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SUOMALAINEN LAKIMIESYHDISTYS • HELSINKI

Tilausosoite
Suomalainen Lakimiesyhdistys
Kasarmikatu 23 A 17
00130 Helsinki
p. (09) 6120 300
f. (09) 604 668
sly@lakimies.org
www.lakimies.org

Kannen suunnittelu: Heikki Kalliomaa

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Jon Bing

Calculating the cases of the widow Brandt

THE LIFE AND DEATH OF THE MS BAGNA BRANDT

In 1913, Ms Bagna Brandt declared to the authorities in her local municipality, Ås, that she was leaving Norway. She had reason to dislike the local community. Her late husband had in 1911 sold the property Froen, and had been accused by this transaction unlawfully to evade the law on concessions in force at that time. This had made him unhappy and worried, and he died from a heart failure 1912. Ms Brandt herself became embittered, and told her lawyer and others that she never wanted to have anything to do with Norway in the future. She therefore sold the new property purchased by her late husband with all her furniture, and left Norway. She was at this time approximately 65 years old.[1]

She spent the winter in Rome, looking for an apartment, as she found the climate of Italy invigorating. Failing to find appropriate lodgings, she returned north for the summer, intending to travel back to Rome in the autumn. Regrettably, she was prevented by the outbreak of the First World War, and took up residence in Copenhagen, where she lived throughout the war, only returning to Norway briefly for the funeral of a relative. During the war, she was granted the full rights of a Danish citizen with respect to fuel and rations coupons, and travelled to visit her daughter in Sweden on documents issued by Danish authorities.

In 1919, she visited her son in Norway for a month, then left for the south, and arrived once more in Rome after spending some time in Paris and Nice. Here she found an apartment, in which she settled and lived until her death in 1930. She visited in this period Norway rarely; in 1921 and 1922 she passed through on her way to a Swedish spa, and in 1924 and 1925 for

[1] She was born either 1845 or 1848.

consultations with Dr Holst, a professor of medicine, with respect to an operation which later was performed in Rome. She briefly visited Norway and Denmark 1927 and 1928. For the purpose of travel, she was issued a passport by the Norwegian consulate in Rome 1920 or 1921, renewed 1929 – the passport was not found at her death.

At her death, Ms Brandt had no real property in Norway, but an estate consisting of securities and bank accounts.

THE CASES OF MS BRANDT

The story of Ms Brandt is not very remarkable, but she is the cause of an extraordinary situation with respect to case law. Often relations between court decisions are discussed; there may be similar cases with diverging results. Such divergence may have at least two major reasons. One is that the courts deciding the issue have different views of the law. A second reason may be that there are underlying differences in facts between the two cases. The case report will never be complete with respect to the factual circumstances, the court limiting itself to describing the case with those circumstances necessary for arriving at a solution (and giving a general picture of the situation). Comparing two cases will be limited to comparing the *descriptions* of the two cases by the courts, and there will always be some uncertainty with respect to the occurrence in one case by a circumstance not mentioned in the other case. This omission may have been caused by the circumstance not occurring in the case, or by the court finding the circumstance of little or no importance to its reasoning, and therefore omitting mentioning it.

It is in this respect that Ms Brandt provides a rather unique opportunity. While residing in Copenhagen, an issue arouse with respect to her tax liability for the year 1914–1915 to Ås, the municipality in which she had been living in Norway. This revolved around the question of whether Ms Brandt had lost her domicile in Norway at that time. She had not at this time settled abroad, but was living more or less temporarily in Copenhagen, waiting for the war to end. One may argue that she was *in transitu,* on her way from one place to the other. With respect to the Norwegian interlegal law and its modest theory on the domicile principle, it was not – perhaps – quite clear if one could lose a domicile without acquiring a new. And it was also a question of whether the Norwegian domicile really was lost.

The dispute ended before the Supreme Court,[2] which decided that that Ms Brandt had shown her intention of leaving Norway permanently. Domicile is seen in principle as composed of two conjunctive elements, a subjective (*animus*) and an objective (*factum*). In this case, the subjective element was satisfied, and as she was actually resident outside Norway, the objective element also was seen as satisfied. The court finds that the critical aspect is whether she has "broken off her relations to Norway and her former resident municipality", and that she "had not at once taken residence at a certain place abroad, but drifted among several places" was not decisive for determining whether the relations were broken off. Therefore, Ms Brandt was not seen as liable for tax to Norway or the municipality Ås.

The Supreme Court decision is from 1917. Ms Brandt was still living in Copenhagen, but a couple of years later she found the apartment in Rome to which she moved and lived for the rest of her life. Her contact with Norway was very limited during the more than ten years to her death in 1930. According to the act on taxation of decedent estates,[3] the tax was to be levied on the successor if the decedent was a citizen of Norway at the time of his or her death. According to the act of citizenship[4] a person only lost his or her citizenship by "leaving Norway forever". This has in legal theory been construed as a reference to the Norwegian principle of domicile.[5] The estate must have been sufficient for the Ministry of Finance to take an interest, because a tax was levied, and contested by the successor, the son of Ms Brandt, landowner N Darre Brandt. Again the case worked itself up through the tiers of the court system, ending at the Supreme Court in 1937. And again the issue was whether Ms Brandt was domiciled in Norway.[6]

In this lies the unique quality of the two decisions of the widow Brandt. They are twenty years apart, but otherwise we know that the circumstances are identical, as the case refers to the same woman, and the focal point in both cases is whether she has broken off her relationship with Norway (1917) or left the country forever (1937).

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2 Rt-1917-972.

3 Act of 8 April 1905 sect 1(2).

4 Act 8 August 1924 sect 6(b)(1).

5 Cf Gjelsvik, Nikolaus: Lærebok i mellomfolkeleg privatrett I. Nikolai Olsen, Oslo 1936, p. 89.

6 Rt-1937-276.

It would be tempting to see this issue as an argument from the greater to the lesser: If Ms Brandt indeed had broken off her contact with Norway in 1917; it would seem that she twenty years later, scarcely without visiting the country in the meantime certainly should be considered as having left the country forever. But the Supreme Court found that Ms Brant had not left the country forever, that she therefore retained her Norwegian citizenship and that the estate was liable for tax in Norway.

The obvious explanation of this apparent contradiction for a lawyer would be to claim that though both the liability to pay income tax and liability to pay tax of the descendent estate referred to the principle of domicile, the detailed concept of domicile was not identical in these two areas of law. It is not unusual for a concept to have – at least in detail – somewhat different structure within different areas of law, even when as closely related as in this case.

But it also makes one curious, and it may be of interest to discover exactly what these differences are. To do so, one may apply some of the techniques of knowledge based systems in law.

FACTORISING AND MODELLING OF LEGAL EXPERT JUDGEMENTS

An approach would be to analyse the decisions for the purpose of reducing their "facts" to a set of "factors", a process often described as "factorising". This is based on the view that what generally is referred to as the facts of a case, can be represented as a set of circumstances. An analysis is performed, and from the case report is pulled the factual circumstances that one thinks have been relevant to the court. This is by no means a trivial process. Circumstances may be mentioned in the report in order to give a coherent description of the situation, but without any indication of the facts having had relevance for the decision of the court. The court may cite the arguments of the parties, here mentioning circumstances claimed to exist[7] or be relevant, but of which there are no trace in the arguments of the court. Therefore, the analysis is a qualified task, similar to other ways of analysing case law.

[7] In the 1917 case, the municipality had two witnesses claiming that Ms Brandt had retained rooms at the property Berg, in which some of her furniture was stored. The court tersely comments that "according to the other information in the case, this can not be so."

Also, it is the issue of "granularity" of the circumstances. There may general or specific circumstances, and one should attempt keeping the circumstances on a level where they may deem to correspond with respect to generality. This hardly can be measured, and will again have to be justified by the person conducting the analysis. At the same time, one should try to specify the circumstances as close to the level of generality which the court uses in describing the case. If the court uses very specific language, the analyser will have to interpret this and decide whether the description fits a general category. The interpretation has to be defended by the analyser, and it may be argued that the granularity ought to be as fine as possible to reduce this influence.[8]

Factorising is a strategy used in several attempts for modelling cases, and for different purposes. In the cases of Ms Brandt, we want to explore a certain legal concept, domicile. This is a binary concept – one either is, or is not, domiciled with respect to the country of the *lex forum.* The interlegal law of a country may permit multiple domiciles;[9] this does not alter the issue, as the court always is restricted to decide whether the person in question is domiciled within its jurisdiction.

In cases related to taxation, the issue before the court always will be whether one has *lost* domicile to Norway, as the duty to pay tax ceases in such a case. In other domains, it may be an issue whether domicile has been gained in Norway, for instance when deciding the applicable law of succession, which under Norwegian interlegal law is the law of the country of the last domicile. In order to compare cases, one therefore has to polarise[10] the decisions.

In binary decisions, the circumstances comes in two versions – a positive version, indicating that the circumstances favour domicile in a new country; or in a negative version, indicating that the circumstances favour domicile in

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[8] There is the possibility of secondary specification, a general circumstance may be seen as a result from the existence of a set of more specific circumstances, allowing the analyser to stay close to the granularity of the court's description and specifying the circumstances fitting the antecedent of a rule by which these specific facts combine to constitute a general circumstance.

[9] It may be argued that Rt-1927-559 gives an example of this, a merchant, Thams, resided for parts of the year in Monaco where he by personal intervention by the Prince was permitted to settle. The Supreme Court mention in an *obiter dictum* that a person may be domiciled in two countries at the same time.

[10] Cf Lawlor, Reed: "Computer analysis of juridical decisions" in Bryan Niblett (ed.): Computer science and the law. Cambridge University Press, Cambridge 1980, p. 219–232.

the current country, an extension of *status quo*. For the widow Brandt, there will be some circumstances favouring that she has lost her domicile in Norway (positive), and some favouring the Norwegian domicile to be retained (negative).

The domicile concept consists, as briefly mentioned, of two conjunctive elements, a subjective and an objective. The objective element is in practice decisive, a person claiming not to be domiciled in Norway when still living here, but wanting desperately to leave, will not be heard. The objective element is factual; there is little assessment in its consideration. On the other hand, the subjective element is not a reference to the opinion of the person in question, but rather to factual circumstance supporting his or her view. Somewhat confusingly, the residence of a person once more surfaces as a major circumstance in deciding this issue. But there are also other circumstances.

Domicile may be seen as an example of a legal expert judgement. The model is based on the theory of norms as first set out by Sundby,[11] but further elaborated. Such a judgement is seen as a model consisting of three elements:

- Categories of circumstances
- Value, *ie* the result favoured by the occurrence of this circumstances, in the case of domicile, the value is binary
- Weight, *ie* the relative weight of the circumstance with a certain value

The model can in general be represented as a table:

Detailed circumstance	***Value***	***Weight***
Circumstance No 1		
Circumstance No 2		
Circumstance No *n*		

By insisting that this is a *model*, one also emphasises that it is *not* identical to the expert judgement as it exists as part of applicable law. It is to some extent a simplification – as any model. On the basis of the underlying theory, two limitations are presumed to be imposed:

[11] Sundby, Nils Kristian: Om normer. Scandinavian University Press, Oslo 1974.

- In a legal expert judgement, one cannot *ex ante* specify which categories of circumstances may be relevant in a new case, there may appear circumstances which are relevant, but of a category not previously encountered.
- In a legal expert judgement, one cannot *ex ante* specify the relative weights to be assigned to the occurrences of circumstances and values in a new case.

These characteristics of legal expert judgements imply that they are non-deterministic; the outcome cannot in detail be determined by empirical studies. A model also has further limitations, for instance related to the manual analysis on which the factorisation is based, see above.

In our case, we are concerned with a binary expert judgement relating to domicile. We try to model the subjective element in this concept, and the following model is suggested:

Detailed circumstance	***Value***	***Weight***
Actual residence		
Duration		
Place of work		
Home and family		
Concentration of estate		
Decision by foreign authority		
Citizenship		
Public law relation		
Self declaration		

Applied to the case of Ms Brandt, the "actual residence" would be the country in which she was living at the time when domicile is to be decided. In the 1917 decision, this was Denmark, in the 1937 decision this was Italy. The "duration" indicates the length of the stay outside Norway; this certainly would be longer for the 1937 than the 1917 decision. The "place of work" was a type of circumstances not appearing in any of the decisions. The "home and family" of Ms Brandt was not unambiguous – she had her home outside Norway, but some

family ties to Norway. The "concentration of the estate" likewise was partly the property abroad and the securities *etc* in Norway. Citizenship was to some extent what was to be decided by the 1937 decision, but is related to her exercise of rights according to public law, the use of Danish or Norwegian passports are important examples. Also, her own declaration with respect to where she considered being living is relevant, and this clearly did not favour Norway.

In this brief discussion of how to classify the circumstances in the case of Ms Brandt, we have also explained the nature of the circumstances resulting of a factorisation. The factorisation is based on an analysis of Norwegian cases which includes both theory and case law.[12] The exemplification above is not sufficient to justify that these are the circumstances to be derived from the source material, but in the present paper no further attempt will be made. The discussion above will be valid even if one would find that the specified factors are incomplete or otherwise insufficient.

CALCULATING REPRESENTATIONS OF THE CASES: SARA

"Domicile" was one of the binary expert judgements explored by the early knowledge based system SARA[13] developed in the 1980s by Johs Hansen at the Norwegian Research System for Computers and Law.[14] The system was designed to analyse and explore a large number of legal decisions within a domain. There are poor tools for the analysis of large numbers of legal decisions; lawyers mainly rely on qualitative methods. In using SARA, the researcher would propose a model of the domain to be explored. Then for each decision, the researcher would indicate which circumstances occur, and with which value. On this basis, SARA would proceed to process the material.

SARA would identify decisions than could not simultaneously be explained (for instance, because identical circumstances with identical values occur, but the results are different), calculate trees of precedence (identifying sub-sets of decisions), *etc*. The overall objective would be to juggle the weights in order to arrive at a model of the decision which explained as

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[12] Cf Bing, Jon: "Modeller av rettslige avveininger med et eksempel fra norsk interlegal rett", Tidsskrift for Rettsvitenskap 1985, p. 395–431.

[13] System for analyse av rettslige avgjørelser.

[14] Cf for instance Hansen, Johs: Et edb-system for analyse av rettslige avgjørelser, CompLex 1/81. Scandinavian University Press, Oslo 1981.

many of the cases as possible.[15]

It should be understood that SARA was developed as a tool for analysis. There are several presumptions with respect to the material that can be challenged. One is that the assessment is stable over the time period from which the decisions are sampled. Another – exemplified by the cases of Ms Brandt – is that it really is *one* expert judgement which are represented, and not two or more related, but somewhat different judgements.

In the case of "domicile", court decisions on this issue were selected. All cases available at the time of the analysis (1984) were selected, but the number was a modest 27. This really is too low for the strength of SARA to become apparent, the system works much better with more than one hundred decisions. But it was chosen for demonstrational purposes and by luck and in the process the unique instance of the cases relating to Ms Brandt was disclosed.

One should expect that the analysis would have identified these cases as two which could not be explained at the same time. Surprisingly, SARA does not find them in conflict. The calculated model for each decision is set out below:

The cases of Ms Brandt	***Rt-1917-972***		***Rt-1937-276***	
Detailed circumstance	***Value***	***Weigth***	***Value***	***Weight***
Actual residence	+	1.46	+	1.46
Duration	+	0.77	+	0.77
Place of work		0		0
Home and family		0	+	0.96
Home and family	–	0.90	–	0.90
Concentration of estate	–	1.37	+	0.85
Decision by foreign authority		0		0
Citizenship		0	–	0.53
Public law relation		0	–	2.66
Self declaration	+	0.04	+	0.04
Result calculated by SARA		0.0		–0.01

[15] The problem of "juggling" is not trivial, but a "hard problem" in mathematical terms.

The results calculated by SARA are in both cases zero (though – 0.01 for the latter decision, second decimal not counting in the comparison). In the analysis, the researcher will take a special interest in decisions with a calculated weight around zero. These are "doubtful" decisions, and it may be of interest to see the cause of the low weight in favour for a result. Even if we had not been aware of the special nature of the Ms Brandt cases, SARA would have identified them to us.

We know that the circumstances in the two cases are identical, with the exception of twenty years having passed while Ms Brandt stayed away from Norway. However, we see that the descriptions of the cases are not identical as they are presented for the system.

The major difference is "public law relation". The underlying factual circumstance in the 1937 case was that Ms Brandt had requested and been given a passport from the Norwegian consulate in Italy.

> The Supreme Court indicates that importance is placed on Ms Brandt herself taking the imitative to have the passport issued; such a document should not have been issued if she was not a Norwegian citizen, which again – according to the applicable law – depended upon her domicile. On the other hand, it is claimed that she did not have any valid passport at her death. The Supreme Court did not take into account that Ms Brandt had failed to make a declaration before the Norwegian consulate which the citizenship act (1888) required if she was not to lose hr citizenship on leaving the country forever, nor did she make any written request according to the later act (1924) to regain her citizenship. Ms Brandt had herself first requested a Danish passport, but this required a residence in Denmark of 15 years. Only after the Danish passport had been refused did she request travel documents from the Norwegian consulate.

We note that this circumstance is not indicated in the 1917 case. It may be questioned whether this is correct, as the case reports that she was given Danish documents for travelling to Sweden – and also that she was given equal treatment with respect to fuel and rations coupons. As it is, the circumstance "public law relation" with a negative value has few occurrences among the cases analysed. Therefore SARA has been able to "force" the model by assigning a very high weight to this combination, outweighing the positive elements.

We also see that "citizenship" occurs with a negative value for the 1937 model. This may be seen as less than appropriate – it is correct that Ms

Brandt in the decision was found to have a Norwegian citizenship, but this is closely related to the question of her domicile, and it may therefore not be correct to operate with a value for this circumstance.

Perhaps this is sufficient discussion to indicate that an analysis of these two cases may give further insight into the law at that time. Today, it has only interest as an illustration, though it is easy to argue that "public law relations", especially the question of passport, is more important to decide whether a deceased estate is liable to tax than whether a living person is domiciled in Norway for income tax purposes.

The cases of Ms Brandt do bring out some characteristics of an analysis by automated means based on factorising of decisions, and give a unique possibility to compare to cases in which it is known to what extent the underlying circumstances are identical.

INVERTING SARA

SARA has been developed as a tool for exploring binary expert judgements in law, a tool for legal research. Little of its potential has been discussed in this paper, which focuses on the curious case of Ms Brandt.

But it is rather easy to see SARA being "inverted" into a decision tool.

We presume that there is a domain in which a rather complex expert judgement of a binary nature has to be exercised. A model of this judgement is developed, discussed and trashed about until there is wide agreement on it being appropriate. Subsequently, a large number of decisions are registered as suggested above. These are then analysed by SARA, the result being examined – inconsistencies being weeded out, doubtful cases re-examined, re-registered and new runs being done until one will have a model on which there was broad consensus.

There would now be a data base in existence of prior expert judgements. To the text of the cases would be attached a meta-representation as a SARA model. Also, the calculated weights for each occurrence of circumstance and value would be available.

When a new case came along, one would – by a computer-assisted system – register which circumstances occurred with which values. A simple calculation would indicate the result as a pure extrapolation of the cases contained in the database.

However, the limitations of a model are taken into account. Therefore the decision maker is invited to check the result by comparing the current case to the precedents most similar. The system facilitates this, as the representation may be made into a vector and compared to the vectors constituted by the representations of all the cases in the database. This make it possible not only to find matches in the database (as would be the case for pure Boolean logic), but also "similar" cases.[16]

The system would then present the decision maker with two prior cases. The first would be the case most similar to the current case, and with a result corresponding to the result calculated for the current case. The second would be the case with the *different* result most similar to the current case.

In this way, one may argue that the two precedents represent some sort of boundaries of the decision space – it is in the gap between these two cases that the current case fits. The decision maker will check against these cases before making his or her final decision. When the current case has been converted into a decision, it goes into the database for future reference – supplying some dynamics to the database.[17]

There are obvious aspects of such a system that have to be examined critically. The major aspect is the conservation of prior decisions which such an approach implies, which may result in a less dynamic understanding of the law than desirable, making it more difficult for changes within the social context of the domain to be reflected in the expert judgements. On the other hand, it would allow complex judgements to be handled in a more efficient manner, and perhaps also requiring less expertise or familiarity with the domain, while retain legal certainty.

And if applied to the cases of the widow Brandt, SARA would have suggested – as we have demonstrated – two different results for the two cases, provided the decision maker represented the cases by the same circumstances as the Supreme Court on the two different occasions.

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[16] Similarity being measured as angles between the document vectors in the vector space.

[17] But only to a limited extent – if new types of circumstances are found to be relevant in a new case, this will have to result in a revision of the representation which in principle presumes a revision of all represented cases.