

Cross-references in Court Decisions: A Study in Comparative Legal Linguistics

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As a rule, lawyers are concerned with the content of court decisions. Researchers may focus on the structural properties of the texts: the length, sentence structure and register of language, as well as the terminology used by the authors. Researchers may also investigate the characteristics of court decisions from the point of view of information retrieval and information management: tables of contents, indices, lists of sources referred to, lists of abbreviations and other documents which are included in or annexed to the judgments. In taking this latter perspective, one important aspect is the intertextuality of judgments. In this paper, the intertextuality of court decisions is studied comparatively: how frequently and in what way do courts of law in different jurisdictions refer to other legal texts, especially scholarly legal literature in their decisions?

1. Intertextuality of court decisions

An examination of the structure of a court decision reveals, *inter alia*, the order in which the different elements are presented, especially where the judges place the operative part of the judgment (at the beginning or end of the document or somewhere else). An analysis of sentence structures, on the other hand, clarifies to what extent the language of the judges is stereotypical and formulaic and petrified phrases are used. As far as legal terminology is concerned, it is particularly interesting to see how many archaisms, abbreviations and words of foreign origin (notably Latin expressions) are used in court decisions. It is also useful to examine the frequency of cryptic or misleading names of institutions in judicial documents. Sometimes, the names of various law courts and legal professions are entirely mystifying from the point of view of the general public.² Researchers may also investigate the characteristics of court decisions from the point of view of information retrieval and management: tables of contents, indices, lists of sources referred to, tables of abbreviations, and so forth that are attached to judgments.

From a comparative point of view, there are important differences as far as the style of judicial decisions and their various elements is concerned.³ In the present paper, one key question concerning judicial style will be examined: How frequently and in what way do courts of law refer to other legal texts, notably legal scholars (legal literature)⁴, in their decisions? In linguistic terms, the paper focuses on the intertextuality of judgments.

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² These kinds of names are particularly numerous in the judiciary of England, where old traditions are still respected: *Queen's Bench*, *Master of the Rolls*, *puisne judge*, etc.

³ An overview of the recent development of legal language in various countries is given (in Spanish) in Mattila 2009. Legal terminology is discussed in Mattila 2011.

⁴ Most legal literature is written by academic scholars. Therefore, the terms "legal literature" and "legal scholars" are used alternatively in this paper. In a more precise usage of language these should be separated: part of legal literature is produced by legal practitioners. On the other hand, the term "academic legal writing" is also used in this article.

The present paper first presents the general aspects of judicial style, and particularly the use of external references, in three leading European legal cultures: Germany, France and England. These legal cultures have strongly influenced judicial style around the world, and judicial documents from these countries are numerous in cross-border enforcement of judgments as well. Following this, the study is enlarged to cover some other legal cultures in Europe and overseas.

2. German legal culture

2.1. Style of judicial decisions

In general, German court decisions are stylistically uniform. They are characterized by abstract language. This clearly appears in a classical guide to court style (Sattelmacher 1955): “*Das Urteil ist ein Staatsakt. Der Richter spricht als Organ des Staates.*” (“A judgment is a State act. The judge speaks as an organ of the State”).⁵ The style of German judgments is formal, without any personal overtones. German judges never use the first person singular when writing, and no dissenting opinions are attached to judgments (except in decisions of the Constitutional Court).⁶

As for the structure of German court decisions, the operative part of the judgment is placed at the very beginning of the document (immediately after the number of the decision and information on the parties and other relevant matters). Only after this do the judges present the facts of the case and the reasons for the decision. The claims of the plaintiff and the arguments of the defendant are presented as a kind of mirror image, one after the other: i.e., they are immediately juxtaposed in the text of the document (the so-called *Urteilsstil*).⁷

The positions taken by academic scholars have an important influence on German judges, even in cases where there is a precedent which is contrary to the position of the scholars. If this precedent has been widely criticized in legal literature, a new judgment may be given in accordance with the position taken by academic scholars. This is especially notable in cases where a majority of the scholars take a clear standpoint, the so-called *herrschende Meinung* (‘dominant opinion’).

Therefore, German judges often refer, in addition to legislation, precedents and *travaux législatifs*,⁸ to academic writing: legal scholars are widely cited in court decisions. In effect, it can be argued that a German judge writes the grounds for his or her decisions, in addition to the parties and fellow judges, for the whole legal science community as well. Court decisions are, so to say, contributions to a continuous dialogue between legal science and the application of the law by jurisdictions. This is also the reason why the grounds for a German court decision resemble a scientific essay.⁹

⁵ Wetter 1960, pp. 34 and 144.

⁶ Lashöfer 1992, pp. 86-87.

⁷ Arntz 2001, pp. 297-298.

⁸ A typical expression which refers to *travaux préparatoires* in German judgments is “*nach der Begründung des Gesetzentwurfs*”. Abbreviations are common in these references.

⁹ Markesinis *et al.* 1997, p. 9.

2.2. Explanatory factors

The influential position of legal science in German court practice can be explained by the legal history of Germany at the end of the Middle Ages and at the beginning of modern times.¹⁰ Towards the end of the Middle Ages, the German-speaking lands of Central Europe were fragmented into small kingdoms and principalities (even though the Holy Roman Empire still existed in principle). This was a clear obstacle to cross-border commerce, creating a strong need for legal unification. This need, together with ideological reasons and the growth of the universities, led to the reception of Roman law in German-speaking Central Europe.

The growing reception of Roman law deeply influenced the German legal system, which acquired an abstract and conceptual nature. The application of law which earlier required, first of all, experience of life and a sense of justice became a technical skill for which one had to be especially trained. Judges became professionals. Learned people replaced those who were academically uneducated, and career lawyers replaced lay people. The application of law was no longer based on inherited wisdom and rules of life; it was now founded on the authority of *Corpus Juris Civilis* and its binding force.¹¹

When the use of Roman law spread into law courts, local judges began to ask for the opinions of legal scholars since these were the only people who knew the sources of Roman law in Latin. The documents of the cases to be decided were sent to universities. This was called, in German, *Aktenversendung*. Hence, one can say that the German faculties of law played the role of appellate courts in the 16th and 17th centuries. The procedure before the court that sent the documents was, for the most part, only ostensible. At a more general level, *Aktenversendung* signified that the status of the lower law courts was reduced, while that of the universities rose.

2.3. Frequency of references to legal authors

Due to this development, academic scholars gradually became key figures in German legal culture with considerable authority in practical lawyering. This tradition still continues, and it appears externally in court decisions in the form of frequent references to the opinions of legal scholars.¹² These references constitute a typical feature of German judicial documents¹³ (see Example 1 of the Appendix).

¹⁰ See, e.g., Mattila 2006, pp. 161-164 and the sources mentioned therein.

¹¹ *Corpus Iuris Civilis* is the most influential codification of laws in European history. The codification was ordered by Emperor Justinian the Great in Byzantium in the 530s. This codification conserved the fundamental achievements of Roman legal science. The most important part of *Corpus Iuris Civilis* is the *Digest* (or *Pandects*), based on the writings of classical Roman jurists.

¹² In this respect, the period of National Socialism signified a temporary change: German judgments only seldom included references to academic legal writing. Since the end of World War II, these references have again become more frequent. See Forster 1996, pp. 130-131.

¹³ For instance, in a decision of the German Supreme Court given a decade ago on whether a claim fell under the statute of limitations, one can find 24 references to legal authors. See *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 142/2000, n:o 4.

In effect, it has been said that German court decisions are characterized by “doctrinal word abundance”. They give the impression that the writer of the document is a legal scholar lecturing to his or her students or a superior speaking to subordinates.¹⁴

This frequency of references to legal scholars may easily be demonstrated, e.g., by searching for certain key words in the data bank of the German Supreme Court (*Bundesgerichtshof*), which includes all the decisions of this jurisdiction from the year 2000 on. One typical feature of German legal culture is the publication of massive works of commentary (*Großkommentare*) where the authors present and analyze the legislation that is in force in various branches of law.¹⁵ When the writer of this article searched (in October 2009) in this data bank for references to legal scholars using the word *[k]ommentar*, the number of hits was almost one thousand (during a single decade). Furthermore, one must remember that the word *[k]ommentar* does not appear in all references to legal authors.¹⁶

3. French legal culture

3.1. Style of judicial decisions

In France, a judicial decision is written in an inflexible formula where the grounds of the decision are scarce and formal. In these grounds, the judges refer almost exclusively to statutory provisions to support the decision.

Each set of grounds constitutes a paragraph and begins with certain key words which vary according to the law court in question. In the case of the Supreme Court (*Cour de cassation*) and courts of first instance, these words are *attendu que*, but in the case of administrative courts and certain courts of appeal the expression *considérant que* is used. Both mean ‘considering that’. Each new ground in a set of grounds begins after a semi-column with the word *que* (‘that’). The operative part of the judgment is always preceded by the words *PAR CES MOTIFS* (‘with these grounds’), written in capital letters.

Judgments of the Supreme Court in which a petition of appeal is dismissed normally include three paragraphs beginning with the word *attendu*. The first *attendu* presents the facts of the case and the decision of the appellate court, the second one describes the reasons given by the appellant, and in the third *attendu* the Supreme Court rejects these reasons (*mais attendu que*). When the Supreme Court quashes the decision of a lower court, it refers to the statutory provisions that support its standpoint. These paragraphs begin with the words *vu la loi (...), vu les articles (...)*.¹⁷

¹⁴ Lashöfer 1992, 81-84.

¹⁵ These are normally cited using an abbreviated name: e.g., *Karlsruher Kommentar*, *Münchener Kommentar*, etc.

¹⁶ When the writer of this article did a search using the word *[L]iteratur*, the number of hits was greater than that permitted by the system (= 1000 documents).

¹⁷ See, e.g., Mattila 2006, pp. 84-85.

3.2. Explanatory factors

As stated above, a French court decision is formulaic, and the judges refer almost exclusively to written law to support their decision. There are historical reasons for this. Before the Great Revolution, the French superior courts of law had a great deal of discretionary power in cases that were politically important, and this often provoked conflicts with the rulers. In consequence, the powers of the courts of law, notably in relationship with the legislature, were reduced during the Revolution. There was a need to emphasize that court decisions are dictated solely by statutory provisions, legislative rules. A fiction was created according to which judicial decision-making is a mechanical operation of reasoning: the decision of the court is directly deduced from written law with almost mathematical precision. The jurisdictions had to cite the law, and only the law, as their authority. In terms of this fiction, it is logical that no dissenting opinions were mentioned.¹⁸

Despite some moderate reforms, the way French judges write their judgments has largely been retained as it was. One of the factors behind this conservatism is the professional training of the judges. Judges, especially in the case of general courts, rarely have much experience working in other legal fields. A young lawyer who has a diploma from a law faculty and who is going to become a judge in a general court of law applies for admission to a special judicial academy (*École nationale de la magistrature*, ENM). After finishing the academic studies, he or she is appointed as a judge and, in normal cases, gradually advances through the ranks of the judiciary.

3.3. The real importance of legal literature in the application of law

It is important to know that there is a vast gulf between the external form of a French court decision and the real importance of legal literature in judicial decision-making in France. The external appearance of a court decision is only – as has been said – the tip of the iceberg. A judge *rapporteur* of a French law court, whose task it is to prepare the case for decision, goes through all relevant case law and legal literature on the topic in question. In the consideration of the court, on the basis of the report of the judge *rapporteur*, every type of argument arises – not only arguments founded on statutory law. Furthermore, it is customary in France that a judge or legal scholar writes a so-called *note* concerning important precedents of the Supreme Court. This *note* presents the complete range of argumentation in the case and the importance of the precedent from the point of view of the French legal order. In effect, it has been said that the court decision and the note published on it form a functional whole. This system explains why it is still possible to maintain the tradition of scarce and formal grounds in court decisions taken as such.¹⁹

One must also remember that the data bank of the French Supreme Court includes, as for plenum decisions and decisions of mixed chambers, not only the decision itself, but also the report of the judge *rapporteur* and the proposition of the advocate general. These documents are electronically linked with the decision. In the report of the judge *rapporteur*, one finds a description of the facts of the case and a crystallization of the legal questions which the court should answer. All relevant sources of law are discussed in this report. The report often contains a special section entitled *doctrine* ('legal literature', 'legal science') or *doctrine et*

¹⁸ Troper & Grzegorzczak 1997, pp. 110 and 122.

¹⁹ Lashöfer 1992, p. 60.

jurisprudence ('legal literature/science and case law').²⁰ The description of the opinions of academic scholars is often very detailed, and there are many footnotes indicating the exact pages of the relevant sources.²¹ This also applies to the reasons for the proposed decision by the advocate general: legal literature may be extensively cited.

4. English legal culture

4.1. Style of judicial decisions

A decision of an English superior jurisdiction consists essentially of individual opinions of judges called *speech* (due to the oral tradition in courts of law). The differences and similarities of the standpoints of the judges are clarified in a procedure which is relatively informal.²² Normally, unanimity, a common standpoint, is reached, at least as far as the outcome of the case is concerned (according to statistics, there are dissenting opinions in ten per cent of the cases decided).²³ The dissenting opinions are printed *in extenso*. However, it is important to know that judges of higher jurisdictions may give a speech of their own, to be printed later, even in cases where they agree with the majority of the court members on both the outcome (the decision itself) and the grounds for the decision.²⁴ As stated by Lord Hope of Craighead, this sometimes results from differences in approach: a judge thinks that the reasoning leading to the decision may be expressed in a more pertinent way than it appears in the text written by the majority. On the other hand, it is possible to think that the existence of several concurrent speeches augments the value of the decision as a precedent.²⁵

Consequently, a decision of an English superior court is a collection of individual speeches printed one after another (*seriatim*) without any attempt to fit them together structurally or stylistically. An English judge always speaks in the first person singular. Indeed, the structure and style of the speeches vary greatly. As for the techniques of argumentation, various methods are used. For instance, the judge sometimes asks rhetorical questions, and, when answering them, he or she excludes some answers by proving, by means of practical examples, that they are impossible (*reductio ad absurdum*) or flawed.²⁶

Hence, an English judge is free to choose the style of his or her speech,²⁷ and – as stated above – there are enormous possibilities for variation. The style may be rhetorical or literal,

²⁰ The term *doctrine* may also refer to an established interpretation of law courts on a certain point of law.

²¹ See the case 04-16.174 (arrêt no 263 du 10 octobre 2008), linked with a detailed report of Mme Radenne, *Conseiller rapporteur*. One part of this report is cited in Example 2 of the Appendix.

²² The chairman tries to convince the initially dissenting members of the correctness of the opinion of the majority. If necessary, the advocates of the case are asked to make their chains of argumentation clearer, so that competing alternative decisions can better be weighted in relationship with each other and a choice made between them (Goodman 2006, p. 33).

²³ Goodman 2006, *ibid*.

²⁴ Goodman 2006: 33 and Bankowski et al. 1997, pp. 317-318.

²⁵ Hope of Craighead 2005: 2.

²⁶ Lashöfer 1992, pp. 10-11 and Arntz 2001, p. 306.

²⁷ Judges are sovereign in their stylistic choices in other common-law countries as well. This may be illustrated by hyper-personal formulations of judgments, even if these are exceptional. In the United States, judgments have sometimes been given in the form of a poem or a text written in a light vein (George 2007, p. 431 *et seq.*). American judges may also permit themselves to make emotional

but colloquial language is also used as a stylistic device. Lord Rodger of Earlsferry, for instance, once used the word *guys* in his speech. The style of some judges is so characteristic of them that it may be considered as their “signature”.²⁸ Sometimes, a judge seeks to stand out by making a linguistic protest. While the Plain English Movement requires Latin-free texts, some judges have privately stated that they always make sure there is at least one Latin expression or maxim in their speeches.²⁹ The language of English superior judges is often colorful, sometimes even lyrical. Certain law lords are well-known for their eloquence, as shown by the beginning of two speeches of Lord Denning:³⁰

It happened on April 19, 1964. It was bluebell time in Kent. Mr. and Mrs. Hinz had been married some 10 years, and they had four children, all aged nine and under. The youngest was one. Mrs. Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children.³¹

Broadchalke is one of the most pleasant villages in England. Old Herbert Bundy, the defendant, was a farmer there. His home was at Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt.³²

Because of these characteristics, the decisions of English superior jurisdictions tend to be reiterative and often very long.³³ The same things are repeated in the speeches included. The document in its entirety is often dozens of pages long.

4.2. Explanatory factors

The English legal system was originally developed at the end of the Middle Ages in legal proceedings before the royal court of law.³⁴ For this reason, precedents of superior jurisdictions play a central role in the system. They still form the chief pillar of the system in certain branches of law, like the law of obligations and the law of torts. That is why the basic method of an English lawyer is the opposite of that of a civil-law (Continental) lawyer. On the Continent, lawyers use the deductive method: the solution to a legal issue is deduced, so to say, from the top down. A rule of written law is applied to an individual case. On the contrary, since English lawyers focus on precedents, their method may be characterized as an inductive one or, more precisely, inductive-deductive. On the basis of earlier cases (precedents), new rules of law are inducted which, in their turn, are deductively applied into new cases.

outbursts (see Example 3 of the Appendix). It is understandable that this has been severely criticized. The Judicial Opinion Writing Handbook recommends that every judge create a high standard of style for him- or herself and obey strict self-discipline when writing judgments (George 2007, pp. 428-429).

²⁸ Hope of Craighead 2005, p. 7.

²⁹ Goodman 2006, pp. 98-99.

³⁰ Goodman 2006, pp. 68-69.

³¹ Hinz v. Berry [1970] 2 QB 40 @ 42. The case concerns a traffic accident in which Mrs. Hinz's children were injured. See Goodman 2005, p. 68.

³² Lloyds Bank Plc v. Bundy [1975] 2 QB 326 @ 334). See Goodman 2005, p. 69.

³³ This is stated, *inter alia*, by Wetter 1960, p. 33.

³⁴ The reasons for this can be found, e.g., in David & Brierley 1985 and David & Jauffret-Spinosi 2002, part 3, sec. I.I.

Consequently, English superior courts pay special attention to the grounds for a decision. These grounds are not meant only to convince the parties but also to provide a basis for the crystallization of new rules of law. Simultaneously, the presentation of extensive grounds makes the decisions longer.

On the other hand, it is not possible to understand the structure of a decision of an English superior court without taking into consideration the individualism of English judges. In the background one finds a strong self-respect developed over the course of centuries. The superior judges of Westminster were a key factor in the process of strengthening the power of the kings in the Middle Ages, representing the king himself in the application of laws. It is characteristic that the members of the superior courts of London have traditionally been received by a company of honor and canon fire when arriving in other cities.³⁵ Certainly, the social background of these judges, the strong centralization of the English court system, as well as the earlier distance between academic legal teaching and the practical application of law, have played a role in this matter.

Traditionally, English lawyers have not studied in law faculties but have acquired their professional qualifications in Inns of Court, which are a kind of legal guild.³⁶ In consequence, they have not been guided by academic legal theory. At the same time, the superior courts in England, concentrated in London, have never been very large: the number of judges in them has been limited. That is why these judges have formed a relatively isolated legal sub-profession following their own traditions. On the other hand, English judges have been appointed from among successful advocates (barristers). In effect, the legal proceedings in English superior courts have been compared to a cultivated conversation between gentlemen who all know each other very well.³⁷

4.3. *Individuality of references in court decisions*

The characteristics of the English legal system, as described above, explain why the superior judges of the country frequently refer to precedents in their decisions (statutory law is naturally referred to as well). Simultaneously, English court decisions differ greatly as far as references to other texts are concerned: the judges are extremely individualistic in this respect. Sometimes references are made to texts other than legal ones. There are law lords who like to refer rhetorically to the Bible or to famous novelists, even foreign writers like Marcel Proust. Long quotations may be taken from Shakespeare or Dickens.³⁸ For instance, the case *Commission for Racial Equality v Dutton* [1989] QB 783 CA includes a speech where the following quotation may be found:

We find this usage in Shakespeare, Othello, Act III, scene IV: where Othello says to Desdemona:

³⁵ The old rituals of English judges are described in Derriman 1955 (which also contains many illustrative photos). For instance, the book includes an interesting survey of the history of the use of wigs (pp. 90-91).

³⁶ According to David & Brierley (1985, No. 298: Role of the Universities), "It has never been the tradition for English lawyers to be educated in universities [...] Traditionally, these persons were educated in legal practice".

³⁷ Wetter 1960, pp. 32-33 and Lashöfer 1992, p. 22.

³⁸ See also the poem of Lord Tennyson cited in the Indian decision in the Appendix (Example 8).

That handkerchief
Did an Egyptian to my mother give.
She was a charmer, and could almost read
The thoughts of people.³⁹

Traditionally, contemporary legal writers are not referred to in English court decisions (only classical authors, dead a long time ago, can appear in these decisions).⁴⁰ However, a change has recently taken place in this respect. References to contemporary legal writing are more frequent today than previously. Some law lords are inclined to cite academic studies and treatises. There are judges who also make international comparisons of law in their speeches, based on foreign legal literature. Indeed, Lord Hope of Craighead has recently stated that a new sound dialogue has developed between academic legal science and courts of law. In his opinion, the use of references to legal literature in court decisions may also help outside readers get more information about the issue.⁴¹ On the other hand, it has been observed that, in many cases, judges have referred to academic treatises or articles in which a position taken by law courts has been criticized but, despite this, have maintained their earlier standpoint.⁴²

5. Broadening the study

The description above shows that the style of court decisions has traditionally been very different in Germany, France and England. There is also a difference in the nature and frequency of references to other texts. In Germany, judges refer to various legal sources: legislation, *travaux préparatoires* and case law, as well as legal literature. In France, the judgment itself includes only references to statutory provisions. In England, the nature and frequency of references depends on the personality of the judge in question; however, references to case law and statutes are normally included.

The differences are particularly evident in the case of references to legal science. In Germany, these references have been customary for centuries. In England, they have been very rare⁴³ but are becoming more frequent. In France, too, references to legal literature are lacking in the text of the court decisions themselves, but are common if one takes into consideration the accessory documents of the decisions written by the judge *rapporteur* and the advocate general.

Taking into account these differences in the texts of court decisions in Germany, France and England, it is interesting to examine the situation in other legal cultures. For this purpose, some countries in Europe and overseas, representing both leading and minor legal cultures, will be briefly examined in the following pages. Today, there are good possibilities to do this thanks to the development of electronic data banks. The decisions of the supreme jurisdiction of almost every country can be read and analyzed *in extenso* via the Internet. The properties

³⁹ Goodman 2006, p. 106.

⁴⁰ This has been expressed with the axiom “the only good academic is a dead one” (De Cruz 2007, p. 290).

⁴¹ Hope of Craighead 2005, p. 9.

⁴² De Cruz 2007, pp. 258-259 and 290-291.

⁴³ Earlier the difference with Germany was very clear. In 1985, every German court decision included on average 13 references to legal literature while the corresponding figure in the case of English court decisions was 0.77 (!). This information comes from a comparative study by Hein Kötz. See De Cruz 2007, p. 265.

of various data banks differ as far the ease of information retrieval is concerned, but in many cases it is possible to search for relevant court decisions by means of freely chosen key words. Hence, one can use words which, in the country in question, are most likely to give hits for court decisions including references to academic legal writing.

5.1. Poland

Poland is the biggest country in Eastern Central Europe, and therefore worthy of special attention. On the other hand, Poland is a civil-law jurisdiction which has, in addition to the Supreme Court, a separate Supreme Administrative Court (*Naczelny Sąd Administracyjny*). The data bank of the latter jurisdiction is highly developed, and it is easy to search for information by means of key words. As in Germany, Polish legal scholars write massive commentaries on laws. When the writer of this article searched for the word *komentarz* ('commentary'), the number of hits was almost four and a half thousand (4,355).⁴⁴ Spot checks showed that the Polish Supreme Administrative Court often enumerates, in its decisions, several academic authors whose standpoints support the opinion of the Court. A good example is the recent (2009) decision II SA/Wr 354/09, 2009-09-30 (see Example 4 of the Appendix).

5.2. Finland

In Finland, the data bank Finlex includes all the precedents of the Supreme Court (*Korkein oikeus / Högsta domstolen*) and the Administrative Supreme Court (*Korkein hallinto-oikeus / Högsta förvaltningsdomstolen*). A search for the word **kirjallisuus** ('literature' cut at the beginning and at the end of the word) in the texts of the precedents of the Supreme Court from 1926 to 2006 gave 320 hits.⁴⁵ In some of the hits, the reference to legal literature appears in the written pleading of a party (cited by the Supreme Court) or in the grounds given by a lower court (cited by the Supreme Court), but sometimes the reference appears in the grounds given by the Supreme Court itself. The reference is frequently a general one, but there are also precise references to the authors of books or articles.

To get a better idea how frequent precise references to legal authors and works are in Finnish court decisions, the writer of this article went through all the hits. The number of cases where there is a precise reference to a legal author in the grounds given by the Supreme Court itself is 27.⁴⁶ Correspondingly, the number of precise references to legal writing in the report of a referendary (reporting secretary of the court) or in a dissenting opinion is 24.⁴⁷ Normally,

⁴⁴ A considerable number of hits may also be obtained using other expressions referring to legal literature. When the writer of this article searched for the word *literaturze*, which appears in the expression *w literaturze* ('in literature'), the result was 881 hits.

⁴⁵ As for the Finnish Supreme Administrative Court, the corresponding number is approximately one hundred.

⁴⁶ KKO (= Supreme Court) 2008:46, 2008:30, 2008:19, 2007:23, 2005:95, 2005:14, 2001:12, 2000:23, 1998:96, 1998:54, 1998:31, 1997:206, 1997:198, 1997:184, 1997:169, 1997:156, 1997:70, 1997:69, 1997:61, 1997:10, 1996:129, 1996:112, 1996:37, 1996:26, 1995:196, 1994:94 and 1990:97.

⁴⁷ KKO 2007:40, 2006:94, 2006:74, 2006:56, 2005:76, 2005:75, 2004:109, 2004:47, 2003:129, 2002:43, 2001:115, 1998:34, 1997:209, 1997:107, 1997:86, 1997:47, 1997:6, 1996:54, 1996:53, 1995:206, 1994:112, 1993:169, 1993:68 and 1991:155.

references are made to only one author, but sometimes several legal scholars are mentioned.⁴⁸ On this basis, one can state that legal literature is quite seldom referred to in the grounds of Finnish court decisions.

5.3. Brazil

The most important genuine civil-law area outside of Europe is Latin America. Here we focus on Brazil, the biggest country in the area.⁴⁹ In Brazil, the comprehensive JusBras data bank includes a considerable number of court decisions from various jurisdictions (the Supreme Court, appellate courts, special courts, district courts, etc.). On the basis of searches in this data bank, references to legal scholars in Brazilian court decisions seem to be common. The word *doutrina* ('legal literature', 'legal science',⁵⁰) gave more than seven thousand hits in the precedents of the Supreme Court and the appellate courts. Legal literature is frequently referred to in a general way only, but there are precise references as well. An illustrative example is the decision REsp 150908 SP 1997/0071637-6) of the *Superior Tribunal de Justiça* (see Example 5 of the Appendix).

In Brazilian court decisions, it is worth noting that the references they contain often concern European legal literature. Indeed, after gaining independence, the states of South America largely took inspiration, in the 19th and beginning of the 20th centuries, from Continental Europe to develop their legal orders. For linguistic reasons, legal literature from the Latin countries of Europe, or translated into Romance languages, was read extensively in South America.⁵¹ The tradition of citing legal literature from Continental Europe is still visible in the Brazilian court decision cited above.

5.4. Republic of South Africa

In addition to the Americas, European colonial powers brought and implanted their legal systems, technically more developed than the native ones, to Africa and Asia. The most advanced African state south of the Sahara is the Republic of South Africa. The data bank of its supreme jurisdiction (*Supreme Court of Appeal*) reveals references to legal scholarship in

⁴⁸ The names of several legal scholars appear in, e.g., KKO 2001:12, 1996:129, 1996:37 and 1994:94.

⁴⁹ Court decisions in other Latin American countries, like Argentina and Chile, also include references to court decisions. However, it is not easy to get a clear idea of the frequency of these references on the basis of information from data banks alone. If one searches for references using the terms *literatura jurídica* ('legal literature') and *ciencia jurídica* ('legal science'), only a few hits occur in the data bank JurisChile and the data bank of the Supreme Court of Argentina. The term *doctrina* gives a large number of hits, but this term has two meanings in legal Spanish. It refers, on one hand, to legal literature (legal science) and, on the other hand, to an established interpretation of law courts on a certain point of law. This kind of ambiguity also appears in the case of some other words, like *autor* ('author'). In any case, law courts in both countries include, at least occasionally, precise references to legal literature, e.g., in the cases 03.08.04 - Rol N° 2098-03 (Chile) and C. 1757. XL. *Recurso de hecho Casal, Matías Eugenio y otro s/ robo simple en grado de tentativa, causa* No□ 1681 (Argentina).

⁵⁰ As in the case of legal Spanish (see the previous note), the Portuguese term *doutrina* may refer to both legal literature or legal science (sometimes called *legal dogmatics*) and an established interpretation of law courts on a certain point of law (*doutrina dos tribunais*). On the basis of spot checks, the term regularly appears in the sense of legal literature in Brazilian court decisions.

⁵¹ For more detail, see Mirow 2004, pp. 129-142.

South African court decisions.⁵² Here we will take a closer look at the case *Kruger v Joles Eiendom (Pty), Ltd.* (400/07) [2008] ZASCA 138 (27 November 2008) (see Example 3 of the Appendix).

One can see that this decision includes, *inter alia*, references to two legal scholars (Voet and Carpzovius), the works of whom are written in Latin, as their titles and the citations given in the Appendix show. Indeed, Johannes Voet was a Dutch scholar who lived from 1646 to 1714. His principal work was *Commentarius ad Pandectas* ('Commentary on the Pandects')⁵³, the first edition of which came out in 1698–1704. Benedict Carpzov (Benedictus Carpzovius) was a German legal scholar who lived from 1595 to 1666. He published, among other books, an important work entitled *Jurisprudentia Forensis Romano-Saxonica* (1668).⁵⁴

The reason why in a court decision given by the Supreme Court of Appeal of South Africa in 2008 there are references to Latin works written by European legal scholars in the 17th century goes back to the complicated legal history of the country. In the beginning of modern times, statutory law was incomplete and fragmented throughout Europe. For this reason, superior judges often founded their decisions on academic legal writing based on Roman law, in the form codified in Byzantium. This also applied to the Netherlands and her overseas colonies, where the power was exercised by the Dutch East India Company.

The Netherlands lost its Cape Colony to Britain before the modernization of Dutch law. As in other parts of the Empire, the British maintained the old private law system in South Africa and only those branches of law which had a clear political importance were rebuilt on a common-law basis. This is why the so-called Roman-Dutch private law has been conserved as a living system in the region. The confrontation between the British and the Boers in the 20th century led to a situation where the Roman-Dutch legal legacy was even more emphasized in the middle of the 20th century than in the 19th century.⁵⁵ This is still visible in the Republic of South Africa today, despite the fact that some of the judges of the supreme jurisdiction of the country are African (see the names of the judges in Example 3 of the Appendix).

5.5. India and Indonesia

In Southern Asia, there are two huge states: India and Indonesia. As in most countries, the data banks of the supreme jurisdiction of these States can be accessed via the Internet.

The precedents of the Supreme Court of Indonesia (*Mahkamah Agung*) include many references to statutory law. However, on the basis of key word searches, the number of references to legal scholars seems to be quite limited.⁵⁶ Despite this, some references can be

⁵² The terms *literature*, *learned (author)*, *scholar*, etc., give only a few hits, but the abbreviation "ed." gives almost 400. Besides, only references to books published in several editions are revealed this way; certainly, many books that have been published in only one edition are referred to by South African courts.

⁵³ Concerning Pandects, see footnote 11.

⁵⁴ Kleinheyer & Schröder 1996, pp. 87-92 and 440-442.

⁵⁵ For more detail see Merwe and du Plessis 2004, pp. 9-19 and 47-48, Zimmermann 1997, pp. 536-549, and Tamm 2009.

⁵⁶ The writer of this article searched for hits in the data bank of the Indonesian Supreme Court (including some 10,000 cases) using various words that could reveal references to legal literature:

found (see Example 7 of the Appendix). Unlike South Africa, the application of law in the legal science of the Netherlands – the earlier colonial power in both countries – is not cited in Indonesian court decisions.⁵⁷

This is not the case in India. In the decisions of the Supreme Court of India, one can easily find references to legal literature. In addition, some works referred to were originally written by English lawyers and have been updated by local scholars. One example is *Mayne's Hindu Law and Usage* (1st edition, 1906; 13th edition, 1991).⁵⁸ In important questions of interpretation, Indian Supreme Court judges often make extensive legal comparisons in which the legal literature of the other Commonwealth countries plays an important role. Example 8 of the Appendix exemplifies this tradition.

5.6. Common law countries

Nowadays, the decisions of the Supreme Court of the United States contain many more references to academic legal writing than previously. Already in the 1990s, decisions were given that contained dozens of references, sometimes fifty or more, to legal scholars.⁵⁹

Legal literature is quite often referred to in other Commonwealth countries besides India. In the following paragraphs, Canada and Australia are taken as examples.

As in common-law countries in general, Canadian court decisions are often extensive. The decisions of the Canadian Supreme Court may include a comprehensive list of sources used as the basis of the decision. For instance, the case *Gosselin c./vs. Québec* (2002 CSC 84)⁶⁰ contains as much text as a 200-page book. The list of sources used covers four pages. This list includes all the cases cited in the opinions of the judges, the relevant statutory provisions, and all books and articles to which reference is made. The list of the titles of these books and articles fills an entire page.⁶¹

penulis ('author'), *sastra* (*kesusastraan*) *hukum* ('legal literature'), *ilmu* (*pengetahuan*) *hukum* ('legal science'), *halaman* ('page'), etc. The only term that gave a hit – and it only produced one – was *ahli* (*akhli*) *hukum* ('legal scholar'). Furthermore, the author examined, in a cursory way, cases in some branches of law, like customary law (*hukum adat*). Concerning the translations of the terms mentioned, see Massier 1992.

⁵⁷ On the contrary, Dutch legal writing is frequently cited in some Indonesian legal treatises. See Mattila 2006, p. 116.

⁵⁸ John Dawson Mayne (1828 - 1917) was a famous judge and author of treatises on Indian law. When, in October 2009, the author of this article searched for hits on Mayne in the data bank of the Indian Supreme Court, the number was about 90, the most recent one from the same year (2009). In India, the members of each religious group (Hindus, Muslims, etc.) follow the law of the group in question, notably in matters of family law. This is why treatises on Hindu law, Islamic law, and others occupy an important position in the application of laws in India.

⁵⁹ Forster 1996, p. 130.

⁶⁰ The decisions of the Canadian Supreme Court are published in both English and French. The original document may be in either of these languages, depending on where the case originates. In the case referred to here, the original language is French.

⁶¹ The information retrieval system for the data bank of the Indian Supreme Court, which works in English, is well developed and easy to use. If one searches for the terms "learned author" and "learned authors", the bank gives 400 hits for the years 1960 - 2009, including some from each decade.

In Australia, legal scholars are also widely cited. This is clearly visible in the data bank of the *High Court of Australia*. Unlike judges in England or Canada, but like judges in the Republic of South Africa, Australian judges place all the references in footnotes.⁶² For instance, in the case *Wong v. Commonwealth of Australia*⁶³, the extensive text of the decision includes 320 footnotes. In addition to frequent references to precedents, statutory provisions, committee reports and parliamentary documents, they contain numerous references to legal scholars as well.

6. Conclusion

Only a few of the numerous legal cultures of the world have been examined in the present paper. Despite this, one can say that the overall picture is fragmented: there are countries where academic legal literature is widely cited in court decisions⁶⁴ and others where references to legal scholars are relatively rare.⁶⁵ The references are often general, but the names of authors and the titles of works may also be given.

Furthermore, the example of France demonstrates that academic legal literature may have a far greater importance in the decision-making of the law courts than one might suppose on the basis of the text of the decision itself. The real importance of legal literature clearly appears in accessory documents (the report of the judge *rapporteur* and the opinion of the advocate general). Hence, one has to be prudent when drawing conclusions on the importance of legal literature at law courts on the sole basis of the texts of the decisions. If legal scholars are often referred to, it is natural to conclude that academic legal writing has a great importance in the application of law in the court in question (even if English judges may maintain their position after having cited academic legal writers). However, it would be dangerous to draw the conclusion that academic legal writing is not important in the application of law in courts on the sole basis that the texts of decisions do not mention any works of legal scholars.

Our comparison also shows that there are many technical ways to construct and place references to other texts in court decisions. A classic custom is to add the references in the text of the decision in brackets (this is done in Argentina, Germany, Indonesia and Poland). The decision may also include a special list of sources cited, as in Brazil and Canada. Finally, one can avoid making the text cumbersome and unclear by placing all the references in footnotes (as is done in Australia, South Africa and the United States).

⁶² This practice was originally developed in the Supreme Court of the United States, which adopted it already at the end of the 1880s. Even if there has been some opposition, the usage of footnotes is today an established stylistic feature of the decisions of this Court. For more details, see Goodman 2006, pp. 40-41.

⁶³ 309 [2009] HCA 3 (2 February 2009).

⁶⁴ This was observed earlier in the 1990s by Marc Forster on the basis of a comparison of several legal cultures. He also states that in some countries there is a clear tendency towards more frequent references to academic legal writing. For instance, nowadays the supreme jurisdictions of the Netherlands and Switzerland clearly cite legal scholars more often than in the past (Forster 1996, pp. 129-130).

⁶⁵ Earlier, even binding prohibitions could be found. In Italy, legal provisions expressly forbade the citing of legal writers in court opinions (Forster 1996, p. 129).

As previously stated, the study above covers only a few countries. In addition, this study is mainly based on mechanical information retrieval from free data banks containing court decisions given in the countries examined. Finally, the study was carried out by a single person, the writer of this article, who possesses very limited background knowledge about the legal orders and the court systems behind the precedents examined. The risk of misunderstanding is therefore high.

Because of the limitations mentioned above, a more extensive and reliable study of the use of references, notably references to legal science, in court decisions is needed. This kind of research, on a comparative basis, would have both theoretical and practical value. From the linguistic point of view, it would give additional information on the problem of intertextuality in judicial texts. From the point of view of legal science, research on reference practices would elucidate the scope and forms of interaction between legal science and the application of law by jurisdictions in various countries, and the tendencies visible in this respect in different legal cultures. From a practical point of view, extensive comparisons of reference techniques used around the world would help the authors of guidebooks on legal style propose systems of reference that would make the court decisions as readable as possible. Hence, this kind of study would be a useful tool to achieve the goals of the plain legal language movement in one important sector: references.

The comprehensive project proposed here could be realized only through cooperation between linguists and lawyers in the framework of a joint project involving specialists from many countries. Indeed, it would be necessary to create an international network for this purpose.

Appendix

Example 1.

The following decision (Zivilsenat 11.11.2009 VIII ZR 221/08) of the German Supreme Court (*Bundesgerichtshof*) is a casual example of the extensive citing of legal literature in German judgments:

(...) Die wiederkehrenden Kosten einer solchen Öltankreinigung gehören daher zu den umlagefähigen Betriebskosten nach § 2 Nr. 4 Buchst. a BetrKostVO (ebenso AG Karlsruhe, DWW 2006, 119; AG Regensburg, WuM 1995, 319; Langenberg, aaO; Blank/Börstinghaus, *Miete*, 3. Aufl., § 556 BGB Rdnr. 27; Kinne in: Kinne/Schach/Bieber, *Miet- und Mietprozessrecht*, 5. Aufl., § 556 BGB Rdnr. 132; Schmidt-Futterer/Lammel, *Mietrecht*, 9. Aufl., § 7 HeizKV Rdnr. 30; Pfeifer, *Betriebskosten bei Wohn- und Geschäftsraummiete*, 2002, S. 61 f.; Sternel, *Mietrecht aktuell*, 4. Aufl., Rdnr. V 12 und 542; Wall in: Eisenschmid/Rips/Wall, *Betriebskostenkommentar*, 2. Aufl., Rdnr. 2968 f.; Staudinger/Weitemeyer, *BGB* (2006), § 556 Rdnr. 25; Schmid, *Handbuch der Mietnebenkosten*, 11. Aufl., Rdnr. 5101; aA AG Speyer, ZMR 2007, 871; AG Hamburg, WuM 2000, 332; AG Rendsburg, WuM 2002, 232; AG Gießen, WuM 2003, 358; LG Landau, WuM 2005, 720).

Translation (including titles of books and articles):

Therefore, the typical costs of cleaning such an oil tank are counted as operating costs to be taken into consideration in taxation in accordance with Section 2, Subparagraph 4a of the Decree on Operating Costs (likewise: Local Court of Karlsruhe, DWW (= Zeitschrift "Deutsche Wohnungswirtschaft") 2006, 119; Local Court of Regensburg WuM (= Wohnungswirtschaft und Mietrecht; Zeitschrift), 1995, 319; Langenberg, o.p.; Blank/Börstinghaus, Lease, 3rd ed., § 556 BGB = Bürgerliches Gesetzbuch), margin number 27; Kinne in: Kinne/Schach/Bieber, Law on Lease and Lease Procedure, 5th ed., § 556 BGB, margin number 132; Schmidt-Futterer/Lammel, Law on Lease, 9th ed., § 7 HeizKV (= Heizkostenverordnung), margin number 30; Pfeifer, Operating Costs in the Lease of Residential and Business Flats, 2002, S. 61 f.; Sternel, Topical Law on Lease, 4th ed., margin numbers V 12 and 542; Wall in: Eisenschmid/Rips/Wall, Commentary on Operating Costs, 2nd ed., margin number 2968 f.; Staudinger/Weitemeyer, BGB (2006), § 556 margin number 25; Schmid, Handbook on Additional Costs in Lease, 11th ed., margin number 5101; differently: Local Court of Speyer, ZMR 2007, 871; Local Court of Hamburg, WuM 2000, 332; Local Court of Rendsburg WuM 2002, 232; Local Court of Gießen, WuM 2003, 358; District Court of Landau, WuM 2005, 720).

Example 2

In France, the reports of the judges *rapporteur* may include, *inter alia*, profound analyses of judicial theory based on the discussion in legal literature. Case No. 04-16.174 (arrêt no.- 263 du 10 octobre 2008, rapport de Mme Radenne, *Conseiller rapporteur*) of the Supreme Court is a good illustration of this. It includes the following paragraph:

Attachée aux seuls actes juridictionnels mettant fin à la contestation, l'autorité de la chose jugée revêt deux aspects, une autorité négative, qui empêche qu'un même procès soit renouvelé, notion sur laquelle chacun s'entend, et une autorité positive, qui donne lieu à de nombreuses controverses doctrinales et divergences sémantiques. Pour la doctrine classique, l'autorité positive, qui impose de tenir pour vrai ce qui a été jugé, n'a d'effet qu'entre les parties. L'effet erga omnes, qui déroge au principe du contradictoire, n'a lieu qu'à titre exceptionnel lorsque l'ordre public l'exige. Un courant doctrinal plus récent estime que tout jugement définitif, qui certes n'a d'effet substantiel qu'entre les parties, est néanmoins opposable à tous en ce qu'il modifie l'ordonnancement juridique. Les effets du jugement ne doivent cependant pas être confondus avec l'autorité de la chose jugée(2). Les tiers, qui, pour reprendre la formule de Marie-Anne Frison-Roche, extérieurs à l'instance n'en sont pas moins spécialement intéressés par le sort du procès,(3) devant pouvoir contester une décision à laquelle ils n'ont pas été parties. Pour un autre courant doctrinal "*les tiers comme les parties doivent admettre que ce qui a été jugé entre les parties a autorité*"(4).

Footnotes of the report:

2. Gérard Cornu et Jean Foyer, in "Précis procédure civile", Thémis, droit privé Puf, p. 590.

3. Marie-Anne Frison-Roche, in "Généralités sur le principe du contradictoire", Thèse Paris II, 1988, p. 94.

4. Voir notamment Georges Wiederkher, in "Rep. pr. civ. Dalloz, Chose jugée" n° 366.

Translation:

Res judicata (l'autorité de la chose jugée),⁶⁶ which is attached only to court decisions that bring an end to a lawsuit, is a two-sided phenomenon: the negative *res judicata*, which prevents the possibility of resuming legal proceedings in the same lawsuit – a notion on which everyone agrees – and the positive *res judicata*, which gives rise to numerous doctrinal controversies and semantic divergences. In classical legal science, the positive *res judicata*, which presupposes that what has been confirmed by a judgment is considered to be true, has effects solely between the parties. An *erga omnes* effect, which forms an exception to the principle of contradictoriness, comes into existence only exceptionally, when it is required by public policy (*l'ordre public*). A more recent doctrinal trend esteems that every final judgment which has material effects only between the parties, none the less has effects on everyone (*est néanmoins opposable à tous*) because it modifies legal regulations. However, the effects of a judgment should not be confused with *res judicata*.⁽²⁾ *Tertii* (third parties), who – to cite Marie-Anne Frison-Roche – have an equal interest in the outcome of the lawsuit⁽³⁾, even though they are procedurally outsiders, must be able to contest a decision in which they have not been parties. Another doctrinal trend states that “both the *tertii* and the parties must approve that what has been stated in a judgment between the parties is valid”⁽⁴⁾.⁶⁷

Translation of the footnotes:

2. Gérard Cornu and Jean Foyer, in “Basics of Civil Procedure”, Thémis, civil law Puf, p. 590.

3. Marie-Anne Frison-Roche, in “General Ideas on the Principle of Contradictoriness”, Thèse Paris II, 1988, p. 94.

4. See especially Georges Wiederkher, in “Rep. pr. civ. Dalloz, Res Judicata” n° 366.

Example 3.

As stated in Footnote 27, judges have considerable authority not only in England but also in the other countries that follow the English legal tradition. They are free to choose the style of their judgments. For instance, in the United States, the texts of the opinions of some judges have an extremely personal flavor. This may be due to a state of intense agitation. A famous example is the dissenting opinion of Judge Musmanno in a case concerning Henry Miller's *Tropic of Cancer*:

⁶⁶ Due to important differences between civil-law thinking and common-law thinking in the field of procedural theory, and the conceptual differences in consequence, it is difficult to give an exact English translation of certain Continental terms of judicial procedure, such as *autorité de la chose jugée* or *opposabilité*. The translation *res judicata* is common in legal dictionaries, but it has also been criticized (see Mattila 2006: 266—267). In the same way, the expression *opposable à tous* is a typical term of French procedural law. According to the leading French legal dictionary, *opposabilité* is « aptitude d'un droit, d'un acte, d'une situation de droit ou de fait à faire sentir ses effets à l'égard des tiers. » (Cornu, 2000). Michel Doucet and Klaus Fleck translate the expression *opposable aux tiers* in legal German as *Dritten gegenüber wirksam* (Doucet & Fleck 1997). Accordingly, the writer of this article uses the word “effects” here.

⁶⁷ Unofficial translation by the writer of this article.

“Cancer” is not a book. It is a cesspool, an open sewer, a pit of putrifaction, a slimy gathering of all that is rotten in the debris of human depravity. And in the center of all this waste and stench, besmearing himself with its foulest defilement, splashes, leaps, cavorts and wallows a bifurcated specimen that responds to the name of Henry Miller.... From Pittsburgh to Philadelphia, from Dan to Beersheba, and from the Ramparts of the Bible to Samuel Eliot Morison’s Oxford History of the American People, I dissent.⁶⁸

Exceptionally, an American judge may be irritated by the opinions of his or her fellow judges in cases where ethical standards are involved (e.g., in a case concerning the immorality of a movie):

Some state judges, acting the part of sycophants, echo that doctrine. It would appear that such an argument ought only to be advanced by depraved, mentally deficient, mind-warped queers. Judges who seek to find technical excuses to permit such pictures to be shown under the pretense of finding some intrinsic value to it are reminiscent of a dog that returns to his vomit in search of some morsel in the filth which may have some redeeming value of his own taste. If those judges have not the good sense and decency to resign from their positions as judges, they should be removed either by impeachment or by the vote of the decent people of their constituency.⁶⁹

Example 4.

The judgment II SA/Wr 354/09 (2009-09-30) of the Supreme Administrative Court of Poland is a good example of frequent references to legal scholars in court decisions. Its grounds include, *inter alia*, the following paragraph:

Żeby jednak uznać, że skarga dotyczy innych aktów lub czynności z zakresu administracji publicznej (lub beczynność w tym przedmiocie) należy zbadać, czy wszystkie wyżej wymienione elementy występują (por. wyrok WSA w Warszawie z dnia 21 maja 2008 r. sygn. akt I SAB/Wa 24/08 - LEX nr 479036; B. Adamiak, Z problematyki właściwości sądów administracyjnych (art. 3 § 2 pkt 4 p.p.s.a.), ZNSA II nr 2/5/2006; T. Woś [w:] T. Woś, H. Knysiak-Molczyk, M. Romańska, Prawo o postępowaniu przed sądami administracyjnymi. Komentarz, Wydawnictwo Prawnicze LexisNexis, Warszawa 2005, s. 59-63; J. P. Tarno, Prawo o postępowaniu przed sądami administracyjnymi. Komentarz, Wydawnictwo Prawnicze LexisNexis, Warszawa 2006, s. 29-31; A. Kabat, Komentarz do art. 3 ustawy z dnia 30 sierpnia 2002 r. - Prawo o postępowaniu przed sądami administracyjnymi, [w:] B. Dauter, B. Gruszczyński, A. Kabat, M. Niezgódka-Medek, Prawo o postępowaniu przed sądami administracyjnymi. Komentarz, Zakamycze, 2006, wyd. II).

Translation:

However, in order to accept that other acts or measures in the field of public administration (or omitting to act in this respect) form the object of an appeal,⁷⁰ one has to study whether all the elements mentioned above are present

⁶⁸ Tiersma 1999, pp. 140-141.

⁶⁹ Salt Lake City v. Piepenburg (571 P.2d. 1299 (1977). See George 2007, p. 449.

⁷⁰ The case concerns whether an administrative appeal may also be made concerning acts other than regular administrative decisions fulfilling the formal requirements established by law.

(compare the decision of the Administrative Court of Warsaw of May 2, 2008, deposit copy Nr I SAB/Wa 24/08 – LEX nr 479036; B. Adamiak, On the Problems of the Competence of Administrative Courts (Sec. 3, subs. 2, para. 4 of the Law on Administrative Procedure), ZNSA (= Scientific Journal of the Administrative Courts) II nr 2/5/2006; T. Woś [in:] T. Woś, H. Knysiak-Molczyk, M. Romańska, Law on Procedure before Administrative Courts. A Commentary, LexisNexis, Warsaw 2006, pp. 29–31; A. Kabat, A Commentary on Sec. 3 of the Law on Procedure before Administrative Courts (August 30, 2002) [in:] B. Dauter, B. Gruszczyński, A. Kabat, M. Niezgódka-Medek, Law on Procedure before Administrative Courts. A Commentary, Zakamycze 2006, Part II).⁷¹

Example 5.

The following decision (REsp 150908 SP 1997/0071637-6) comes from the Brazilian *Superior Tribunal de Justiça* (which is competent in certain constitutional matters and matters of fundamental rights). A summary (*ementa*) of the decision may be found on the Internet. This summary includes a list of the books cited in the decision. The part of the summary containing references to legal literature reads as follows:

O Direito tem seu método. Se não observado, a conclusão, com certeza, será equivocada. O homicídio é crime porque elimina a vida do homem. A calúnia afeta a honra. O furto diminui o patrimônio. A literatura alemã, por influência jurisprudencial, construiu a doutrina da insignificância, cuja divergência é restrita ao seu efeito, ou seja, se elimina a culpabilidade, ou repercute na própria tipicidade. Aliás, a sensibilidade dos romanos consagrou - de "minimis non curat praetor".⁷² O prejuízo não é qualquer dano material, de que são exemplos o ligeiro corte na cutícula provocado pela manicure, ou o queimar, sem maior importância, as pontas dos cabelos da cliente. Nessa linha, "BETTIOL, ANIBAL BRUNO, MANTOVANI, MAURACH". O talonário de cheques, dada a insignificância de valor econômico, não se presta a ser objeto material do crime de furto, ou de receptação. Esta conclusão não se confunde com a conduta que se vale do talonário para praticar crime, de que o estelionato e o falso são ilustração.

Doutrina

OBRA: TRATTATO DEL FURTO E DELLE SUE VARIE SPECIE, TORINO, 1926, V. 3, AUTOR: VINCENZO MANZINI
OBRA: DIRITTO PENALE, 9ª ED, CEDAM, PADUA, 1976, P. 520. AUTOR: GIUSEPPE BETTIOL
OBRA: DIREITO PENAL, RIO DE JANEIRO, FORENSE, 1959, V. I, TOMO 2, P. 254. AUTOR: ANIBAL BRUNO
OBRA: DIRITTO PENALE, 2ª ED. CEDAM, PADUA, 1988, P. 197-198 AUTOR: FERNANDO MANTOVANI
OBRA: TRATADO, ARIEL, BARCELONA, 1962, P. 180. AUTOR: REINHART MAURACH

⁷¹ Unofficial translation by the writer of this article.

⁷² In the original court decision, the quotation mark is wrongly placed. It should appear before the word *de*.

Translation:

Law has its method. If this method is not observed, the conclusion is certainly incorrect. A murder or manslaughter⁷³ is a crime because it deprives a human being of his or her life. Defamation insults the honor. A theft diminishes property. German literature, influenced by case law, has constructed the doctrine of insignificance, according to which the distinction is based on the gravity of the act, so that the culpability may be eliminated or the typicalness may be lacking. In effect, the Romans were sensible enough to develop the maxim “de minimis non curat praetor”. A prejudice is not material damage. Examples of this are a slight cut in manicure or a minor singeing of hair ends. Along this line: BETTIOL, ANIBAL BRUNO, MANTOVANI, and MAURACH. A checkbook is not suitable as the material object of a larceny or concealment of illegally obtained goods when the insignificance of its financial value is taken into consideration. This conclusion must not be confused with a situation where the checkbook is used to commit a crime like fraud or falsification.⁷⁴

Legal literature

Work: Treatise on Larceny and its Types. Torino 1926, V. 3. Author: Vincenzo Manzini

Work: Criminal Law, 9th ed., Padova 1976, p. 520. Author: Giuseppe Bettiol

Work: Criminal Law, Rio de Janeiro, Forense 1959, V. I, Part 2, p. 254. Author: Anibal Bruno

Work: Criminal Law, Barcelona 1962, p. 180 [a Spanish translation, *Tratado de derecho penal*, of the German original]. Author: Reinhart Maurach

Example 6.

The decision *Kruger v Joles Eiendom (Pty) Ltd* (400/07) [2008] ZASCA 138 (27 November 2008) of the Supreme Court of Appeal of the Republic of South Africa is worth citing. References to classical European scholars from the period of the *jus commune* are made in Point 8 of the opinion of Judge Heher (which expresses the opinion of the majority):

THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

Case No: 400/07

JOHAN BLOEM KRUGER Appellant
and

JOLES EIENDOM (PTY) LTD 1st Respondent

REGISTRAR OF DEEDS (CAPE TOWN) 2nd Respondent

Neutral citation: *Kruger v Joles Eiendom (Pty) Ltd* (400/07) [2008] ZASCA 138 (27 November 2008).

Coram: MPATI P, MTHIYANE, CLOETE, HEHER JJA *et* KGOMO AJ

Heard: 10 NOVEMBER 2008

Delivered: 27 NOVEMBER 2008

Summary: Servitude-interpretation where ambiguous:

⁷³ In legal Portuguese, *homicídio simples* corresponds roughly to manslaughter and *homicídio qualificado* to murder.

⁷⁴ Unofficial translation by the writer of this article.

[8] In the circumstances I believe that such ambiguity as there is should be resolved by applying the well established rule of construction that because a servitude is a limitation on ownership, it must be accorded an interpretation which least encumbers the servient tenement. Voet,(12) in discussing the urban servitude of *tigni immittendi* (i.e., the right to let a beam into a neighbour's party wall), contrasts the position under a limited agreement as opposed to a general agreement and says that where the number of beams and mode of letting in has been defined, the owner of the dominant tenement is not allowed either to let in more or to alter the shape of the letting in. The reason he gives is:

'That is especially so because the granting of a servitude receives a strict interpretation as being an odious thing (because it is opposed to natural freedom); and in case of doubt there must be a declaration in favour of freedom.'(13)

As authority for this proposition Voet refers to, amongst others, Carpzovius(14) and the author of the opinion in the *Hollandsche Consultation*(15), where the passage from Carpzovius which follows is quoted:

'... *servitus ceu res odiosa restringi, ac in dubio pro libertate pronunciari debet. Et semper servitus indefinita ita est interpretanda, quo fundus serviens minori afficiatur detrimento.*'

The passage may be translated as follows:

'... a servitude, being something odious, should be interpreted restrictively and so, in case of doubt, should be declared free of restraint. And an imprecise servitude must always be interpreted so that the servient tenement is the less adversely burdened.'

Footnotes from the passage:

12 *Commentarius ad Pandectas* 8.2.2.

13 Gane's translation, Vol. 2, p. 440. To the same effect, as regards the general principle, is Schorer in his supplementary notes to Grotius 2.32, Austen's translation, p. 303.

14 *Jurisprudentia Forensis Romano-Saxonica* 2.41.4.

15 Opinion 146.

Example 7.

Decision No. 581 K/Pdt.Sus/2008 of the Indonesian Supreme Court (*Mahkamah Agung*) is not typical of Indonesian court decisions since it includes precise references to legal scholars. This decision was given in a case of patent law involving questions of a procedural nature. The decision refers to legal literature in three passages (giving grounds for the decision), numbered and beginning with the word "that" (*bahwa*). The use of "bahwa" may be compared with the way the word "que" is used in French court decisions (See Section 3).

15. Bahwa putusan Hakim yang dianggap tidak memberikan pertimbangan yang cukup pada putusan yang dijatuhkannya, haruslah memenuhi salah satu kriteria-kriteria di bawah ini: a. Apabila diabaikan suatu dalil (yang dapat memberi arah untuk suatu kesimpulan lain yang berbeda [...]) (dikutip dari

buku “ANEKA MASALAH HUKUM DAN HUKUM ACARA PERDATA”, Setiawan, SH. terbitan ALUMNI, Bandung, cetakan I/1992, halaman 388) [...]

19. Bahwa kewajiban seorang Hakim untuk memberikan *motivering*⁷⁵ yang cukup bagi putusannya sesuai dengan pendapat Setiawan, SH. dalam bukunya “ANEKA MASALAH HUKUM DAN HUKUM ACARA PERDATA” , terbitan ALUMNI, Bandung Cetakan I/1992, halaman 372, menjelaskan bahwa: Adanya kewajiban bagi seorang Hakim untuk memberikan suatu *motivering* terhadap putusan-putusannya memberikan jaminan akan adanya suatu “fair hearing” [...]

21. Bahwa menurut pendapat ahli hukum Prof. R. Subekti, SH. dalam bukunya Hukum Pembuktian, Pradnya Paramita, Jakarta, Cetakan ke 11, 1995, halaman 15 menyatakan: “Suatu masalah yang sangat penting dalam Hukum Pembuktian adalah masalah pembagian beban pembuktian.” [...]

Translation:

15. That a judicial decision for the part of which it is esteemed that sufficient grounds have not been given must fulfill one of the following conditions: a. When a consideration has been omitted (which can support another outcome) [...] (cited from the book “SOME LEGAL PROBLEMS AND LAW OF CIVIL PROCEDURE”, [by] Setiawan, Law Graduate (Bachelor of Laws), Publishing House ALUMNI, Bandung, publ. I/1992, p. 388) [...]

19. That the obligation of the judge to give sufficient grounds for his or her decision is in harmony with the opinion of Setiawan, Law Graduate (Bachelor of Laws), in his book “SOME LEGAL PROBLEMS AND LAW OF CIVIL PROCEDURE”, Publishing House ALUMNI, Bandung, publ. I/1992, p. 372 [where the author] states: The [existence of an] obligation of the judge to give the grounds for his or her decisions guarantees that there has been a “fair hearing” [...]

21. That Prof. R. Subekti, Law Graduate (Bachelor of Laws), states as his opinion in his book “Law of Evidence”, Publishing House Paramita, Jakarta, 11th ed., 1995, p. 15: “One problem which is very important in the law of evidence is that of the allocation of the burden of proof.” [...] ⁷⁶

Example 8.

The following example is a decision of the Supreme Court of India given in a case involving Constitutional Law. The decisions of the Indian Supreme Court are given in English, which is an

⁷⁵ The judges here use a Dutch legal term (*motivering*) instead of the Indonesian term *pertimbangan* (‘grounds’). This is an example of the partial conservation of the legal traditions of colonial times in Indonesia. Indonesian court decisions include other Dutch expressions as well, as in the following sentence (which also appears in the decision cited above): “Bahkan Mahkamah Agung, di tingkat kasasi dapat membatalkan putusan pengadilan (baik Pengadilan Negeri ataupun Pengadilan Tinggi) atas dasar pertimbangan bahwa putusan itu tidak diberikan pertimbangan yang cukup (*niet voldoende gemotiveerd*).” An unofficial translation by the writer of this article reads: ‘Furthermore, the Supreme Court may quash, in the cassation procedure, a decision of a court (either district court or appellate court) on the grounds that sufficient reasons have not been given for the decision (*niet voldoende gemotiveerd*).’ In effect, it can be generally stated that there is still a great deal of Dutch influence in legal Indonesian. For more details, see Massier 2008, pp. 241-244.

⁷⁶ Unofficial translation by the writer of this article.

“associate national language” according to the Constitution. Judge C. K. Thakker’s opinion contains broad comparisons of law between various countries of the Commonwealth. Legal scholars of these countries are cited:⁷⁷

CASE NO.:
Writ Petition (civil) 1 of 2006
PETITIONER:
Raja Ram Pal
RESPONDENT:
The Hon'ble Speaker, Lok Sabha & Ors
DATE OF JUDGMENT: 10/01/2007
BENCH:
SABHARWAL, Y.K. (CJI) & BALAKRISHNAN, K.G. (J) & THAKKER,
C.K.(J) & R.V. RAVEENDRAN (J) & JAIN, D.K. (J)
JUDGMENT:
J U D G M E N T
With
TC (C) Nos. 82/2006, 83/2006, 84/2006, 85/2006, 86/2006, 87/2006,
88/2006, 89/2006, 90/2006 and WP (C) No. 129/2006.
Y.K. Sabharwal, CJI.

Factual Backgrounds

The interpretation of Article 105 of Constitution of India is in issue in these matters. The question is whether in exercise of the powers, privileges and immunities as contained in Article 105, are the Houses of Parliament competent to expel their respective Members from membership of the House. If such a power exists, is it subject to judicial review and if so, the scope of such judicial review. [...]

Sir Edward Coke was in favour of ‘High Court of Parliament’ having its law and was of the view that the matters decided in Parliament were not part of Common Law. He observed that it was not for a Judge to judge any law, custom or privilege of Parliament. The laws, customs, liberties and privileges of Parliament are better understood by precedents and experience than can be expressed by a pen.

As Lord Tennyson stated;

“A land of settled government,
A land of just and old renown,
Where Freedom slowly broadens down,
From precedent to precedent.”

Let us consider the view points of learned authors, jurists and academicians on this aspect. In Halsbury’s Laws of England, (Fourth Edn.; Reissue : Vol. 34; p. 569; para 1026); it has been stated; [...] Although the House of Commons has delegated its right to be the judge in controverted elections, it retains its right to decide upon the qualifications of any of its members to sit and vote in Parliament. [...]

⁷⁷ All grammatical forms and punctuation are faithful to the original text. A few paragraph breaks have been excised in the interests of conciseness.

O. Hood Phillips also states ('Constitutional and Administrative Law', Fourth Edition; p. 180) that the House may also expel a member, who although not subject to any legal disability, is in its opinions unfit to serve as a member. [...]

Wade and Phillips also expressed the same opinion. In 'Constitutional Law', (7th Edition; p.793); it was stated; "The House of Commons cannot of course create disqualifications unrecognized by law but it may expel any member who conducts himself in a manner unfit for membership." [...]

Sir William Anson in "The Law and Custom of the Constitution", (Fifth Edn; Vol. I; pp. 187-88) states; "In the case of its own members, the House has a stronger mode of expressing its displeasure." [...]

Griffith and Ryle in "Parliament, functions, practice and procedures", (1989), at p. 85 stated; "The reconciliation of these two claims (the need to maintain parliamentary privileges and the desirability of not abusing them) has been the hall-mark of the House of Commons treatment of privilege issues in recent years." [...]

In Twentieth Edition by Sir Charles Gordon (1983), in Chapter 9 (Penal Jurisdiction of the Houses of Parliament), it had been stated; [...] In the case of contempts committed against the House of Commons by Members, two other penalties are available, viz. suspension from the service of the House and expulsion. [...]

In Twenty-third Edition by Sir William McKay (2004), Chapter 9 titles (Penal jurisdiction of Both Houses). The relevant discussion reads thus; [...] In the case of contempts committed against the House of Commons by Members, or where the House considers that a Member's conduct ought to attract some sanction (see pp. 132-33), two other penalties are available in addition to those already mentioned : suspension from the service of the House, and expulsion, sometimes in addition to committal. [...]

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