

**THE INFLUENCE OF JURISPRUDENTIAL
THEORIES ON LEGAL DOGMATICS IN FINLAND
IN THE AREA OF CIVIL LAW**

Matti Ilmari Niemi*

Abstract: Scandinavian legal realism and its influence on legal dogmatics during 20th century is a characteristic of Nordic jurisprudence. With the help of it and original legislation, Nordic countries have restrained the strong influence of German legal doctrine. Legal realism is a naturalistic approach to law: law is treated as a psychological phenomenon. On the level of legal dogmatics, legal realism emancipated scholars to make fruitful analyses. Analysis of ownership is the most important example. Nordic functional-analytical legal dogmatics has survived even though legal realism as its philosophical foundation has lost its credibility. The author of the paper states that such analyses can be made founded on different philosophical theories, even a theory who denies the ontological dimension of law.

Keywords: legal realism; property; Nordic countries.

1 Introduction

Nordic jurisprudence has many specific features. On the level of legal theory, the appearance of Scandinavian legal realism is well known. It reached an influential position in Nordic Countries from 1920's until 1960's. Today, however, there seem to be no supporters of this school anymore. In this sense, it seems to be an outdated conception of law. It is, nevertheless, interesting as a part of legal tradition and object of research in the area of legal theory.

During its highlights, legal realism got a large influence on the level of legal dogmatics (legal doctrine) and, especially, in the area of civil law. Although legal realism has lost its credibility, its influence on the level of civil law has survived. The prevailing civil law doctrine in Nordic Countries is still founded on the functional-

* Professor of Property Law at the University of Eastern Finland, Law School.

-analytical approach created under the influence of legal realism. The fruits of legal realism are at hand and in use although their origin is denied.

Scandinavian legal realism and its influence on legal dogmatics are the most original feature of Nordic jurisprudence. Therefore, it receives largest attention in this paper.

On the level of legal dogmatics, I call attention to property law and, more precisely, to the analysis of ownership. Alf Ross developed, first, a theory of law engaged to legal realism, and, second, he introduced an analysis of ownership founded straight on the theory. It is the most important and paradigmatic application of Scandinavian legal realism. Simo Zitting's analysis of ownership, following the model of Ross, has a similar position in Finland. It started the Scandinavian turn in the development of Finnish jurisprudence. This stage started after the Second World War and it is still the prevailing orientation in Finnish jurisprudence.

Here, I refer to the theories of law included both in legal theory and theoretical legal dogmatics as jurisprudential theories. I presume that they constitute the foundation of practical legal dogmatics, that is, systematizing and interpreting the legal material given in statutes and other legal sources. Legal interpretation as sentences of legal dogmatics expresses knowledge of law in the most obvious way. Systemizing supports the search for the knowledge and serves as means of logical and coherent presentation of the knowledge.

Nordic countries, that is, Denmark, Sweden, Norway, Finland, and Iceland constitute a legal group of their own from the comparative viewpoint. Here, the focus is on Finland. Finland shares the same legal history with Sweden and, accordingly, the legal history of Sweden has to be taken into consideration as well.

2 The unique features of the nordic legal culture

The Western world contains two different legal cultures, the common law countries, originally, the area of the British Empire, and the civil law countries, that is, the Romano-German systems or the continental legal systems from the European viewpoint. No doubt, Nordic countries belong to the civil law countries. On the other hand, Nordic countries constitute an original subgroup in this group. Therefore, the Nordic legal culture has often been classified as a group of its own (ZWEIGERT; KÖTZ, 1998).

The distinction between law and equity is unknown in Nordic Countries; they share the same concepts of ownership and contract with other countries in the continental Europe and they perceive the positions of legislation and court judgments in the same way. The valid law appears, in the first place, as statutes enacted by national parliaments. On the other hand, a comprehensive civil code has not been adopted in any Nordic Country. In addition, the civil law systematics, similar in all Nordic Countries, deviates from the other continental countries. First of all, the content of

law, which is uniform in a significant way in Nordic Countries, differs from the other continental systems.

The idea of legal groups or families is a helpful means – from the comparative point of view – in order to understand different legal cultures and systems. It has obvious weaknesses, as well. On the one hand, large groups include apparently different legal systems and, on the other hand, the demand of uniformity leads, in the end, to treat each legal system as a group.

German legal culture was powerful and influential at the end of 19th century and at the beginning of 20th century in the continental Europe. At the time, Germany was the leading country as far as legal doctrines are concerned. The advanced German legal systematics was adopted in many European countries. No doubt, it was influential in Nordic Countries as well. Nevertheless, the German systematics was not adopted as such. The German influence was adapted and coordinated with the Nordic tradition. For instance, the distinction between obligation law and property law or personal obligations and property rights was not adopted in the strong German sense. Even today, these distinctions do not bear a ruling position either on the level of systematics or on the level of legal interpretation.

All Nordic legal systems have their own specific features. On the other hand, there are good reasons, first, to acknowledge the Nordic legal family and, second, to divide the Nordic group into two subgroups in the area of civil law. Denmark, Norway and Iceland constitute the first subgroup, Sweden and Finland the other one. In many cases, legislation and legal concepts are uniform in these subgroups. Denmark and Norway have often adopted similar statutes and the civil law systematics is strikingly uniform in these countries.

Before 1990's, Nordic countries performed joint and coordinated statute drafting. Many crucial civil law statutes have come into existence and got their content this way. After that, European Union legislation has got the dominant position. Today, European Union is the most important operator in harmonizing legislation in Europe.

3 The influence of legal doctrine before the end of the 19th century

Until the year 1809, the contemporary law of Finland constituted the eastern counties of Sweden. The old Swedish law was valid and applied in Finland even after that – first, under the Russian Empire, and second, after gaining independence in 1917. The Finnish law is based on the Swedish one. Moreover, Finnish legislator has often adopted solutions, concepts and texts given in Swedish statutes. Accordingly, Finnish law is a successor and an heir of Swedish law.

In Sweden, the early statute collections were the most important way to express the legal culture of the time during the Middle Ages and until the 18th century. Provincial laws were acknowledged after the 13th century and the so-called country laws were given in 1347 (Magnus Eriksson country law) and 1441 (Kristoffer's country law). The General Swedish Code, given in 1734, was a similar collection.

During the Middle Ages, the general development of society, the adoption of Christianity and the reception of foreign law were the three most important factors of Swedish legal development. The influence of Roman-Canon and German-Roman law can be identified in the statute collections. The systems and doctrines of law of the time acknowledged in Sweden were provided by the oldest European universities (INGER, 1997; KLAMI, 1986).

The early Swedish statute collections were not codes in the modern European sense. They were not instruments to create a modern society or execute democracy according to the principles of the Enlightenment or the French revolution. Rather, they were remembrances and collections of the established habits, institutions and rules taken as given and permanent matters. The modern European codes were, on the contrary, means in reforming societies.

The foundation of the major power time of the Swedish domain was created during the 16th century, especially by the king Gustav Vasa (Gustav I). During the following century, Sweden became one of the most powerful states in Europe. Universities and courts of appeal were established and legal doctrine was developed. It was influenced by the German-Roman law and the theories of natural law (INGER, 1997). During the 18th century, there was a close communication between scholars of Sweden and the European continent.

The religious reformation took place in Sweden in 16th century like in the other Nordic countries. Therefore, the straight influence of natural law theories, supported by the Catholic Church, and even the influence of canon law, supported by the Nordic protestant churches, has been limited. Nordic societies are secular. Nevertheless, natural law theories were supported alongside with Roman law on the academic level (KLAMI, 1986).

The roots of Swedish legal system are in the continental legal tradition with its dependence on statutory law. The system of statutory law has been established on the old national foundation traced back to the medieval provincial laws. Accordingly, the Swedish Code of 1734 is divided into books, as a matter of fact, "arches" (*balkar*), for instance, the Book of Marriage, the Book of Inheritance, the Book of Land and the Book of Commerce. The content of them includes practical rules, independent of theories, classifications and doctrines. This arrangement has been followed later both in Sweden and Finland. Later, the books have appeared as independent statutes with restricted application scopes. There are even fields of civil law without any regulation with the help of statutes. There has been no decision to draft a general civil code.¹

The traditional statutory systematics and the way to write statutes have hindered the influence of the continental doctrines, especially the powerful German systematics, both in Sweden and Finland. The Swedish and the Finnish statutes are not founded on the systematics of Gaius Institutes or the Pandect System, but on the old

¹ In Sweden, there have been discussions about a possible civil code. The arguments were the same as in the simultaneous discussion in Germany. The outcome was, however, different. See Peterson (2004).

national foundation. Therefore, the classifications created in Germany and in other continental countries and confirmed in the European civil codes are not straight applicable in Nordic countries. In other words, keeping the traditional national statutory system has maintained the ability to resist the influence of the powerful continental doctrines. There have been room and possibilities for the own Nordic doctrine founded on own tradition. This option has been used as we can see later.

4 The german influence at the end of 19th century and at the beginning of 20th century

In Finland, the first half of the 19th century was a silent period. The emperor did not convene any parliamentary sessions, diets, between the years 1809 and 1863. Even the work of the sole Finnish law faculty was depressed (KLAMI, 1986). There was no progress either in legislation or in doctrine. Adoption of the modern society and legal system delayed in Finland (KEKKONEN, 1987).

The accession of the emperor Alexander II in 1855 changed the situation. After that, lots of new legislation were issued, and liberal politics took the dominating position. Construction of modern society begun in Finland – although as an autonomic state in the frames of the Russian Empire until the year 1917.

As a rule, the new legislation followed the old Swedish tradition, and the corresponding Swedish statutes, issued earlier, served as models in many cases. The new statutes had limited application scopes and they were often casuistic. At the time and even later, the biggest problem of Finnish legislation drafting has been small resources.

The pressure of the strong German doctrine appeared even in legislation. One interesting example and an exception to the line is the regulation of unseparated parcels of pieces of real estate.

Swedish legal tradition treats land as an object of contracts and ownership in an uniform way. Same rules are applied to registered pieces and unseparated parcels of them. The German doctrine is different. According to it, only certain objects as real and proper pieces of property can be objects of ownership. A registered piece of real estate can be an object of ownership, but an unseparated parcel cannot. Instead, a purchaser of a parcel gets a severance right, that is, a right to separate an object from a piece of real estate. It is not an ownership or a property right, but a weaker personal right.

In the year of 1895, legislation implementing the German doctrine was issued in Finland.² It did not match, however, other regulation over real property or land or other Finnish regulation. Even the acceptability of it, that is, its moral justifiability was questionable. It proved to be a failed legal transplant and an irritation in the Finnish

² The statute "Asetus maatilojen osittamisesta 5/1895".

legislation. In jurisdiction, this doctrine and regulation was often evaded.³ This regulation was not, however, repealed until 1997 when the present Book of Land (Code of Real Estate, 540/1995) took effect.⁴ In this respect, the year of 1997 was a return to the Swedish legal tradition.

On the academic level, the influence of German doctrine was strong both at the end of 19th century and at the beginning of 20th century and until the Second World War. Most of the scholars in the area of private law had learned and studied the Roman Systematics or the German Pandect Systematics (AUREJÄRVI, 1988; TEPPORA, 1988). Uniting the adopted foreign systematics with the national legislation was a constant problem. Finnish legislation was not drafted in accordance with either systematics. Instead, it was a collection of practical rules, most often without any connection with doctrines or systematics. In addition, in many cases, legislation was outdated and incomplete.

Conceptual Legal Dogmatics (*Begriffsjurisprudenz*), introduced by, for instance, G. F. Puchta and Bernhard Windscheid and, on the other hand, Legal Positivism, especially in the form introduced by Hans Kelsen, were recognized in Finland. The strong emphasis on concepts and classifications was a characteristic of private law compared with public law. The German Historical School and the writings of F. C. von Savigny provided the basis for Conceptual Legal Dogmatics. The philosophical background of Historical School can be located in the German Idealism presented, in the first case, by G. W. F. Hegel and Friedrich von Schelling.

This theoretical foundation was acknowledged on the level of legal dogmatics. Rights and other concepts of private law were treated as objects of research. The applied method was often analysis of concepts with the help of classifications and deductive reasoning. The scattered and incoherent legislation and precedents were united with this conceptual framework (HELIN, 1988).

5 Appearance of legal realism and the turn to Scandinavia

In Finland like in other Nordic countries, legal dogmatics has specific features different both from the continental research and legal literature in common law countries. The origin of these characteristics can be traced back, first, to a certain philosophical doctrine at the beginning of 20th century and, second, to a certain school of jurisprudence and legal dogmatics founded on the philosophical doctrine. They first appeared in Sweden, next in Denmark, and later they got an influential position in Norway and Finland.

A new approach to the law was put forward in Sweden and Denmark in 1920's and 1930's. Most often, it is called Scandinavian Legal Realism, sometimes the

³ See the precedents of the Finnish Supreme Court, KKO 1935 II 544, KKO 1937 II 61, KKO 1993:144 and KKO 2006:36. A holder of an unseparated parcel was treated as an owner, in a large scale, irrespective of the legal doctrine as the foundation of the legislation.

⁴ See more closely about the development of the regulation of unseparated parcels of pieces of real estate, Niemi (2007).

Uppsala School. It was recognized in Finland even before the Second World War but, at the time, it was most often treated as an object of criticism. Conceptual Legal Dogmatics kept its prevailing position until the 1940's.

5.1 The philosophical background of Scandinavian legal realism

The dominant position of positivistic philosophy in Europe at the end of 19th century and at the beginning of 20th century was the background of Scandinavian Legal Realism. In Nordic Countries and from the viewpoint of Jurisprudence, Axel Hägerström was the most noteworthy positivistic philosopher. Besides the general positivistic approach to reality and sciences he introduced criticism against traditional jurisprudence and legal dogmatics.

Hägerström took it for granted that the real world as the only acceptable object of knowledge is the observable world which appears to us as the objects of perceptions. Everything else is product of human imagination. Norms, concepts as ideas and values are not parts of tangible world and not acceptable objects of knowledge. Metaphysical speculations do not bear acceptable knowledge (HELIN, 1988). Hägerström's philosophy has many common features with the empiricism, naturalism and emotivism of David Hume and the positivistic philosophy of young Ludwig Wittgenstein.

Hägerström's critique on idealism appeared on the level of jurisprudence as well. Legal concepts as such and as constructions or legal norms as ideal entities clearly did not belong to the real world defined by him. According to Hägerström, legal dogmatics must have some defined object in the real world in order to be an acceptable science and not any metaphysical nonsense. According to these criteria, conventional legal dogmatics cannot be an acceptable science (HÄGERSTRÖM, 1953).

In addition, Hägerström introduced a detailed criticism against legal positivism and especially voluntarism included in positivism. Here, voluntarism refers to the idea of legal rules as expressions of will. According to Hägerström, a will cannot be an object of scientific knowledge. It cannot be the will of a state because a state is a legal construction, that is, legal rules, and it cannot be a will of a sovereign because the power of a sovereign also means legal rules. Here is a vicious circle at hand. The same hold true with the power of a parliament or its members. On the other hand, it cannot be a will of citizens in general or as a shared matter because one cannot find such a matter in reality. Moreover, such a will cannot be a part of reality because it is a fiction and as such it cannot be an object of knowledge (HÄGERSTRÖM, 1953).

Hägerström abandoned conventional legal dogmatics as acceptable knowledge and science. Instead, he tried to show an alternative way out and to know about the real phenomena which are hidden behind the normative expressions and legal concepts. He explained that a person has certain affections of duties when she or he talks about duties. Accordingly, there are duty affections as parts of observable reality, more closely, as parts of psychological phenomena and reality (HÄGERSTRÖM,

1953). In other words, he reduces norms and legal concepts to psychological facts, that is, expressions of feelings. This is a naturalistic solution and in line with Hume as far as he reduces values to feelings and emotions.

Hägerström did not develop any detailed theory of law or legal knowledge or research. He, nevertheless, did show a direction, that is, the points of departure of a solution. The solution is to reduce the existence of legal norms and concepts to psychological phenomena, feelings, emotions or attitudes. The solution could provide a foundation for a theory of legal knowledge satisfying the demands of the positivistic philosophy of Hägerström.

It was the job of Hägerström's followers to develop a detailed theory and guidelines for a new kind of legal dogmatics. It is worth of notice that Hägerström was a philosopher while his followers were lawyers. With the help of this change, the new approach was introduced in the field of law. Anders Vilhelm Lundstedt, Karl Olivecrona and Alf Ross were the most notable scholars of Scandinavian Legal Realism. Here, I will focus on Ross and the analysis introduced by him. They constitute a connection between the school of legal realism and Finnish legal dogmatics after the Second World War. In addition, Ross created the most advanced theories of Scandinavian Legal Realism.

The name of the school is, however, misleading. The term "realism" does not refer to philosophical realism. Legal positivism introduced by Hans Kelsen stands for philosophical realism: the independent existence of legal rules as the objects of legal knowledge is presumed. Scandinavian legal realists deny the existence of any such reality. Instead, they are naturalists. They reduce the existence of legal rules to a certain piece of perceivable reality. On the one hand, they insist on the demand of this kind of reality as the object of knowledge and, on the other hand, they do not accept legal norms or concepts as such objects. Hence, the existence of norms and concepts has to be reduced to some kind of perceivable reality.

The term "real" seems to come from the search for the "real content" of the sentences of legal dogmatics which is the essential feature of the school. The terms "real content" expresses the naturalistic reduction.

Scandinavian Legal Realism is an analogical approach compared with American Legal Realism as a branch or dimension of American Legal Pragmatism. The supporters of American legal realism reduce the existence of legal rules and concepts to the behavior of judges. Therefore, their school can be called behavioristic or court naturalism. Its Scandinavian cousin can be called psychological naturalism.

5.2 Alf Ross and the functional-analytical jurisprudence

From the viewpoint of this paper, the earlier theory of Ross introduced in 1930's is worth of notice. It contains the general theory and its application as an analysis of ownership. The analysis is the key in order to understand the new approach to civil law adopted in Finland in 1950's. Ross' later theory, introduced in 1950's, was

acknowledged in Finland, as well, but it does not have a similar constitutive and influential role in Finnish legal dogmatics.

5.2.1 Ross' General Theory of Law

According to the Ross' earlier theory, the vicious dualism of validity and reality in law has to be resolved. It can be resolved by seeing validity as a dimension of reality. According to him, "law is a fact, a phenomenon, not ideality", and accordingly, legal knowledge is knowledge about the phenomenon (ROSS, 1946). This is possible when the reality of law is explained as a psycho-physical phenomenon (ROSS, 1946). More closely, the reality of law consists of three elements: first, interested behavior attitude, that is, fear of compulsion (sanctions) corresponding the idea of reality; second, disinterested behavior attitude corresponding the idea of validity and, third, actual, inductive interaction between these attitudes (ROSS, 1946). Normative sentences refer to these attitudes as the real content of the sentences (ROSS, 1946).

Ross seems to treat these attitudes as the attitudes of citizens in the earlier theory. In the later theory, the attitudes appear as the beliefs of judges bringing Ross near the American Legal Realism.

Scandinavian Legal Realists criticized the conventional way to describe and analyze legal concepts such as rights. They cannot be described because they do not refer to anything in the real world, that is, in the perceivable world. Concepts or rights do not exist as such. Instead, one has to describe the real phenomena to which the sentences of legal dogmatics refer. Lundstedt (1929, p. 51) saw "legal protection, that is, the possible legal coercion as the real phenomenon"⁵. Accordingly, real knowledge can describe only the phenomena behind the concept.

Here we meet one important conclusion and principle of legal realists: it is not possible to draw conclusions from concepts. Concepts are "empty". One has to directly show the real phenomena behind the concepts with the help of analysis. The same facts can be analyzed in many ways. There is no right analysis. Instead, there are more or less useful analyses. With the help of a useful analysis, one can disclose and show legal facts in an illustrative way.

Later, this view has been adopted and applied in a large scale in the Nordic civil law doctrine. According to this approach, one cannot deduce or draw rules from concepts or classifications. For instance, it is not permitted to conclude rules of legal protection based on the separation between obligations and property rights. A certain strong legal protection is not a privilege of rights classified as property rights. This kind of legal protection is granted if it is justified on the ground of the real need of legal protection. Instead of classification, one has to find out the rules in the conventional legal sources to which the concepts refer. Concepts themselves are, nevertheless, treated as "empty".

⁵ See also Lundstedt (1956).

The weak status of legal systematics, classifications and concepts is a characteristic of Nordic legal dogmatics and interpretation. Instead of classifications the so-called real arguments have got an emphasized role in legal interpretation. It bears emphasis on substantial reasons and justification instead of formal reasons. In this way, Nordic legal interpretation has become more informal and more flexible. This kind for denial of legal formalism is a natural ally of legal realism. This is a shared feature with American legal realism and pragmatism.

Is it not necessary to abandon the use of legal concepts entirely according to the approach adopted by legal realists? This is the conclusion they do not want to come to. Instead, they treat rights and other concepts as weak means of legal dogmatics and legal interpretation. Concepts perform merely as technical tools of presentation. With the help of them, one can find the phenomena which consist the real objects of knowledge. With the help of concepts, one can show the direction or area of possible phenomena. The final research has to be directed to the phenomena as the reality and as the proper object of research and knowledge. In addition, one can present the phenomena as suitable and illustrative groups with the help of concepts. In this sense, concepts are tools of systematizing. Legal realists do not want to abandon legal dogmatics. Instead, they want to change it and interpret legal knowledge in a new way.

Later, Ross explained the adopted weak interpretation of concepts with the help of the famous Tû-Tû example. Ross refers to an anthropological study on primitive Negn people. According to a belief of the people, first, if someone behaves in an improper way, for instance, kills a holy animal, she or he falls under Tû-Tû. Tû-Tû means bad luck to the whole people. Second, the person under Tû-Tû has to cleanse her or himself in a ceremony. According to Ross, Tû-Tû does not have any semantic reference or any real function. As a matter of fact, Tû-Tû is a redundant element and step in the conclusions. The real conclusion is: if someone kills a holy animal, she or he has to cleanse her or himself in a ceremony (ROSS, 1951).

According to Ross, the same mistake is made in conventional legal dogmatics when legal concepts are employed. For instance, when someone grants a loan to another person, she or he will get a debt. A person who has a debt can demand the payment of it. "A debt" is here the redundant "Tû-Tû". In fact, the proper reasoning is: someone who grants a loan to another person can demand the payment of it (ROSS, 1951). With the help of this example, Ross wanted to show the redundancy of legal concepts, in this case, the concept "debt". The real content of reasoning refers to two observable facts: granting a loan and the power to demand the payment, that is, the behavior of a person as a legal fact and its remedy (a sanction) as a possible decision of a court.⁶

⁶ As a matter of fact, this example is a part of Ross' later theory presented in the book *On law and justice*. It is, nevertheless, a useful way to show the way how Scandinavian realists explained the fictive nature of legal concepts. Ross' later theory is founded on the beliefs of judges as psychological facts and, on the level of concepts, on the decisions of courts. Therefore, legal concepts are analyzed and explained as groups of legal facts – decisions of court – relations. See Ross (1958, p. 170).

Scandinavian legal realists had a negative and restrictive attitude to legal concepts. They wanted to find out and show their real perceivable content. They wanted to see what is hiding behind them. In order to make this they wanted to “break” the concepts. “Breaking” means here a special kind of analysis. In other words, they wanted to show the real content of concepts with the help of analysis. The point of departure is unconventional, indeed, but it emancipated legal realists, especially Ross, to make fruitful analysis. They proved to be most successful in the area of property law. Ross’ early analysis of the concept of ownership is the most famous and important from the viewpoint of Finnish legal dogmatics.

5.2.2 Ross’ analysis of subjective rights

On the general level, Ross (1946) analyzed subjective rights by defining them as functions of duties. This is important. Like Kelsen, legal realists define duties primary in relation to rights and abilities. In addition, legal protection is primary in relation to the content of a right. These initial settings express the fact based view on law: law is a factual matter, not anything ideal.

According to Ross (1946), the real content of legal duties is certain combinations of concrete interested and disinterested behavior attitudes of people and interaction between them explained above. The attitudes against other people appear as relations between persons and, at the same time, functions of a right. There are many different functions and relations included in a right. Different rights contain different functions, and there are very many kinds of persons, that is, persons in very different roles involved in rights. Accordingly, there are very many different relations between very many different persons included in subjective rights. Instead of legal concepts as such legal positions of certain persons and, at the same time, different legal relations as the structure of legal positions appear as relevant and interesting object of research. Relations between persons proved to be the most important feature of the new approach.

Often, functions included in a right are the following ones. First, a right as static benefits (ROSS, 1946). It means that other persons have duties towards the person who is treated as the holder of a right. The duties of other persons are restrictions of their behavior. They are expected and they expect themselves to restrict their behavior in certain respects. It is a static dimension of a right because it is a matter of behavior. The persons as parties of legal relations (who have different attitudes to each other) are the same. In other words, there is no change in the relations, for instance, as a transfer of a right.

In the case of ownership, static benefits bear the duties of other persons to respect owner’s exclusive abilities to use the property as the object of ownership. In other words, static benefits constitute the content of the owner’s possession.

Second, a right as power (ROSS, 1946). Ross interprets this dimension of a right as a power to bring an action and exercise compulsion against the persons who do not restrict their behavior in the way described. It is a right to initiative legal pro-

cesses. This dimension has a close connection with the first one. They both are static dimensions of a right. As a matter of fact, they are different sides of the same matter: right as a certain behavior and its legal protection. In the case of ownership, static protection means the protection of possession.

Third, a right as competence (ROSS, 1946). Competence means ability to sell one's right or dispose about it in another way. Here it appears the dynamic side of a subjective right. It can be transferred. Dynamics means here change of persons as parties of legal relations. A right and the legal relations and positions of persons included in the right are in a move. Competence is a secondary ability because it is directed to the primary aspects of a right. A transfer means the change of the person as the holder of a right.

5.2.3 Analysis of ownership

Ross applies his general analysis of subjective rights to the concept of ownership as a special case. In addition to the three dimensions of ownership mentioned before, Ross introduces a fourth dimension: dynamic protection (ROSS, 1935). As a matter of fact, the dynamic side of ownership and the dynamic protection of an owner are the essential subjects of the new study: it is a study of a change of ownership.

Ross emphasizes the different functions and personal relations included in ownership (ROSS, 1935). Ownership is not a unity and does not have any essence besides the personal relations and attitudes. One has to study duties, abilities, relations between them and, basically, attitudes of persons as the real content of ownership; there is nothing more to study. Different personal relations express different functions included in ownership. In this sense, ownership is not anything absolute, but a relative matter: a group of certain personal relations. Moreover, the concept of ownership is merely a joint term for certain functions, that is, personal relations and legal positions (ROSS, 1935). A concept does not appear as substance.

Accordingly, it is not necessary to presume that an ownership as a "mystical substance" or as a mystical ideal entity transfers from a person to another in a certain moment and at once and for all. Instead, it is possible to see a transfer as a relative process. This process can take place step by step and it can take place in different ways and different times in different personal relations.

As a matter of fact, this approach is adequate in the frames of legislation in Nordic countries. Different effects of a transfer in different personal relations were and are still regulated separately. There is no enacted definition of the moment of the change of ownership. Moreover, this approach exposes many interesting intermediate states when a transfer has taken place in a relation, for instance, between a vendor and a purchaser, but has not yet taken place in another relation, especially, between the purchaser and third persons. Accordingly, a transfer of ownership has to be studied separately in different relations, that is, in details and analytically. The aspiration is to create a more precise and specified, that is, more fruitful

research. This is the characteristic of the Nordic functional-analytical studies in the area of civil law.

A transfer of ownership is treated as a non-substantial and relative matter in this sense in Nordic Countries. On the other hand, the three stages process of transfer of ownership, adopted in most European countries, is unknown in Nordic Countries. There is no separation between a contract and a conveyance of ownership. Instead, a sale contract contains the conveyance. This is because of the weak difference between personal rights and property rights. Moreover, delivering possession or registration does not transfer ownership between a vendor and a purchaser. Instead, this act can transfer ownership between a purchaser and third parties, for instance, in relation to the predecessor of the vendor.

There are, naturally, contract relations involved in the transfer of ownership, in the first case, between a purchaser and a vendor. The relation between them has to be treated as such (ROSS, 1935). According to the Nordic legislation, this relation is a matter of contract law. It is not possible to draw conclusions from the concept of ownership in this relation. A purchaser does not express claims as an owner against the vendor but as a contracting party.

As far as a change of ownership is concerned, the relations between third persons are essential. Dynamic protection takes place in these relations. Ross shows the different personal relations between third parties included in a change of ownership (ROSS, 1935).

Ross' point of departure is the position of a purchaser, and the point of view is the relations between her or him and different third persons. Ownership is called a property right because the object of it is an individual thing and because relations to third parties are involved in. Worth of mention are relations between a purchaser and the predecessor of the vendor, between a purchaser and a person who has hired the sale object to the vendor, between a purchaser and a person who has got the possession of the object from the vendor and between a purchaser and a person who is the successor of the vendor, for instance, a double sale situation (ROSS, 1935). After that, Ross presents the different legal rules which govern the different personal relations included in ownership.

Ross presumes that legal rules are the reflections of the attitudes of citizens, that is, people in his earlier theory. The analysis is not just an analysis of rules, *simpliciter*. Basically, legal rules appear to Ross as interested and disinterested behavior attitudes and as the inductive interaction between them, that is, as a psychological and factual matter captured with the help of empirical methods.

In the same way, Ross (1935) introduced a corresponding analysis of transfer of ownership in relation to creditors. In addition, analyzed many other situations of a transfer of ownership in the same way.

5.3 Simo Zitting and the analysis of ownership

5.3.1 *Zitting's approach*

In Finland, Simo Zitting introduces a similar analysis of ownership and its transfer. Ross' analysis acted as a model. There are, nevertheless, significant differences between Ross and Zitting. In addition to Ross, Zitting based his study on the support of other Nordic scholars as well as on Hohfeld.

Zitting's analysis of ownership proved to be very important in the Finnish legal dogmatics in the area of civil law. It started a new era in Finland. Zitting's paradigmatic analysis was the most powerful expression of the orientation to Scandinavia instead of Germany. Often, it is called the analytical legal doctrine or the Nordic doctrine of civil law.

The Nordic orientation provided a powerful and fruitful approach to law. Finnish legislation belongs to the Nordic group and there is a close connection between Finnish and Swedish legal systems. The new Nordic doctrine matches Finnish legislation as well as jurisdiction better than German doctrine. Moreover, the new analytical approach provided more logical and detailed answers with better justifications compared with the earlier conceptual reasoning.

Legal rights or other concepts were popular subjects of studies under the influence of the German doctrine. Legal positions of certain persons, such as, of a conveyee of a piece of real estate, an heir, conveyee of an unseparated parcel of a piece of real estate and an owner of a building have been popular subjects of studies under the influence of the Nordic doctrine. It is a visible sign of the change to the Nordic orientation.

Zitting adopted Ross' analysis of ownership as a point of departure on the level of legal dogmatics. Ross' analysis did serve as a model. Zitting created, however, his own independent approach. It is a simple modification of the original model.

Zitting knew very well the philosophical foundation of Ross' analysis. Zitting, however, did not adopt Ross' philosophical theory as such. He was very selective. He adopted only the starting points of legal analysis included in the theory.

Zitting does not mention anything about philosophical naturalism or principles of legal realism as the foundation of his own analyses. Rather, he seems to see the legal rules as such as the reality of law. He did analyze the concept of ownership and conveyance of ownership, but the reality as the foundation of the analysis seem to be, rather, the reality of rules instead of psychological facts. Instead of legal realism, that is, philosophical naturalism, Zitting rather seems to adopt philosophical realism. He seems to adopt Kelsenian approach to law. He seems to exchange naturalistic philosophy and legal realism for philosophical realism and legal positivism (HELIN, 1988). Kelsen is easy to combine with analytical approaches because Kelsen himself emphasized legal analysis.

According to this approach, a concept, for instance, ownership is a certain bunch of legal relations between positions, that is, persons in certain roles. The relations and positions create the adopted systematics and the formal structure of a study. The relations constitute the structure of the object of the study as well. The objective of a study and the analysis employed is to show the content, that is, legal rules regulating the different legal relations. The content of a legal position of a person as a party of a legal relation is constituted by legal rules. Rules are shown by the help of legal interpretation but, nevertheless, in the frames of the formal framework of the legal relations as the structure of legal positions or a concept.

The benefit of this kind of analysis is exact questions and, with the help of them, exact answers. For instance, there had been many open questions with ambiguous answers connected with a transfer of ownership. With the help of the new analysis, it was possible to show that a certain answer is correct as far as a certain personal relation is concerned, but another answer is correct as far as another personal relation is concerned. For instance, a transfer of ownership takes place in different times and on different conditions in respect of different third parties. Therefore, it is not correct to ask when a transfer takes place in relation to third parties.

From this point of view, the prohibition against to infer rules from concepts appears as prohibition against to infer matters of content from form. Basically, it is a prohibition against to infer that results of a study from the approach adopted. According to this approach, it is not allowed to determine results with the help of the adopted viewpoint. Concepts and legal relations are merely an appropriate tool to structure the object of the study. In other words, a strong separation between legal rules and concepts, that is, between legal substance and forms, is adopted.

At the same time, psychological reality and philosophical naturalism provided by Ross is exchanged for legal rules as ideal entities and philosophical realism provided by Kelsen. According to Kelsen (1970), legal rules as such constitute an independent branch of reality and the foundation of analytical jurisprudence. Existing rules as social facts are clearly separated from nature as the subject matter of empirical studies and from values as the subject matter of ethics (KELSEN, 1970). While legal relations appear as systematics and as the structure of the subject of a study rules are the reality of the study. With the help of legal relations, rules are located in a proper way in proper places and they are interpreted in the correct context. This is a way to make sections of statutes and other legal material more intelligible and a way to provide detailed and systematized legal knowledge.

In addition to Zitting (1951), this seems to be the solution of most other Nordic scholars in the area of civil law.

5.3.2 Analysis of ownership

As the foundation of his detailed study, Zitting (1951) showed the different dimensions of ownership, that is, different sides and parts of ownership. According to him, there are the static and dynamic sides, that is, the viewpoint without any

transfer or change of legal relations and the viewpoint of transfer (ZITTING, 1951). There are even two different kinds of legal protection: static and dynamic protection (ZITTING, 1951).

The most important and primary part is the possession right of an owner. An owner has, as a rule, the exclusive right to use the object of ownership. Possession is protected. This is the static protection (ZITTING, 1951).

An owner, as a rule, is exclusively entitled to convey his ownership, that is, ultimately, the owner's possession. According to Zitting (1951), this power is the competence of an owner.⁷ Moreover, the owner is entitled to dispose of the ownership in a more restricted way. Competence is a secondary ability of the owner because it is directed, in the end, to the possession of the object of ownership.

As the third part of ownership, an owner enjoys a special kind of legal protection, dynamic protection. Dynamic protection is connected with a transfer of ownership. It is exchange protection (ZITTING, 1951). Dynamic protection means solutions of collisions in relation to third parties. For instance, a purchaser enjoys dynamic protection, on certain conditions, against the predecessor of the vendor, against another competing successor of the vendor and against a creditor of the vendor. The dynamic protection is regulated by different rules in different personal relations. Finally, as the essential object of the study, Zitting shows, with the help of legal interpretation, the exact legal rules connected with each relation, that is, located in their proper places.

6 Conclusions

Nordic Countries shared the same philosophy of law as other European countries at the academic level until the beginning of 20th century. Nordic countries had, nevertheless, their own tradition of legislation. It was the foundation of resistance against the influence of strong German jurisprudence. The emergence of Scandinavian legal realism created new means in maintaining the independent and original legal tradition.

Scandinavian legal realism as well as its cousin in America was a child of its time. It was a consistent application of philosophical positivism which achieved a dominating position at the end of 19th century. According to its principles, all knowledge has to be founded on observations of perceivable reality. It is not easy to find any such reality as the reality of law. Following Hume in the area of ethics, legal realists explained psychological facts as legal facts. Human beliefs and attitudes were seen as these facts. At the same time, philosophical naturalism was adopted.

This is the philosophical foundation of the functional-analytical legal dogmatics adopted in Nordic countries after 1930's and the analysis of ownership made by Ross. It proved to be a fruitful method and it still has the prevailing position. The contemporary

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⁷ Ross defined the concept "power" in a different way.

civil law doctrine has, however, gained independence from its philosophical origin. From 1960's philosophical positivism lost its credibility and, at the same time, the original philosophical foundation of the Nordic civil law doctrine was denied. The same analysis can be united with Kelsenian legal positivism made, for instance, by Zitting in Finland.

It seems to be that a fruitful legal analysis, even the functional analysis, can be made founded on different philosophical theories. Therefore, the crucial question is: is any kind of philosophical theory necessary as the foundation of legal knowledge. My answer is the following one. All rational and advanced legal thinking has to be founded on theoretical foundation; it can be explicit or implicit, that is silently adopted. On the other hand, law or legal dogmatics does not need any "reality" or any other similar defined ontological foundation. A successful theory of law and legal dogmatics can contain ontological view according to which there is no legal reality or anything else as the defined objects of the sentences of legal knowledge.

According to this view, it is understandable that the philosophical origin and foundation of Nordic analytical approach became redundant after the analysis, made on the philosophical foundation, had been made. Historically, legal realism encouraged and emancipated young scholars to make the new kind of legal analysis and the new kind of research. The analysis proved to be successful although its philosophical foundation proved to be erroneous.

Normally, Nordic civil law scholars do not appeal to any specific ontological commitments or foundation today. Accordingly, it is possible to interpret the prevailing functional-analytical approach founded on "non-reality" ontological view. Instead of descriptions of facts, that is, psychological or social facts, it is reasonable to treat legal interpretation as argumentation and justifications without any ontological commitments.

A INFLUÊNCIA DE TEORIAS JURISPRUDENCIAIS NOS DOGMAS JURÍDICOS DA FINLÂNDIA NO DIREITO CIVIL

Resumo: O realismo legal da Escandinávia e sua influência nos dogmas jurídicos durante o século XX é uma característica da jurisprudência nórdica. Com a ajuda dele e da legislação original, os países nórdicos têm sofrido forte influência da doutrina jurídica alemã. O realismo legal é uma aproximação natural ao direito: as leis são tratadas como um fenômeno psicológico. No nível dos dogmas jurídicos, o realismo legal emancipou os estudiosos a fazerem análises frutíferas. A análise da propriedade é o exemplo mais importante. Dogmas jurídicos analítico-funcionais nórdicos sobreviveram mesmo que o realismo legal (sua base filosófica) tenha perdido a credibilidade. O autor do artigo afirma que tal análise pode ser feita, fundamentada em diferentes teorias filosóficas, até mesmo uma teoria que negue a dimensão ontológica do direito.

Palavras-chave: realismo legal; propriedade; países nórdicos.

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