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Nordic Law – Between Tradition and Dynamism

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COMPARING FINLAND AND SWEDEN: THE STRUCTURE OF LEGAL ARGUMENT

1 Comparative Law

Comparing Finland and Sweden – and it took me a while to find a suitable metaphor – is like comparing a Saab with a Volvo. Both are cars. They absolutely belong to the same class of family cars. They generally have the same function, to drive safely at a relatively good speed, but definitely not racing, from home to work and on vacation. Only when it comes to nuances can you find some differences. One signals intellectual values, the other working middle class.

To stay in the world of cars, if you wanted to compare systems,[1] you would compare one based on private transportation, such as the United States, with one with public transport, such as the Greater-Stockholm area. To be global, you might add a developing country that still relies on rickshaws or bicycles, or Greater-Copenhagen, for that matter. You would not compare Finland with Sweden, two countries which definitely belong to the same transport as well as legal family, the Scandinavian legal tradition based on statutory law, with strong Continental influence, a liberal political tradition and a welfare state with individual benefits.[2]

If you were interested in the functions of legal institutions,[3] such as consumer bankruptcy or telecommunications surveillance, you would probably choose countries with

1 The traditional task of comparative law has been the classification of national legal systems into broader groups of legal families. See the classic works by Renee David, e.g., *Comparing Legal Cultures*, Aldershot: Dartmouth (1996) and Konrad Zweigert & Hein Kötz, e.g., *Introduction to Comparative Law*, Oxford: Clarendon Press (1998).

2 The Scandinavian legal family is sometimes included in the continental legal systems and sometimes counted as a legal family of its own. See e.g., Smits in this issue.

3 According to Zweigert & Kötz *functionality* is "the basic methodological principle of all comparative law", supra at 34. For an account of functionalism in comparative law and its challenges see Michele Gradiadei, "The functionalist heritage", in Pierre Legrand & Roderick Murray (eds), *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press (2003), 100–127.
A lot of comparative work is devoted to comparing legal institutions in a number of countries, selected by various criteria. Often the purpose of such comparison is instrumental; to serve law drafting, harmonizing legislation or analysing common legal principles for the purpose of interpretation and com-

somewhat but not too different histories in a market economy and constitutional rights. You might compare the somewhat conservative payment morality in Germany with the market efficiency approach and ideology of the fresh start in the United States in the context of consumer bankruptcy,[4] or you would compare the histories of legal telecommunications surveillance and its relationship to the constitutional and human rights regimes in the formerly socialist or authoritarian countries and in some countries of the "free world". But to compare Finland with Sweden? You would not expect any differences in functions worth mentioning.

Why then compare a Volvo with a Saab – as I do every day? I find it more fascinating day by day. There seem to be a number of reasons for doing it, beside the circumstances that have led me to work in Sweden after almost twenty years in Finland.[5] The most usual reason for comparing Finland and Sweden is the adaptation of alternative legislative solutions or interpretation in one's own system. This is surely easier if the legal system being compared to is close to one's own. This is not, however, my interest here. The questions that intrigue me arise from my everyday experience, from observations of court practice and discussions with colleagues and students, and concern legal thinking. Do Swedish lawyers think differently from Finnish ones? How differently do they argue?

parison is done without methodological scruples under what Van Hoecke would call naïve epistemological optimism. See Mark Van Hoecke, "Deep Level Comparative Law", in Mark Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law*, Hart Publishing (2004), 165–196, 172. It is possible to compare the letter of the law (formalist comparison), but often it is interesting also to compare the law in action (realist comparison); that is, its functions. See, e.g., Jaakko Husa, *Nordic Reflections on Constitutional Law: A Comparative Nordic Perspective*, Frankfurt am Main: Peter Lang (2002), John C. Reitz, "How to Do Comparative Law?" *American Journal of Comparative Law* (1998), 617–636, at 621. An interesting example of functional comparison is the judgement of M.C. v. Bulgaria by the European Court of Human Rights 4.12.2003. The applicant had claimed that the police and prosecutor did not investigate a complaint of rape and that it amounted to a violation of her rights to privacy and to protection against cruel and inhuman treatment (integrity). The Court made a broad comparative study of the rape laws of its member states, some other countries and the case law of ICTY, concluding that the laws are either based on the element of non-consent or on the element of the use of force and coercion. The Court went further and analysed the implementation of the element of force, concluding that it is and should be interpreted as meaning non-consent. "...the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim" (point 166 of the judgement). It is left to the reader to reflect on the functionalism in the Court's reasoning.

4 See Johanna Niemi-Kiesiläinen, "Collective or Individual? Constructions of Debtors and Creditors in Consumer Bankruptcy", in Niemi-Kiesiläinen, Ramsay & Whitford (eds), *Consumer Bankruptcy in Global Perspective*, Hart Publishing (2003), 41–60 and other articles in the same book.

5 I recognize the difficulty of understanding the "other", the legal system which being compared, the difficulty that is so elegantly described by Michel de S.-O.-L'e Lasser in The question of understanding. In Pierre Legrand & Roderick Murray (eds), *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press (2003), 197–240, 202, 222. As a Finnish legal scholar, working in Sweden, I would like to add one more to the problems of comparison. I find it difficult to keep up with the developments in my "own" original legal system while I work with the "new" legal system..

Why do my students in Sweden always talk about the purpose of the law, while the Finnish students never bother with this? Where are the legal principles in legal argumentation?

The interest for understanding how the lawyers think in different legal systems has been emphasized in recent comparative theory.[6] William Ewald argues that the aim of the comparative law should be "an understanding of conscious ideas at work in the legal system; that is, the principles, concepts, beliefs, and reasoning that underlie the foreign legal rules and institutions."[7]

A large comparative project mapped the doctrine on legal sources in ten European countries and the United States in the 1990s.[8] Comparisons in the different modes of legal argument have utilized the difference between common law and continental written law countries.[9] While it is sometimes claimed that the systems are converging, Pierre Legrand argues that the difference in the *mentalité* are quite profound, culturally anchored, and he questions the need to overcome them.[10] 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 with lawyers from the other system but it may also benefit understanding of one's own legal system. As Legrand argues, the recognition of difference is the basis of comparison.[11] Perhaps the recognition of difference is sometimes easier when the object of comparison is closer. A car person would probably laugh at my metaphor and argue that a Saab and a Volvo are based on completely different concepts.

As a further step, I would also like to ask if it matters whether the lawyers in two legal systems use different modes of argument? Are the outcomes different? Do the texts construct different meanings?[12] How are the middle class image of a Volvo and the West

6 Reitz supra at 628.

7 William Ewald, "The Jurisprudential Approach to Comparative Law: A Field Guide for "Rats", 46 *American Journal of Comparative Law*, 701–708, at 705.

8 Neil MacCormick & Robert Summers (eds), *Interpreting Statutes: A Comparative Study*, Aldershot: Dartmouth (1991) and same (eds), *Interpreting Precedents. A Comparative Study*, Aldershot: Ashgate/Dartmouth (1997).

9 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. Pierre Legrand, "Uniformity, Legal Traditions and Law's Limits", *Juridisk Tidskrift* (1996–97), 306–322. Markesinis analyses the differences in attitudes towards academic writings and oral pleadings in these two traditions in his lecture "A Matter of Style" 110 *The Law Quarterly Review* (1994), 607–628.

10 Legrand (1996–97), 321.

11 Pierre Legrand, "The same and the different", in Pierre Legrand & Roderick Murray (eds), *Comparative legal Studies: Traditions and Transitions*, Cambridge University Press (2003), 272.

12 Mary Ann Glendon has pointed out that interesting legal comparisons should and could lead to analysing and understanding of the way "a society make sense of things". Legal discourses select certain facts and factual situations as legally relevant and also give meaning to them through legal norm and interpretations. Glendon draws attention to the symbols and stories that the legal texts reflec Mary Ann Glendon, *Abortion and Divorce in Western Law*, Harvard University Press (1987), 5–9 reprinted in Mary Ann Glendon, Michael Gordon & Christopher Osakwe, *Comparative Legal Traditions: Texts, Materials and Cases*. 2 ed., St. Paul: West Publ. (1994), 16.

Coast intellectual image of a Saab constructed? This reading, however, goes beyond this project.

Theoretical comparisons on the interpretation of legal sources show both similarity and difference between Finland and Sweden.[13] The theoretical approaches in the countries are discussed in the following, highlighting the different attitudes toward the functions of law and legal principles. Because my interest arises from the "grassroots" level, I also wanted to compare the argumentation in practice. For that comparison, I have chosen Supreme Court cases from my other research, consumer debt adjustment and crime investigation.

2 Modes of Legal Argument

The differing modes of legal argument in Finland and Sweden have been on my mind for about a decade. The difference I am talking about can be phrased in various ways. What first became so intriguing was the functional approach of Swedish legal doctrine. The functions or purposes of law as a source of law were discussed in doctrine more than I ever had noticed in Finland. I was forcibly struck by this method as the opponent of Marie Tuula who related her comparative analysis of insolvency law to the purposes of the law.[14] She persuasively defended her thesis that the institutions of the new Swedish reorganization law of 1994 did not correspond to its stated purpose. Claes Sandgren attributes, in his study on Swedish doctoral theses, the teleological method especially to researchers at the University of Uppsala. Tuula is associated with the universities of Stockholm and Gothenburg, which indicates that the method is more wide spread.[15]

Compared to Finland, the difference seemed to be both quantitative and qualitative. Finnish legal theory seemed to focus on the legal principles, and the functions of law were hardly ever discussed. The difference between Finnish and Swedish doctrine on legal sources has been noted several times before, particularly, the more pronounced role of the preparatory works as a source of law in Sweden having been emphasized.[16] In this article, I explore the role of functional arguments, including both formal references to preparatory works and material arguments on the purposes and functions of law, in the doctrine and practice of those two countries. My thesis is that functional arguments

For constructionist reading of legal texts, see Johanna Niemi-Kiesiläinen, Päivi Honkatukia & Minna Ruuskanen, "Legal texts as discourses", in Margaret Davies, Åsa Gunnarsson & Eva-Maria Svensson (eds), *Feminists against Pessimism*, Aldershot: Ashgate (forthcoming 2006/2007).

13 Aleksander Peczenik & Gunnar Bergholz, "Statutory Interpretation in Sweden", in MacCormick & Summers (1991) (eds) supra at 311–358 and Gunnar Bergholz & Aleksander Peczenik, "Precedents in Sweden", in MacGormick & Summers (eds) (1997) at 293–314. Aulis Aarnio, "Statutory Interpretation in Finland", in MacGormick & Summers (eds) (1991) supra at 123–170 and, "Precedents in Finland", in MacCormick & Summers (eds) (1997), supra at 65–101.

14 Marie Tuula, *Rekonstruktion av företag inom insolvenslagstiftningens ramar en jämförande studie av svensk och amerikansk insolvensrätt*, Iustus (2001).

15 Claes Sandgren, "Hänvisningar i rättsvetenskapen", *Juridisk Tidskrift* (2005/06), 65.

16 See, for example, Allan Rosas, "Tolknings- och tillämpningsproblem i mötet mellan nordisk och internationell metod". Det 37th Juristmøde. Reykjavik 2005 http://www.congress.is/njm2005/, 317–345 at 335.

have a more pronounced role in Sweden than in Finland. For Finland, I will outline a different bend in legal theory, putting increasing emphasis on legal principles. I will pay attention to how the courts use functional arguments and legal principles in the case law but I make no presumption that the Finnish courts are more inclined to use legal principles in their argument than the Swedish ones.

To understand the functionalism in Swedish law one has to look at the influence of Scandinavian realism, the Uppsala school of philosophy in the 1930s, on Swedish legal thought. Some of the most famous representatives of that school, Vilhelm Lundstedt, Karl Olivercrona and Alf Ross, were both philosophers and legal theorists. 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]

Both Scandinavian realism and the analytic school of jurisprudence took distance from conceptual jurisprudence (*Begriffsjurisprudenz*) and natural law. To draw conclusions from and make recommendations for the correct 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 components and seek guidance as to the interpretation of law from this analysis.

3 Scandinavian Realism, Legal Theory and Functionalism

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. 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 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

17 Markku Helin has researched the relationship between the Scandinavian realism and the Finnish analytic legal theory in his nominal thesis in 1987. The following discussion draws heavily on his work. Markku Helin, *Lainoppi ja metafysiikka*, Finnish Lawyers' Publishing (1987).

18 Analytic jurisprudence is the term used in Finnish for the dominant school of legal studies from the 1950s till 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.

19 Alf Ross, *Ret og retfærdighet: En indførelse i den analysiske retsfilosofi*, Nyt nordisk forlag (1966), 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), 204, Ross (1966), 456, Lundstedt (1956), 159, 201.

21 Hägerström, *Gällande rätt*, 83–83; Ross (1966), 63, 79, 89.

theorist, an MP and a 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] Neither was he a value nihilist, thinking that social utility and shared social values go hand in hand. Against this background one might expect that Lundstedt would value law as a tool of social engineering and a means of promoting social change, but even he seems to downplay such ideas and emphasises that social values could be realised in legal security and promotion and protection of credit and market exchange.[24]

In later Swedish legal tradition, the purpose of the law becomes central. Its purpose is divided into two parts, the subjective and the objective. The subjective, that is, the aims of the legislator, are all but denied.[25] They are unclear, insufficient, too general and probably outdated, and can not be attributed to certain person called "the legislator"[26] – an argument that I have always found difficult to understand, since both Swedish and Finnish *travaux préparatoires* tend to be detailed and rich in discussions on the purposes and correct interpretation of the law. Notwithstanding, the law is seen as an important means of guiding the behaviour of citizens.

The objective functions of the law, instead of the subjective aims of the legislator, 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. 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.[27] For example, the central function of the civil procedure, according to Ekelöf, is to promote a foreseeable and secure credit market.[28] This statement has provoked a lot of discussion among the procedural scholars in the Scandinavia;[29] 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, most textbooks list the sources of law in this order: law, preparatory works and

22 Lundstedt (1956) at 215.
23 Vilhelm Lundstedt, *Legal thinking revisited*, Almquist and Wicksell 1956 at 134, 150.
24 Lundstedt (1956), 139. This applies especially in private law.
25 For a philosophical critique of the "state will", see Axel Hägerström, "Är gällande rätt uttryck av vilja?" *Festskrift Vitalis Norström* (1916), at 171–210.
26 Ross (1966), 166. P.O. Ekelöf, *Är den juridiska doktrinen en teknik eller en vetenskap?*, Lund: Gleerup (1951), 28; P.O. Ekelöf, *Processuella grundbegrepp och allmänna processprinciper*, Stockholm: Norstedts (1956), 8; P.O. Ekelöf & Robert Boman, *Rättegång I.*, 7th ed., Stockholm: Norstedts (1990), 80.
27 Ekelöf & Boman (1990), 69–82.
28 Ekelöf & Boman (1990), 12.
29 A critique of Ekelöf's theory is also found in Peczenik (1995), 367.

precedents,[30] and include a lengthy discussion on the subjective and objective purposes of the law connected to the preparatory works. In addition, some Swedish theorists recognize another source of law that has a functional character, the real arguments (*reella överväganden*).[31] 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.

4 Analytic and Post-Analytic Theory in Finland

According to Markku Helin, Scandinavian realism had considerable influence in Finland. Simo Zitting laid the foundations for the Finnish legal doctrine for the next thirty years in the 1950s. The analytic school of jurisprudence used the method of splitting the legal relationship, such as the transfer of ownership, into its smallest elements.[32] 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 most students of law since its publication.[33] In several books Aarnio has 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 arguments or real arguments. Aarnio classifies the legal sources into (1) strongly binding, (2) weakly binding and (3) accepted sources of law.[34] 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.[35]

30 For example, the practical textbook the law students use, *Finna rätt: Juristens källmaterial och arbetsmetoder*, 9th ed., Norstedts (2006), written by several professors of the University of Stockholm, lists the sources in this order. See also Stig Strömholm, *Rätt, rättskällor och rättstillämpning* (1996), 292–298 and Bergholz & Peczenik (1997), 298.
Peczenik and Bergholz discuss precedents before the preparatory work in their 1991 article (supra 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 given to the rationally constructed ratio, not the views of individuals who participated in the legislative process (at 327–328). See also Alexander Peczenik, *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation*, Norstedts (1995), 215, for a detailed classification of legal sources.
31 Ross (1966), 169, 466.
32 Simo Zitting, *Arvopaperin luovutuksensaajan oikeussuojasta*, WSOY (1957), 13; Simo Zitting, *Lärobok i sakrätt: allmän del*, Vammala (1971), 2. Generally about the Finnish analytic legal theory see Aulis Aarnio, *Philosophical Perspectives in Jurisprudence*, Acta Philosophica Fennica Vol 36 (1982), 20–30.
33 Aulis Aarnio, *Laintulkinnan teoria* (1989). His work is also to a large extent available in English.
34 The same classification was used by Peczenik & Bergholz in 1991.
35 See Aulis Aarnio, *Reason and Authority: A Treatise on the Dynamic Paradigm of Legal Dogmatics*, Dartmouth (1997), 82.

In the group of binding sources we find law, systematic arguments[36] 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 is that law and the custom of the land are mentioned as sources of law in the Code of Procedure Chapter 1 para 11, but this less convincing since the same paragraph also mentions the purpose and the foundation of the law.[37]

The two groups of arguments related to the purpose and function of the law warrant some attention. The purpose of the law can, according to Aarnio, be traced from the preparatory works only with trouble and uncertainty.[38] 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.[39] 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.[40]

Interestingly, there is no place for legal principles in Aarnio's doctrine of legal sources.[41] At the time of publishing his book, his student Juha Pöyhönen (later Karhu) had already published his thesis on contract law,[42] which, together with Tapio Lappi-Seppälä's thesis on criminal law,[43] introduced legal principles into Finnish legal theory. Their books were the beginning of a new era, which Kaarlo Tuori much later called post-analytic.[44] The theory of legal principles relies on Robert Alexy's theory of legal argumentation[45] and, less immediately, on Ronald Dworkin's theory of legal principles.[46] Essential to the theory was 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

36 For the central role of the legal system in interpretation, see Aulis Aarnio, *On legal reasoning*, University of Turku (1977), 266–281.

37 Aarnio (1989), 220. The paragraph mentioned is one of the few that have not been reformed since the Code of Procedure was first enacted in 1734.

38 Aarnio (1989), 226–227.

39 Aarnio (1989), 229.

40 Aarnio (1989), 240–241.

41 Principles are discussed elsewhere in the book (Aarnio (1989), 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), 174–186.

42 Juha Pöyhönen, *Sopimusoikeuden järjestelmä ja sopimusten sovittelu*, Suomalainen lakimiesyhdistys (1988).

43 Lappi-Seppälä Tapio, *Rangaistuksen määräämisestä I*, Suomalainen lakimiesyhdistys (1987).

44 Tuori Kaarlo, "Sosiaalisesta siviilioikeudesta myöhäismoderniin vastuuoikeuteen", *Lakimies* (2002), 902–913 at 902.

45 Robert Alexy, *Theorie der juristischen Argumentation: Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Suhrkamp (1983).

46 Donald Dworkin, *Taking Rights Seriously*, Harvard University Press (1977).

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.[47] After the reform of constitutional rights in Finland in 1995, several legal scholars have found the legal principles in their areas in constitutional and human rights. Juha Pöyhönen (Karhu), now Professor at the University of Lapland, has even used constitutional rights to develop a theory of new system of law of property and obligations.[48] In my own field of procedural law, Jaakko Jonkka,[49] Tatu Leppänen[50] and Anna Nylund[51] develop the legal principles even if, in my opinion, this is more difficult in procedural law than in the material disciplines of law. Just to take one example, Laura Ervo discussed the fairness of the trial in her thesis choosing both the human rights standards and Habermas' criteria of ideal communication as the measure of fairness.[52]

5 Conclusions on Theory

There seems to be an obvious difference in the theory of legal sources in Sweden and Finland. My initial thesis about the more pronounced role of functional arguments in Sweden seems to hold in the light of the theory. In Finland, the systematic arguments and the customary law had high status in Aarnio's theory in 1989. The legal principles have since then been elevated to the level of legal norms and an abundant theoretical discussion on legal principles is reflected in legal science in various fields of law. We do not find equivalent discussion on legal principles in Sweden and the functional arguments are crucial. Peczenik and Bergholz have observed that Swedish judges tend to down-play the role of interpretation reducing interpretation into harmonization of materials deriving from the legislator, the courts and various organizations.[53] It might be that this pursuit of harmony underlines both the weight of the legislative material and real arguments in the interpretation.

The doctrines of legal sources in both countries, as discussed here, are formal in nature. Legal principles are not mentioned in the context of legal sources.[54] In later Finnish theory, Hannu Tolonen makes a distinction between formal and material sources of

47 Aarnio has also adopted it in his later work. See Aarnio (1997), 174–185.

48 Juha Pöyhönen, *Uusi varallisuusoikeus*, Lakimiesliiton kustannus (2000).

49 Jonkka Jaakko, *Syytekynnys: Tutkimus syytteen nostamiseen tarvittavan näytön arvioinnista*, Suomalainen lakimiesyhdistys (1991).

50 Leppänen Tatu, *Riita-asian valmistelu todistusaineiston osalta: prosessioikeudellinen tutkimus*, Suomalainen lakimiesyhdistys (1998).

51 Anna Nylund, *Tillgång till den andra instansen i tvistemål*, Finnish Lawyers' Association (2006).

52 Ervo Laura, *Oikeudenmukainen oikeudenkäynti*, WSOY (2005).

53 Peczenik & Bergholz (1991), 321. They do not mention real arguments as a source of law, but do state that when arguments are in conflict, the purpose of law is decisive. Lundstedt, not surprisingly, underlines the consensus on the values behind the laws see: Lundstedt (1956), 161.

54 Peczenik, for example, discusses the legal principles but not as legal sources. Peczenik (1995), 446.

law, placing legal principles in the latter group. In his theory on legal sources (2003), principles are placed after law, the preparatory work and case law.[55] Keeping in mind that Tolonen shares Aarnio's scepticism towards the purpose of law as expressed in the *travaux préparatoires*, it is a fair conclusion that legal principles have achieved high status in the Finnish theory of legal sources.

When look at examples from case law in the following, I will face the problem that the sources of law may be difficult to distinguish from each other. Some arguments may be formulated either in principles or in functions. For example, a rule that concerns the protection of privacy can be formulated either so that it protects that principle or so that its purpose is protect privacy. The distinction is not necessarily clear cut. My intention in the analysis is to accept the formulation of the court; whether it has formulated an argument as a principle, a purpose or a systematic argument.

6 Empirical Study

The interest in comparing the modes of legal argument in these two countries arose in my work on consumer debt adjustment (consumer bankruptcy) law and practice. Reading the decisions of the supreme courts of both countries, I first noted the absence or presence of the purposes of the law in the decisions. The purpose of consumer debt adjustment law is fairly obviously, to rehabilitate the debtor from an insurmountable debt burden by granting her a partial or total discharge of debt in a regulated debt adjustment procedure. On the other side, the interests of the creditors are acknowledged. Debt adjustment and the discharge of debt may not be granted if the debtor has acted in an inappropriate manner. The purpose of these regulations is not primarily or solely to protect the creditors in an individual case but also to uphold the general payment morality.[56]

The conditions for discharge are regulated in different ways in the Finnish and Swedish debt adjustment laws. Both require that the debtor be essentially insolvent, that is, hopelessly in debt. The Swedish law allows for debt adjustment if it is reasonable taking into account the personal and economic circumstances of the debtor and, in particular, the age of the debts, the circumstances in which they were incurred, the debtor's sacrifices to pay the debts, the attempts to reach an agreement with the creditors and the cooperation in the debt adjustment procedure. According to the Finnish law, a hopelessly insolvent debtor is granted a debt adjustment unless one of the obstacles enumerated in the law exists. Since the enactment of the laws in 1993 and 1994, the number of debt adjustments in Finland has been many times greater than in Sweden.[57] The formulation of the conditions may be a partial explanation of this difference even though the severe downturn in the Finnish economy in the late 1980s and early 1990s may be a far more

5 Hannu Tolonen, *Oikeuslähdeoppi*, WSOY (2003).

6 On the moral character of the Swedish debt adjustment law, see Bo Carlsson & D. Hoff, "Dealing with Insolvency and Indebted Individuals in Respect to Law and Morals", 9 *Social and Legal Studies* (2000), 293.

7 The number of debt adjustments in Sweden has slowly risen to its present level of about 3,000 filings per year. In Finland, the number of filings went up to 10,000 in the mid-1990s and levelled out at ca 4,000 filings per year by the end of the 1990s.

important reason. These differences probably make no difference to the structure of argument, which I am interested in here.[58] The decision to grant a discharge is, in the end, always a balance between competing interests.

I started my empirical research by looking at how the Supreme Courts argue on the conditions of discharge. My material consisted of 18 judgements of the Finnish Supreme Court and 14 Swedish Supreme Court decisions.[59] The research produced unexpected results. In fact, it gave no results at all. References to the purposes of the laws were simply absent. I observed that in the Swedish cases the district courts had in some cases used a standardised reference to the rehabilitative purpose of the law. This observation may be counted as support for my thesis that the Swedish courts are more familiar with the argument in terms of the purpose of the law. When the case came to the Supreme Court, such references became rare. In the Finnish cases, the Supreme Court had referred in one judgement to the purpose of the provisions of precluding debt adjustments that would endanger the general payment morality.[60] In another judgement, reference was made to the "effect that the debt adjustment would have on the debtor's and the creditor's situation".[61]

What then did the courts do? They subsumed the facts in the case under the relevant rule of law, quoting law text and sometimes the preparatory works. It is possible that the purposes of the law were implicitly present in the reasoning of the courts when they discussed the legal prerequisites of debt adjustment. Since my interest is the mode of argument, not the material application of the law, I decided not to go into the legal analysis and discuss its relationship to the purposes of the law. Instead, I decided to stay in the formal analysis of the arguments and to undertake a qualitative study of two judgements that I knew were rich in arguments.

7 First Pair of Cases: Debt Adjustment

These judgements were both result of a vote in the Supreme Court. In the Swedish case, the minority concurred but in the Finnish case it was dissident. However, the fact that there was a vote indicates that the case was understood as a tricky one.[62]

In the Swedish case (HD 2004 s. 220), the issue was the status of an unknown, disputed debt in debt adjustment. According to the main rule,[63] debts that are reported neither by the debtor nor the creditor (unknown debts) are discharged in the debt

58 It may explain the differing use of purposes. In Sweden the rare references are to the rehabilitative purpose and in Finland to the purpose of upholding the payment morality. See the next paragraph.

59 I am grateful to Anna Norsten Seweha, a law student at the University of Umeå, who discussed the same cases in her essay "Kvalificerad insolvens och skälighet", 2006-01-12.

60 KKO 1997:15. In another cases the Supreme Court confirmed the decision of the district court, which had used the same reasoning (KKO 1995:50).

61 KKO 2002:21.

62 The cases are somewhat technical and do not have corresponding case law or even provisions in the other country. This is not a problem because I will only compare the structure of argument, not the material content.

63 Skuldsaneringslagen 26 §.

adjustment.[64] Some debts, however, are exempted from the discharge effect and survive the debt adjustment. This exception was regulated by a reference to article 6 of the Debt Adjustment Act, which lists debts that are not discharged in the debt adjustment. The exemption covers, for example, maintenance debts and debts that are disputed. In this case, the creditor (ex-spouse[65]) did not know about the debt adjustment and claimed that the debtor should pay his part of their shared housing loan. The debtor denied the claim on the grounds that he was not liable for the payments and that it was prescribed in the debt adjustment. As an unknown debt the debt should be discharged but as a disputed one not.

The judgement includes several explicit references to the government's proposal for the Debt Adjustment Act. It is explained that exemptions to the discharge were added to the proposal after the *Lagråd*, the committee of Supreme Court judges that is entrusted with examining the Bills, had done its work. The proposal gave no guidance on the interpretation of the said exemptions.

The Court uses both interests and principles in its argument. First, it confirms the somewhat antagonist interests of rehabilitation and upholding the creditor's rights, which also is an interest for society. It then refers to two classic principles of insolvency law, the inclusion of all debts in the procedure and equality among creditors. Furthermore, the Court noted with reference to the Bill that the disputed debts were exempted from the discharge for practical reasons. Finally, the court uses a "*reella övervägaden*" reasoning about the consequences of excluding or including the disputed debt from discharge. The conclusion is that the unknown and disputed debt is discharged and the exception rule is not applied.

The Finnish case concerns revocation of debt adjustment (KKO 2002:50). The issue in this case is when the creditor loses his or her right to request revocation because of passivity. The debt adjustment can be annulled if the debtor neglects the payments that she is obliged to make according to the confirmed payment plan without due reason. The creditor must request annulment without undue delay.[66] The debtor had neglected the payments since March 1998 after making regular payments for two and a half years. The creditor had reminded the debtor in September 1999, asked for enforcement of the judgement later in 1999 and requested annulment in July 2000, immediately after the payment plan would have ended had it been fulfilled.

The Court made reference to general principles of private law according to which the passivity of the creditor does not decrease the creditor's right to fulfilment but may have lesser effect on the creditor's right. The Court argues that the annulment is not part of the regulation of monetary obligation but an insolvency regulation that concerns all creditors (a systematic argument). The Court then strikes a balance of interest, coming to the conclusion that the annulment would be harsh towards the debtor while having little effect on the creditors. Therefore, the conclusion is that the creditor has no right to

64 This rule is common in insolvency law. This is one of the reasons why the insolvency procedures are publicly announced. Exceptionally, the Finnish debt adjustment has no such effect.

65 Interestingly, the Supreme Court makes no reference to the relationship between the debtor and the creditor.

66 Act on Debt Adjustment of Private Individuals 61 §.

remain passive and loses his right to request annulment about six months after the debtor stopped the payments.

The minority also referred to the general principles of private law, seeing no reason to make any exception to them. Since the payments were dismissed until the end of the payment plan the creditor had a right to seek annulment.

Interesting in the arguments of both the majority and the minority is the reference to the general principles of private law, rather than using functional "*reella övervägaden*" arguments. There was no discussion about the possible effects the decision may have on behaviour of the debtors or the creditors in general, such as would the decision have the consequence that institutional creditors feel forced to seek annulment sooner. The majority went in this direction when it mentioned that the creditor does not need to seek annulment at once but that she could remind the debtor and give the debtor time to catch up. This is a very sympathetic idea. It was not discussed along the lines of consequences of the decision, however, but rather by way of stating guidelines for good creditor practice.

8 Criminal Law

When I said earlier that the laws have the same functions in Finland and Sweden, I neglected the criminal law. There are two approximately opposite views about the purpose of the criminal law. Some scholars think that it exists for the purpose of showing people how not to behave and to control their behaviour in a negative way by prevention. Some others, like Professor Nils Jareborg, say that criminal law exists to protect the criminal against undue reactions from his fellow citizens by channelling the reactions to crime to the legal system. The latter view is also dominant in Finland, in my opinion.

In Sweden, the criminal law has become more of a tool of politics. For example, the criminal law has been used systematically for the prevention of economic crime over the years. In more recent times, the policy on equality has discovered the criminal law. During the 1990s, a project called women's peace actively sought legal measures to combat violence against women. Among the criminal law measures undertaken were the enactment of a new crime, grave violation of women's peace, that makes repeated battery of a spouse or other close person more serious than other repeated crimes, and the criminalization of the purchase of sex, a radical experiment because the activity of the prostitute is not a crime. Other important reforms have been the increase in punishments for sexual crimes, the prolonging of time limits for prosecution for sexual abuse of children and a reform of laws on trafficking of women.[67]

Notwithstanding this activity in the field of criminal law, there seems to be little room for functional arguments in criminal law.[68] Interpretation is guided by the principle

67 See Johanna Niemi-Kiesiläinen, "Feminist Policy against Violence in Sweden", in Ulla V. Bundeson (ed.), *Law and Morality*, Köbenhamn: Forlaget Thomson (2006), 289–300; Gudrun Nordborg & J. Niemi-Kiesiläinen, "Women's Peace: A Criminal Law Reform in Sweden", in Nousiainen K, Gunnarsson Å, Lundström K & Niemi-Kiesiläinen J (eds.), *The Responsible Selves: Women in Nordic Legal Culture*, Ashgate (2001), at 353–373.

68 Some authors argue that signs of teleological interpretation can be found in case law, even in criminal law. See Kimmo Nuotio, "Das Gesetzlichkeitsprinzip im finnischen Strafrecht", in Antonio Cavaliere

of legality, which means that an interpretation cannot be based on the purpose of the law if a more restrictive interpretation is more favourable for the defendant. There is some case law on the violation of women's peace which seems to correspond to the pattern I found in the study of the debt adjustment cases; the courts base their decisions on the application of the letter of the law without further discussions of its purpose.

The criminal procedure, to the contrary, might be more interesting. At least there are situations in which the court has to decide even if the law is lacking or unclear. The fundamental rights of citizens are at stake, but at the same time the investigation of the crime should not be hampered too much.

9 Obtaining of Evidence

The case law on the use of coercive measures in criminal investigation is not abundant in the same way as on consumer debt adjustment. Most situations are handled either by the police or the district courts and the decisions are never appealed against. Since the cases that reach the highest courts are usually tricky ones, they are suitable for my purpose of analysing the mode of argument in the court.

The cases I have chosen here for comparison concern the ways in which the police obtain in criminal investigation confidential information. These are the trickiest issues in criminal procedure, which cannot be fully regulated in law. Some of the cases also illustrate how pending regulations have become outdated in the face of new technologies. The first pair of cases concerns a search and a seizure in an advocate's office. The cases are from different time periods; the Swedish case is from 1977 and the Finnish case from 2002. In the Finnish case the difficulty of interpretation derives from the new technology (the police seized a hard disk), which could not be anticipated when the relevant provisions were enacted in 1987. Notwithstanding this, the core issue in these cases is so similar that I find the comparison worthwhile.

The next two cases are both recent, the Swedish one from 2003 and the Finnish one from 2002. Their material content is different; the Swedish case is about phone tapping and the use of surplus information and the Finnish one about a seizure of confidential information. I think that they allow a comparison of the mode of argument, which I made more interesting because both include a consideration of the case law of the European Court of Human Rights.[69]

10 Second Pair of Cases: Search and Seizure

The first example concerns a situation in which two opposing principles are in conflict; the efficiency of criminal investigation and the protection of confidential communication between the advocate and a client.

(ed.), *Das Gesetzlichkeitsprinzip im Strafrecht* (forthcoming 2007).

69 The decisions tempt one to discuss the subject matter; but my objective is simply to figure out how the courts argue, not whether the decision was correct.

In the Swedish case, NJA 1977 s.403, the prosecutor had requested the court to give a warrant to search the offices of advocate S to find an original document in a case of alleged forgery. None of the three courts granted the permission. The use of sources of law in the argument in the case is interesting.

The prosecutor invoked an expert opinion by Professor P.O. Ekelöf, then professor of procedural law at the Uppsala University. The opinion is quoted in the published Supreme Court decision, in which it occupies about four pages while the judgement itself takes about a page. In the judgement, the Court juxtaposes two interpretations, literal one and one that is based on reasoning about the functions of the law *(reella övervägande)*.

The literal interpretation states that the advocate is exempt from the duty to give statement as a witness concerning what the client has entrusted to the advocate for the presentation of his case (36:5.2 RB). Documents that reveal something that the advocate is not obliged to reveal cannot be seized (27:2 RB). The Court notes that this exception has come to cover more documents than would be necessary to protect confidentiality between client and advocate, but that is no reason to make an interpretation that goes against the wording of the law. Here the Court makes a reference to another argument that is formulated functionally, namely, that the given provision has been enacted in order to protect an individual from coercive measures by the state.

The Supreme Court deliberates on the opposing interpretation both in its one-page majority opinion and at length in the opinion of the dissenting judges. Here the Court summarises and explicitly refers to the opinion of Professor Ekelöf, concluding that protection against seizure in a case like this would lead to the possibility of abuse by allowing the client to place a forged document in the custody of the advocate, thus removing it from an investigation. This clearly functional *reella övervägande* argument was accepted by the minority of the Court.

The Finnish case, KKO 2002:85, uses a literal interpretation in a similar vein. The police had searched the office of advocate A and seized the CPU and hard disc of his computer on the grounds that he was suspected of aiding in aggravated fraud. The police copied the material and returned the original material to A. His appeal was dismissed by the courts, but the appeal of his clients B, C and D was deemed admissible (KKO:2001:39) and went up to the Supreme Court (KKO:2002:85). B, C and D claimed that the seizure of the files concerning them was illegal since the information was confidential in the client/advocate relationship and they had nothing to do with the investigation. The Supreme Court held that the police had the right to seize the hard disc, to copy it for technical reasons and investigate it in order to find the information that was under investigation. Technical reasons did not allow an exception from the prohibition on seizure. Thus, the seizure of the information concerning B, C and D violated the prohibition. The Supreme Court ordered that the information concerning them be immediately delivered to A. If this was not possible, the information should immediately be removed from the hard disc.

The decision is brief and clear. The police are allowed to seize the hard disc, copy it, investigate it in order to find the suspect information and are then obliged to return it

and destroy all information concerning third parties. The only legal source referred to in the decision is the law,[70] enacted long before anyone had heard the term hard disc.[71]

11 Third Pair of Cases: Protected Communications and Confidential Information

Finally, I want to look at how the courts reason in extremely difficult cases today by comparing two cases from 2002 and 2003. The Swedish case is about the use of third-party information obtained by phone tapping, which is probably the most tricky issue in the regulation of criminal investigation. I would like to offer a similar case from Finland but, since there is none, I decided to take a decision on the seizure of documents from the client that contain confidential client/advocate information. Since my main interest here is the mode of argument, these decisions are ideal and contemporary; both concern obtaining information in criminal investigation and both include a careful argument by the Supreme Court. In addition, both discuss the case law of the European Court of Human Rights at length.

In the Swedish case, (HD 2003 s. 323), two persons, TZ and JL, had been suspects in an investigation concerning serious drug dealing and their telephone calls were recorded by the police. The telephone calls revealed that TZ and JL orchestrated an illegal weapons transaction, in which three other persons were directly involved. The police followed the suspects, but no weapons were found and seized. All five were convicted of illegal transfer of weapons and aiding and abetting such a crime. According to Swedish law, phone tapping is allowed for drug dealing but not for illegal transfer of weapons. The police had the prescribed warrant from the court for the telephone surveillance.

The three issues before the Court were
1) whether the use of surplus information was legal,
2) how the evidentiary value of such information should be assessed and
3) whether the trial as a whole could be considered as fair.

Clearly, the first mentioned issue was unregulated in Swedish law. The Supreme Court based its decision on the legal principle of free evaluation of evidence that, according to the Supreme Court, applied "even when a piece of evidence has not been obtained according to the prescribed order or when it has been unclear how the evidence has been a acquired." The Court refers to two authorities in legal scholarship[72] and to two Supreme

70 The Coercive Measures Act 4:1 and 4:2.2; 450/1987 and the Code of Procedure 17:23; 1948.

71 Interestingly, the Court ignores the case law of the European Court of Human Rights. This case was brought in the ECHR which found that a violation of article 6 of the European Human Rights convention had taken place, as the Finnish law included no procedure for separating materials that concerned third parties from those that could be seized. See the judgement of the ECHR, Petri Sallinen and others v. Finland 27.9.2005.

72 P.O. Ekelöf & Robert Boman, *Rättegång IV*, Norstedts (1992); Peter Fitger, *Rättegångsbalken*, an updated loose-leaf commentary.

Court cases.[73] After this statement, the Court uses *a majore ad minus* argument stating that there is even less reason to consider lack of positive regulation as an obstacle to using surplus information as evidence.

Even if the Swedish law puts no obstacle in the way of considering the evidence, the Court is cautious about the effect of European Human Rights law. First, the Court discusses whether phone tapping might constitute a violation of the protection of privacy (art 8 of EHRC) of those persons who have not been the object of surveillance. Referring to the relevant case law of the ECHR and the opinion of the Swedish law council,[74] the Court admits that in the absence of adequate legal safeguards a violation might, indeed, take place. However, whether or not a violation of article 8 has taken place or not has no immediate effect on the use of the information thus acquired as evidence at a trial. Again referring to the case law of ECHR,[75] the Supreme Court concludes that it is up to the national law to regulate the admissibility of evidence, as far as the proceedings as a whole can be considered as fair. The Court goes on to state that the European Court has generally required that evidence which has been acquired in violation of art 8 may not be the only evidence in the case, but that in one case, *Khan v. Great Britain*, even the requirement of collateral evidence was toned down.[76]

Here I am primarily concerned with the use of legal sources. First, the reasoning includes several references to legislative history and a single but decisive reference to scholarship. A relevant issue is decided by analogical interpretation of case law and the opinion of the leading scholars. I do not find functional reasoning in the case. The legal principle of protection of privacy is central, but it is mentioned only with reference to the ECHR. The issue turns out to be constitutional control of what the authorities can do.

The Finnish case (KKO:2002:85) is somewhat related to the Swedish case analysed above NJA 1977 s. 403. The police had seized documents from A, who was under investigation of aggravated fraud against the creditors. The documents included an exchange of messages between A and his Spanish lawyer concerning transfer of funds and purchase of real estate in Spain. The procedural rules on client/advocate confidentiality prohibit the counsel from testifying about matters that the client has entrusted him/her to pursue the client's case (Code of Procedure 17:23.1 at 4). Documents containing such information are also excluded from seizure, even if they are in the possession of the client (Act on Coercive Measures 4:2.2).

73 HD 1986 s. 289 (blood test) and HD 1998 s. 204 (video, the origin of which was unclear). The Court also referred to the statement in recent preparatory works for new legislation.

74 Kopp v. Switzerland 25.3.1998, Amann v. Switzerland 16.2.2000 and opinion of the Lagrådet 9.5.2000, as stated in prop. 2002/03:74.

75 Schenk v. Switzerland 25.2.1998 and Khan v. United Kingdom 12.5.2000 and P.G. and J.H. v. United Kingdom 25.9.2005.

76 After the case was decided, a new proposal on the use of surplus information in telecommunications surveillance was presented to the Parliament (prop. 2004/05:145). The new law, allowing the use of such information in the prosecution of crimes that can be punished by a prison sentence for at least one year, came into force in 2005.

The Court formulated as crucial issues the interpretation of the concept of counsel and the interpretation of "matters that the client has entrusted to counsel to pursue the case". It was not disputed that the documents in question were confidential according to the Advocates' Act. The issue was whether the confidentiality also holds when the advocate is heard as a witness at the trial. The starting point at issue is the interpretation of the wording of paragraph 17:23.1 point 4 of the Code of Procedure (1948).

The further reasoning of the Court is very principled, starting with the principle of material truth, which can be formulated as a principle or as a purpose (functional formulation) and the Court actually refers to it as a purpose, such an important one that the exceptions from liability to testify should not be interpreted more broadly than the wording and the protected interest of the exception necessitate. On the other side, the client/advocate privilege belongs to the *Rechtsstaat* (rule of law) guarantees, which are protected by the right to a fair trial in §21 Constitution. More specifically, and now the argument takes on a functional tone, everyone has to be able to turn confidentially to the person whom she asks to represent herself. The rule of law guarantee, however, exists only for the trial, not for general legal and economic counselling.

After its principled reasoning, the Court turns to the functional argument that an interpretation that would give the advocate equally extensive privilege at the trial as the confidentiality according to the Advocates' Act would endanger the principle of material truth and encourage abuse (by giving the client the opportunity to hide whatever document in the advocate's office). Equally, the Court uses a functional argument in fearing that this interpretation would extend the scope of privilege in an uncontrolled manner since there are no formal requirements for legal counsel in Finland.

Finally, the Court turns to the ECHR and discusses confidentiality in the light of two cases from the European Court, *Campbell v. Great Britain* (1992) and *Niemetz v. Germany* (1992). The Supreme Court distinguishes its case from these two, concluding that they are not applicable. The Court admits that the information at issue may belong under the protection of privacy. However, the documents at issue, according to the Court, have no connection with the proceedings and thus the ECHR does not require an extensive interpretation of client/advocate privilege in the Code of Procedure.

In this case as well as the Finnish case on debt adjustment (KKO:2002:50), systematic arguments unexpectedly take a central role; it is of importance that the privilege in the Code of Procedure can be interpreted more narrowly than confidentiality according to the Advocates' Act. In this respect, the wording of the Code of Procedure "entrusted A to pursue the case" becomes important. Moreover, the case discusses the principles of material truth in the law of evidence and the *Rechtsstaat* principle, but this discussion takes on a functional flavour. The consequences of respective interpretations (*reella överväganden*) are discussed. Like the Swedish case, the case law of ECHR was discussed but this case was distinguished from those cases in which a violation of the convention was identified.

12 Conclusions

The first observation of this exercise is methodological. A quantitative analysis of the argument in case law would be extremely difficult because in the bulk of cases the reasoning has the form of syllogism.

In both countries many cases seem to be decided without very advanced use of legal sources, by simply applying the relevant legal provisions. It is of course possible and even likely that the courts have consulted preparatory works, case law and legal literature, but since the case does not require further elaboration, their possible effect is less immediate and obvious.[77] In the case law on debt adjustment, we can also distinguish a balancing of interests or principles, which might be worth another study. Since the interests or principles referred to were verbatim references to the law text, they were not the object of this study, which focused on the use of functional arguments and (more general) legal principles.

The qualitative study of six cases gave interesting results, but no generalisations can be made on the basis of such limited material. The results indicate, however, that such a study is both possible and interesting.

The most obvious difference is the explicit reference to legal sources by the Swedish Supreme court and the lack of such explicit references in the Finnish Supreme court. The Swedish courts make explicit reference to the legal literature and to the *travaux préparatoires* frequently, at least in these cases. References to preparatory work seem to be more frequent in the interpretation of new laws (debt adjustment law) and references to legal literature are more common when the interpreting an older law (Code of Procedure from 1942). The Finnish Supreme court had no references to legal literature and very few references to preparatory work.

Even though my material has been limited, it gives some support to my thesis that the Swedish courts use functional reasoning more often than the Finnish courts. With the exception of the last mentioned Finnish case (KKO:2003:119), I found no examples of functional reasoning in the Finnish cases, whereas such reasoning seems to be quite usual in Sweden in tricky cases.

The use of legal principles probably needs more investigation before anything more general should be said. My evidence indicates that the Supreme Courts in both countries refer to legal principles, at least in tricky cases. On the basis of this study I cannot state that the discussion on legal principles in the Finnish legal doctrine has influenced case law, but this might be an interesting issue to pursue in future research.

An unexpected result of my study is the use of human rights arguments in the reasoning of the Supreme Courts. Human rights were used in a rather similar way in the two last cases analysed, both the Finnish and the Swedish one. Reference to human rights was used as constitutional review, that is, to ensure that the domestic law and application

[77] It might be possible to trace the arguments and how they are transferred from different sources even when the sources are not explicit. In this study I was interested in how the courts structure their argument and such an effort seemed irrelevant.

of law is acceptable within the case law of the European Court of Human Rights. This is completely correct, of course. The problem comes when the principles of protection of privacy and fair trial are hardly recognized as principles of domestic law. It seems that the interpretation of the most fundamental legal principles is entrusted to the European Court of Human Rights, which, for its part, has made it clear that it only ensures that the national law does not violate the Convention and that it has primacy in the important fields of fair trial, including law of evidence. In these cases, there is no doubt that the regulation of seizure of items as evidence, telecommunications surveillance, and how the information is used as evidence at the trial are matters that belong to the domain of national law. The Human Rights Convention and the Court can only impose limits and control that the domestic regulations do not violate the Convention. When the domestic law does not regulate a matter, the domestic courts should develop legal principles for such situations. If the domestic court only concludes that what was done does not violate the Convention, the fundamental domestic rights and principles remain void of content. Thus, we are left with the question of where the legal principles are developed.

Allan Rosas has argued that, as a consequence of the European legal integration, the Nordic courts would become more inclined to argue with the purposes of the law in a broad sense instead of the statements in the preparatory works.[78] In this article I have discussed the modes of legal argument in a somewhat different sense, making a difference between functional arguments and legal principles. My observations suggest that the Nordic courts still have more room for functional and principled argument than they use today.

78 Rosas (2005), 344. Rosas argues that the influence on the interpretation and legal sources has been perhaps smaller than expected.