

## **Autonomy and heteronomy of the judiciary - a historical approach**

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### **Abstract**

In the paper, I will discuss about historical dimensions of heteronomy and autonomy of the judiciary. As an introduction, historical narratives (histories) of main legal actors (the legislator, the judiciary, and legal scholarship) will be discussed. In Section 2 characteristics of “pre modern” conflict resolution and the legitimacy of judicial decision making will be studied. I will argue that during the era of non state law and in circumstances without an authoritative judiciary (like in rural areas in the Nordic Countries) the participation of the conflicting parties and the local community played an important role for guaranteeing legitimacy and acceptance of conflict resolution and judicial decision making in local courts. In addition, various - and historically determined - justifications of lay participation will be analyzed. Hence, questions of public / democratic control over the judiciary, and those of social background of judges will be enlightened. In Section 3 the interplay between and interdependence of various legal actors will be in focus. I will argue for the importance of historical-comparative studies on legal scholarship, through which one can better understand variations in functions and roles of the judiciary, and particularities of judicial argumentation in certain times and geographical/ cultural areas, as well.

### **Key words**

Legal history; Nordic law; conflict resolution; lay judges; justice and law; legal reasoning; Dispute resolution

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## 1. Histories of legal actors

### 1.1. Modern law with a passive judge

In the following<sup>1</sup>, I will discuss the topic "Autonomy – Heteronomy in the Judiciary" from the perspective of legal history. Then, one has to ask, what are the stories or narratives that have been told on history of law, or more specifically on the driving forces of national and European legal history, when the roles of legal actors (e.g. that of the judiciary) have been studied. In other words, we can try to find out what are the narratives that legal historians tell when discussing the history of the main actors of law, or more generally, the historical background of contemporary law(s) and legal systems. In the Nordic Countries, where the number of legal scholars and legal historians is small, it is easy to find two main - and in a way competing - narratives. This is true at least when doctoral theses and textbooks on legal history are concerned.

The first - partly inspired by the ideas of Max Weber - is that of so-called "modern law" - situated between pre-modern and late or post-modern law. This is referred to especially in discussions of the rationale but also of the legitimacy of legal order(s), and in discussions on the hierarchy of legal sources, too. This is the law of the modern nation state systematized with the help of the doctrine of legal sources, where parliamentary legislation stands at the top of the hierarchy of sources. At the same time, the idea of positive law (and legal positivism) is important, and a quite clear division of labour is drawn between various legal actors (the legislator, the judiciary, and legal scholarship). The legislator is the most important and legitimated actor of the modern law era, and the legitimacy of a legal order is based above all on democratic participation.

It is quite easy to agree with this narrative, especially concerning the European continent and the era after the French Revolution – that of modern civil law codifications such as the *Code civil*, the *Bürgerliches Gesetzbuch* and the first *Codice civile italiano*. During this period, judges (who became state servants) have been obligated or assumed to "follow" the law, while the university education of legal professionals has focused on training to interpret and apply national, positive law.

This narrative is also a foundation narrative for "no longer modern" law (late modern or post modern law), discussed by many scholars today. Thus, we seem to be facing the "weakening power of nation states", the "diminishing role of national, ordinary legislation", tendencies "towards privatized legal regulation", "towards judge-made law" and towards various alternatives to ordinary dispute resolution.

Again, legal historians are interested in the characteristics of "not yet modern" law. Legal historians seem to agree at least that this period was long but included many local and regional variations. In every case, during the pre-modern law period, characterized by a plurality of legal orders, the main arenas for discussions on law - non law (in German: *Recht - Unrecht*), i.e. law applicable in a certain case, were court sessions, also in terms of commonplaces of legal communication.

Hence, one meets early courts or judiciary obtaining their authority from various sources of domination (according to Max Weber, *Herrschaft*), but also those with a communitarian (*dinggenossenschaftlich*) nature of conflict resolution. Concerning the latter, the most crucial questions - having parallels with the late modern law period and the weak(ening) power of the sovereign state - are those of legitimacy and acceptance of conflict resolution and of law "made by the courts". Indeed, it is not difficult to draw parallels with late modern mediation systems or the various ADR-models: the legitimacy and acceptance of conflict resolution seem to be based

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on the active participation of the parties themselves and of other members of the (interest) community, as well as on court procedures (e.g. certain rituals or forms) as such.

The narrative of the emergence and development of modern law reflects quite accurately an understanding of the foundations of national legal orders - and division of labour between legal actors "producing" those orders - in the European Continent as well as contemporary doctrine of legal sources with legislation at the top of the hierarchy of sources. But it can also be criticised. Founded on a certain democratic romanticism, it underestimates the role of legal actors other than the legislator. In particular, it neglects legal scholarship - and substantial continuities in legal systems based on impacts of former legal doctrine: The European private law codifications of the 19 and 20<sup>th</sup> centuries were to a great extent based on legal concepts, classifications and ideas of previous centuries. They were - like laws today - drafted by a trained elite, by working groups of legal specialists, and in spite of brand new laws the problems of real life also challenged the idea of a "passive" judge. For instance, continuity is discernible in applying the Roman Law clause *clausula rebus sic stantibus*: German judgments of the 1920s were based on the clause, but before the idea of the clause could be implemented it was to be transferred into the sphere of application of the BGB § 242.<sup>2</sup>

Criticism does not mean that the democratic element of the idea of modern law would be meaningless, but in discussions on contemporary legal problems more nuanced histories would be needed. For instance, when discussing legal pluralism, it cannot be enough to point out only that a plurality of legal orders also existed before the modern era. At the same time, in "post-modern" discussions of freedom of choice and of various (legal) identities of an individual it would be useful to remember the egalitarian element of modern law. Since the French Revolution the idea of status-based law - and judiciary - has been superseded by the idea of equality before the law, one of the most revolutionary ideas in the legal history of mankind.

Features of pre-modern law and its "judiciary" will be handled in more detail in Section 2. This will be done with reference to developments in the Nordic Countries, but the questions concerned, like those of party- and lay-participation or of acceptance of court decisions, have a wider dimension, too. Before that, another narrative will be discussed.

### 1.2. Law made by legal scholars

The other main narrative of legal historians with reflections on current legal debates is that of law without or beyond the state. This very well reflects hopes embedded in current academic bottom-up proposals for harmonisation of European (private) law.<sup>3</sup> This narrative, popular among many younger Nordic legal historians, is about the emergence of the universities and of so-called "learned law", and of the influence or reception of Roman Canon law, as *ius commune*, in European legal systems.<sup>4</sup>

This, too, has some problems. For instance, one has to remember that in spite of the emergence of quite homogenous academic training in law and the foundation of new types of legal institutions (high courts) applying the *ius commune* in medieval Europe - and even later - several legal orders were based on several centres of power: strong cities with their privileges and their own judiciary, or feudal law and *lex mercatoria*, with an active interplay taking place between different legal orders. Additionally, there were several variations of the *ius commune*, and several ways

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<sup>2</sup> See further Luig (1999), and Nörr (1996).

<sup>3</sup> See an interesting contribution to the discussion: Jansen (2010).

<sup>4</sup> See e.g. Vogt (2010), Sunde (2005), and Korpiola (2009).

and grades of its influence in existing legal orders or in judicial argumentation, also geographically.

Actually, this history is especially problematic when studying the early development of law in the Nordic Countries. Influences of Canon law can be seen in Sections on family and inheritance of Nordic medieval laws (e.g. the Swedish *landskapslagar*), and the few scholars were well informed on Roman law literature as well, but the main forum for legal communication until the 17th century was the local court (*ting*), usually without trained lawyers, and for resolution of local, minor conflicts. And like today, early legal scholarship had "dual citizenship": the problems and the working environment of scholars were (usually) local, but legal ideas, concepts, or even individual rules were often common (pan-European, international).

In an interesting way, this can be seen in *Rules for Judges* (1530s) by Olaus Petri, a Swedish theologian and reformer who studied in Rostock and Wittenberg and who published the rules (e.g. "The good judge knows to decide according to the circumstances"; and "The law is that which is best for humanity, even when the written statute provides otherwise") as criticism against disadvantages in Swedish legal administration and court procedure of the beginning of the 16<sup>th</sup> Century. In the *Rules*, continuously published in the first pages of Codes of Law in Sweden and Finland, one can see that Olaus was well informed in ideas of Roman-Canon law, for instance those in the law of evidence<sup>5</sup>, but his proposals were wisely modified to fit into the current social environment, into a court system without an academically trained judiciary.

In every case, the early wave of Roman law influence (that of the *ius commune*) is missing in the Nordic Countries where the first universities were founded in the 17th century, while legal science is mainly a phenomenon of the 19<sup>th</sup> century. However, it would be impossible to think, for example, of early Danish, Swedish, or Finnish legal literature without German influence. When national legal science emerged in the Nordic countries during the 19th century, it happened mostly by adapting German legal ideas, quite often also by translating texts from German legal authors<sup>6</sup> - which then also became channels for the influence of Roman Law-based terminology and systematization.

The most influential German "school" in the Nordic Countries was *Begriffsjurisprudenz* (Conceptual Jurisprudence). This dominated in Finland until the 1950s, but was superseded by the ideas of Scandinavian Realism - with the idea of law as an instrument of social engineering and pointing out the role of the judiciary and so called "real considerations" in judicial argumentation - in Denmark and Sweden from the beginning of the 20<sup>th</sup> century.

In Finland, which had an autonomous position within the Russian Empire in 1809-1917, the role of the Parliament (Estates) was either non-existent (1809-1863) or weak. Thus, many legal reforms necessary for industrialization were realized by the judiciary, through the legal practice of the high courts (courts of appeal). And because of lack of democracy and constitutional guarantees, legalistic thinking and constitutional doctrine became important, too. The first professorship in the Nordic countries solely for administrative law was founded at the University of Helsinki in 1907. Central topics of the discipline were, and still are, the principle of the rule of law and its interpretations. An important model for Finnish doctrine was German literature discussing the concept of the *Rechtsstaat* and the principle of legality.

In other fields of law, too, an orientation towards Germany was common. However, interest in German legal science was not only a Finnish or Nordic phenomenon. It is well known that German legal literature inspired legal professionals in many other European countries, too. A Finnish phenomenon, however, is that this influence was

<sup>5</sup> See further Pihlajamäki (2004).

<sup>6</sup> For instance Montgomery's book *Handbok i Finlands allmänna privaträtt I* (1889) was based on Windscheid: *Lehrbuch des Pandektenrechts I* (1862).

both long lasting and quite one-dimensional. According to Lars Björne (2002, p. 169), Conceptual Jurisprudence with its “apolitical” nature and its self-referential notion of legal science fitted very well with the political and social climate in Finland – first with the Era of Autonomy’s orientation towards legalistic thinking, and then with the politically sensitive circumstances after the Civil War of 1918.

The domination of Conceptual Jurisprudence diminished in Finland - not through Legal Realism as in other Nordic Countries but above all through influences from the Analytic School of law.<sup>7</sup> Analytic criticism focussed mainly against “conclusions from concepts”. But concepts were not neglected. They played a heuristic role – they were necessary for clarifying and classifying legal problems. Additionally, it was important to identify those concepts that connected better than the old ones with the legal reality.<sup>8</sup> Generally speaking, the analytic turn after World War II can be seen as a reflection of social changes, but also of efforts by legal scholars towards concepts which could serve the interests of trade and business better than the old ones.

Still, it is possible to assert that, in Finnish legal life, legal science (scholarship) holds an exceptionally strong position and, moreover, is dominated by a quite heavy theoretical dimension.<sup>9</sup> In legal doctrine, principles have become important as part of a general doctrine of law (*allgemeine Lehren*) but concepts are still in use: they prepare the way for principles-based legal argumentation.

Thus, history of legal science and that of its unifying/harmonising elements are important. But there are differences within legal scholarship, too, and some of these are also reflected in understanding the functions of different legal actors. Thus, scholars of Conceptual Jurisprudence, Scandinavian Realism and the Analytic School have different opinions of judges’ role or of the interplay between the judiciary and other legal actors, and these opinions are often reflected in judges’ daily work, too.

### 1.3. Global perspectives

At the moment, few legal historians are interested in telling other than these two narratives. An exception could be Danish legal historian Ditlev Tamm (2009), who in the latest textbook on global legal culture advocates a “global approach”. According to the words of the author, the book has been written to help law students to better understand the world, but also to demonstrate that national law still matters, in spite of the globalization of legal culture, that of legal ideas. Law is still discussed, drafted and applied mainly by national organs.

Viewing globalization from a political standpoint, one can witness the rise of new political actors such as multinational firms, non-governmental organisations and social movements. At the same time, globalisation has tended to weaken, fragment and sometimes even to restructure the state, but it has not destroyed or replaced it. Globalisation has also blurred and splintered the boundaries between the domestic and external spheres of nation states and of regional integration organisations. It has fostered articulation of systems of multi-level governance and for example helped to achieve a universal human rights discourse.<sup>10</sup>

As a cultural phenomenon, globalisation has implied the emergence of a new global culture. To some extent, this is shared by many elite groups, also by many legal professionals. At the same time, this has contributed to the transformation of many

<sup>7</sup> These were closely connected to the Finnish philosophy of the 1960s and 1970s (e.g. G.H. von Wright and Jaakko Hintikka), which was strongly influenced by Anglo-American analytic philosophy.

<sup>8</sup> The redefinition of ownership by Zitting (1952, pp. 387-401, pp. 501-508; 1951) with a dichotomy of static and dynamic protection of the owner(s) is a classic example of “analytic thinking” in Finland.

<sup>9</sup> The basic idea is that legal discourse has three equally strong actors 1) legislator(s), 2) the judiciary, and 3) legal scholars: The law will be improved and reformed through communication between these three parties.

<sup>10</sup> See e.g. Snyder (2002).

local cultures.<sup>11</sup> In legal practice, for instance, judicial comparisons are becoming more widespread. It is quite usual that supreme /constitutional courts refer to foreign law. They do so for many reasons. Among other things, national legal orders are increasingly bound together in supra-national and global regulatory regimes, which facilitate the opening up of national legal systems towards each other. Additionally, some legal principles, i.e. human rights, are universal and command respect in every domestic legal order (Cassese 2009).

Actually, we are – again – witnessing two conflicting tendencies: On the one hand a particularistic tendency that emphasises differences, the uniqueness of history, culture and identity, sometimes even cultural and ethical relativism. On the other hand, awareness of globalisation points to the changing significance of national boundaries but also the need for new academic approaches to take account of multiple levels of legal ordering. Thus, for legal theory a central question – according to William Twining – is how far is it possible and desirable to generalise about legal phenomena (e.g. conceptually, normatively, empirically) as part of understanding law. As a representative of the Analytic School, he points out above all the importance of analysis of concepts: A “cosmopolitan” discipline of law needs a vocabulary and conceptual apparatus that can be used confidently across jurisdictions and cultures: “If jurisprudence is to be general, its vocabulary and concepts need to travel well” (Twining 2002). For legal history, however, a general or universalistic approach is quite problematic. This is also true when legal concepts (and their travelling) are concerned. Consequently, a new (global) approach could be one based on the comparative method, and on understanding foreign, especially non-European, legal cultures. But also then, a concrete analysis of the role, functions, and even instruments of various (especially national/local) legal actors has to be undertaken.

Interesting ideas can be found in Amartya Sen (2009), who writes much in his book *The Idea of Justice* on understanding, of the importance of comparisons, and of the history of other than Western European societies. Sen’s contribution is a theory of justice in a very broad sense. Its aim is to clarify how one can proceed to address questions of enhancing justice and removing injustice, rather than to offer resolutions of questions about the nature of perfect justice. According to Sen, a new theory of justice that could function as the basis of practical reasoning must include ways of judging how to reduce injustice and advance justice, rather than aiming only at characterizing perfectly just societies. And those ways require study by comparative analysis.

Likewise for discussion of globalisation and of global justice, it is important to examine whether the tradition of democracy, either in its broadly organizational interpretation in terms of ballots and elections, or more generally as government by discussion, is essentially a Western phenomenon. Thus, comparative analysis proves – according to Sen – that the belief is widespread that democracy is basically a Western notion with European and American origins; indeed, this does have some apparent plausibility, despite its being ultimately an erroneous and superficial diagnosis (Sen 2009, p. 328).

Comparative analysis combined with a global standpoint also enlightens the relativity and limits of legal regulation, also those of legislation or judicial power. Then, from Tamm’s (2009, p. 13) comparative analysis it is possible to learn that there have been and still are different ways to understand the boundaries and interplay between law and morality, while Sen points out among other things that the idea of human rights can be and is used in several ways other than motivating legislation: For instance, there are several avenues for promoting claims based on the idea that every person anywhere in the world, irrespective of citizenship,

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<sup>11</sup> See further Friedman (2002, pp. 6-7).

residence, race, or class, has some basic rights which others should respect (Sen 2009, pp. 355-365).<sup>12</sup>

Hence, themes of the interplay between legal ideas and legal practice (such as legislation and adjudication), especially between legal scholarship and legal practice, will be discussed in Section 3. This will mainly be done through thoughts on the relationship between law and justice, thoughts which could open up a highway to a third or at least to a "mixed" narrative. Consequently, I will suggest that different "techniques" are available for bringing idea(s) of justice within modern application of law. These techniques are historically determined, and the "technical" dimension – means of various legal actors and style of their argumentation – cannot be neglected when the role of the judiciary is discussed. Before that, questions of the legitimacy of the pre-modern judiciary will be discussed.

## 2. Interplay between laymen and judges

### 2.1 Participation of the *ting* community

As mentioned above, local court sessions were for a long time (and still are in many parts of the world) main arenas for discussions on law. In the rural areas of the Nordic Countries, administrative and legal matters were dealt by a local assembly, the *ting*.<sup>13</sup> The head of the assembly (in Swedish *häradshövding*) was in charge of a judicial circuit, which consisted of several *ting* districts, that is, units where *ting* sessions were held. In the towns, administration of justice was a task for the town court. The inhabitants of the town, more precisely its burghers, were represented by a council, which was also charged with adjudicative tasks at the council house or town hall.

Hence, the *ting* pertains specifically to rural dispute settlement and the self-determination of the peasant communities where communication for a long time was oral. Documents, or indeed writing, were hardly ever used. Thus, all affairs became public as soon as they were introduced in a *ting* session. However, this is not to say that an early "*ting*-community" for considering common affairs and for disseminating information would have comprised every person in the locality. Instead, the early *ting* was composed solely of able-bodied and tax-paying males with a head of the circuit (*häradshövding*; only later in the meaning of a judge) as chair of the sessions.

The (Swedish and Finnish) *ting*, held twice or three times annually, were also the main events of the year. As many as possible wished to be present when their affairs, and those of their neighbours, were considered. Even as late as the beginning of the 17<sup>th</sup> Century, it was usual for people to arrive in large numbers to the *ting* – to the *ting* house, its yard or other nearby houses. At the same time, it was evident that being present made a difference. The head of the assembly (*häradshövding*), often a nobleman, living in Stockholm, or his local substitute, the 'law reader' (*lagläsare*), would put questions to the audience, for example on drawing boundaries between pieces of land or on the paternity of a child born out of wedlock, or asked the views of the public, for example on the severity of a criminal penalty or the form in which a penalty should be enforced.

In the mid-sixteenth century, at the latest, a panel of men (in Swedish *nämnd*, in Finnish *lautakunta*) had been drawn from among members of the *ting* community, but it did not yet abolish the wider participation of the *ting* community. It can be illustrated that these were men who had followed the head, now also in the meaning of a judge, from the outdoor '*ting* stones' indoors, around a table or on a bench. Interestingly, in early Finnish *lauta* (plank) means the same as *pöytä*

<sup>12</sup> Sen (2009) 355-365.

<sup>13</sup> See further Letto-Vanamo, Honkanen (2005).



(table). Hence, a member of the panel (*lautamies*) could be translated as 'table man'. However, *lautta* is also the same as *penkki* (bench), and the early laymen 'bench men' – refers to the German tradition with the term *Schöffenbank*. Again, the direct translation of the Swedish term *nämnde(mä)n* into English would be simply 'men nominated by name'.

At first, the panel of (lay)men was used only in considering given types of cases, but later it was designated for the duration of the whole *ting*. At the same time, the composition of the panel became more established, so that some of its members also sat in the panel during the next sessions in the same *ting* district. It is also known that the "*lautta /nämnd* -men" were normally selected from among the most respected and wealthiest farmers of the district.

The early legal cases, i.e. cases handled at the *ting*, were either simple criminal cases or civil disputes relating to use and ownership of land. Criminal law was act-oriented, with little regard to the motives of the offender. Hence, every misdeed came with a "price": A bruise cost three marks, a wound six marks, and the price of manslaughter was forty marks. In most cases, convictions were based on confessions or eyewitness reports. In the absence of a witness or confession, oath taking was the normal procedure. A person suspected and accused (by the plaintiff) of a given act was given the opportunity to deny responsibility by swearing an oath. Civil disputes concerned land, that is, the very basis of all economic activity. Disputes were normally decided with the support of assayers or members of the lay panel, i.e. by reference to an act or opinion of the community.

One can see that one of the original functions of the *lautakunta* or the *nämnd*, like that of other early panels of (lay)men, was to represent the local community but also to participate in settlement of conflicts arising between members of the community. They were aware of local affairs and knew the local people. Simultaneously with the rise in status of local judges and their closer identification with the state judicial authority (in Sweden and Finland towards the end of the 17<sup>th</sup> Century), the status of laymen diminished.

Thus, it can be said that participation of the *ting* community or its representatives in the procedure could also legitimize decisions adverse to the parties, and hence make it more likely that the decision would also be observed as "good law". Only later did the legitimacy of a judgment become linked to a command or the authority of a judge, and much later still to the authority of (positive) law and to a state judiciary - independent of the legislator and enforcement power - applying it.<sup>14</sup>

## 2.2. Democratic control over the judiciary

The communal way of conflict resolution (in rural areas) was of course also in use elsewhere in Europe. In other European countries, however, the main rule was that a judiciary with an academic education gradually came to supersede the earlier modes of conflict resolution. It was only in the 19th century that laymen were again accepted as court members; this was mostly a result of the French Revolution of 1789 and the democratization of Western European societies, the courts included. The same process also took place in Norway and Denmark, but not in Finland or Sweden.

In the latter countries, the participation of laymen in the administration of justice continued uninterrupted. In part, this was a result of the late modernization of those societies, but also of the overall slow rate of change in the court system.

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<sup>14</sup> According to the 1734 Code of Judicial Procedure, in force until the 1990s, seven laymen were on the court (of whom at least five had to be present); the laymen had the authority to override the opinion of the professional judge, but only by unanimity. With the unification of the courts of first instance in 1993, laymen were also introduced in the towns. Thereafter, they were markedly lay judges; they were given individual votes and subjected to the responsibility of judges. At the same time, the scope of cases in which the participation of lay judges was expected was narrowed.

Some reasons were ideological: it was important to safeguard the idea of a folksy and equal character of the court procedure, but in Finland finances also played a part. A system composed of a few circuit judges "sitting *ting*" (and partly paying administrative costs by themselves) with lay panels placed little demand on the public purse.

In every case, justifications for lay participation changed from time to time. References to local knowledge became fewer, while popular control and democracy gained currency. In the debates in Sweden of the first half of the 20<sup>th</sup> century and in Finland of the 1960s -70s, the prevailing arguments pertained precisely to the democracy of justice and to popular control over the judiciary. Then in 2003 the Finnish Commission for the Development of the Court System, which emphasized the need for judicial specialization and expert competence, proposed that use of laymen be severely curtailed on the basis that lay participation could only be justified at all by reference to its very long tradition.

Mostly, lay participation has been connected to discussions on public control over the judiciary. Simultaneously, one of the main themes has been recruiting and the social background of members of the judiciary. Even in the Nordic countries of the 20<sup>th</sup> Century, it was pointed out that judges were socially and politically distanced from citizens, which gave rise to a lack of trust in the courts. Attempts to tackle this problem have occurred, for example, through reforms in legal education. In Finland, final and concrete changes in the recruitment base began with the changeover to a salary system for the judiciary and with establishment of the position of so-called district judge (*tingsdomare*). Ever since the 1970s, the number of first instance judges has increased considerably and at the same time the proportion of women in the judiciary has begun to rise.<sup>15</sup>

There are no clear data from the Nordic countries about the social background or about differences of socio-political attitudes between the current crop of judges and their predecessors, but a study was carried out in 1995 where Finnish district judges were asked about what constituted a "good life" and about their relationship to work, money, leisure and family. Interestingly, it was found that, in the main, judges are no different from anyone else in Finland. Also in more general terms, the symbolic self-differentiation of Finns – unlike that of for example the French – is not linked to the formation of social classes over time and to any concomitant values or conceptions. In contrast, the protestant working ethic, a kind of 'pioneer spirit', has indeed been important for defining commonly accepted and desired values.

This is not to say, however, that Finnish judges would not be clearly a part of the middle class, characterized by expertise gained through education, and enjoying a respected and legitimate status as a part of the community. Not uncommonly, the profession of law is 'inherited'; only very seldom would a judge have a working class background.

For a very long time, judicial procedure in Swedish and Finnish local courts was characterized by a certain archaism. Cases were usually not very challenging in terms of the law, and the layman institution emphasized the local character of adjudication. Since the second half of the 20<sup>th</sup> century, judges no longer donned tails, and the sermon preceding the opening of a local session was formally abolished. Nonetheless, this practice has been continued informally in many judicial circuits. Besides various oaths, the sermon opening the local session has been one of the last vestiges of the formalistic tradition in the administration of justice; the forms, which – as also more generally with early adjudication – were closely connected to religious practices.

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<sup>15</sup> In 1950, the Finnish judiciary consisted of 557 judges, 45 of whom were women. In 1970, the corresponding numbers were 699 and 84. According to statistics for 1990, the numbers had grown to 1,981 and 914.

However, another form of 'sanctimoniousness' was the culture, prevalent in Finland until the end of the 1970s, of not justifying court decisions at all or justifying them very pithily. In criminal cases, it was normal to state that 'the Court had looked into the matter and considered' that what had been put forward in the concise charge had (usually verbatim) been proven. Hence, the judiciary could with some justification be compared to the clergy, in the sense that the latter designate certain activities as sinful, but usually do not say why.

Moreover, the procedure in the court of first instance was a blend of judicial interventionism and folksy informality. In a sense, the distant and strict 'old man judge' was *paterfamilias*. This status was reinforced both by the nature of the cases before the court but also by the structure of decision-making there. There is no reason to assume that the older generation of judges would not have known the law or for some reason chose not to obey it. Nevertheless, the issue was more of the dominant position of the ideal of one single correct solution. Nowadays no one believes – in legal theory or in practice – that there would be only one single correct solution; the emphasis has shifted to transparency and supplying proper justification and reasons for the particular outcome "selected" by the court.

### 3. Changing legal techniques

#### 3.1. Just - unjust law

One can see that historical and regional variations exist between legal orders in their sensitivity to political and social changes, and to values, as well. Additionally, differences exist between roles and activism of different legal actors, and this also reflects in functions of judges. Again, Legal Realism with an approach of social engineering, constructivist traditions (i.e. Conceptual Jurisprudence) with a focus on legal concepts, and Analytic Jurisprudence interested in linguistic aspects have different reflections on judicial argumentation and legal reasoning.

As already mentioned, one of the most fundamental topics of legal debate today is that on justice<sup>16</sup>. The relationship between law (in German: *Recht*) and justice (*Gerechtigkeit*) is highly interesting when the position of judges and legal reasoning are discussed. Thus, one of the most relevant questions of legal history is about the changing meaning of justice: how justice has been understood, but also how that understanding has been realized at different times. In particular, the history of legal sources - doctrines of legal sources<sup>17</sup> and that of roles and means of legal actors has been the focus of study.

Of course, the relationship between law and justice is also discussed in studies on current law.<sup>18</sup> One reason for today's debates is European integration: EU Law as well as the competence of the European Court of Human Rights have challenged the foundations of national state doctrines of legal sources and current legal argumentation as well. In addition, ratification of the European Convention of Human Rights (ECHR) has brought into arenas of law discussions of values as well as weighing between different values – generally expressed in different rights of individuals<sup>19</sup>.

Historically, there is a difference between justice as a characteristic of a person or a function on the one hand, and as a characteristic of a legal order on the other hand. The former refers to so-called subjective justice and the latter to objective justice: During the era of modern law the idea of objective justice is dominant. Accordingly, in such sources of pre-modern law as Nordic medieval laws (e.g. Swedish *landskapslagar*), the concept, even the term of justice, is totally missing. The law

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<sup>16</sup> See especially Prodi (2000); also published in German (Prodi 2003), and Schröder (2005).

<sup>17</sup> See for instance Schröder (2001).

<sup>18</sup> See for instance Sen (2009).

<sup>19</sup> On conflicting legal regimes see Fischer-Lescano, Teubner (2006).

was “just”, and questions of (objective) justice were meaningless, because of lack of difference between law and justice. The same is true with the archaic concept of (customary) law, which emerged through conflict resolution by the local courts (e.g. by the *ting*)<sup>20</sup>.

This archaic alliance of law/ justice and ethics came to an end during modern times, when the idea of positive law emerged. Beside divine-natural law existed positive law, in other words human law, and from the 16<sup>th</sup> century on we can meet a dualistic legal system. There was divine or natural law, with the Decalogue as the core, and positive law made by human beings. The latter included norms of Roman law received from the Ancients, and those of local customs put into written form. Now, it also became possible to think about, and necessary to handle, conflicts between human/positive law and divine justice.

Legal theory at the beginning of the modern era, however, neglected the possibility of a conflict between law and justice, so that positive law and justice went in hand in hand: It was thought that unjust law could not be law. The absolutist doctrine of the state legitimated positive law through Natural Law ideas. On the basis of a “state contract” the sovereign could rule on everything that furthered the “common good”. Thus, law and justice were again one and the same, and the idea of subjective justice dominated. Only the essence of the idea changed. During the 16th century and at the beginning of the 17th century (based on commentaries on Aristotle and the Digest) justice was mostly a virtue (in German *Tugend*), *iustitia particularis*, the virtue of equal treatment.

The history of Natural Law is quite well known. Where the history of the doctrine of legal sources is concerned, we also know that at the beginning of the 19th century Natural Law was eliminated from legal sources. Generally speaking, all that was left was positive law. In spite of that, scholars of the Historical School, for instance, were interested in justice during many decades, and positive law was understood as something “organically” developed and rational (Savigny 1840, pp. 290-292) - so that it could never produce something which would be unjust.

Then, at the beginning of the 20<sup>th</sup> century justice became a popular topic of legal philosophy and theory, but now in the sense of objective justice as a feature of a legal order.<sup>21</sup> We meet a concept of legal order that included nothing divine but which was set by human beings - and that was neither legitimated nor idealized by Natural Law. In a way, it could be said that discussions of justice began when it became clear that legal systems seemed to be unable to guarantee it. Hence, the problem of justice is typical of the modern, positivist legal order.

### 3.2 Correcting techniques

However, there seem today to be common or shared ideas of justice for measuring positive law. For instance, current doctrines of legal sources in many countries also include so-called customary law, and courts apply it in their decision making. However, (modern) customary law would be quite impossible without collective and (to a certain extent) common ideas of justice. A custom can become a part of law only if it is derived from a certain understanding of law. Otherwise criminal or illegal customs could also become part of law. However, in today’s complicated societies quite often only members of the legal profession seem to have that understanding. One can say that without this understanding there would not exist legal regulations and institutions beside and even opposite to ordinary laws based solely on acts of (legal) professionals. There is national and international soft law, including for instance a new *lex mercatoria*<sup>22</sup>, generally based on the concepts and definitions of the actors concerned.

<sup>20</sup> See e.g. Letto-Vanamo (2007).

<sup>21</sup> See further Schröder (2005).

<sup>22</sup> On the history and current concept of *lex mercatoria* see Stein (1995).

Also new laws (legislation) are issued on the basis of ideals about law, about what law should be. Only few laws, generally those which emerge through political compromises, are discussed in the media, and the majority of national law seems to be based on a certain silent consensus about justice.<sup>23</sup>

There are quite natural reasons for the deficit of justice, which a "just" judge also meets. Positive law based on legislation (statutory law) is never complete, and it never covers all cases. But modern legal systems do not operate with such institutions as the English Chancellor or the Roman *praetor* that could correct statutory law. Of course, there is always a possibility to issue new laws, but it is quite problematic if a judge until then has to apply unjust law. However, very many problems can be resolved by traditional means of legal reasoning, for example by using analogy. But there are always "hard cases".

During the era of so-called dualistic legal systems, injustice in positive law could be redressed by norms of Natural Law, or by *aequitas* - as one form of justice. Today, during the era of the "monistic system", this is not possible, but there are still corrective means (techniques) for a judge who regards positive law as unjust. Since the 18th century there has been an idea of unwritten legal principles, generally based on the idea that positive law as such includes unwritten basics. The Historical School of the 19th century understood legal principles as "legal propositions" (*Rechtssätze*). These formed a latent part of a legal system, but it was jurisprudence that made them visible.<sup>24</sup> This was based on an idealistic view of law. Rational and organically developed positive law included (according to Savigny) answers to all legal problems, and those unwritten, "scientific legal sentences" (*wissenschaftliche Rechtssätze*) could be used to improve and correct positive law.

According to later legal theories (since the 20<sup>th</sup> century) legal principles are merely basic principles within the legal culture concerned. They surround positive law but with less binding force. Moreover, legal techniques have changed. There are no references to justice, no use of scientific legal sentences, but application of legal principles, as "guidelines" from the legal culture concerned curing unjust positive law.

There is also a model of legal(istic) justice which covers fundamental rights and so-called general clauses. This model is based on the idea that positive law *per se* can control its own justice. We find that idea already in modern codifications of the beginning of the 20<sup>th</sup> century, and later in several texts of legal scholars. One can speak of legal norms called evaluation norms or legal norms of evaluation (in German legal literature usually as *Bewertungsnormen* or *Rechtsbewertungsquellen*). Modern fundamental rights can be placed in this category, as well as general clauses of (individual) laws. § 242 BGB (on *Treu und Glauben*) is one of these clauses<sup>25</sup> - and section 36 of the Finnish Contract Act (*oikeustoimilaki*)<sup>26</sup> can be seen as another.

Thus, it can be said that our era has not forgotten (objective) justice, but new techniques have been developed - and not seldom in cooperation between various legal actors - for bringing it within the modern legal system.<sup>27</sup> These techniques are historically determined, and there are local variations in their use.<sup>28</sup>

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<sup>23</sup> It is not possible to speak of the capture of collective idea(s) of justice. But we do not have the self-confidence through which representatives of Natural Law thinking considered their - for the time typical - ideas as universal law. Nevertheless the modern legal order also includes - or can be cured by - (objective) justice.

<sup>24</sup> See e.g.: Jhering (1875, p. 371).

<sup>25</sup> On the history of the German civil code (BGB) see *Historisch-kritischer Kommentar zum BGB* edited by Schmoeckel, Rückert, Zimmermann (2007).

<sup>26</sup> See e.g. Wilhelmsson (1994, pp. 7-11), and Aarnio (1987).

<sup>27</sup> Legislative techniques are discussed e.g. by Brownsword, Howells and Wilhelmsson (1994)

<sup>28</sup> On Differences in Nordic Countries see Letto-Vanamo (2011).

The latter conclusion can be derived not only from the former examples. According to my Finnish colleague Kaarlo Tuori (Tuori 2004), collective ideas of justice are today transposed to legal reasoning and decision making mainly through fundamental rights. However, Tuori, who is a professor of legal theory, wants to keep ethics and morals separated. Ethics is a matter of shared values, and about ideas of a good life. Although individualization and fragmentation are characteristic of late modern law and ethics, there is more *consensus* (collective understanding) on fundamental moral norms today than some decades ago. This can be seen especially when human and fundamental rights are concerned: Moral norms have been translated into legal language, and the law is needed only when different values cause conflicts between individuals and groups. Then, (basic) legal principles - often linked to fundamental and human rights - do not define values of individuals and groups but have more like a guiding function when conflicts between different values should be resolved. This can be seen for instance in cases where freedom of speech or freedom of religion are discussed. Thus, human rights are guarantees of individual choices, and freedom of choice is one of the foundations of modern law.

However, Kaarlo Tuori is not the only Finnish legal scholar pointing out fundamental values and legal principles - also in the meaning of general doctrine (*allegemeine Lehren*) of law - as channels for bringing these values into judicial argumentation. An interesting idea of the interplay between and interdependence of various legal actors can be seen in Thomas Wilhelmsson's book *Senmodern ansvarsrätt. Privaträtt som redskap av mikropolitik* (Late modern law of responsibility. Private law as a means of micro-politics) (Wilhelmsson 2001).<sup>29</sup> According to Wilhelmsson, late modern law is developing - in contrast to the modern law of the welfare state - through "small stories" (narratives), whereas the "story tellers" and their roles are traditional. One story can have several co-operating actors, such as judges, legal scholars, legislators, and civil servants. The stories are small because they (usually) concern only limited questions: A small story can have its origin in an interesting court case commented on by legal scholars. Later, the case is followed by new cases, which leads to certain concepts and doctrines being taken into consideration. Other stories, however, can begin with legal doctrine. And the possibilities of "micro politics" are best in fields where legal principles play a central role in decision-making.

#### 4. Conclusions

This discussion has been about historical dimensions of heteronomy and autonomy of the judiciary. As an introduction, historical narratives (histories) on main legal actors (the legislator, judiciary, and legal scholars) were discussed. In Section 2 characteristics of "pre modern" conflict resolution and the legitimacy of judicial decision making were studied. I argued that during the era of non state law and in circumstances without an authoritative judiciary (like in rural areas in the Nordic Countries) the participation of the conflicting parties and the local community played an important role for guaranteeing legitimacy and acceptance of conflict resolution and judicial decision making in local courts. Also (later) justifications of lay participation were analyzed, and hence, questions of public / democratic control over the judiciary - and of social background of judges - were enlightened.

In Section 3 the interplay between and interdependence of various legal actors were in focus. I argued for the importance of historical-comparative studies on legal scholarship, through which one can better understand variations in functions and roles of the judiciary, and particularities of judicial argumentation in certain times or geographical/ cultural areas, as well. Interestingly, there are quite many similarities with the ideas of Mitchel Lasser (2004) presented in his comparative book on judicial deliberations. He also points out the importance of an "internal perspective", and analyzes the cultural and scholarly dependencies of judicial

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<sup>29</sup> (Helsinki: Kauppakaari 2001).

argumentation. In particular, Lasser's analysis of the French system (judicial deliberation in the Cour de cassation) is worth of mentioning here.

The official French portrait of the judicial role is a coherent and carefully worked out representation that emerges from three primary sources: legislative rules, judicial interpretation and application of those rules, and the French form of judicial decision. The official portrait presents the judge as a mechanical mouth; He does no more than apply legislative provisions, leading to required outcomes already determined in the matrix of statutory law. This picture, however, neglects the internal discursive sphere of the French civil judicial system: The French *magistrats* (advocates general and reporting judges) play a crucial role in the daily work of the *Cour de cassation*. According to Lasser they are seeking to convince their colleagues (judges) to adopt and deploy particular normative stances above all on the grounds of equity, substantive justice, and contemporary social needs (Lasser 2004, p. 59).

At the same time, there is a link to legal scholarship, too. The French practice of summarizing and personalizing academic arguments plays an important discursive role in the composition of conclusions and rapports. The *magistrats* go out of their way to frame legal issues in terms of "controversies within doctrine", that is, to present doctrinal arguments as falling into divided or opposing camps. It is through presentation of doctrinal controversy that interpretative problems are revealed and explained. At the same time, doctrine controls "la jurisprudence" of the court ( in the meaning of the court's past decisions, precedents, or judicial doctrine on a particular legal issue), not only by critiquing it, but also by enduringly encroaching on, sharing, and shaping its normative content and impact.

Thus, In the French legal system, judicial decisions are not sole or unchallenged masters of their own (jurisprudential) domain. According to Lasser, they are "part of an ongoing, diachronic, and dialogic relationship with academic doctrine, which perpetually partakes in - and thereby limits - their normative authority" (Lasser 2004, p. 310). This is, however, true in many other continental European, or more generally civil law countries, too.

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