality is always interpreted knowledge. Perhaps the most famous formulation of this idea is related to the doctrine of the so-called hermeneutical circle. Another version is to be found in Peter Winch's work, "The Idea of a Social Science and Its Relation to Philosophy". The hermeneutical circle and Winch's views are linked by the concept of knowledge as something which is interpreted. *Propositions in legal dogmatics are in the nature of interpretations of reality.*

It is not possible to defend the idea of the autonomy of social sciences. The question of the nature of scientific activity and the problem of demonstrating (proving) scientific propositions *is to be tied in to the concepts of theory and praxis and the relation between the two.*

Legal dogmatics is one of the hermeneutical sciences. My view is based on Jürgen Habermas's ideas. The foundation is the term, "*praktische Erkenntnisintresse*". It corresponds to the hermeneutical sciences. Regarding the relationship between theory and praxis, Habermas writes, "*. . .ist Hermeneutik die wissenschaftliche Form der interpretatorischen Alltagsleistungen*". When applied to this connection, Habermas' ideas mean the view *that legal dogmatics is the theoretical (in contrast with the practical) counterpart of legal praxis.*

I shall return to the problem of proof. I shall begin by examining propositions regarding the normative content of the legal order. I shall begin with the concept of praxis. On the basis of the above, this

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concept holds a key position in the verification of such propositions. One could say that one must be able to demonstrate the praxis or praxes which forms the basis for the verification of propositions. Is it possible to find this type of "verifying" praxis? My answer is in the affirmative.

The practical counterpart of legal dogmatics is legal praxis. It is divided into two main parts: the application of legal norms and the observation of legal norms.

The subject of legal dogmatics is praxis or praxes through which (in the framework of which) legal norms have an effect. It is customary to speak of this same matter as the problem of the validity of norms. The problem dealing with the subject of legal dogmatics and the verification of propositions in legal dogmatics becomes entangled with the question of the validity of legal norms.

The validity of norms is one of the classic problems in legal science. It has been much discussed. As a matter of fact, every work on legal science contains some concept of validity. I will not enter into the discussion on the subject. I shall try to formulate my proposal for solving the problem on the basis of the point of departure I have presented.

The point of departure of my development of the idea can be summarized as a proposition. Legal norms are valid as application praxis (and as observation praxis). The proposition contains two central problems. These can be formulated as questions. In what way is it possible to identify application praxis from among other forms of praxis in society? What takes place in legal norms application praxis? To begin with, a few words on the problem of identification.

The elements of application praxis are, of course, legal norms and their application. It is important that also the norm sentences (language) constitute a part of application praxis. My proposition is based on the idea that legal norms always appear in a linguistic formulation or that one can always find linguistic formulations behind legal norms (as in the case of traffic signs). A corresponding idea has been presented by, for example, G.H. von Wright in his work, "Norm and Action". *Application praxis is an entity which is composed of norm sentences (language), legal norms and their application.* Decision-making activity by authorities differs from other application praxes in that decisions by the authorities are binding. This binding nature is based on the competence created by legal norms. Its guarantee is organized societal power, in other words the state. Fundamentally, application activity by the authorities is a form of the wielding of societal power. My concept of competence is by and large the same as Chaim Perelman's

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interpretation of the concept "Die Autorität des Richters". Perelman writes: *"Denn der Richter verdankt seine Autorität dem Staate, welcher ihm seine Befugnis und' seiner Macht verleiht, die mit seiner Aufgabe verbunden sind."*

The core problem of my presentation is formed by the theme which perhaps is best characterized by the question, *"what takes place in legal norm application praxes?"* The theme can be analyzed in the form of two subquestions. *What happens to legal norms? What is legal norm application activity?*

I shall first examine the latter question. It can be approached from two points of view. I shall use the terms subjective (intentional) and objective point of view. The subjective point of view is emphasized in the analysis of individual decisions. Why does a judge make the decision he makes? There has been much debate on intentional explanation recently in Finland. I shall pass over intentional explanation with this mention, and concentrate on the objective point of view.

In examining application activity from the objective point of view, the core problem is formed by the question of the structure of application activity. What are the elements of application activity? The basis of my answer is the idea that *application activity is composed of two different types of elements.* I shall call these the knowledge element and the acting element.

In the knowledge element, it is a question of the setting of the premises of application activity (of the decision). There are two types of premises, the norm premises and the fact premises. In the norm premise, it is a question of legal norms, and in the fact premise, it is a question of the matter to be decided. The essential point here is the link between the premises. Connecting the premises, or in other words, the proposition that the fact premise is contained in the norm premise, is by nature a proposition regarding the content of legal norms. Such propositions are based on the interpretation of norm sentences. *Through the interpretation of norm sentences it is possible to form propositions regarding the contents of legal norms. Propositions in application activity appear in the form of combined premises. Fact premises are contained in norm premises.*

Of acting elements, one can also use the term regulating elements. Application contains not only the setting of premises, but also the drawing of conclusions, the reaching of a decision. This is by nature active interference in the legal status of the parties. The active part of application activity is usually called the choice of legal effects. What is essential here is that in this connection it is no longer a question only of propositions regarding the content of legal norms, knowledge.

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On the basis of the knowledge of the content of legal norms, one interferes in the legal status of the parties, one regulates their activity.

The idea that application activity is composed of knowledge elements and acting elements can apparently also be defended. It is my view that one can find suport for the idea from, for example, court decision praxis. It is equally apparent that the elements mentioned are linked to each other. The elements go together. On the other hand, it is not at all settled what view one is to take of the link between the elements. What is the nature of the relation between the knowledge element and the acting element?

It is not possible to deal with the question in detail here. My answer is primarily a proposal for the point of departure of research. It is my view that the theoretically most promising possibility of answering the question is contained in the idea that the link between the knowledge element and the acting element is a logical one. By logic I refer to practical internal logic, not to theoretical formal logic. A corresponding idea concerning the relation between the premises of an act and doing has been presented by von Wright. In legal theoretical discussions, one has tried to develop the practical internal logic terminology primarily in the field of so-called modern argumentation theory. Examples of representatives of this school which can be mentioned are Perelman and Robert Alexy.

I shall go on to the second subquestion. It concerns legal norms, and can be presented as "What happens to legal norms in application praxis?" The difference between the two sub-questions is one of a point of view. On one hand, application praxis is examined from the point of view application activity, on the other, from the point of view of the contents of legal norms. One can outline essential changes in the content of legal norms with the help of two inter-related ideas. These form what can be regarded as a lengthwise and a crosswise cut of the same matter. I shall use the terms concretion process and stabilization of legal praxis in referring to these ideas.

I shall first deal with the initial situation in making an individual decision. What is essential here is the distance between the abstract legal norm and the concrete case which is to be decided. In making the decision, this distance must be closed. It is apparent that the distance is closed from both directions. In any case it is clear that the application of legal norms prerequires the concretion of the content of the legal norm. It is this that the term concretion process refers to. When examining the matter from the point of view of changes in the content of legal normas, the making of a decision (application) can be understood as a concretion process where the end point

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is formed by a situation where the content of the legal norm and the case to be decided are on the same level of abstraction.

Every jurist has some kind of conception of the phenomenon for which one can use the expression, "stabilization of legal praxis". The same matter is referred to by, for example, the expressions, "the opinion prevailing in legal praxis", "the position of legal praxis" and so on. The problem is formed by what stabilization actually means. What happens to the content of legal norms when application activity becomes stabilized?

The foundation for my answer lies in the distinction between open and stabilized application situations. An *open application stituation* is to be found when a new legal norm comes into force. At least in the normal cases, this norm can be applied in a number of different ways. There is what amounts to a field or game area for application possibilities. The legal norms can be applied in many, equally valid ways. In this sense the situation may be called open. Many application possibilities are open. The content of the legal norm is variable. In a way, it wavers.

A *stabilized application situation* is to be found when a legal norm has been applied in praxis many times. Usually, stabilization takes many years. When one of the application possibilities is realized and is repeated in praxis many times, the field of possibilities narrows, and finally only the realized possibility is left. The unused possibilities disappear. The content of the legal norm is crystallized in a certain way.

It is my view that also the surrounding society affects the stabilization of legal norms. The pressures that the surrounding society directs at legal praxis often become apparent in, for example, demands for legal safeguards, demands for equality ("like cases alike") and demands for impartiality. Such pressures are conducive towards stabilizing application activity. Doubtless another influence in the same direction is the phenomenon which I would term the "judge ideology". Its cornerstone is the idea of impartial application activity. Stabilized application activity fits in well with the idea of impartiality. The reasons which I present are primarily proposals lacking a researched foundation. On my own behalf I regard the study of the societal reasons for the stabilization of legal praxis as an interesting research theme of the first order.

In reality, of course, it is not possible to show a clear line of demarcation between open and stabilized application situations. The borderline is fluid. The theoretical foundations for the formation and

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discerning of open and stabilized application situations lies in Max Weber's well-known term, "Ideal-typus".

I shall gather together my position on the verification of propositions on the normative content of the legal order into the form of a summary. The verification of such propositions and the question of the validity of legal norms are entangled with each other. Legal norms are valid if they are applied (and observed) in praxis. The application of legal norms is the practical counterpart of the study of the normative content of the legal order. The application of legal norms is composed of a knowledge element and an acting element. The dual nature of application has its counterpart on the theoretical level in the dual nature of the results of the study of the normative content of the legal order. These are propositions and recommendations. The relation between the knowledge and the acting element on the one hand and propositions and recommendations on the other is a logical one in the practical-internal sense.

In the knowledge element, it is a question of the knowledge of the content of legal norms, based on the interpretation of norm propositions. In application, this knowledge is evidenced in the fact that the factual premise is contained in the norm premise. Legal dogmatics presents propositions on the contents of legal norms. In the acting element, it is a question of an interference in a legal situation, in the legal status of the parties. The acting element is evidenced in application in the choice of legal effects, and in legal dogmatics as recomendations.

In the verification of propositions regarding the normative content of the legal order, it is a question of whether or not the propositions correspond to the way in which norms are applied in praxis. The basis for verifications is the stabilization of the contents of the legal norms in praxis. In stabilization, it is a question of a gliding scale, on which we can separate an open and a stabilized application situation from each other. My central idea can be formulated into a thesis: *the basis for the verification of propositions regarding the normative content of the legal order is formed by the stabilization of the contents of legal norms in application praxis.*

Regarding legal praxis, I have only dealt with norm application praxis. In many respects norm application and observation praxes are different. Even so, my view is that in norm observation praxes, one can find a counterpart to the central propositions I have presented. The observation of legal norms is formed of a knowledge element and an acting element. In the observation of legal norms, one can find an open and a stabilized observation situation.

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I shall go on to the problem of the verification of propositions regarding the material content of the legal order. The point of departure is similar to that used in the verification of propositions regarding the normative content. The concept of praxis is in a key position. One must be able to demonstrate the praxis or praxes which forms the basis for the verification of propositions regarding the material content. Is it possible to find this type of verifying praxis? My answer is in the negative.

As justification for my answer I shall examine taxation law as one example. My thesis is as follows: it is not possible to demonstrate a form of praxis in society by which the propositions on the material content of taxation law can be verified. My thesis is general. I shall briefly develop it. I shall begin with a few words on the focus of these propositions under discussion. What do these propositions deal with?

In the material content of taxation law, it is a question of the economic effects of norms. Taxes are —today— payments by the private sector to the public sector which are not compensated. Central problems are the total amount of taxation (the gross taxation level) and the distribution of the taxation burden. One could summarize this by stating that the bulk of propositions regarding the material content of taxation law deal with the effects of norms on the total amount of taxation and on the distribution of the taxation burden.

What type of praxis could form the basis for the verification of such propositions? There are primarily two possibilities. One could imagine that it would be possible to verify propositions by comparing them with the legislative process or, on a more general level, to the public economic policy. The other possibility would be to construe private economy as praxis. I shall examine each of these possibilities separately.

The legislative process of public economic policy can not form the "verifying" praxis for propositions regarding the material content of taxation law. I shall justify my argument briefly. By studying the passing of taxation or by studying public economy —even in the ideal case— we can only clarify the *intended* economic effects. In propositions regarding the material content of taxation law, it is a question of *realized* economic effects. This realization is also affected by changes in the private economic sector or in income formation and so on.

The economic effects of taxation law are the result (consequence) of measures undertaken by the public sector and by changes in the private economic sector. It is not possible to verify propositions regarding such effects by comparing them only with the public sector measures, in other words with the legislative process or with economic

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policy. Such a praxis (measures undertaken by the public sector) does not cover an area large enough for it to be possible to use this praxis to verify propositions regarding the material content of taxation law.

The construction of the situation is rather the same also in the case where the private economic sector is construed as a "verifying" praxis. It is not large enough. The economic effects of taxation law are not due solely to the private economic sector. The measures undertaken in the public sector is another factor. It is not possible to verify propositions regarding the material content of taxation law by comparing them with the private economic sector.

Verification would be possible only by asuming that the demands of the private economic sector are transmitted unchanged into taxation law norms. In such a situation public economic policy and the legislative process would not have any significance in the formulation of the material content of taxation law. The material content could be drawn entirely from the private economic sector. It is extremely difficult, however —with the possible exception of isolated cases— of finding examples in market economy countries in support of such an assumption. In the taxation law norms under discussion, it is precisely a question of market economy countries.

I have only dealt with taxation law. It is my opinion, however, that the results of the discussion can be generalized *mutatis mutandis* to involve also other sectors of the legal order. In the point of view taken here, taxation law does not differ from the rest of the legal order. *Propositions regarding the material content of the legal order cannot be verified in the same way as propositions regarding the normative content of the legal order.*

The conclusion is automatically followed by the question of what types of arguments can be presented in support of propositions regarding the material content of the legal order. The central idea in my answer can be presented as a thesis: *we can rationalize the material content of the legal order.* I shall defend my idea by again turning to the example of taxation law.

The economic theoretical basis for the taxation of consumption can be derived from classical political economy. The explicit formation of this idea can be found, for example, in John Stuart Mill's work, "Principles of Political Economy". The material content of norms containing this form of taxation can be rationalized by connecting it with the economic policy based on the classical theory as well as with the concepts of the theory on the limited functions of progressive income taxation can be rationalized in many ways. One possibility is A.C Pigou's idea, according to which a central principle

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of taxation is the "least aggregate sacrifice". The use of taxation norms in the redistribution of the national income can be rationalized by referring to the ideas of John M. Keynes in his work, "The General Theory of Employment, Interest and Money". Many other examples can be presented.

It is my opinion that the above examples sufficiently illustrate the structure of my idea. Through economic theory we can rationalize the material content of taxation law. One could also say that through economic theory one can rationalize the systematics (structure) of taxation law. In a similar manner, we could also deal with the other sectors of the legal order. It is clear that the societal science providing the rationalization perspective must be chosen in accordance with which types of phenomena the norms to be studied regulate. *The nature of the rationalization of the material content of the legal order is that of a question regarding the relation between legal dogmatics (legal science) and the other social sciences.*

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