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Challenges in Legal Argumentation: A Swedish-Finnish perspective

1 Personal introduction[1]

The Swedish-Finnish author Marianne Alopaeus wrote a book titled *Drabbad av Sverige* (Taken by Sweden) in the 1970s. Had I not been an admirer of Sweden already before I read the book, it would have made me one. The solidarity of the Swedes with the oppressed people of the world made a big impression on a young person with a conscience. It still does. Solidarity, the emphasis on the principle of equality and the lively way of discussing any imaginable controversy are still the three features of the Swedish society that I awe and envy from the Finnish perspective.

During 2004–2007 I had a possibility to become more acquainted with the Swedish society and the Swedish legal system. While working in Sweden in 2004–2007 I continuously compared Sweden and Finland, both professionally and in everyday life. I am still a great admirer of Sweden even if my views have become a bit less uncritical. Accidentally, a contemporary novel about a Finn who admires Sweden, Hallonbåtsflyktingen (2007) by Miikka Nousiainen, was published about at the same time that I finished my work at Umeå University. The novel is a satire about an uncritical wish to become a Swede, which leads to absurd consequences.

[1] This article is based on my inaugural lecture as Doctor Honoris Causa at Uppsala University in 2010. Towards the end, the article proceeds towards to more recent developments. Parts of the article have been published in Niemi-Kiesiläinen Johanna, Comparing Finland and Sweden: The Structure of Legal Argument. In Jaakko Husa, Kimmo Nuotio & Heikki Pihlajamäki (eds), Nordic Law – Between Tradition and Dynamism. Intersentia 2007, p. 89–108.

When you stay in another country for longer periods, you realize that prejudices and stereotypes do not come out of nowhere. But if you look closer you also realize that the reality is more complicated than you expected. For example, it is common knowledge that the Swedes are regularly *sjukskrivna*, that is, absent from their working places because of "illness". This symptom is actually so well known in Sweden that the first day of absence because of illness is without pay, something that the Finnish labour unions would never accept. The Finnish problem is that employees come to work when sick. However, to conclude that the Swedes do not respect work is totally wrong. Working is for them the most cherished value. To be included in the Swedish society, one wants to work and pay taxes, like everyone else, as a migrant looking for work once expressed it. The wonderful parental leave system in Sweden is created to give women the chance to be included in the labour, not to care for the kids.

Seriously, I have learned tremendously from working in Sweden and with the Swedish scholars and the Swedish legal system. During the 2000s the Finnish government was preoccupied with an austerity program that led to the reduction in the number of district court from 60 to 27 in 2010 (now 20). At the same time, the Swedish legal community was shocked by a report that suggested that there are many innocent people in the Swedish prisons. Not a word about the costs of legal protection.[2] The Swedish judges calmly informed that "justice costs".

The comparison of two closely related legal systems has been interesting, rewarding and often fun. I made a number of anecdotal observations, for example, that the Finnish laws tend to have many more paragraphs than the Swedish ones.[3]

But the comparative jurisprudence seems to have very little room comparisons between closely related legal systems. Do such comparisons have any general relevance? In this article I argue that comparing legal systems that are close to each other is important because it can reveal more about patterns of legal thinking than comparisons between countries that are far from each other.

In the first part of this article I reflect on comparative law with the view of comparing two legal systems that are closely related. Concluding that comparison of the legal argumentation in two closely related

[2] Axberger et al. 2006.

[3] Niemi 2010.

legal systems may help to understand the reasoning in both of them and perhaps even generally, the second part of the article compares the patterns of legal argumentation and the use of sources of law in Swedish and Finnish jurisprudence. I shall argue that Swedish jurisprudence was until recently influenced by the inheritance of the Scandinavian realism whereas the Finnish legal thought is permeated by somewhat formalistic school of rational legal argumentation. Both are challenged by the quest for justice that all of us should strive for and young people in particular are interested in. In the end I discuss the fundamental rights, legal principles, social constructionist theory and discourse analytical approach as challenges to the traditions of legal thinking.

2 Comparison between similars

2.1 Legal families

In any comparison we use the concepts of similarity and difference. As Pierre Legrand argues, the recognition of difference is the basis of comparison.[4] The comparative project includes a search for, the identification and analysis of differences and the evaluation of similarities and differences. Depending on the purpose of the comparison, emphasis is put on either similarities or differences.

A considerable part of comparative law has been preoccupied with the comparison and grouping of legal systems on a grand scale. Any introduction to comparative law would start with the presentation of the major legal families of the world. Such comparison puts emphasis on similarities between the countries in the same family.

There is no doubt about Sweden and Finland belonging to the same legal family, either to the broad family of Continental or written law countries (as opposed to Anglo-Saxon family) or to the Nordic legal family.

Either way, the legal family approach underlines the similarities between Finland and Sweden. The Nordic legal systems are based on statutory law. Traditionally the German law has influenced the content of laws. The Nordic legal systems have evolved in societies with democratic political traditions that have been characterized by a unique mix of individual rights and community.[5] Law has been seen as a tool of social

[4] Legrand 2003.

[5] Berggren & Trägårdh 2006.

change, even social engineering, for achieving general welfare. Thus, the equality principle has been central in upholding the rights of persons. The welfare system is based on individual benefits, as opposed to family based ones. Basic benefits and services have been universal. At the same time individual rights may have needed to bend for the common good. Equality policy has yielded a strong emphasis on the equal rights between the sexes. At a more technical level, the Nordic law is often aimed at pragmatic solutions and grand codifications have been avoided.[6]

Even if distinctions among the Nordic legal systems are made, Sweden and Finland together are Eastern Scandinavian countries. One feature that distinguishes them from Denmark and Norway is the two-track court system, separating administrative courts from general courts. Clearly, the broad comparisons based on legal families do not give nor take anything in a Swedish Finnish comparison.

2.2 Functional comparison

Another theoretical approach in comparative law has paid attention to the functions of law. In legal practice, the law drafters regularly look at other legal systems for inspiration on how to regulate a new issue. As the functionalists have shown, a certain legal institution can serve different social functions in different legal systems. On the other side, a certain social function can be fulfilled by different legal institutions in different legal systems.[7]

In functionalist social theory, social institutions keep the society together, hinder them from falling apart in a chaos.[8] For example, marriage as a legal institution is one of the fundamental guarantees of social and family cohesion all over the world. What has happened in the Nordic countries? People do not get married any more, at least not as much as many people think they should. Richard Posner, the famous American judge who writes books on law and economics, was extremely worried about the share of children born out of wedlock in Sweden.[9] However, the Swedish society has not fallen into pieces, and actually the US society has much more problems with single mothers than Sweden or any other

[6] Husa, Nuotio & Pihlajamäki 2007; Nousiainen & Niemi-Kiesiläinen 2001.
[7] Zweigert & Kötz 1998.
[8] Parsons 1968.
[9] Posner 1992.

Nordic country. Is seems that the decline of marriage has been exaggerated, but also other legal institutions have come to fulfil its cohesive function, such as the conformation of paternity, social responsibility for child care and so on.

Similar examples can be found in criminal justice system. It is not exceptional for non-Nordic persons to wonder how we can have such lenient criminal sanctions and how the prisons can be so homely. Yet, the level of crime is relatively low in these countries. Simply, the societal cohesive functions are performed by the free educational system, social services and accessible health care.

The functional approach does not yield much to comparison between Sweden and Finland. As the two countries have fairly similar social structures, most legal institutions have similar functions in each of the countries. This situation has been a fertile ground for legal transplants. Especially the Finnish law drafters have tended to look to Sweden in their search for legislative ideas.

In reality, much comparative work is guided by practical interest and capabilities. For example, in the beginning of the 1990, Denmark was the only European country that had a law on debt readjustment (consumer bankruptcy). Of course, any law drafter who could read Danish, studied it. Language guides much of comparison, and it is a pleasure to tell that all Finnish laws and Bills are available in Swedish and many of the laws also in English.[10] This kind of technical comparison is important but it is focused on similarities and explains little about the differences.

3 The heritage of Scandinavian realism

3.1 Legal reasoning as a topic for comparison

In comparative law, the emphasis has shifted towards legal reasoning and legal thinking.[11] For example, a large comparative project mapped the doctrine on legal sources in ten European countries and the United States in the 1990s.[12] William Ewald argues that the aim of the comparative law should be "an understanding of conscious ideas at work in the legal sys-

[10] See www.finlex.fi.

[11] Reitz 1998.

[12] MacCormick & Summers 1991; MacCormick & Summers 1997.

tem; that is, the principles, concepts, beliefs, and reasoning that underlie the foreign legal rules and institutions."[13]

These kinds of issues are also behind my interest in comparison. Teaching and examining legal theses in the Swedish law faculties, I was struck by the focus on the purposes of law in the reasoning by young lawyers. They also seemed to have a strange uneasiness with the concepts of "content of law" (gällande rätt) or "interpretation of law". Swedish law students introduced me to the concept of "rättsutredning",[14] a clarification of a legal point. Swedish doctoral students often discussed "fastställande av gällande rätt", confirmation of the content of law, as a purpose of legal research. Finnish law students and legal scholars do not use such expressions. They would talk about "interpretation of law" as finding the correct interpretation of law and about systematization of law. They would mention the purpose of law but not as a primary concern. These kinds of observations have led me to ask: Do Swedish lawyers really think differently than Finnish ones? How differently do they argue? I have also been concerned about the eluding role of the legal principles in legal argumentation in both countries. Could we better understand the role of legal principles by looking at their role in these two countries?

The interest in legal argumentation in comparative law has as a natural starting point the distinction between common law and written law countries.[15] While it is sometimes claimed that the systems are converging, Pierre Legrand argues that the differences in the *mentalité* are quite profound and culturally anchored. He also questions the need to overcome them.[16] Avoiding a stance on the convergence thesis, it is easy to argue for the importance of understanding the mode of thinking in other legal systems. It is important for communication between lawyers representing another legal system but it may also benefit understanding of one's own legal system. Perhaps the recognition of difference is sometimes easier when the object of comparison is closer.

[13] Ewald 1998, at 705.

[14] I would translate the concept as a "legal memo" meaning legal research (not academic) to clarify the content of law on a certain point of law.

[15] For Pierre Legrand *mentalité* is the key concept in understanding the different reliance on facts in legal systems based on common law and on civil law. Legrand 1996, at 306–322. Basil Markesinis has analysed differences in attitudes in legal traditions and also between legal cultures that are close to each other. See e.g. Markesinis 2001.

[16] Legrand 1996, at 321.

The above mentioned questions indicate that I am intrigued by the heritage of the Scandinavian realism in the Swedish jurisprudence. Therefore I will first discuss basic statements of the Scandinavian realism and relate them to some of my observations of the Swedish law and legal scholarship. I am especially interested about how young scholars understand their relationship to the normative force of law ("gällande rätt") and the role of arguments that relate to the purposes of the law. My thesis is that functional arguments have a more pronounced role in Sweden than in Finland. For Finland, I will outline a different bend in legal theory. The influence of Scandinavian realism in Finland was less direct.[17] In Finland, two theoretical schools have been important during the latter half of the 20th century, the analytic school of jurisprudence from the 1950s to the 1980s and the post-analytic school since the late 1980s.[18] The post-analytic school puts increasing emphasis on legal principles but I make no hypothesis that the Finnish courts are more inclined to use legal principles in their argument than the Swedish ones.

3.2 The focus on the functions of law in Sweden

Scandinavian realism was a school of philosophy in the 1930s, based at Uppsala and Copenhagen. Some of its most famous representatives, Vilhelm Lundstedt, Karl Olivercrona and Alf Ross, were both philosophers and legal theorists.

Both Scandinavian realism and the analytic school of jurisprudence took distance from conceptual jurisprudence (*Begriffsjurisprudence*) and natural law. To draw conclusions from and make recommendations for the interpretation of the law on the basis of legal concepts, a habit attributed to the conceptual jurisprudence, was outspokenly condemned. The alternative was somewhat different in each of these schools. While Scandinavian realism discussed the purposes and functions of the law, the analytic school wanted to split the legal relationship into its smallest

[17] Markku Helin has researched the relationship between the Scandinavian realism and the Finnish analytic legal theory in his nominal thesis in 1988. Helin 1988.

[18] Analytic jurisprudence is the term used in Finnish for the dominant school of legal studies from the 1950s until the 1980s. The term in also used in other contexts, see Ross 1966 at 39. Scandinavian legal realism also has a close connection with analytic philosophy while underlining the importance of conceptual analysis and the "purification" of legal context.

components and seek guidance as to the interpretation of law from this analysis.

Scandinavian realism was critical of idealist and normative legal scholarship. Legal scholarship should have become scientific and realist, based on facts,[19] which might be empirical facts or states of mind.[20] Legal scholarship could not jump into the world of normative statements and recommendations but it should make prognoses of the behaviour of the courts based simply on the facts.[21] While this view, represented by Alf Ross, became the dominant understanding of Scandinavian realism in Finland, Vilhem Lundstedt's more politically oriented version may have had more influence in Sweden. Lundstedt was a legal theorist, MP and social democrat. He did not have great problems with the normativity of legal scholarship[22] and was interested in rationalism, social planning and social utility in law.[23]

The idea of law as a tool of social change logically puts the purposes of the legislation in the foreground. But Scandinavian realism had a peculiar relationship to the purposes and the functions of law, ascribing a high but ambivalent status to the purpose of the legislator. The purpose of the legislation is not simply what the legislator states it to be or what the purpose of a certain reform is. The purpose of the law is always seen in a broader context of the legal system. Already Lundstedt emphasised that social utility and shared social values go hand in hand. The social goals of legislation should and could be realised in legal security and promotion and protection of credit and market exchange.[24] Thus, we have a twofold heritage of Scandinavian heritage that carries until this day; the uneasy relationship to the normativity of the scholarship and the emphasis on the functions of the law.

In the doctrines on sources of law functional arguments take two forms. First, the doctrine mentions the purposes of law as a legal source. Secondly, the anticipated effects of a certain decision may be regarded as an argument in legal reasoning.

[19] Ross 1966, at 82.

[20] *Rättsmedvetandet*, that is, the consciousness of the law of either the public or of the judge was a central fact for the realists. See Hägerström 1916, at 204; Ross 1966, at 456; Lundstedt 1956, at 159, 201.

[21] Hägerström 1916, at 83; Ross 1966, at 63, 79, 89.

[22] Lundstedt 1956, at 215.

[23] Lundstedt 1956, at 134, 150.

[24] Lundstedt 1956, at 139. This applies especially in private law.

The purpose of is divided into two parts, the subjective and the objective. The subjective, the aims of the legislator, are all but denied.[25] They are unclear, insufficient, too general and probably outdated, and cannot be attributed to a certain person called "the legislator".[26] This is an argument that I have always found difficult to understand, since both Swedish and Finnish *travaux preparatoires* tend to be detailed and rich in discussions on the purposes and correct interpretation of the law.

The objective functions of the law should inform those who apply the law. This line of thinking was brought to its extreme in P.O. Ekelöf's teleological method of interpretation.[27] According to Ekelöf, the judge or legal scholar should establish the typical case of application and confirm how the law should be applied to it. This typical case would then guide the interpretation in more complicated cases or in cases, which do not obviously fall within the scope of the relevant legal rule. The purpose and function of the law should be decisive, in confirming the interpretation in the typical case. The functions or purposes, found through an analysis of the typical cases, are objective.[28] For example, the central function of the civil procedure, according to Ekelöf, is to promote a foreseeable and secure credit market.[29] This statement has provoked a lot of discussion among the procedural scholars in the Scandinavia;[30] it has been asked whether, when proof is insufficient, we should sacrifice some debtors on the altar of the credit market.

Even if many authors do not share Ekelöf's doctrine, the purpose of the law, connected to the preparatory works, is central to the Swedish doctrine of legal sources. Indeed, many textbooks list the sources of law in this order: law, preparatory works and precedents,[31] and include a

[25] For a philosophical critique of the "state will", see Hägerström 1916, at 171–210.

[26] Ross 1966, at 166; Ekelöf 1951, at 28; Ekelöf 1956, at 8; Ekelöf & Boman 1990, at 80.

[27] In a recent dissertation Moa Bladini has analyzed how Ekelöf constructed objectivity in his scholarship. See Bladini 2013.

[28] Ekelöf & Boman 1990, at 69–82.

[29] Ekelöf & Boman 1990, at 12.

[30] A critique of Ekelöf's theory is found in for example Peczenik 1995, at 367. The Swedish procedural law doctrine have recently been extensively analysed in Bladini 2013 and Björling 2017.

[31] For example, the practical textbook the law students use, Bernitz et al. 2006, written by several professors of the University of Stockholm, lists the sources in this order. See also Strömholm 1996, at 292–298; and Bergholtz & Peczenik 1997, at 298.

lengthy discussion on the subjective and objective purposes of the law connected to the preparatory works.

In addition, Swedish theorists recognize another source of law that has a functional character, the real arguments (*reella övervägande*).[32] These refer to the consequences of a decision by the court. If the consequences of a given interpretation are contradictory to the rational purpose of the law, the interpretation should not be condoned. For example Marie Tuula related her comparative analysis of insolvency law to the purposes of the law.[33] She defended her thesis that the institutions of the new Swedish reorganization law of 1994 did not correspond to its stated purpose.[34]

The uneasy relationship to the normative argumentation is present in many doctoral theses in Sweden. For example, Patrik Södergren who defended his thesis on the division of jurisdiction between the administrative courts and general courts in 2009 stated that he utilizes the customary legal method, that is, he wants to state the law as it stands. Like many other young scholars, he was faced with the difficulty of making normative conclusions. Because it is difficult, he shielded away from giving recommendations on the interpretation of the law.[35]

Claes Sandgren attributes, in his study on Swedish doctoral theses, the teleological method especially to researchers at the University of Uppsala but in my observations it has been more wide spread.[36]

3.3 Analytic theory of legal argumentation in Finland

According to Markku Helin, Scandinavian realism had considerable influence in Finland. In the 1950s, Simo Zitting laid the foundations for the Finnish legal doctrine for the next thirty years. The analytic school of jurisprudence used the method of splitting the legal relationship, such as

Peczenik and Bergholtz discuss precedents before the preparatory works in their 1991 article (Peczenik & Bergholtz 1991, at 322–328). While the precedents are discussed one and a half page, the discussion on preparatory works takes four and a half. They emphasize that attention should be given to the rationally constructed ratio, not the views of individuals who participated in the legislative process (at 327–328). See also Peczenik 1995, at 215, for a detailed classification of legal sources.

[32] Ross 1966 at 169, 466.

[33] Tuula 2001.

[34] Sandgren 2006, at 65.

[35] Södergren 2009.

[36] Tuula defended her thesis at Stockholm University and Södergren at Umeå University.

the transfer of ownership, into its smallest elements.[37] Legal conclusions should not be drawn from legal concepts but from a detailed analysis of the consecutive details of the relationship or transaction. This method is not the focus of this article. Instead, I will look at the doctrine of legal sources as it was presented by one of the most prominent representatives of the analytic school, Professor Aulis Aarnio in his 1989 textbook, which has been read by many students of law since its publication.[38] In several books Aarnio developed the analytic theory to its height.

In Aarnio's theory, the functions and purposes of law are related to two types of legal sources, which are differently located in the hierarchy of the sources. The two sources of law that are particularly interesting here, are, first, the purpose of the legislator and the *ratio legis* and, second, the teleological or real arguments. Aarnio classifies the legal sources into (1) strongly binding, (2) weakly binding and (3) accepted.[39] In this classification, the purpose of the legislator and the *ratio legis* are in the second group together with case law. Teleological arguments (real arguments) are in the third group after historical, comparative and doctrinal arguments, but before values.[40]

In the group of binding sources we find law, systematic arguments[41] and the custom of the land. The hierarchical position of systematic arguments and the custom of the land above the purpose of the legislator is interestingly in contrast with the Swedish theory and gives weight to my claim that the position of the functional arguments is weaker in the Finnish doctrine than in the Swedish. Aarnio's own reasoning for this placement was that law and the custom of the land were mentioned as sources of law in the Code of Procedure,[42] but this was less convincing since the same paragraph also mentioned the purpose and the foundation of the law.[43]

[37] Zitting 1957, at 13; Zitting 1971, at 2. Generally about the Finnish analytic legal theory see Aarnio 1983, at 20–30.

[38] Aarnio 1989. His work is also to a large extent available in English.

[39] The same classification was used by Peczenik & Bergholtz 1991.

[40] See Aarnio 1997, at 82.

[41] For the central role of the legal system in interpretation, see Aarnio 1977, at 266–281.

[42] Code of Procedure, Chapter 1 para 11 was repealed in 2016. Now Chapter 9 para 1.1 states: "En domare utövar dömande makt självständigt och är i denna verksamhet bunden enbart av lag."

[43] Aarnio 1989, at 220.

The purpose of the law can, according to Aarnio, be traced from the preparatory works only with trouble and uncertainty.[44] The objective purpose of the law or *ratio legis* is, according to him an unnecessary appendix in the theory of legal sources that can be traced to other legal sources.[45] The teleological argument, placed in the group of accepted but not binding legal sources, comprises weighing and evaluating the consequences of a given interpretation in practical life. The teleological argument, according to Aarnio, is equivalent to the Swedish real argument and an argument of last resort, followed however by values.[46] Interestingly, there is no place for legal principles in Aarnio's doctrine of legal sources.[47]

3.4 Problems

The heritage of Scandinavian realism has been widely discussed. Looking from the perspective of a young scholar (and her supervisor) I want to point out some weaknesses of Scandinavian realism and analytical school of jurisprudence. Both limitations are connected to the lack of idealism. Young scholars are usually interested in justice. They are interested in questions about the legal rights, their implementation and realization in people's lives; the injustices that our legal systems create; about the sustainability of our planet and so on. They are interested in principles, structures, systems and discourses. They are interested in the big issues of justice and injustices; and that is how it should be: young people should be idealists.

Neither Scandinavian realism nor analytical jurisprudence give much to an idealist. With the prognosis of what the judges will do, the realist is bound with the conservative world view of the judges and left with no room for criticism. There is much to say in favour of the conservatism of the courts: one of their central functions is to guard the predictability of actions from the legal point of view. But one of a scholar's main functions is to be analytically critical and a doctrinal view that seriously impairs that function is constraining.

[44] Aarnio 1989, at 226–227.

[45] Aarnio 1989, at 229.

[46] Aarnio 1989, at 240–241.

[47] Principles are discussed elsewhere in the book (Aarnio 1989, at 81–82) but not in the context of legal sources. Legal principles get more attention in his later works, but are not discussed as legal sources: Aarnio 1997, at 174–186.

The analytical school has not restrained critical stand per se. It allows scholars to be critical if their detailed analysis leads to a critical conclusion. To be critical on a detailed point of interpretation of one section of a law, however, is seldom enough for a young scholar who is interested in broader issues of justice or how the justice system works. In addition, a young scholar is not always best equipped to find relevant problems of interpretation. These problems arise in legal practice which she does not necessarily know well enough.

4 Period of post

4.1 Post-analytic school in Finland

When Aarnio's text book was published, his student Juha Pöyhönen (later Karhu) had already published his thesis on contract law,[48] which, together with Tapio Lappi-Seppälä's thesis on criminal law,[49] introduced legal principles into Finnish legal theory. Their books were the beginning of a new era, which Kaarlo Tuori has called post-analytic.[50] The theory of legal principles relies on Robert Alexy's theory of legal argumentation[51] and on Ronald Dworkin's theory of legal principles.[52] Essential to the theory is the classification of legal norms into rules and principles and an interest in the modes of argument. While the rules can be either followed or not and the traditional logical rules of analogy and *e contrario* can be used in applying them, several principles can be applied in the same decision at the same time and their relative influence is determined by weighing them against each other. The rules are usually (but not always) found in the letter of the law, but the principles are often articulated by the courts or in legal scholarship. It is important, however, that the principles have institutional support; that is, they can be derived from the legal sources; the provisions of the law, jurisprudence, etc.

The post-analytic theory has been dominant in Finland since its introduction.[53] After joining the Council of Europe and the European Convention of Human Rights (ECHR) in 1990 and the reform of constitu-

[48] Pöyhönen 1988.
[49] Lappi-Seppälä 1987.
[50] Tuori 2002, 902.
[51] Alexy 1983.
[52] Dworkin 1977.
[53] Aarnio has also adopted it in his later work. See Aarnio 1997, at 174–185.

tional rights in 1995, several legal scholars have found the legal principles in constitutional and human rights. Juha Pöyhönen (Karhu) has even used constitutional rights to develop a theory of new system of law of property and obligations.[54] In my own field of procedural law, Jaakko Jonkka,[55] Tatu Leppänen[56] and Anna Nylund[57] developed the legal principles. Laura Ervo discussed the fairness of the trial in her thesis choosing both the human rights standards and Habermas' criteria of ideal communication as measures of fairness.[58]

Finnish legal theory has proceeded to the philosophical and ethical direction. Several scholars have been inspired by the ethical considerations in the work of the judge, in particular. Based on the post-structural philosophy, the works of Panu Minkkinen, Samuli Hurri and Susanna Lindroos-Hovinheimo have discussed the confrontation between the judge and the Other. These works have focused on the philosophical foundations of legal thinking.

4.2 Law as a discourse and social construction

The Swedish scholars have made different attempts to solve the problems of legal realism, but we cannot observe same kind of euphoria of human rights as in Finland in the 1990s. This is natural since Sweden has been party to the ECHR from the beginning (1953) and the Convention and its case law have become part of the standard legal scholarship all along.

However, there has been a need to tackle the heritage of legal realism. One way of doing it has been to analyse the structures of laws and legal disciplines, often expressed as 'underlying' structures or principles. Many young scholars have been influenced by social constructionism and discourse analysis, either explicitly or implicitly. Feminist legal theory has had an influence in this regard since, influenced by feminist and gender theory, this approach to law has renewed itself as law and gender and adopted early on the view that gender is socially constructed.[59]

The origins of social constructionism go back to the early 1960s and the linguistic turn in social and cultural sciences. Berger and Luckmann

[54] Pöyhönen 2000.
[55] Jonkka 1991.
[56] Leppänen 1998.
[57] Nylund 2006.
[58] Ervo 2005.
[59] Gunnarsson & Svensson 2009; Svensson et al. 2011.

theorized in 1966 that reality is constructed in everyday interpersonal interaction, social practices and discourses.[60] About at the same time John Searle paid attention to the power of legal actions to constitute new statuses, such as marriage.[61] As Ian Hacking points out, there is a difference between Searle's approach and social constructionism: as Searle analyses the *construction of social reality*, social constructionism is interested in how *reality is socially constructed*.[62] Searle's approach, like standard legal approach, sees the legal system as constructed by humans and in social processes, such as legislative process, case law and legal science. Social constructionism goes further and analyses how the legal discourses construe facts beyond the legal discourse. Gender is a prime example. Law constructs women and men in the institutions of heterosexual marriage, sex assignment and structures of organizing work and reproduction.

We find examples of structural analyses of legal discourses and their underlying principles[63] or discursive patterns.[64] Such analysis resembles Searle's approach in looking at how the social world of law is constructed. Discourse analysis offers methodological tools to an analysis of text as construing practices. Early work using discourse analysis appeared in law and gender analysing how legal discourses and practices construct the identity of the victim of crime.[65]

Here I take up two path breaking theses in procedural law, a discipline that is usually associated with traditionalism and technicalities, renewing the disciplinary paradigm. Moa Bladini defended her thesis in 2013 in Lund, analysing the concept of objectivity in procedural law. Bladini's data included case law and jurisprudence, represented by the grand old man of Scandinavian procedural law, Professor P.O. Ekelöf. Using discourse and linguistic analysis Bladini analysed how "objectivity" was constructed in these texts. She found out that several discursive tactics were used to distance the authors from the facts and from the parties, to construct objectivity.[66]

[60] Berger and Luckmann 1966.
[61] Austin 1986; Searle 1969.
[62] Hacking 1999, at 29.
[63] Ulväng 2005.
[64] Samuelsson 2008, at 179.
[65] Andersson 2004; Burman 2007.
[66] Bladini 2013.

The concept of objectivity may be problematic in a multicultural society[67] but it is unlikely that we could do without it in procedural law. However, it is important to recognize that everyone is speaking and writing from some position – not even a judge is without a position. To acknowledge this is the first step in reflecting upon the impact of one's position on the evaluation of facts and law.

Like Bladini, Eric Björling is interested in how the idea of law is reproduced in case law. Via detailed analysis of six Swedish Supreme Court cases he comes to the conclusion that the courts do not explicate every step in their argumentation that tends to culminate in a syllogistic operation.[68] The formulation of the premises of the syllogism tend to include implicit (or as Björling says, invisible) steps.[69] He then seeks another way of understanding what the courts do.

Björling uses narrative analysis, but not in an analysis of case plots. He sees the cases as narratives about law. Björling argues that the courts not only narrate about law, but they narrate law. Björling uses Gilles Deleuze's concept of rhizome[70] that denotes the continuities and small steps in processes of differentiation, as opposed to opposites. Deleuze shifts the gaze from the existence of a structure to the becoming; becoming an equal and becoming similar through repetition.

Edward Mussawir and Björling take the concept of becoming into the legal field, making a differentiation between the representation of law and the expression of law in the understanding of legal discourses in courts and jurisprudence.[71] In the representation of law, the legal discourses are

[67] Sandra Harding opened the discussion of objectivity in science, claiming that the objectivity has been mostly that of dominant groups. Her improved version of objectivity means including the oppressed groups into the production of knowledge. Harding 1986. For a post-colonial perspective see Spivak 2010; Connell 2007.

[68] Earlier in Swedish legal theory Aleksander Peczenik has used the concept transformation to denote to such invisible non deductive steps in legal argumentation. Peczenik 1983, at 84.

[69] The invisible features that Björling identifies are 1) entymems, that is, invisible understandings and steps in the legal methodology and reasoning, 2) overdetermined legal subject positions, such as consumer, that have a decisive effect on the outcome of the case and 3) narrativdissonans, that is, miscommunication in which the parties speak their own narratives without confronting or even understanding the narrative of the other party. Björling 2017.

[70] The concept rhizome has not won same popularity as the concept network; theoretically they are different, notwithstanding resemblance. Deleuze & Guattari 1988.

[71] Mussawir 2011.

seen as a reflection and a representation of the law and the legal system that is out there. The norm system is separate from the cases and the jurisprudence in which a representation is given. When discourses and practices are seen as expression of law, they are part of the law, and there is no distinction between the spheres. Thus, the courts, the jurisprudence and other sources of law are seen as part of the process of law's becoming. As Pierre Legendre says "…even though the Law has no body, it speaks."[72]

This way of understanding law is perhaps not so revolutionary, after all. The idea that judges are law makers is obviously present in the common law, and understanding law as an expression would bring the written law tradition closer to the common law and European law. Moreover, it would underline the role and responsibility of the judges and the legal scholars in the evolving of legal principles and rules.

5 Conclusion

This article has painted a broad picture of the developments in Finnish and Swedish legal research. As such, it certainly misses much of the richness of contemporary legal research. But what I hope to have shown is that the valuable inheritance of Scandinavian realism and analytical jurisprudence has in the new era turned into new approaches and theoretical bases of legal research. A shared pursuit in these new approaches, I think, is the aspiration to justice. While Scandinavian realism tried to avoid normative statements it also refrained from making statement on values. Analytic jurisprudence has given us a lot in improving the technical skills of analysing law but offered little in finding principles and analysing values.

The post-period has developed ways of analysis that take principles, legal structures, discourses and values seriously. In this article I have juxtaposed the Finnish and Swedish approaches in legal research to the point of exaggeration. I started this article by referring to Marianne Alopaeus and her and my admiration for the Swedish solidarity, equality and tradition of discussion. At least in the last mentioned respect, Finland has approached Sweden; the discussion climate has become free and Finland has even been appreciated as one of the countries with most respect for freedom of speech. As Finns and Swedes and as lawyers and researchers

[72] Legendre 1998, at 121.

we still share a common heritage and, as I like to think, the pursuit for a better world.

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