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The source of law – doctrine and reasoning in Finland

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Abstract:

In the article my aim is to provide a short overview on the basic features of the Finnish legal system and then move on to the more challenging issues such as the reasoning of the Finnish court decisions and legal certainty in Finland. More profoundly, in this article I try to challenge the influence of the European law in the Finnish jurisprudence. For example, the European emphasis on teleological interpretation of law, substantive legal certainty and too casualistic understanding of coherence in judicial application of law do not in my opinion reflect very well the main stream thinking of judicial interpretation and argumentation in Finland. One has to bear in mind that Finland is a modern civil law country, in which sources of law are very well systematized and the legal system is not that much based on case law than the legal system of the European Union seems to be. If the national courts settle for casuism and tend to neglect the systemic interpretation, the coherence of the legal system will be hampered, All my considerations come back the central idea that levels of justification, various legal arguments and legal normativity are intertwined and that these affect to the concept of legal certainty as well. This conclusion, I hope, reveals something relevant and characteristic of the Finnish legal system and legal thinking.

1. Introduction - The Finnish Legal System in General

This paper requires some preliminary remarks about the Finnish legal system and legislation. The legislative power is exercised by Parliament in conjunction with the President of the Republic. The Government comprising the Prime Minister and the requisite number of Ministers, operates at all

times under the requirement of parliamentary confidence. In practise almost all laws are enacted on the basis of a Governmental Bill. Bills and legislative motions by members of parliament (MP's) are sent to one of the standing Committees of the Parliament, the report of which then serves as basis for decision-making in two plenary sessions. An Act adopted by Parliament is submitted to the President for confirmation. If it is not confirmed within three months it is returned to Parliament for reconsideration. If Parliament then adopts the law without material alterations it enters into force without Presidential confirmation.¹

A distinctive feature of the Finnish Constitution is a developed system of preview over the constitutionality of new legislation or EU treaties. Based on Section 74 of the Constitution the most important operator in the overall system of preview is the Constitutional Law Committee of the Parliament. When questions arise as to the compatibility of a Government Bill with the Constitution or with Finland's international human rights obligations, the matter is then sent to the Constitutional Law Committee for an opinion. Although composed by politicians, the body operates upon legal advice by constitutional and European law experts, typically university professors. Also the Treaties of the European Union (TEU, TFEU) were sent to the various Committees of the Parliament for an opinion before the ratification.

Another distinctive and somewhat peculiar feature of the Finnish Constitution and politics is the role of the President in the European Council meetings. According to Section 93 of the Constitution Finland's participation in the EU is in the hands of Parliament and the Government. In the matters of general foreign policy the President has a constitutional duty to seek co-operation with the Government, which is politically accountable to Parliament. On the other hand, in the course of Finland's participation in the foreign and security policy within the EU, the Government has a duty to engage itself in co-operation with the President. The EU matters and general foreign policy are in practise intertwined and therefore the President used to participate in the European Council meetings. This confusing practise has caused criticism among some Finnish scholars and it has been discussed, whether the Prime Minister alone should represent the Finnish views in the EU Summits or whether the Section 93 should be clarified some other way.² The traditional explanation for the President's participation is that the President acts upon authorisation by the Government in the European Council meetings. However, this typically Finnish dilemma concerning the dual representation in the Summits is not that relevant any more, since there is a political consensus among the largest parties that it is the Prime Minister who represents Finland in the EU Summits.

Finally one may point out that the various regions of Finland, provinces, do not possess such a political power and impetus than for example certain relatively independent regions in larger Member States such as *Bundesländer* in the Federal Republic of Germany or Scotland, Wales and Northern Ireland in relation to England in the United Kingdom. Only the demilitarized Åland Islands constitute an exception.

2. The Sources of Finnish law

Finland is one of the continental civil law countries. In these countries the law enshrined in the legal code is a more important foundation for judicial decision than case law is. Comparatively speaking legal positivism in the interpretation of the law and the principle of legality continue to be typical features governing Finnish legal practice and the actions of public authorities. In the background is the idea that justice must be administered in an equal and predictable manner. An illustration of this

¹ See Section 77 of Finnish Constitution (11.6.1999/731) and Scheinin 2002, p. 39.

² See e.g. Husa 2007, 201. The status of the European Council as an institution of the Union increases the status of the Prime Minister in Finland.

is Article 2, paragraph 3 of the Finnish Constitution, which states that the use of public power must be based on law and that officials must comply with the law at all times in the exercise of their public duties. This principle is defined as rule of law in the same article. Thus the Rule of Law is an intrinsic part of the Finnish Constitution. In Article 3 the duties of the state are divided into legislative power, executive power and judicial power, which confirms the doctrine of tripartite division of power as the basis of our constitution. The independence of the courts is also affirmed in this article.

The rule of law principle embodies in itself the requirement to specify the grounds for a judicial decision. The factors and juridical reasoning underlying a judgment must be clear from the text of a court decision. Precise instructions regarding the exercise of judicial power and the contents of a court decision are given for example in Chapter 24 of the Finnish Code of Judicial Procedure and Chapter 11 of the Law of Criminal Procedure. In an older section of the Finnish legal code dating back to Olaus Petri's rules for judges in the 16th century, there is the requirement that a judicial decision may not be arbitrary, but must be founded on "reasons and laws". In other words the decision must be based on proven facts and valid legislation. Finland has not for example adopted in criminal cases the practice of "plea bargaining", a familiar aspect of the American (U.S.) legal system. An absolute prohibition on applying legislation retroactively (an element of the principle of legal certainty) is the starting point of criminal law in particular, or in other words the punishment for a crime must be based on legislation in force at the time the crime was committed.

In the rules for judges there is the presumption that a judge can not apply the law literally, if such application would lead to an unfair outcome. This is expressed in the statement: "What is not right and equitable cannot be the law either". This advice is regarded as supporting natural law theory and possible deviation from strict legalism. The judge must make a decision, but in uncertain cases he has discretionary power with respect to the content of the decision. The consequences of a decision are often taken into account in the interpretation of European law, human rights, and flexible national administrative norms.

Sources of law may be divided into three groups according to their binding effect in legal argumentation. This in turn is tied to how democratic and authoritative the birth process of the particular source of law is. Sources of law may be divided into - strongly binding, must-sources of law; weakly binding, should-sources of law; and permitted, may-sources of law. Strongly binding sources are the norms of statutory law and established custom. Weakly binding norms are provided by legislative drafts and decisions of both the Supreme Court and the Supreme Administrative Court. Permitted sources of law are jurisprudence, unwritten general legal principles and actual arguments, which often allow for in particular a teleological interpretation of the law. In their operations courts always strive to justify their decisions by reference to laws or other similar written legal norms. That being the case substantive justification is not so important, which for its part is a reflection of the legality principle and the emphasis on the predictability requirement in the application of the law.

2.1 Legislation

In this connection written law means all rules of law belonging to the normative hierarchy covered by the constitution. As far as EU law is concerned, it is significant that Finland has recognized the supremacy of EU law in the normative hierarchy over national law.³ Without such recognition the Finnish normative hierarchy from the point of view of written law could be portrayed as follows: Constitution, Act, Decree, Cabinet (Government) decision, Decision of a Ministry and Decisions

³ See the decision on 31 December 1996 of the Supreme Administrative Court in the case 2617/96.

of other public authorities. The essence of a normative hierarchy is that a lower-level statute may only be given on the basis of an entitling provision based on a higher-level statute. In accordance with the Finnish Constitution Parliament enacts legislation and the President ratifies them. The right to issue decrees has been given to the President, the Council of State and individual Ministries.

In Finnish jurisprudence one has been able to see an established division between rules and principles. There may exist a logical, normative conflict between rules. One law may forbid, what another law requires one to do. Principles on the other hand can be weighed in the balance. They can not have a mutually excluding effect. Principles have a dimension of weight, which influences the content of a judicial decision as an argument lighting the way. Aarnio has described the internal normative prioritization of rules to be included in a legal text as follows

- a) *Lex superior derogat legi inferiori*: a higher level rule abrogates a lower one, e.g. a law abrogates a decree.
- b) *Lex posterior derogat legi priori* : A later rule abrogates an earlier rule of similar status, unless otherwise stated in the provisions implementing the later rule.
- c) *Lex specialis derogat legi generali*: A less universal rule is seen as an exception to the general rule i.e. the special rule abrogates the general one.
- d) *Lex posterior generalis non derogat legi priori speciali*: A general rule does not abrogate an earlier special rule unless otherwise prescribed.⁴

An important source of law for national law is the Statute Book of Finland, which contains all existing provisions, regulations and rules with the exception of some ministerial decisions and administrative instructions. When a new law, decree or decision is enacted, it is published in its entirety in the Statute Book of Finland. When a statute is amended at a later date, only the amended sections of the statute will be published. In this way the provisions published in the Statute Book of Finland remain up-to-date, as the rescinded sections of a statute are deleted, and amended sections are replaced with revised text. Statute books are not official publications, but the most important annual commercial publications are The Law of Finland I, II and III and Tax Laws.⁵

2.2 Established Custom

Chapter One, Section 11 of the Code of Judicial Procedure accepts established custom as a source of law, but places it subsidiary to written law. The provision states:

“ The judge shall carefully examine the true purpose and basis of the law and judge accordingly, but not against it, as he sees fit. The established custom, if it is not unreasonable, shall also be his instruction when making the judgment, when enacted law does not exist. ”

The validity of established custom is based on the passive acquiescence of the legislator. The principle of legal certainty demands its legalization or at least its consideration as a legal norm.⁶ The more completely and comprehensively legal issues are covered by legislation the less important established custom may be. If no relevant provision of national or European law can be applied to a problem, then established custom is given precedence over other sources of law. Established custom must be reasonable. In practice this means that justice based on tradition or national usage, when confirmed by the higher courts, may become established custom.

⁴ Aarnio 1989, p. 254.

⁵ Timonen 2002, pp. 26-28.

⁶ Aarnio 1989, p. 225.

2.3 Legislative Drafts

Legislative drafts are different kinds of groundwork, which are published as committee or working group reports, or as publications of the Legislative Council. An important group of legislative drafts are Governmental Bills (*hallituksen esitys*), which describe the objectives of new legislation to be enacted, justify possible amendments to a law, and indicate the relation of the proposed law to earlier legislation. Legislative drafts also constitute the minutes of parliamentary committees and even the discussions of plenary sessions of parliament are parliamentary documents. If national legislation is based on an EU Directive, then the Directive must be considered a guiding norm in the interpretation of the law on the basis of the indirect effect of directives.⁷ As a generalization one can say that the wording of and justification for a proposed law is presented in legislative drafts. This being the case the importance of legislative drafts from the point of view of determining the intent of the legislator is paramount. As a matter of principle the closer some source material is to the actual decision-making of parliament, the greater its dimension of weight must be when clarifying the intent of the legislator.

2.4 Court Decisions

National court decisions which are significant in the justification of a legal interpretation may be considered a source of law. However, also the decisions of the European Court of Justice and the European Court of Human Rights are significant. As a source of law the precedents of the Supreme Court in particular may be considered the most significant judicial decisions, but the precedents of the Supreme Administrative Court also carry considerable weight. Appeal to the Supreme Court is restricted by a leave to appeal system with the result that most decisions remain at the previous instance i.e. the Court of Appeal. Only those cases of general significance with respect to the application of the law are channelled to the Supreme Court for a decision. Precedents are not formally binding, but they do have a guiding influence on the judicial decisions of lower instances. A lower court can deviate from a precedent if there are proper grounds for such deviation. In the domain of civil law the judicial decisions of certain special courts like the Market Court or Labour Court (*Industrial Tribunal*) may also have considerable *de facto* significance as a source of law. Information about precedents are to be found in the yearbooks of the Supreme Court and the Supreme Administrative Court or the Finlex database in the internet.⁸

2.5 Jurisprudential Research Material and Other Permissible Legal Sources

The claim of jurisprudential research material to be considered a source of law is not based on legal authority, but it may have on a case by case basis an interpretative significance. Its significance rests on attempts to clarify the content of existing legislation and to systematize sources of law. Information about recent research is to be found from certain bibliographies and databases, but also here and there even from the Law of Finland I -III. Other permissible sources of law can be found for example in the reasoning underpinning judicial decisions.

⁷ See e.g. C-106/89 *Marleasing* (1990) ECR I-4135.

⁸ Timonen 2002, p. 29.

3. Reasoning Underlying Judicial Decisions

3.1 Arguments Employed in the Application of the Law

The reasoning underpinning judicial decisions affects in a fundamental way the manner in which justice is administered and the quality of judgments. Following the example of the Bielefeld group⁹ I have divided the arguments manifested in jurisdiction into linguistic, systemic, teleological and transcategorical types. This classification is the result of comparative law research which utilized the legal practice of the courts of last instance in Argentina, the Federal Republic of Germany, Finland, France, Italy, Poland, Sweden, the United Kingdom and the United States. In general the judicial decisions of these supreme courts are accompanied by a justification for their application of the law, and these reasons may be assumed to be the most authoritative possible. On the whole the supreme courts of the different countries employed similar kinds of arguments, which reflect rationality in the application of the law. The work of the Bielefeld group had already created an international dimension to the examination of quality in the administration of justice, before the pressures of reform associated with human rights and European law in the 1990s began to gain considerable importance in the administration of Finnish justice. In the following section I will apply the Bielefeld taxonomy to research into Finnish legal practice.

3.1.1 Linguistic Arguments

From the perspective of the legality principle linguistic arguments are the most natural foundation for a judicial decision: the application of the law must be based on law. Linguistic argumentation can be based on the accepted semantic meaning of a legislative text to be interpreted. If the text to be interpreted has several conventional meanings, interpretation is context-based. If some expression has a specific technical meaning in a legal context which differs from its everyday meaning, then the interpretation should give precedence to the legal meaning.¹⁰ The principle in linguistic interpretation is that no part of a clause to be interpreted is redundant or inconsequential, and that a clause to be interpreted should not be given a meaning different from its conventional meaning without adequate grounds.

The concepts contained in a legal provision to be interpreted refer to the facts and circumstances of a case in different ways. According to Klami there are concepts which directly refer to facts e.g. table, or indirectly through reference to the proportionality of facts e.g. “considerable” damage and appreciation thereof (“reasonable” compensation). There are also institutional concepts which are understandable in the context of the social norms from which they originate e.g. judge.¹¹ One soon notices the limitations of linguistic interpretation especially in the interpretation of institutional facts, and the fact that our language is essentially tied to the social reality that surrounds us. Especially in connection with institutional facts it is possible through language to create facts rather than merely describe them e.g. with ordinary performative acts like joining a couple in holy wedlock through the utterance “I now pronounce thee husband and wife”.¹²

⁹ See e.g. MacCormick – Summers 1991, p. 1-7 and MacCormick – Summers 1997, p. vii-ix.

¹⁰ MacCormick – Summers 1991, pp. 516-517.

¹¹ Klami 1994, p. 21.

¹² Searle 1999, p. 111-134.

With respect to European law as a source of law in Finnish courts the multilingualism of the EU presents problems for linguistic interpretation.¹³ Finnish is an official language of the EU, yet only a small minority of its citizens speak it with any mastery. Applying EU law in national courts would be difficult, if in the name of quality of judicial decision-making courts were obliged to stick only to linguistic interpretation. The criteria for quality in the administration of justice must be so defined that different kinds of arguments and different models of legal interpretation are allowed in national courts. In practice, the use of official sources and legal literature particularly in English is very common, if a Finnish translation is not available. The set of legal concepts typical in the legal systems of common law countries do not necessarily translate directly to fit the set of concepts typical of the civil law legal culture of continental Europe. For example, one can imagine that a Finnish judge hardly conceives the concept interim relief in the same way as his English colleague – not to mention the estoppel doctrine or tort concept, which can't be translated by one word.

Thus a special risk is created for the quality of judicial decisions, if supranational law is translated directly into national legislation relying on semantic equivalence in the target language, and then a literal interpretation is used in judicial decision-making. This is especially so the more a term is open to various interpretations with respect to substantive meaning. For example, such a term is democracy. Additionally, the legislative text of European law is anchored in the temporal existence of the legislator, to the legal system of the time and its own linguistic context, which may also cause some difficulties to literal interpretation. In this respect an apt example is the literal translation of *Rechtstaat* by the term *Law-State*, because in British jurisprudence discussion about what constitutes a fair and just state revolves around the term *rule of law*.¹⁴

3.1.2 Systemic Arguments

In the systemic interpretative model the statute to be interpreted is interpreted within the context of the body of statutory material of which it is a part. According to the Bielefeld group arguments of the systemic type are contextual-harmonisation, logical-conceptual, analogous and historical arguments, and also arguments which appeal to general legal principles as well as arguments from precedent.¹⁵ The core of a contextually harmonious argument is that the clause to be interpreted must be interpreted within the context of the whole statute of which it is a part, or together with other clauses belonging to the same context within the statute in question or similar contexts within different statutes. In our domestic law the pattern-setting arguments from precedent are associated with in particular the case law of the Supreme Court. Analogous arguments are used when the clause to be interpreted can be regarded as being comparable in essence to clauses in other statutes or legal cases, which emphasises the consistency of judicial interpretation. In similar fashion the endeavour to preserve the systemic unity of a normative system is manifested in a logical-conceptual argument, according to which the established jurisprudential concepts generally accepted by the legal community must be interpreted consistently in all clauses in which they appear. A historical argument gives substance to the clause to be interpreted, which corresponds with the meaning established interpretation has given it over time. Using this argument one can refer for example through consuetudinary law to outmoded norms, *desuetudo*. Appealing to general legal principles as an interpretative argument is not that typical in our domestic law than it is in European law.

¹³ The problems of multilingualism has been studied more thoroughly in Paunio 2011, pp. 1-65.

¹⁴ MacCormick 1999, pp. 29, 46-47.

¹⁵ MacCormick –Summers 1991, pp. 517-518.

3.1.3 Teleological or Transcategorical Arguments

In a teleological interpretation a clause is interpreted in the light of its objectives. According to the Bielefeld group the context of a teleological interpretation is the whole statute of which the clause is a part.¹⁶ In a Finnish teleological interpretation one can take into account the objectives of the statute in question, which at least partly appear in the legislative drafts. On the other hand, the consequences of a judicial decision can also be taken into account as a kind of practical argument. For example, one can refer in Administrative courts to certain objectives esteemed by Finnish society such as the welfare state or the endeavour to preserve a state governed by the rule of law, but such references do not occur as often as references in the European Court of Justice to the central objectives of the Treaties.

Depending on the situation transcategorical or unclassified arguments may use the argumentation of any of the above-mentioned interpretative models. An unclassified argument may be called an argument of express intent, according to which a clause can be interpreted according to the intent of the norm giver, which one must “discover”. Arguments of express intent can be roughly divided into two groups according to how much weight they give in interpretation of the law to clarifying the different stages in the birth of legislation.

The subjective interpretation theory emphasizes the clarification of the objectives of those, who have participated in the setting of legal norms. The objective theory emphasizes the intention of an idealized legislator, the *ratio legis* of the legal norm, and it allows in the determination of the substance of that intention the exploitation of very different arguments, so that a linguistic, systemic or teleological interpretation may acquire importance. Therefore the courts should not only publish linguistic arguments as justification for their decisions, but also systemic, teleological and unclassified arguments that have played a part in their decision-making heuristics – and in that way follow the model of the European Court of Justice.

On the other hand, taking into account the objectives of legislation and the consequences of judicial decisions is not at all new in Finnish jurisprudence. The teleological interpretation typical of the European Court of Justice does not seem to be especially strange, in spite of the fact that legal positivism and linguistic interpretation are emphasized in our legal culture. In connection with teleological interpretation there is good reason to remember the work of Kaarlo Makkonen, a legal theoretician influential in the 1960s and 1970s, and his definition of practical reasoning in the application of the law.¹⁷ In practical reasoning it is relevant to compare the objective and the means essential to the achievement of that objective. There is no logical necessity between objective and means. Such practical syllogism produces a technical norm, which contains the idea of what must be done to achieve an objective as a kind of practical necessity. The technical norm is not an imperative, simply a proposition stating the situation.

As far as practical reasoning and teleological reasoning are concerned, one can refer to the well-known example, namely the Van Gend en Loos case¹⁸ in EU law. A prerequisite for the realization of a customs union was the prevention of new internal duties and charges being implemented within the EU, after the Treaty of Rome had come into effect in the Member States in 1958. A prohibition on new duties was clearly expressed in article 12 of the EEC Treaty, but its efficacy in practice required an individual right of action on the basis of Community law, from which later on developed through practical reasoning the doctrine of direct effect. Practical reasoning is also often

¹⁶ Ibid., p. 514.

¹⁷ Makkonen 1978, pp. 165-167 and 180-182.

¹⁸ 26/62 *van Gend en Loos* (1963) ECR 1.

applied in situations where the decider has to weigh the value of possible legal consequences and to choose a norm on that basis. I consider it exemplary that attention is focused on the possible consequences of a judicial decision at the stage when that decision is being prepared.

3.2 Levels of Justification and Types of Arguments

I find that the basic elements of the objectivity in law and legal decision-making in Finland can be illustrated by using the following figure:

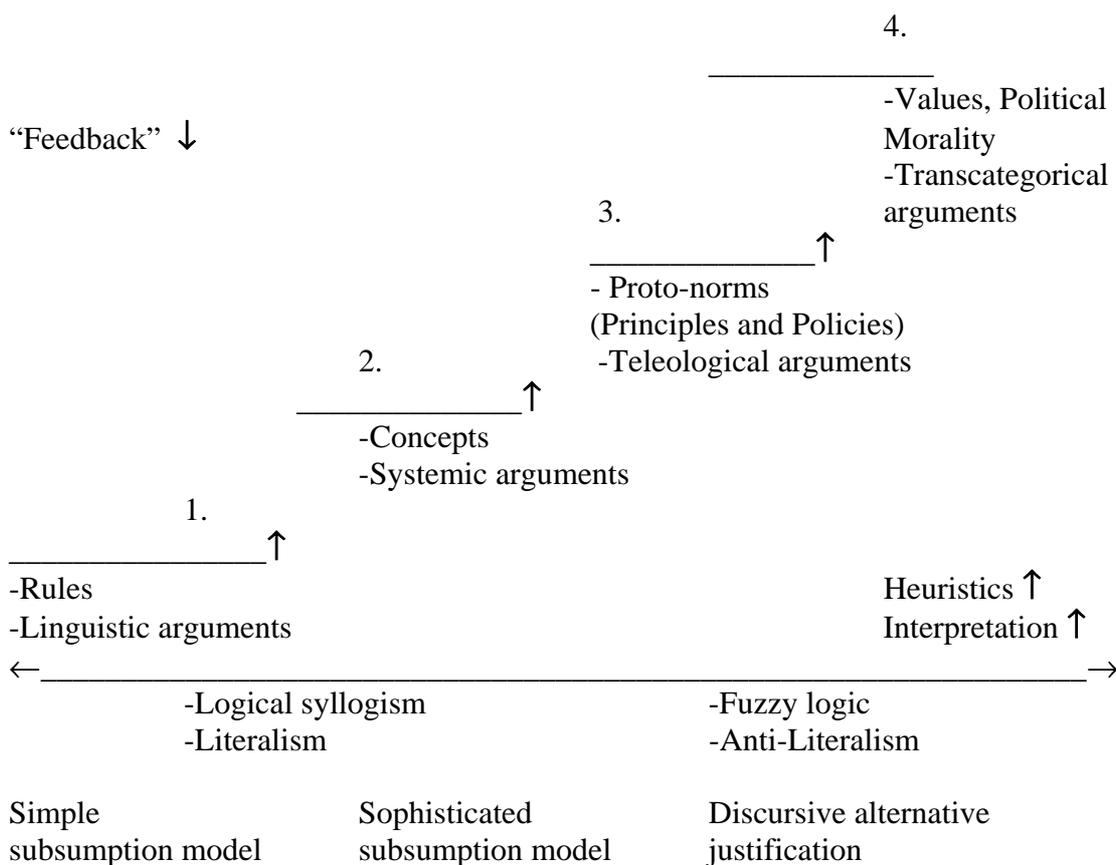


Figure 1: Levels of Justification and Types of Arguments

According to this framework, one must endeavour to justify a judicial decision at the lowest possible level. If a judicial decision can not be justified by appeal to sources of law, one must move to argumentation using conceptual definitions and *proto-norms*, i.e. legal principles and policies. When determining the dimension of weight carried by different legal principles, it is important to consider and benefit from the respect and regard with which these principles are held at the highest justification level. One might argue that in practice normative contradictions concerning principles are not solved by moral arguments, but rather through practical reasoning by taking into account the practical consequences of decisions. In isolated cases this may lead to conflict situations between the safeguarding of human and fundamental rights and financially-oriented objectives.¹⁹

¹⁹ See for example the cases 34/79 *Henn and Darby* (1979) ECR 3795 and 121/85 *Conegate* (1986) ECR 1007 related to public morality expressed in Article 36 TFEU (ex-Article 30 EC) or cases related to sexuality C-159/90 *SPUC v*

Irrespective of whether the decision-making is value- or objective-based, deliberation that occurs at a certain level of legal ideology may be realized sometimes even as explicatory justification. On the other hand transitions between justification levels also happen from the top down. A decision based on a *proto-norm* or conceptual definition argument may become a pattern-setting model and so become quoted as a source of law, in which case it is interpreted as a source to be studied in accordance with the source of law doctrine being applied by the court in question.

This, I think, applies to the decision-making of the European Court of Justice as well. For example, the linguistic arguments do not provide a sufficient basis for interpretation of Article 28 TFEU, which prohibits the customs duties and all charges having equivalent effect between Member States. One should take into consideration the unity of the Union customs territory and the objectives of the Union as a whole. The ECJ has consistently held that the justification of the prohibition is based on the fact that any pecuniary charges imposed on goods by reason of the fact that they cross a frontier constitutes an obstacle to the free movement of goods.²⁰ However, in certain exceptional circumstances the prohibition may apply to goods entering a region within the Member State as well, just like in *Lancry* case.²¹ The ECJ has confirmed this interpretation in its subsequent case law²², so one might rely on the *erga omnes*- effect of this case law in the interpretation of Article 28 TFEU and treat it as a source of EU law.

Different justification levels can utilize different types of arguments. The object of linguistic interpretation are the sentences defining the norms embodied in a source of law. The defining of concepts can create meanings that differ from those in everyday language, so the role of linguistic interpretation is especially emphasized at lower justification levels. Systemic interpretation, however, is emphasized especially at the conceptual definition level, because consistency of interpretation requires that the substantive meaning of concepts used in statute material being interpreted does not vary. Teleological and transcategorical interpretation of the law becomes important at the level of *proto-norms*. This proposed schema is fuzzy and imprecise, especially with respect to transcategorical interpretation. It can be placed at the highest justification level, or equally well at all justification levels. Transcategorical arguments illustrate the possibility that several argument types are actualized simultaneously.

Within the Bielefeld group justification has been examined from the perspective of the internal logic of a decision. Of the civil law countries France is one where perhaps a simple subsumption model is followed which is reminiscent of predicate logic and which applies a statutory interpretation of the law in a spirit of strong legal positivism. In this model the relevant norms are subsumed to facts and circumstances, and a conclusion is reached which forms the judgement. Often the judgement is pronounced in one long sentence expressed in rather formal language. Maybe a more typical model in, for example, Italy, Germany and Finland is a sophisticated subsumption model, where the final conclusion is deduced logically from premises, which are justified one by one by additional premises. In this way the judgement, structurally speaking, consists of a chain of premises and deductions with each premise justified by several arguments. The sophisticated subsumption model represents a shift in justification away from an authoritative model towards a more dialectic model. Typical of the Anglo-American legal culture is the discursive alternative justification, which for its part is the result of juridical choices and statutory

Grogan (1991) ECR I-4685, C-13/94 *P. v S. and Cornwall County Council* (1996) ECR I-2143, C-249/96 *Grant* (1998) ECR I-621, C-117/01 *K.B.* (2004) ECR I-541 and C -423/04 *Richards* (2006) ECR I-3585.

²⁰ See 2 and 3/69 *Brachfeld* (1969) ECR 211, esp. 222, para 14.

²¹ See C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93 *Lancry* (1994) ECR I-3957, esp. I-3991, para. 29.

²² See C-485/93 and C-486/93 *Simitzi* (1995) ECR I-2655, esp. I-2676 - I-2677, paras. 21-22.

prioritization. The judgement represents a conclusion based on an argument which is, in a way, victorious in a "war of arguments". The discursive alternative justification thus resembles the process of practical reasoning, where the judgement is not a logically deduced imperative from premises, but a proposition, which leads to a desirable conclusion from the perspective of the objectives of the legal system.²³ One might argue that all these patterns of argumentation can be discerned from the case law of the ECJ.²⁴

In Finland the binding effect of precedents has generally speaking increased in the last couple of decades. Full membership of the European Union and the blossoming of a human rights mindset together with the fundamental rights reform of the late 1990s have further augmented the importance of argumentation based on principle. In a typical Nordic legalistic doctrine on sources of law legislative drafts are emphasized more than the pattern-setting nature of judicial decisions. In Finland, however, the role of judges and the courts has been emphasized in a way that has carried our legal culture more in the direction of Anglo-American law. The importance of factual arguments has increased at the expense of authoritative arguments and at the same time the position of case law as a source of law has strengthened.

What I consider of good quality in the Finnish administration of justice is its well-systematized structure and its linkage to sources of law in the form of sophisticated subsumption. However, when one is assessing the quality of the manner in which the law is applied, there is reason to recognize the different argument types and to see their possibilities. I do think that the stronger is the desire to emphasize a fundamental rights in Finland, the more there will be an adoption of the features of discursive alternative justification in Finnish jurisdiction. As the arguments used in legal interpretation change, so too will the doctrine of the sources of law and the role of the trial judge. If such a change eventuates, one can predict that the dimension of weight of national legal practice as a source of law will also grow, and correspondingly the relative importance of, for instance, legislative drafts will decline. It is not at all strange then, that discussion about a nation governed by judges may be linked on one hand to discourse on a state ruled by law and on the other to legal certainty.

4. Legal Certainty in Finland

4.1 Conception of the Principle of Legal Certainty

There is no clear-cut, unambiguous definition of the principle of legal certainty in our national legislation or other sources of law. It is a general legal principle, which presumes predictability in application of the law. Predictability for its part requires definition, be it only a very simply-worded, unambiguous everyday expression. Bix has aptly portrayed unpredictable application of the law by an example associated with flipping a coin. An American judge decided the innocence or guilt of a person accused of reckless driving by flipping a coin, because he wasn't able to solve the case on the basis of the evidence presented. Later on in disciplinary proceedings initiated against the judge, his course of action was found to be unacceptable.²⁵

Flipping a coin does not provide rational justification for the application of the law, thus it is not acceptable as a procedural model. It does provide a predictable decision in so far as the probability of a conviction is **1:2**. It does not, however, provide predictability in the manner intended by jurisprudence. In application of the law predictability must be linked to facts and circumstances and

²³ MacCormick and Summers 1991, pp. 492-494.

²⁴ Barceló 1997, pp. 411-415.

²⁵ Bix 1995, p. 106.

relevant norms. The understanding of legal certainty as a requirement for predictability leads to its being closely associated with the principle of legality.

Two legal scholars, Aulis Aarnio and Aleksander Peczenik, active within the domain of Scandinavian legal culture, have concluded that the principle of legal certainty requires that decisions having legal consequences must be predictable and acceptable. The expectation of due process associated with the principle of legal certainty may be linked to two matters: prohibition of arbitrariness and unpredictable application of the law and the fact that a decision must be fair, based on the material evidence and facts of the case.

The prohibition of arbitrariness emphasizes the formal principle of legal certainty, the consequence of which is that a court must proceed in such a way that judicial subjects can plan their activities rationally.³⁵ The elimination of chance from judicial decisions presupposes a rational statement of the reasons for such decisions. Aarnio is also known for his emphasis on the rational argumentation of judicial decisions. A way to assess the legitimacy of judicial decision-making is linked to Aarnio's term "rational acceptability". According to him legal certainty is realized if the following conditions are met:

1. the decision is legal;
2. the negotiations which will lead to a decision proceed rationally;
3. the decision is in harmony with the prevailing set of norms.

Thus a decision must make sense and be reasonable, not just predictable, which is embodied in substantive legal certainty. In Aarnio's theory of law these criteria form a kind of yardstick for the legitimacy of a judicial decision.

4.2. The Aspects of Legal Certainty in Nordic Legal Theory

Let's take as a starting-point that legal certainty has least two dimensions, namely predictability and acceptability.²⁶ The demand of legitimacy relates to the principle of legal certainty and to the interpretation process in that it requires the courts to justify their decisions in a tried and tested way. So the requirement of acceptability in judicial decision-making can be linked with legal certainty when considering the grounds of the judgment. Those grounds should be both predictable and acceptable, both rational and reasonable. This viewpoint in turn has a close connection to some views of democracy because of the demand of openness, which makes external control of the decision-making activity possible. It is widely known that this dichotomy of legal certainty has many links to Nordic legal theory and especially to the Analytical School of Law. The question of an adequate justification of any court's judgments might be understood to be an aspect of legal certainty even on the basis of the case law of the European Court of Justice.²⁷

Additionally, there are cases on the grounds of which one might conclude that the democratic form of government can be held as a requirement of EU law.²⁸ So the democracy requires legal certainty which in turn presupposes a certain degree of respect for democratic values.²⁹ Legal decision-making ought to be loyal to the democratically-elected legislature. On the other hand, when the law

²⁶ See e.g. Aarnio 1987, pp. 1. ff.

²⁷ Case 69/83 *Lux* (1984) ECR 2447, esp. pp. 2466-2467.

²⁸ See Rasmussen 1993, pp. 83-84, cases 93/78 *Matheus v. Doego* (1978) ECR 2203, esp. pp. 2209-2212, 138/79 *Roquette Frères* (1980) ECR 3333, esp. pp. 3360-3361, para. 33 in particular and C-300/89 *Commission v Council* (1991) ECR I-2867, esp. p. I-2900, para. 20.

²⁹ See Peczenik 1989, p. 40.

is vague or unclear, other bases of interpretation than linguistic prevail. Aarnio has pointed out that one of the most important properties of a mature democracy is openness, which makes the external control of the decision-making possible. The courts do not fall completely outside the democratic control, although they are independent of other power centres in the society. The requirement of openness in turn leads one to conclude that decisions must be justified in such a way that considerations relating to moral or social values are revealed.³⁰ This kind of conception of democracy might be considered to be typical from the view-point of a Nordic nation-state, which does not necessarily mean that these ideas could not be applied *mutatis mutandis* in the framework of the European Union. In any case, the concept of democracy, rule of law or legal certainty are definitely context-bound and therefore one might pose the question of objectivity as regards the use of them.

In the more recent Nordic jurisprudence even more elaborated conceptions of legal certainty have been presented.³¹ For example, Gustafsson has presented an idea of social acceptability and moral acceptability (*etisk godtagbarhet*) in the context of substantive legal certainty.³² My contribution in turn has been the threefold conception of legal certainty, namely the formal, factual and substantive legal certainty. The three elements of the conception of legal certainty may illustrate the Legal Positivism, Legal Realism and Natural Law theories, respectively. Factual legal certainty is a logical derivation of *Wróblewski* conception of factual validity.³³ Factual legal certainty can be perceived as the demand of efficiency and stability in law. Thus it intertwines with formal and substantive legal certainty.

For example, in the case of *desuetudo*³⁴ obsolete laws are not considered to be in force any more because they have not been applied by the judiciary for a long time, although they are formally in force. If a court applied unexpectedly such an obsolete law, it would be against factual legal certainty. One could point out that the court's behaviour was unpredictable and thus against formal legal certainty. This idea is not tenable, however, because by definition formal legal certainty as a requirement of predictability is fulfilled, if the formally valid legal rules are applied in the judicial decision-making. On the other hand, one might also point out that legal certainty was breached because of the material reasons related to the conception of substantive legal certainty. This latter counter-argument to factual legal certainty is much more convincing because one might not consider the application of obsolete laws acceptable in the light of the social and moral norms of the society. Therefore there might be plausible reasons to argue that the factual legal certainty is part of the broader conception of substantive legal certainty, which in turn resembles the idea of social and moral acceptability by *Gustafsson*. However, the idea of stability in the (factual) legal certainty is actually not a novelty at all, since *Bydlinski* has already in the 1980s listed the following elements for the legal certainty: "*Rechtsklarheit, Sicherung der Rechtsdurchsetzung, Stabilität des Rechts, Zugänglichkeit des Rechts*".³⁵

In Denmark and Norway, there has been a tendency to advocate for substantive legal certainty, not only the formal one. In Finland, perhaps the most far-reaching attempt to emphasize the substantive legal certainty is presented by *Paunio*, although in the context of analysing the decisions of the

³⁰ See Aarnio 1997, p. 193.

³¹ See Raitio 2003, pp. 347-387 and Gustafsson 2002, pp. 1. ff.

³² See Gustafsson, pp. 1 ff.

³³ See *Wróblewski* 1992, pp. 75-83. According to him, the validity of norms is based on systemic, factual and axiological validity.

³⁴ See Klami 1989, p. 62.

³⁵ See *Bydlinski* 1982, pp. 325-329.

multilingual European Court of Justice.³⁶ She seems to think that legal certainty consists of a more substantive element than that of predictability. According to her views substantive legal certainty is related to substantive acceptability of legislation adjudication.³⁷ In many cases legal certainty can be understood as a means for justifying a certain outcome or interpretative choice. Paunio claims that coherence in legal reasoning promotes legal certainty in its substantive form.³⁸ One might note that the underlying theoretical framework of Paunio's research is based on hermeneutical philosophy as well as on Habermas' work on discourse theory of law.

5. Conclusions – the Return of the Casanova?

Instead of summing up all the issues I have dealt with in this article, I would like to concentrate on the coherence in legal reasoning, which I find to be in the core of the still relatively legalistic Finnish legal thinking. Therefore Paunio's ideas lead me to pose some questions. Will the emphasis on substantive legal certainty lead to increasing casuism, to context-bound discussions of fairness or to emphasizing legal certainty too much from an individual's point of view instead of a more communitarian way emphasizing stability and predictability? Will the emphasis on substantive legal certainty advocate for more Anglo-American way to justify legal decisions than has been the Finnish court's practise so far? Or what has been the "European way" in the argumentation of the European Court of Justice?

My aim has been to challenge the ultra-teleological interpretation of law. The court decisions should be context-bound, but this does not mean that the coherence of the legal system as a whole can be hampered. It is not enough to make sure that a judicial decision contain coherent arguments from the beginning to the end of it. I call such a casuism as 'the Casanova –method' named after a famous playboy. Casanova was successful, because he told to the partner whatever she wanted to hear. He could trust that no-one really knew, how the stories differed from one another depending on the casual wishes of the numerous partners. Courts don't have this possibility, because the judgments are published and known. The courts should not settle for casuism and neglect the systemic interpretation, which has so far been so characteristic for the Finnish jurisprudence. The coherence of the legal system will be hampered, if one overemphasises one of the types of arguments presented above. A balance between various types of arguments is perhaps the most illustrative aim of the Finnish jurisprudence.

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³⁶ See e.g. cases 100/84 *Commission v United Kingdom* (1985) ECR 1169, C-428/02 *Fonden Marselisborg* (2005) ECR I-1527, C-161/06 *Skoma-Lux* (2007) ECR I-10841 and C-506/06 *Mayr* (2008) ECR I-1017. In all these cases one can note how ordinary words and their indeterminacy in one or more language versions may have implications on the way in which EU law is interpreted.

³⁷ See Paunio 2011, p. 7.

³⁸ *Ibid*, p. 113.

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