

A Brief Description of The Transdisciplinary Jurionomics and The Scandinavian Institutional Sources of Law Framework

HELSINGIN KAUPPAKORKEAKOULU
HELSINKI SCHOOL OF ECONOMICS



Tom Railio

A Brief Description of The Transdisciplinary Jurionomics and The Scandinavian Institutional Sources of Law Framework

Business Law

April
2009

HELSINGIN KAUPPAKORKEAKOULU
HELSINKI SCHOOL OF ECONOMICS
WORKING PAPERS
W-469

HELSINGIN KAUPPAKORKEAKOULU
HELSINKI SCHOOL OF ECONOMICS
PL 1210
FI-00101 HELSINKI
FINLAND

© Tom Railio and
Helsinki School of Economics

ISSN 1235-5674
(Electronic working paper)
ISBN 978-952-488-324-5

Helsinki School of Economics -
HSE Print 2009

1. Introduction

This text focuses both on describing and discussing two main themes, which have a relevant linkage to each other. One is the transdisciplinary jurionomics and the other one is the Scandinavian institutional sources of law framework within the sector of international taxation. These two themes have a relevant link, so that is why they are discussed here under one heading. But what exactly is jurionomics? Well, before I answer that question, let me just categorically brief you, what it is not. Jurionomics is not; business law, law and economics, commercial law, legal theory, legal philosophy, heuristic legal dogmatics or any multidisciplinary nor interdisciplinary approach to legal science. These well established research fields are not the place, where jurionomics could be positioned. In addition, jurionomics is not a new interpretation-argumentation matrix. Metaphorically speaking, I could call jurionomics as necessary eyeglasses, which rational decisionmakers of open society organizations must wear in order to act smoothly, yet profitably, in the normative regulatory environment.

1.1. The definition of transdisciplinary jurionomics

1.1.1. The levels of interdisciplinarity

As the individual sciences progress further and further, the cooperation between the researchers from different fields of study will continue to increase. Such an interdisciplinary approach is a welcome one, because it enables us to create more explanatory theories of the social reality and also of the nature around us. In general, the *multidisciplinary* approach represents the weakest form of interdisciplinarity. It basically means, that we conduct our research in a problematic area by using the perspectives of many different sciences. A bit stronger interdisciplinarity is being represented by the *interdisciplinary* approach, such as the law and economics movement in general. *Transdisciplinary* approach represents the strongest form of interdisciplinarity. This transdisciplinarity takes place, when we try to create a new theoretical framework altogether, take the cognition science for an example.

1.1.2. Jurionomical argumentation theory

Coherent jurionomical thinking stipulates, that all organizatorial research settings in the field of jurionomics, must start by mapping out those risk or return aspects which are going to be researched further. The core return and risk variables can be seen in the below table. A combination of a legal dogmatical and business economical research setting, that fails to do this, remains either multidisciplinary or interdisciplinary dialog. The starting point for the jurionomical research is, that the present organizatorial situation is not optimal in the sense that profitability can be increased by way of conducting risk and return audit in the broad meaning. The jurionomical risk and return relations related argumentation theory includes the following primary variables.

RETURN ¹	HOW'S	THE RISKS OF AN ORGANIZATION ²	HOW'S
REVENUES	Customer's utility curve improvement by repositioning/differentiating the service/product. Totally new cash flows. Growing current cash flows.	External risks: political, legal, terrorism etc. Operational risks. Insurable risks. Economic risks. Financial risks.	Measurement/estimation of risk exposure and choice of risk protection instruments if the cost of such hedging instrument is smaller than resulting cash flow.
COSTS	Eliminating certain costs altogether. Reducing certain costs.	Business risks. Market risks. Liquidity risks. Credit risks.	
ASSETS	Competing supplier chains. Searching higher interest incomes.	Exchange rate risks. Interest rate risks. Commodity price risks. Stock price risks, Et cetera.	
LIABILITIES	Eliminating certain liabilities altogether. Reducing interest rate costs.		

Table 1. The generalizing explanatory principled variables of Railio's jurionomical argumentation theory.

¹ One of the latest management fads, the popularised *blue ocean* strategy and its managerial tool four actions framework in the formulation of a new value curve by Kim & Mauborgne (2005) 17, 29, is based on somewhat similar theme construction in the revenue and cost context.

² These risks are rather standardized in the meaning that they can be observed in most organizations. The risk management consultants have developed more sophisticated approaches, such as the Enterprise-wide risk management (EWRM).

One could easily argue, that what exactly is an argumentation theory in this context. When we discuss legal dogmatics based on the normative judge ideology, we are in that area of jurisprudence, which can be categorized as interpretation science. Business economics, on the other hand, consists of so many subjects, that it is impossible to give a single definition, as to where its scientific roots are. Moreover, the research findings in the field of business economics are often generalizations. These generalizations are often outcomes, from a statistical analysis, although general thinking frameworks are often more relevant, when we try to analyze or generally understand a certain phenomena. Thus, jurionomical argumentation deals with interpretation, systematization and weighing sentences of legal dogmatics, together with the broad toolbox deriving from the field of business economics. In any case, although I consider it to be relevant, yet difficult, to determine the jurionomical argumentation theory on definite terms, I would like to remind here, that the jurionomical dialog is always aimed at relevant risk and return relations broadly speaking. The description of these relations is always contextual, perhaps even heuristic. By keeping this risk and return perspective in our conscious mind during the research itself, we can more easily argue, how should one act in order to expand utility. Thus, jurionomical argumentation theory is very different from the traditional view of a theory itself. The jurionomical argumentation theory is something truly unique, because each research question or objective, will remain different. This requires, that the researcher firmly believes, that his/her insights will materialize into those kind of sentences or overall conclusions, which either decrease risks and/or costs as well as increase revenues in each and every research setting. If someone would read these, should we say; recommendations, and would implement such policies in their organizations, then utility should at the very least expand. In addition, the ability to discuss these risk and return relations pragmatically, does not often require any statistical tests whatsoever. Besides, nobody ever required, that the reality should always be explained with the help of statistical reasoning.

An attempt to explain beforehand how to expand utility, in cases where more utility is preferred to less is impossible, simply because each organizatorial situation is different from each other. However, analogically to traditional price theoretical studies, it is taken

as given that decisionmakers' are rational agents who attempt to maximize utility and minimize costs. The business economical perspective to all this is therefore, that organization's managers act simultaneously to maximise profitability and minimize both the costs and the risks. Hence, in essence jurionomics is a more holistic viewpoint to organizational decisionmakers' as to, how to increase profitability. To sum things up, I define jurionomics as follows:

“jurionomics is a new field of study, tied into the society's institutional background and business economics. Jurionomics has a research focus on valid law in the light of existing judge ideology, and in the contextual³ relation(s) of these obligatory legal norms into the business economics theories, models, frameworks and conceptualisations. Jurionomics represents that kind of a combined contextual dialog between legal dogmatics and business economics, which attempts to decrease the cost and/or risks and also increase revenues, so that the utility of the organizations and thus also their interest groups would expand”.

Thus, jurionomical research has the following main elements:

- I.) Legal dogmatical and business economical context.
- II.) An attempt to decrease costs and/or risks of an organization.
- III.) An attempt to increase revenues of an organization.

1.1.3. The objective of jurionomics

But what exactly do we want to find out, when we apply the jurionomical approach to a certain research question? The key objective with the jurionomical approach is to present justifiable interpretations of the valid law in the context of business economical theories, models, frameworks and conceptualisations, so that the utility would expand. As already noted the organization's profitability (utility) will expand, whenever either the risks/costs decrease and revenues increase. Such new visions of risk and return related realities in legal dogmatical and business economical contexts or should we say, understanding of the present world, ought to provide us answers to the kind of questions; “how should one ACT in order to achieve the best possible consequences to his/her organization and consequently, to his/her interest groups?”. In other words, when it comes to jurionomics,

the general nature of the transdisciplinarity itself is, to explain how to expand utility or to be more precise, how to increase profitability.

Generally speaking, a truly rational decision-maker should be able to carry on a dialogue with his specialist colleagues within the same discipline and preferably, also with the other specialists from the related fields of disciplines. Without such dialogue and argumentation capacities it becomes very unlikely, that the risk and return aspects are resting on their optimal levels.

Contrary to cognition science, jurionomics is not focusing primarily on creating new explanatory theories of the nature or of the social realities. Cognition science has evolved into a transdisciplinary special science due to its valid theories. Transdisciplinary jurionomics is firmly based on a single jurionomical argumentation theory. The greatest difference between the cognition science and jurionomical approach is right here. The cognition scientists attempt to create new explanatory theories. However, the jurionomical researchers have their theoretical context ready in the beginning stages of the research and they can use it with pinpoint accuracy in order to increase the profitability of organizations. Hence, it is fair to conclude, that jurionomics is pragmatical truth seeking aiming to help organizatorial managers to formulate more rational management decisions by reducing risks and costs whilst at the same time improve revenues. After all, by applying the existing jurionomical argumentation theory and by taking the juridical reality, in the form of normative norms and non-normative norms as negotiable ones as given, profitability maximization efforts becomes a lot easier. It is a matter of taste in principal level to say, which kind of transdisciplinarity would be better or more pure than the other. For example, is transdisciplinarity in the sector of natural sciences more better than the transdisciplinarity in the sector of social sciences, simply because the jurionomics is so firmly focused on increased profitability efforts.

As jurionomical research is applicable to almost all fields of civil law and public law as well as to business economical sector, it is an extremely powerful mental instrument at the

³ Following, the term contextual does not refer to any linguistic meaning. Contextual in this case implies, that each

right hands. Hopefully needless to say, jurionomical research is of relevance both to public and private sector organizations.

The main elements and the nature of transdisciplinarity of jurionomics can be shortly illustrated as a figure as follows:

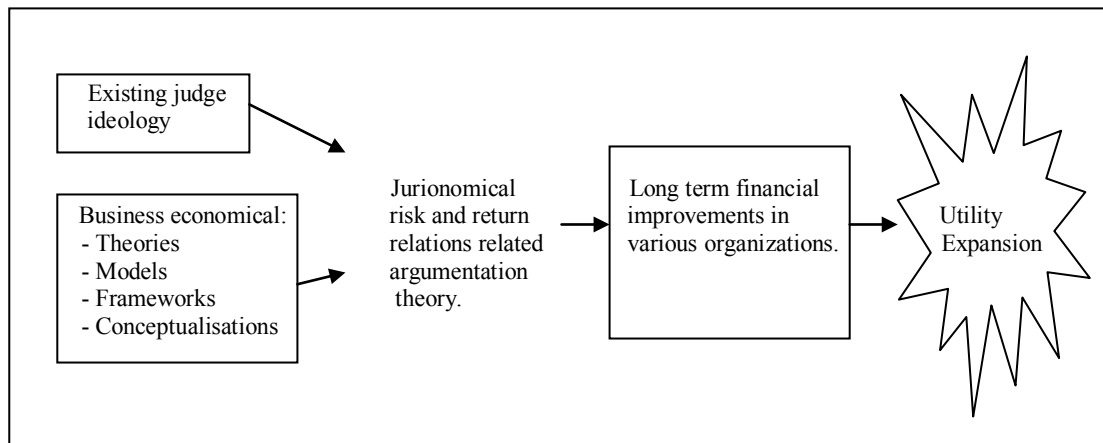


Figure 1. The nature of transdisciplinarity of jurionomics.

1.1.4. Positioning jurionomics

According to jurionomical world view, the society is made of different organizations and implementation of the discoverial applications deriving from the jurionomical argumentation theory determines, how efficiently the organizations are operating. Since jurionomics is positioned so far from the generally interdisciplinary law & economics movement, it is necessary to draw some differentiating lines between interdisciplinary law & economics and transdisciplinary jurionomics.

Characteristic(s)	Law & Economics	Jurionomics
The research interests	Various approaches: Chicago school (Posner), Institutional, Public choice school, game theory etc.	Discoverial applications of jurionomical argumentation theory.
The basic nature	Very loose interdisciplinary dialogue between two traditional social sciences; the legal science in the broad sense and economics.	Strictly focused transdisciplinary risk and return relations related dialogue between the disciplines of business economics and jurisprudence.
Objective	The initiation of more efficient judicial structures, practices or norms for example.	Increasing profitability of organizations.

Table 2. The key differences between Law & Economics and Jurionomics.

In jurionomics, legal dogmatics is seen as a social fact. In other words, legal dogmatical thinking is naturally based on the institutional sources of law also occasionally referred simplistically as the existing judge ideology. The other interpretation matrixes which view the law as a social ideal such as; the social civil law, CLS, law & economics movement in general or marxist approaches are all dismissed in jurionomical dialogue.

When it comes to dialogue between independent disciplines, one could observe, that rather similar weaker level interdisciplinary approaches, does exist already also in the field of economic analysis of law. Such as; law and economics, which has a very long history internationally. In Finland, the law and economics research have been given many different names for the time being and it can be concluded, that the law and economics has arrived into Finland both terminologically and via research practice, for good. The economical analysis of law, law and economics, analyses legal norms and systems, through economics unified concepts and theories. On the other hand, jurionomics sees the reality of valid norms, mainly in the context of business economical models and thinking frameworks in a way, which expands utility in the broad sense. This is the key difference between the interdisciplinary economical analysis of law (law and economics) and transdisciplinary business economical analysis of law in an utilitarian context (jurionomics). Terminologically we are not very far, but in reality, the economics and

business economics, do not stand very close to each other in a categorical scientific setting. Another main aspect, which roughly differentiates the economics and business economics from each other is, that only economics theories and models are significant enough in the judgment of legal disputes, when the valid law does not cover the situation. Sure, there is some common ground as well between these two alternatives, as one could easily imagine. The elasticity calculations, for example, are an area, that has much relevance for both of these fields of study. Historically however, it was Alfred Marshall, who invented the elasticity calculations, so in that respect, this area could be said to belong to the national economists, or more commonly, to the economists. The business economists have, as one could again easily imagine, made many alterations to these elasticity calculations, so that they would have more relevance in the daily operations of various organizations. Moreover, because the business economics consists of many fields, we can keep our analytical framework versatile, yet simple enough to reliably explain significant phenomena or cause-effect relations. Jurionomics can also occasionally integrate economics and business economics together on the common issues as well, such as elasticity calculations. Thus, a single phenomena could now be approached, from a single integrated perspective or unified theory. Jurionomics is also harmonious, because it is based on the normative judge ideology. The argumentation is thus reliable, informative and hopefully of significance, also to the wider society outside the academic circles. One question, that has to be asked here is that, is the construction of an unified theory a relevant criterion for the measurement of the success of a certain scientific discipline at all. I am not going to try to answer this question, because in my opinion, there are no absolute answers.

1.1.5. The factual research methodology of jurionomics

The factual research methodology of jurionomics does not differ from the business economical methodologies or the legal dogmatics itself all that much. In other words, one should be able to interpret, systematize and weigh, the various valid sources of law and legal principles in such a manner, that each source category is given the weight they deserve upon the situation. In addition, one should be able to only include those norms,

which the risk and return relation related context determines and disregard the irrelevant norms without remorse. This helps us also to understand, why I argue jurionomics to be a transdisciplinary approach, instead of being yet another interdisciplinary approach. Moreover, jurionomics does not help us to interpret the valid law any differently, than what the institutional source of law doctrine suggests. As we know, this is not the case, for example, with the law and economics, because when a relevant norm is missing, interpretation in the name of some sort of economical Pareto related efficiency or alike, may become persuasive at the courts of law. Unfortunately, the business economical models, very rarely provides such efficiency contexts, which would also represent the wider society. So, to sum things up; legal dogmatics and business economics are only necessary evils for the purposes of jurionomics, because we absolutely and categorically only try to expand utility.

Thus, jurionomics is by no means a new sort of superdiscipline, but factually requires traditional legal dogmatics and business economics disciplinary research in various risk and return contexts in order to truly become transdisciplinary, whilst at the same time expand utility. Naturally, it goes without saying that the expansion of utility is occasionally accomplished inside the traditional disciplines as well. In other words, traditional legal dogmatical and business economical research is not antagonistic to jurionomics, but complementary.

1.1.6. The ideals of jurionomics

1.1.6.1. Towards neutral dialogue

What justification could one present, for a novel approach to jurisprudence, especially when the interpretation matrixes of legal dogmatics seem to be somewhat complete in this respect. Well, to be perfectly honest, we do not need any new justifications, because the old ones will serve us just nicely. In other words, the general welfare of most of the organizations interest groups is the beacon for the jurionomics. This can be summarized as follows:

“Utility is derived from consumption and consumption is derived from money. Thus, higher returns leads to higher stakeholder/shareholder happiness, measured for example by such conceptualisations as utility⁴”.

From this summarization, we can generalize, that when it comes to utility, more is preferred to less. This is also the view of the price theory. One could naturally ask, which interest group is the most important one or whether some interest group factually loses in some areas, when the organizations attempt to increase their returns. No answer can be given for this kind of question setting, because each organization is truly unique with its connections to the society in general. It is the brilliant implementation of the business economical models, which will make it easier for managers to decrease risks and costs, and thus, also achieve higher returns in their daily operations. The very implementation of the business economical models, must pay attention also to the valid law. Naturally, it would be beneficial, if one could also reflect his/her management decisions against the economical constructions, whenever the context so determines. However, It should be highlighted here, that jurionomical approach is by no means an approach only of relevance to the private sector. Public sector organizations are not that different from the private sector. After all, they both produce either services, products or their combinations. It might well be worthwhile for the public sector organizations, to more often analyse, the possible operational legal risks from a fresh perspective. The same thing could be said also, when it comes to return aspects, for example, operative level cash management tactics.

Another main issue, which concerns jurionomics lies in its philosophical⁵ backbone or should we say in the lack of it. We have to raise the question, is it theoretically enough for the jurionomics to minimize risks and/or costs and increase revenues, so that the utility of the organizations and thus, also their various interest groups would increase. What kind of transdisciplinarity is this? The legal science, has a tradition to go much deeper in its

⁴ In an utilitarian context and in the context of price theory, the term utility means roughly happiness.

⁵ Niiniluoto (1984) 11 discusses the objects of philosophy in general and points out, that “philosophy goes beyond all special fields of inquiry also in the sense that it tries to build upon their results systematic world views. The sum of the results of the special sciences at a certain moment of time does not yet constitute a fullblown *Weltanschauung*, since to tie them together one needs a philosophical outlook about the nature of reality, the preconditions for attaining knowledge and the mission of a man in the world. This endeavour is visible not only in the finished “great” philosophical systems but also in the everlasting strive for deeper and more complete understanding of reality”.

analyses. Also, the various fields of the business economics often try to at least to find some cause-effect relations, whereas the economics in the broad sense is more focused on validating some theories or individual hypotheses. I would like to answer to this concern as follows:

“Do not assume, that the creation of a jurionomical research problem would be simple. After all, we are trying to prove our point from two different contexts, whilst also trying to pay attention to proven economical constructions. Clearly, we are going above argumentation, which is based on personal value level valuations. The final conclusions are thus; more neutral and impartial. If the various interest groups of the various organizations benefit of the research findings, then all the better”.

One factor, which increases both the reliability and validity of the jurionomical approach is, that jurionomics focuses on valid law in the light of existing judge ideology. A point worth remembering here is, that the (rational) decision-makers of the various organizations would have to study and apply the research findings in their organizations, so that their interest groups would factually benefit somehow. Otherwise, the jurionomical debate becomes academic discussion only, and that, I believe, we have more than we need.

1.1.6.2. Towards existing judge ideology

The legal theorists focusing their interest to the field of natural law, often argue, that the dialog between the natural law principles and valid law is the area, where good, reasonable or somewhat more equal legislation is born. I would like to point out here, that jurionomics can significantly help us to implement more rational decisions and extent utility, without taking the natural law principles into account all that much⁶. This implies also, that all other interpretation-argumentation matrixes which view jurisprudence as a social ideal are to be put into a garbage can. The existing judge ideology, also called as the institutional sources of law doctrine in some instances is the only rational base, when it comes to evaluating valid law somewhat similarly to judiciary in the broad meaning.

⁶ See also Tuori (2000) 15, who argues as strongly as follows: “the nature has been dumbfounded in front of the justice”.

After all, what would be the factual relevance say, for example, that of a sophisticated tax planning efforts if the Tax Offices would have a different interpretation of the same tax object or business transaction?

1.1.6.3. Towards utilitarianism and interest group wide utility

Since jurionomics is positioned so strongly around the term utility, we need to take a broader look at this concept. The popular utilitarian philosophers, such as *Jeremy Bentham* and *John Stuart Mill* both highlighted, that human beings should avoid pain and seek happiness instead. Thus, the rightness and perhaps also the justification of acts could be found, from the value of their consequences. If the promotion of happiness would have been an universal supreme natural law principle before the legal positivism took over, then the jurionomical approach would have been a relevant if not necessary step towards this end, although certainly not the only one available. The biggest weakness of this general level utilitarian approach to utility is, that one might naively assume, that the attempts of the human beings to avoid pain and seek happiness is a strong psychological principle, which would factually always guide a person's behaviour. This is not the case. The economist's view of the utility is much more simplified and more narrow as well. According to Hirshleifer (1980) utility reflects nothing more than the rank ordering of preference. Utility is now seen as a variable whose relative magnitude indicates direction of preference: in finding the most preferred position, the individual maximizes utility. Both the philosophers and the economists view the utility differently, from their own traditional perspectives. This is unfortunate, because I will extend this terminological confusion a bit further. Broadly speaking, if an utilitarian were concerned with maximizing the utility of the universe, then the business economists should be concerned with maximising the utility of their organizations and consequently their interest groups. This could happen by implementing policies and tactics, based on jurionomical thinking. Neither the philosophers nor the economists offer us relevant insights as to how to produce revenues. This is an important question, because both in the public and private sector, the utility is more or less derived from consumption and consumption is derived from money. In its basic, for the business economists, the utility is synonymous with the

level of happiness of the various interest groups. The jurionomical thinking shows in the management decisions in two main ways: avoidance of unnecessary risks/costs and constant search for higher revenues all in harmony with the valid law. I believe, that in the long run such decisions would maximise the utility of most of the various interest groups. Hence, jurionomical thinking can at its best enable organizations to become evermore profitable and therefore make also the wider interest group networks better off in financial terms which is the same as higher utility point in the utility curve.

The measurement of utility is not meaningless in this context, but difficult. This so, because each interest group is different from each other, as are the organizations as well. Some interest groups appreciate, how well the organization takes care of the society in general, whereas some others may only have a focus, on the amount of money they receive from the organization.

1.1.6.4. Towards economical imperialism

Nowadays the economic analysis of law, more commonly referred to as the law and economics amongst the legal researchers, does already exist as central organizing philosophy in the U.S. legal education⁷. Whereas the economists are very interested in making the jurisprudence more efficient very broadly speaking, the business economists are interested mainly in making their organizations more profitable. However, whether we see the efficiency improvements as Pareto improvements or as increased net profits, we should try to keep the borderlines between the economics and business economics as low as possible. In fact, since both the economics and business economics can both contribute to common good by making the judiciary and judicial reasoning more efficient, we ought to increase our research efforts in unifying these two neighbouring sciences.

I also believe, that jurionomical dialog benefits greatly from some of the economics models etc. The jurionomical dialog is, however, positioned firmly between the field of legal dogmatics and business economics. Jurionomical dialog could surely advance the

⁷ This opinion is expressed in Cooter et al. (2000) ix.

economical theories and models somehow in the future, for example, by providing more rational underlying assumptions for such important areas as consumer behaviour. After all, the reason why microeconomics never gained much popularity within the business school environment was, that the traditional view to demand in the sector of price theory was focused too narrowly. In the real consumer behaviour, the price does not explain very much, when it comes to factual purchase decisions. Naturally, the economics has also a lot to offer to the business economics. Currently, the economics is helping the business economics to develop in numerous ways. It is not an exaggeration to suggest, that the economical imperialism is trying to conquer, further clarify and expand some of the traditional business economical models. This could be easier for the economists, if the consumers and economical actors were rational also outside the definition. It is hard, even for an economist, to model reality with precise econometrical equations, when the behaviour of any kind consists of too many causes. The economists have noticed this in their management science related studies: individuals are not rational nor maximisers⁸. In the field of financial accounting the economics has very little to offer, but in the corporate finance sector we are already seeing breakthroughs; take option pricing models for an example. Also marketing has gained from the economics, when it comes to analysing the impact of advertising or the formulation of preferences. I strongly believe, that the biggest advantage of this kind of expansionism of economics into the fields of business economics is simply, that we learn to formulate more correct underlying assumptions. The modern models of price theory are working logically and they can be validated rather easily. However, a model, which explains the real behaviour only partially, is often a model of little relevance to anyone. If the economists want to serve the wider communities outside the academia, they are going to have to start listen the business economist more carefully. Naturally, also the business economists should start using more econometrical approaches in their model creations, because in the natural sciences, unified formulas are mathematical instead of conceptualisations. But why are there so few unified formulas internationally, in the various fields of business economics? Well, many reasons. Perhaps the biggest reason for the time being is, that no significant unification is

⁸ The economics has, however, occasionally relevance also in the field of management science. See for example, Edward P. Lazear's (1998) compilation, on the personnel economics related topics, which uses also rigorous derivations on occasions as additional arguments.

on its way and this so, because the business economists are currently avoiding econometrical approaches which could be validated also in an international setting.

The actual interpretations of the valid law should, however, be as precise as possible. The formal jurionomical research findings are thus, correct interpretation, systematisation and weighing sentences in an insightful business economical contexts. Clearly, it would be in the common interest, that we would concentrate on the main theories of the business economics in this jurionomical dialog. The truth is, however, a bit sad here. The world of business economics, is generally not a world of precise theories, but a world of models, concepts, general thinking frameworks and interesting case stories. The economics have, more or less, the theories on their side of the table. Besides, if I was to choose some well-founded business economical theory here and say, that this is the key theory in the jurionomical dialog, I would be doing great injustice to some fields of business economics, which consists of financial accounting, marketing, management science, corporate finance and so forth.

1.1.7. Future development of jurionomics

Jurionomical dialog will become one of the most relevant developments, in the area of applied business economics and pragmatical legal dogmatics for the following decades, because the best ideas of economics are already in place in the public policies. However, the relevance of jurionomics depends largely on the substance of the new thinking frameworks. Should the new thinking frameworks tell us in crystal clear interpretations, how to decrease risks and costs as well as increase returns, then the jurionomics could become a challenger to the law and economics movement itself, especially in the business school environment. Perhaps the biggest reason why the economical analysis of law never reached popularity in the business schools is, that the models of the law and economics were considered to be nice stories so to speak, but of little real relevance to daily operations of various organizations. In any case, we should not wait for the miracles to materialise, when it comes to changing the business school courses. After all, the present law and economics field has taken some 50 years to mature and was never considered

mainstream jurisprudence, not even mainstream economics for that matter. Some voices have also been around, that the economical analysis of law is starting to become to the end of the line.

Another major aspect of the relevance of the jurionomical models, deals directly with the various sources of law. As we know, the history of the common law countries and civil law countries is such, that in general some industrial countries place more weight on the actual contracts and the other countries on valid law itself. These walls will surely exist also in the future. Thus, it can occasionally be difficult to predict, how the judges would rule our cases, especially when one has not got a full picture of the traditions of a foreign legal system. In other words, the jurionomical models are not reliable to the point of perfection and probably never will be.

Jurionomics could well become a standard methodological tool in the future, because of its usefulness in the analysis of tax policies⁹. The problem with such a research is, that it would usually require a degree both in jurisprudence as well as in business economics from the researcher. On the other hand, econometrical equilibriums are always subject to severe limitations, which are plainly called as the underlying assumptions. It is no secret, that by changing the assumptions we get different results. Financial ratios are also subject to speculation. The financial ratios are often not defined at the level of domestic tax law. Regulatory bodies tend to be silent on such basic issues as, the regulation of performance measurement of mutual fund investments in all Scandinavian countries. The performance measurement issues are left to the levels of legal doctrine and industry practice, which means there does not exist any one leading truth, when it comes to presenting for example, the best performing mutual funds in one time period. Even if such a consensus became a reality in the future, it would still have to be ratified by means of valid law. Very rarely a legal research methodology becomes a substitute for a valid norm, but rather often, only a way of illustrating the best possible interpretation of the issue at hand¹⁰.

⁹ The same things can be said of the law and economics methodology as well. See, for example, Mähönen (1995) 125-139, and Kanninen et al. (1996) 11-45.

¹⁰ Helin (1998) 310 notes, that the earlier argumentation theories were centered on the theme, that juridical interpretation is not logic but argumentation based on valuations.

Rational jurionomical modelling can provide us with optimal recommendations for the development of legislation in any country at any given time. The very acceptability of such modelling depends on the level of consensus that can be reached in the scientific community. However, even if some jurionomical model could be accepted as the optimal situation for any legislation, it does not follow, that this would become implemented in the form of new legislation. For out of all dead isms, egoism is still alive and kicking. Also, political parties who holds the key positions within the government, tend to initiate legislation that benefits their voter's interests or establishments self-interests, as opposed to what might be the most effective legislation for the whole society.

Although the economics and business economics are two separate fields of study with their own contextual research traditions, they do have sometimes common ground as well. By first finding this common ground in various contexts, we can finish the legal analysis and perhaps this kind of a three-dimensional angle, provides us with even more information about the truth. Broadly speaking, the business economics should be capable of providing more effective underlying assumptions. Thus, these kinds of analyses explain more effectively the research phenomena in question. In addition, we should also see more easily, the effects of our actions beforehand. For example, by analysing the future tax deductions of certain investment schemes, we could see, whether the income taxation can be said to represent neutral taxation, instead of directing taxation. It could also be the case, that we need to analyse a certain problem jurionomically first, and only then can we proceed to economical analysis of law and determine, whether the income taxation in some instance is directing, discriminatory or something else. If there exists some kind of final single truth as to how consumers behave and how the organizations are to respond to the consumers behaviour most efficiently, then this kind of a three-dimensional research setting might be a rational research approach.

The global trend is also, that the size of the public sector is decreasing. SME-firms, especially the service-oriented ones, are generally seen as the futures employers. The jurionomical dialog does not rest on any mathematically precise theories, but rather on

general models or should we say, thinking frameworks. The knowledge of econometrics, financial mathematics or statistics is often not necessary at all. In addition, the legal dogmatics itself is not all that difficult to grasp, once the person gets a grassroot feeling what is the role of various sources of law. Thus, fruitful implementation of jurionomical models will take place also outside the legal journals at the operative levels of organizations. But one major obstacle remains, however. Do we dare to challenge the traditional economical analysis of law by jurionomical approach. You bet!

1.2. Introductory analysis of the sources of law in the field of international taxation in the Scandinavia.

1.2.1. Introduction

As I have previously defined, jurionomics has a research focus, *inter alia*, on valid law in the light of existing judge ideology. The judge ideology is something, each lawyer must know, but rarely do we know the judge's ideologies in the other EU member states. This implies, that this introductory analysis is partially aimed also outside the Scandinavian lawyers, who are not familiar with the basic aspects of the existing judge ideology in the Scandinavian countries. Moreover, when we invest capital in foreign mutual funds or similar fund based investments, we need to know the various sources of law in the foreign countries, as well as their degree of binding effect against each other. It is rather easy to assume, that the effects of the various sources of law are known both to investors and lawyers. However, I do not believe, that this is really the case. It is true, that some taxation-related books include a brief discussion of the basic sources of law in the field of taxation. These brief discussions are, however, seriously limited in their analyses. And I mean, seriously limited in the strict meaning. I have not come across a single book in the field of taxation, which would analyse the sources of law purely in the context of valid law. This is the case with all of the Scandinavian countries as far as I am aware of. Of course, the lawyers are being taught the basic courses in the sources of law as part of their curricula, but such courses remain on the surface level and do not touch any specific field of legal science individually. Yet, the polycentricity of the sources of law is always a lively area of practical debate. In addition, there is currently no previous comparative discussion of the sources of law, in the context of international tax law in the light of existing judge ideology in Scandinavia. Considering the volume of today's mutual fund industry and this lack of practical knowledge, the following brief introductory analysis should be a welcome one although the valid law was followed only until the end of 2002. Besides, talking about judge ideology in the context of jurionomics loses it ground quickly, if we do not tell, what our view of the judge ideology happens to be. But why is the knowledge of the various sources of law so significant. Simply, because interpreting the valid law norms differently from the national tax authorities, may result a tax increase. So, it is rather easy to see, why the knowledge of the various sources of law in the context

of valid law, really matters. Next, I shall evaluate, some of the previous studies in the area of sources of law.

A recent study by Thorpe (2001) on the online legal information in Denmark, Norway and Sweden, discussed the history and various Internet sources of valid domestic law and concluded, that despite the fact that access to some sources of law is still limited, Denmark, Norway and Sweden have an outstanding record for making comprehensive legal information available online. This study excluded Finland, but we can safely say, that in the field of taxation, all the relevant¹¹ Finnish sources of law can be accessed online. However, some of the services are being provided by private institutions and are thus, not available for free. Our experience during this study has been one of amazement, when it comes to finding legal information online these days. It is fair to say, that the legal materials will come to stay online in the future as well. Although, all the sources of law may well be soon available for the general public for free, we still need to know, how to correctly interpret the various sources of law. This problematic area was studied by NSFS (1989), which included research papers from all of the Scandinavian countries. These research papers discussed the sources of law in the field of taxation, in a descriptive perspective.

1.2.1.1. On the binding effects

In this brief introductory analysis, we firstly extend these previous discussions by providing arguments, which are focused mainly on the issue of binding effect. This seems to be an issue for some of the sources of law, where no one leading truth exists currently. We believe, that the various sources of law need to be analysed beforehand in the context of factual binding, in order to lessen the legal risks involved with cross-border mutual fund investments or with any other investments for that matter. However, we do not analyse the norms with the purpose of achieving a doctrine level systematisation¹² of

¹¹ However, these online sources do not include preparatory documents from the Ministry of Finance, which have recently been given importance in the interpretation of tax treaties.

¹² According to Timonen in Sc.St.L., (1990) 270 “ the doctrine of the sources of law must consider validity alternatives in the research on valid law. Also, the mutual relation between various validity concepts needs to be analyzed at least regarding the interpretation of legal dogmatics”. Björne (1993) 6 argues, that “it is impossible to

valid law. It is true, that often judges and legal scholars share the same view for a common doctrine of the sources of law. But, the yearly taxation assessment and implementation process, for both the individual and legal persons alike, is the situation where the majority of legally binding decisions becomes implemented. In this taxation process, it is mostly the domestic tax legislation¹³ that acts as an interpretative tool.

1.2.1.2. The relevance of Constitution

Secondly, we also mention briefly those Constitutional articles, which we consider to be relevant in the context of, basic fund investments. In general, Constitution has strong directing effects. Thus, we make an assumption, that the valid domestic tax laws reflect the spirit of the Constitution in all of the Scandinavian countries. A short list of Constitutional articles may seem even naive, but taking their weight into account, it is harder to justify, why they would have been left out of this comparison¹⁴. Thus, in the following analysis, we have separated Constitutions from domestic tax¹⁵ laws. We argue that the Constitutions' real nature is to provide directing effects to all the legislation in all Scandinavian countries. Thus, Constitutional articles are rarely applied¹⁶ in the *supreme tax courts* judgments.

Briefly observed, the primary source of law in Scandinavian countries is the domestic law and when it fails to provide an unambiguous interpretation norm, then one must use the

create clear rules for the application of different sources of laws should the different sources be opposing each other". In this chapter, we only intend to present a short synthesis of the valid norms concerning mutual fund investments and what is their degree of binding effect against each other. According to Husa (1997) 408, the word synthesis means, joining together or uniting so that a general picture is made of details or an integrated whole from pieces. Note also, that this brief introductory analysis is not reflecting all the latest norms of relevance.

¹³ The following analysis sees the sources of law in a narrow, *sensu stricto* meaning. See for the distinction of various possible definition approaches for the sources of law, in Aarnio (1988) 218-220. Tikka (1998) 1161 notes, that solving the taxation problems is becoming harder in the context of sources of law and the presence of European tax law is strong. In general, we have not noticed any emphasis to use arguments, from the other Scandinavian jurisdictions either in the preparatory materials or in the precedents.

¹⁴ The relevant Constitutional articles, are also being listed in an inventory manner, which may strike the reader as a surface level guidebook of some sort. Again, I feel, that it is absolutely necessary to dive through the Constitutional articles, no matter how short the discussion following the presentation of these articles.

¹⁵ The domestic tax law category contains also lower level materials than legislation, such as regulatory decrees, for the purpose of creating a workable comparison framework.

¹⁶ See also Aarnio (1993) 256.

sources other than domestic law¹⁷. Moreover, the lack of relevant articles in domestic law, causes planning problems for long-term individual and corporate tax minimizing. Now, assuming the correctness of one's own view for final taxation, it is very improbable indeed, due to the lack of doctrine for the sources of Scandinavian law. I believe that there will never be a consensus¹⁸ on the level of binding degree of certain sources of law, as long as the legal community¹⁹ stays politically separated.

1.2.1.3. On the polycentricity

Thirdly, we make strong recommendations for the development of the current legislation in all of the Scandinavian countries. These recommendations are a partial answer to the problems, which the recent tax law theoretical discussion, on the *polycentricity*, or should we say, *polycentry* of the sources of law has highlighted. These recommendations are not, however, theoretical by their nature, but more of a personal practical reflections, as to what constitutes a good tax legislation broadly speaking. The concept of polycentry²⁰ itself, was introduced by Zahle back in 1986. Although there is no general concept as of yet, what the polycentry is²¹ and what it is not, it provides us with a wider thinking context in the field of taxation, when we try to explain the factual role of the various sources of law. According to Zahle, the starting point for the discussion of polycentry is, that we have *many sources of law*. These sources of law are being produced by the legal community, which consists of many different groups and in some cases, individual persons. Moreover, *the various sources of law are being interpreted differently from one interpretator to another, in terms of their degree of binding effect*. For example, the

¹⁷ For further discussion, see Timonen (1990) 280, Björne (1993) 6 and Herala (1997) 71. The analysis of Herala (1997) of the various Scandinavian sources of law, is one of the best we have come across. However, this analysis includes areas, which have not been thoroughly discussed in the context of valid law.

¹⁸ Mattsson (1990) 17 argues, that the historical development has created a monster, which influences the Scandinavian legal system. The main weakness in the Scandinavian countries, according to the experiences of the present study is, that the domestic tax laws are often written too vaguely, which leaves a lot of space for valid interpretation. Unfortunately, this does no service to the legal certainty.

¹⁹ Here, the legal community term refers to all those institutions, which put forward legal materials of a guiding nature, in other words, sources of law.

²⁰ See Zahle's (1986) article.

²¹ Michelsen (2001) 173-174, provides us with the following insight: "The Greek term for 'much' is 'polys', so that poly means more or many. Polycentry in the sources of law means several centers for the application of sources of law. Polycentry in the sources of law is the opposite of monocentry in the sources of law, meaning that the law is a unity applicable to all actors (or centers) applying sources of law (rules of law) with the standards applied by the courts of law as the unifying element".

administrative practice and guidelines from the ministries, often binds those agencies at whom, such norms are directed to. Yet, the courts are not bound by such norms²². In other words, the administrative agencies apply techniques, which formally seen are not legislative²³ and does not represent, the classic representative system²⁴. This leads us into some big problems. Perhaps one of the greatest problems in any legal system, are the consequences from the fact, that we have several sources of law, which to some extent have a degree of binding effect subject to circumstances, instead of valid law.

Especially difficult situations²⁵ arise, when there is no consensus, as to the hierarchy of the various sources of law, because in such cases, interpretations are bound to become as correct as the alternative, competing one. The field of tax law is a very good area to discuss the issues related to polycentricity, because there exists so many sources for the taxation norms²⁶. When we take a look at the Scandinavian mutual fund investments, we can see, that there are several sources of law, which are not based on the valid law. Such traditional sources include, preparatory materials to some extent, recommendations from the Securities Board in the case of Finland, self-regulation from the Scandinavian mutual fund associations and industry practice. The usage of these sources of law, which are not based on the valid domestic laws is by definition, undesirable. This is undesirable, because at some point, we may lose our faith in the parliamentary processes²⁷. Several steps should be taken pro-actively, in order to correct the present situation.

I.) To begin with, we have to end the *decentralization* of legislative powers. Self-regulation should be transferred back to parliamentary committees and the usage of the preparatory materials in the tax offices and courts should be minimised. Why is it, that the tax offices use so much non-binding materials in

²² Zahle (1986) 752-756. Zahle adds also, that the courts control the legality principle, in other words, the legality of administrative decisions. Also Michelsen (2001) 179 emphasizes, the importance of having a consensus as concerns what applicable law is, because no such consensus is currently available.

²³ Pålsson (1995) notes, that the norms from the RSV are theoretically not binding, but in practice function as if this was the case.

²⁴ Zahle (1986) 752-756.

²⁵ See also Sandgren in JT (1992/93) 458 and Loft (1994) 133.

²⁶ Similar conclusion was made in Denmark by Michelsen (1994) 35.

²⁷ I have a dream too: I want that my taxes be based on law, I want the tax laws to be understandable and most of all, I want that only one interpretation of a certain tax law article is the correct one. I am sure, that many taxpayers in the Scandinavian region share my thinking.

their decision-making, instead of basing their interpretations on the valid law, which includes also constitutional articles and the sector of European tax law. Is it an element of a good tax system, that the tax authorities can occasionally disregard the valid law at the tax office level, and we have to appeal on and on, until we get our case settled satisfactorily. In short, does this kind of tax system represent justice or is it a modern-day meat grinder? This leads us into the second step, which means basically, that the legislation should become more easily understandable.

II.) *Vagueness* in the legislation is an issue, which does not fit all that well together with legal certainty. Broadly speaking, when the tax laws are being drafted and ratified in all of the Scandinavian countries, the idea is to create so-called framework laws. Such framework laws are often open for many alternative interpretations. Years after the ratification, the Supreme Tax Court may give a precedent, as to what is the correct interpretation. Too often, such precedents never come and the vagueness of the legislation is left alive. To ease the interpretative problems, administrative level institutions issue a great variety of formally non-binding norms, which have a strong degree of binding within the sphere of the norm giving institution. It is interesting, that we accept this year after year²⁸. Too often, there is a battle amongst the best legal scholars on the subject, what is a correct interpretation of a certain article. How are the taxpayers supposed to plan their finances, under these kinds of circumstances. For example, where do we really need the preparatory materials, when the legislation becomes so simple, that only one interpretation is correct? Furthermore, why do we occasionally have to reach the Supreme Tax Courts, in order to get “real” justice?

III.) *Contextuality*. We have to avoid in all possible ways the creation of tax norms, which enable more than one correct interpretation. Thus, we must insist on and on, that we are being provided with tax norms, which enable only one correct interpretation. In today’s legal situation we can easily notice, that higher the court hierarchy, then higher is the applicability of Constitutional articles in the argumentation. On the other hand, the lower level courts and especially the tax offices, follow more their own guidebooks and norms, which are not formally binding. The idea, that the norms from the national tax administrations supersede the Constitution, is totally unacceptable.

The following imperatives can now be construed. Also, if and when the context allows in the following discussion, we will ask the following questions:

- I.) Decentralization must be turned back into centralization. In other words, taxation should be based on the parliamentary laws, to the

²⁸ The Finnish Ministry of Justice published a guide (*lainlaatijan opas*) already in 1996 for those Finnish government officials, who draft the new laws that have not been ratified yet. This guide presents those principles, which shall be followed in the drafting of new laws. See especially page 5, for a question list before the Government proposal, Decree proposal or Decision proposal are being put forward and pages 128-138, for a discussion of avoidance of vagueness in the legislation.

- highest possible extent. Is it possible, to erase a certain source of law category by the creation of parliamentary laws instead?
- II.) Vagueness in the legislation must be decreased. All relevant laws in effect, should go through a rewriting process and future laws should fulfil certain minimum requirements on understandability. When possible, separate laws should be united into a single law. How could the vagueness in a certain source of law category be ended and made more easily understandable?
 - III.) Contextuality of interpretation must be stopped. How could we end the contextuality of interpretation?

1.2.2.1. European tax law

European tax law as a concept, can be categorized in two main divisions: primary and secondary²⁹. The European Community sources of law supersede all domestic level legislation, even the national Constitutions and tax treaties, in all 15 EU-member states. Despite of this strong superiority over the national level norms, the sources from the European Community have not been given any popular nicknames. Perhaps the term European tax law, is satisfactory for the legal practioners in Europe. At the very least, the term European tax law is becoming more and more common in cases, where the Treaty establishing the European Community or ECJ cases are involved. Both primary and secondary sources of law have relevance in mutual fund investments.

1.2.2.1.1. The primary materials

Currently, the primary level materials have been incorporated in a consolidated version of the Treaty establishing the European Community. This consolidated version is available also through the Internet, under the EUR-Lex webpages, in all official languages. In general, the Internet has become a source for valid law, in all of the Scandinavian jurisdictions at the cost of an Internet connection and, without a doubt, this development is a permanent one. One of the most important articles of the EC Treaty in the context of this study, is § 56 (1-2), which determines that, all restrictions on the movement of capital and on payments between Member States and between Member States and third countries

²⁹ See Huuskonen et al. (1990).

shall be prohibited. These paragraphs have been popularized as the free movement of capital. One of the current problems in the correct interpretation of the EC treaty itself is, that the Tax Authorities openly assume that all new EU sources of law, have been successfully implemented in domestic tax legislation. However, this is not always the case. Especially, when there exists big financial interests of a certain interest group. We may want to ask then, that is it possible to factually grease the members of the Scandinavian Parliaments? It is not fruitful to answer this hypothetical question, because also the lower level norms play a central role, in the regulation of Scandinavian mutual fund investments. For this reason alone, the European Union should control the national level legislators more carefully. There is enough strong evidence, that the national level legislators, in other words, the legal community cannot be trusted in the implementation of national level norms. The European Court of Justice is not an effective solution to this problemacy and neither is the academic community. More likely, when the national taxation guidelines or tax law compilations do not include any reference to the EC treaty, then it is only a matter of time, when the national Tax Administrations make serious interpretation mistakes. Of course, smaller interpretation mistakes happen always, but bigger somewhat protectionist interpretations are unfortunately already a reality.

1.2.2.1.2. The secondary sources

Secondary sources³⁰ include regulations, directives and decisions. According to section 249 of the EC Treaty, a regulation shall have a general application which means it shall be binding in its entirety and directly applicable in all Member States³¹. Furthermore, a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. Also the decision shall be binding in its entirety upon those, to whom it is addressed³². We might want to ask, is it possible to legislate only one type of sources of

³⁰ Ståhl et al. (2000) 18-58 provides a fresh discussion on the structure and character of EU law in general, which also includes a description of the main interpretation methods of EU law. Note however, that Norway is not a full EU member State.

³¹ Skov (1996) notes, that the development of the importance of EU law for the Danish tax law takes place mainly through harmonizing with directives and with the cases deriving from the European Court of Justice. This is a common feature for all the Scandinavian EU Member States.

³² Other European tax law sources include, inter alia ECJ cases, general legal principles and customary law.

law within the European tax law sector in the future? Considering the short-run development of the European Union, the answer is negative. In all probability, the European Commission and the European Parliament will exist also in the future. Although it is a fact, that there exists several members of the European Parliament, which would like to see the total abolishment of the European Union itself. A more relevant question would be, how could we make the present European tax law sources more understandable. The fact is, the French is the main working language in most of the EU organs. In addition, the European tax law sources are translations from these original French documentaries, which further complicates their readability, no matter how skillfull a translator makes the translations. Also, the legislative culture in the EU institutions is different than in the Scandinavia. This partially explains, why the regulations, directives and even the recommendations include several pages of technicalities. By technicalities, we mean those referrals to all those bodies that were consulted in the process of legislating a certain norm.

1.2.3.1. International tax law

The concept of international tax law is not based on the idea of supranational legal jurisdiction, which is characteristic of international law³³. As such, the international tax law concept can be misleading. For this reason, we must analyze what is meant by such a concept. International tax law is an integral part of domestic tax law, in all of the Scandinavian jurisdictions³⁴. In addition, domestic tax law is situated under the public law. We can sum this up as follows: Public law → Domestic tax law and international tax law. Furthermore, the Finnish international tax law can be conceptualized in two classes: internal foreign tax law and tax treaty law³⁵. The Danish international tax law is also a

³³ However, Martha (1989) 181-184 reminds us, that international law plays a role in matters of taxation, because international law regulates taxation by means of two types of norms: complete norms and incomplete norms. This was also shown to be a partial cause, for the international double taxation in his study.

³⁴ This is parallel also to German terminology. Vogel et al. (1997) 10 explains, that the international tax law term, has traditionally been used to refer to all international as well as domestic tax provisions relating specifically to situations involving the territory of more than one State, so-called "cross-border situations".

³⁵ This category is being used, for example, by Niskakangas (1983) 2, and Myrsky (1993) 11. Qureshi's (1994) 3-7, international observations describe the present Finnish situation as well: "A significant proportion of international fiscal norms are treaty-based. The instrument of the treaty has played a major part in the evolution of international tax principles".

unifying top concept. International tax law includes both the double taxation convention sector and foreign tax law sector. The Danish foreign tax law means those norms, which regulate a situation where, *inter alia*, a person or a company, is connected to both Denmark and another country³⁶. In short, the concept of international tax law is very similar in different countries. As such, there is no need to evaluate, what term would do more justice, to describe the international taxation aspects.

1.2.4.1. Danish sources

1.2.4.1.1. Danish Constitution

The Constitution of the Kingdom of Denmark Act entered into force on 5 June 1953. This Constitutional Act consists of 89 sections. The most relevant articles in the context of mutual fund tax consequences, are the following ones. The Constitution's § 43 determines, *inter alia*, that no taxes shall be imposed, altered or repealed except by statute³⁷. In addition, the Constitution's § 46 (1) determines, that no taxes shall be levied before the finance Act or provisional appropriation Act has been passed by parliament³⁸. These two articles, contribute strongly to the predictability and legal certainty of taxation in Denmark. Also, due to these two articles, it is rare, that courts make direct reference to the Constitution itself. Thus, we should not demand the abolishment of the Danish Constitution or at least not these two articles, because without the directing effects based on these two Constitutional articles, the predictability and legal certainty of taxation would surely decrease. Surely in cases, where the Constitutional articles can be used as arguments, they have a strong degree of binding effect. In addition, the Constitution's § 88 makes the procedure to pass new Constitutional amendments inflexible³⁹. However, this is rather irrelevant to mutual fund investments in Denmark, because most norms having a binding effect at some level, can be located at the domestic tax law level and in

³⁶ Michelsen (1996) 22.

³⁷ Official translation by Henry et al. (1985) 20.

³⁸ As translated by Henry et al. (1985) 20.

³⁹ Iversen et al. (2000) 15, provides us with the insight: "The Constitution is far more difficult to amend than an ordinary piece of legislation. Section 88 prescribes that in order to amend the Constitution the bill proposing the change shall be adopted twice – in un-amended form – by the Folketing, the second time after a new general election has been held, and further approval is also required by referendum, under which a majority of the voters representing no less than 40 per cent of the electorate shall vote in its favour. Finally, the consent of the head of state in the form of *royal assent* is necessary".

the administrative decisions. Although the Danish Constitution seems to have strong directing effects, historically seen, the sources from the European tax law sector have not always been given such status. It would seem a workable solution, to establish an independent EU agency, which would monitor, that also the European tax law sources are given the correct status, in the ratification of domestic tax laws. Tax neutrality of similar financial instruments and discrimination conflicts, would perhaps be the most important issues on the agenda of such an agency.

1.2.4.1.2. Danish international tax treaties

The VCT has been ratified in Denmark on 29 April 1980⁴⁰. VCT provides valid principles of interpretation, when tax treaties and domestic tax legislation sections intertwine with each other. The legal literature⁴¹ emphasizes that the rules of international law should be adapted to the Danish legal system and respected in applicable judgments for both idealistic and practical reasons. Article 26 of VCT determines, that every treaty in force is binding upon the parties to it and must be performed by them in good faith. This article is the basis for the legal principles of *pacta sunt servanda* and *bona fide*, i.e. good faith. Article 31 (1) further clarifies the interpretation of treaties in Denmark: a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In the interpretation of tax treaties, we can thus, allow importance to the fact, that the purpose of tax treaties is, *inter alia*, to avoid double taxation⁴². However, a draft treaty needs to be ratified by the competent national organ, in order for Denmark to become bound by the treaty under international law⁴³. The legal literature suggests, that a tax treaty can never increase the actual taxation, only reduce it, but if the treaty reduces the taxation of a certain type of income, there must exist domestic tax legislation stipulating the matter⁴⁴. Currently, Denmark has over 80 bilateral treaties against double taxation and the treaties, especially

⁴⁰ Bekendtgørelse (34/1980) af konvention af 23 Maj 1969 om traktatretten.

⁴¹ For further discussion, see Gulmann (1991) 247-268.

⁴² See Michelsen (1996) 52.

⁴³ For this opinion, see Nielsen (1999) 80-96, who provides a thorough analysis of treaties in the Danish legal system.

⁴⁴ These opinions are expressed in Michelsen (1996) 43 and Maltesen (1997) 4.

the latest ones, correspond greatly to the recommendations made by the Organization for Economic Co-operation and Development⁴⁵. Denmark participates in the multilateral Nordic treaty of double taxation as well. Certain specific questions arise, from the discussion of polycentry in the sources of tax law in here. To begin with, we could ask, could the tax treaties be united inside the domestic tax laws, so that we would not have so many sources of law. The answer to this is interestingly somewhat positive and somewhat negative, because tax treaties do not, in principle, take preference over the Danish domestic law, for the basis is, that tax treaties and domestic laws are two independent systems of law which shall be applied at the same time to the individual case⁴⁶. Thus, when the Danish legislators do not grant tax treaties a *lex specialis* role at the level of valid law, the tax tax treaties might as well be ratified like any other domestic law. However, because of the practical reasons, this is not probably going to happen in the future. The history of tax treaties, is a history, which keeps the tax treaties separate from the other domestic laws. This is a universal principle or a practice at least. Secondly, if we hypothetically assume, that the tax treaty articles were written inside the domestic tax laws, then some of the taxpayers would get a misleading picture of the taxation of the non-resident persons. Although, non-resident persons are usually taxed, in their country of residence. The possible tax benefits resulting from the double taxation treaties, are in our opinion greatly exaggerated. Generally speaking, the tax treaties function very well in those situations, where a certain tax subject is liable to pay taxes from a certain tax object, in more than one country. The tax treaties are also rather easy to understand, once we become familiar with their basic phrases. Perhaps for this reason alone, we do not often see cases, where the national Tax Administrations and courts had made substantially different interpretations in the same case. As far as we are concerned, these observations apply also to other Scandinavian countries.

⁴⁵ See Pedersen (1996) 349-350. OECD's commented model treaty has a considerable significance in the interpretation of Danish domestic tax laws in conflict situations and references can also be found from the reasonings of court judgments. Michelsen (1993) 305 points out, however, that it is rare for the law-applying authorities to make a direct reference to the OECD Model Convention Commentaries in their decisions. For further discussion of the topic, see Winther-Sørensen (2000) 5-9.

⁴⁶ See Michelsen (2001) 181-182.

1.2.4.1.3. Danish domestic tax law

Domestic tax laws are the most important source of law in Denmark, within the field of taxation. This role follows partially from the Constitution's § 43⁴⁷. Seen from the statistical perspective, the tax laws form a very significant category. The tax laws make up about one fourth of all the yearly legislative proposals in Parliament⁴⁸. The most central domestic tax law, regulating the taxation of mutual fund investments for the resident individual, is the individual income tax law, hereafter PSL. On the other hand, companies are taxed mainly according to the corporate income tax law, hereafter SEL. Of great significance is also ABL. To the benefit of individual Danish persons, the net wealth tax was abolished as of 1997⁴⁹, which causes the after-tax returns from the mutual funds to be bigger. When we address the question of polycentry of the sources of law and especially the issue of vagueness, we strongly believe, that the Danish domestic tax laws would become easily understandable by taking the following steps. Firstly, all vague articles should be re-written, according to some predetermined principles. Why is it, that we must have dozens of separate laws and amendment laws, instead of just a few main compilations, which becomes modified every now and then? Has anyone ever really thought about, whose interests does this serve in the long run. We believe, that nobody wins under the current situation and it is easy to see why. Often, instead of taking a look of just one single law, we must search for several laws and possible amendment laws at the same time. Thus, we spend much more time and in the worst case, we cannot make up our minds, because these separate laws remain vague on the subject or otherwise complex to correctly interpret. Does this sound familiar or not?

The contextuality of interpretation could be avoided by establishing an independent monitoring agency, which would control, that the Danish domestic tax laws reflect both the spirit of the European tax law sector and the Danish Constitution itself. By independent monitoring agency in this context, we mean an agency, which does not

⁴⁷ See Bjørn et al. (1989) 19. The Constitution's article 43 determines inter alia that, no taxes shall be imposed, altered, or repealed except by Statute.

⁴⁸ This observation was made by Dam et al. (1998) 2.1.

⁴⁹ See IBFD (1999) 5.

include persons, who are being employed by outside institutions. Thus, the personnel would remain independent in their decision-making process. Should the Danish tax code go through this step-by-step process, we would get a thorough understanding of the Danish taxation much more easily. If and when the difficult areas for interpretation were re-written, we would be able to make much more correct interpretations and also, when an independent monitoring agency checks the constitutional aspects of the new tax norms, then the contextuality of interpretation is bound to end point-blankly. But why is it, that none of these idea's will never materialize in Denmark? Simply, because the old decision-making processes and thus, also the power structures would need to be re-evaluated from the bottom to the top of relevant Ministries. In the formulation of tax policies, it just is not enough, that we come across with pragmatistical ideas. These ideas have to be also in the interests of the leading politicians, otherwise they become garbage can archives.

The legal principle of *lex superior derogat legi inferiori* is applied also in Denmark. The Danish interpretation of this legal principle is similar to other Scandinavian countries. In other words, the Constitution will supersede Parliamentary laws and Parliamentary laws will supersede lower level regulations from the public administrations⁵⁰, such as Ministerial Orders⁵¹ and Circulars⁵². However, it is very rare that the Constitutional articles are being used in a court case as an argument. The legal principles of *lex specialis*⁵³ and *lex posterior*⁵⁴ are also used in Denmark⁵⁵. However, these principles are only legal principles and as such, not as binding as a clearly worded domestic tax law article. Furthermore, the legal literature suggests, that it is not possible to have a clear priority order for different sources of law⁵⁶. When we do not have a clear priority order for the different sources of law and especially, when we have a legislative culture, which creates a seemingly endless list of tax norms, we factually create an environment, which

⁵⁰ See Olsen (1998) 13, for this opinion. See also Evald (1997) 22.

⁵¹ Bekendtgørelser.

⁵² Cirkulærer.

⁵³ Special norms supersede general level norms. Hjerminde (1997) reminds us, that there does not exist any fixed solution to the interpretation conflict, where *Lex Generalis* is newer than the *Lex Specialis* materials. See also Michelsen (2001) 182.

⁵⁴ New norms supersede old norms.

⁵⁵ See Olsen (1998) 19.

⁵⁶ See Von Eyben (1991) 20-21 for further discussion. Also Iversen (2000) et al. 12-13 note, that due to the interaction of relevant rules, it is not really possible to set up any binding hierarchy.

decreases the predictability of the final taxation. Under this kind of regulation, it is difficult to see, how some interest group would benefit. In our opinion, everybody loses. The only positive aspect is, that some may lose a little less than the others.

1.2.4.1.4. Danish precedents

Court precedents play a role in Denmark, in the interpretation of valid law. As one might assume, the Supreme Court⁵⁷ decisions have the highest rank within the court hierarchy. The Supreme Court does not decide all that many taxation cases yearly, which is not to say that their importance derives from that quantitative argument⁵⁸. Wood⁵⁹ (1995) notes that the Danish jurisdiction is a mixture of the Franco-Latin approach and the Germanic approach. However, common law influence exists as well. Common law legal systems are well known for their *stare decisis*⁶⁰ principle. In Denmark, the precedents' pragmatic value lies in the fact, that they serve as a useful tool, when clarifying the valid interpretation of any given domestic tax law or treaty article. Broadly speaking, we believe, that the decisions of the National Tax Assessment Board⁶¹ are, however, of more relevance in Denmark, than are the precedents from the Supreme Court, when it comes to mutual fund investments. Regrettably, we cannot define the factual degree of the binding effect for any given precedent. The notion that each case will always be judged on its own merits, is the guiding principle both for the Supreme Court judges as well as for government officials in the Danish Tax Administration. However, by analyzing previous cases, it is possible to present a few descriptive generalizations⁶². The following categories⁶³ provide us with some working principles or should we say, tax planning tools.

⁵⁷ Højesteret.

⁵⁸ Danish precedents are available in Ugeskrift for Retsvæsen as a full text. As such, construction of ratios is time-consuming and subject to individual differences in the actual interpretation. Currently, it is unlikely, that shortened citations of a case, so-called database cases, would become available in the Retsinformation database. According to our understanding, Ugeskrift for Retsvæsen periodicals are a private business and thus, a monopoly of its own kind.

⁵⁹ Wood (1995) 103.

⁶⁰ Let the prior decision stand.

⁶¹ Ligningsrådet.

⁶² These generalizations are not based on valid written law.

⁶³ See further Engholm-Jacobsen et al. (1995) 80-81.

- i) The higher the court hierarchy, the higher the binding effect⁶⁴.
- ii) Consistent rulings over the years, overrule a newish precedent⁶⁵.
- iii) More often the previous precedent guides legal disputes, the higher its value as a source of law.

The general observation of Danish legal literature suggests, that these generalizing principles are accepted implicitly in different legal forums. The legal literature presents precedents mainly in an inventory manner. That is, by listing the recent cases without going into a deeper analysis of what will probably happen, in similar future cases. However, as none of the above mentioned principles are based on valid domestic tax law, their binding effect is at best, only guiding. In the discussion of the polycentricity of the sources of law, we also have to evaluate, how the Danish precedents affect the taxation process. To some extent, we could argue, that the precedents are a reflection of decentralized legislative culture, where the courts are exercising factual legislative powers. Thus, to centralize the legislative powers back to the Parliament, we would have to ratify more specific tax laws, because when a certain legislative area becomes thoroughly regulated by the valid domestic tax law, the importance of precedents would in all probability decrease. But is it, in general possible, to ratify comprehensive domestic tax laws for all possible states of the world. Surely, there is no yes or no answer to this issue. More fruitful question would be, do we⁶⁶ even want to regulate a certain legislative area by the ratification of domestic tax laws or do we accept, that the judges become partially, factual legislative branch of the Government. The polycentric question making forces us to also answer, how the vagueness and contextuality of legal decision-making could be minimized, in the taxation process at all levels. In my opinion, there is a very simple methodology already available, to overcome this problemacy. Let us make an

⁶⁴ See also Blume (1989) 66, Aagesen et al. (1994) 22, Andersen et al. (1997) 26, Olsen (1998) 15 and Nielsen (1999) 100.

⁶⁵ Iversen et al. (2000) note, that very old judgments will only play a modest role if developments in society have changed materially in the area involved since the decision was made. We believe, that material changes in the valid domestic tax law over the years, is a far more common reason to overrule previous judgments than are the developments in society. Furthermore, it is extremely rare to find arguments from the Supreme Court cases, which goes as follows: "due to the socio-economical changes in our society, the Supreme Court has decided...". In other words, developments in the society, are not a valid source of law and if such arguments do factually exist, then they should represent only some interesting obiter dicta.

assumption here, to illustrate this methodology further. Now, let us assume, that the Danish Government decides to establish an independent agency, which has the following public objective: to write ratio's from the National Tax Assessment Boards and from the Supreme Courts precedents, and also make them publicly available in the Internet. Thus, there should not be all that many quarrels at any levels, as to what is the ratio decidendi of a certain case and what is the obiter dictum. Therefore, the vagueness of this particular source of law would decrease tremendously. Moreover, the contextuality of interpretation would decrease as well, because now we have, more or less official interpretation, as to how the certain precedents should be interpreted both at the tax offices and in the court of law.

1.2.4.1.5. Danish preparatory materials

The main preparatory materials in the field of taxation include, committee reports⁶⁷, answers to law proposals⁶⁸ and the Tax Minister's answer on questions from the taxation committee⁶⁹. These sources have often a considerable weight, in the concrete interpretation of tax legislation⁷⁰. When this is the case and especially, when the valid law stands silent on the subject, then surely we need to address the legitimacy of this kind of interpretation. After all, the irrationality of interpretation does not become rationality of interpretation, on the basis, that it exists widely at all levels of the legal system. The usage of the preparatory materials is an example of a decentralized legislative culture. This decentralization could be avoided, by simply ratifying more thorough laws instead. When the laws became thorough enough, which is not the case in today's Denmark, then we would not have to deal with the negative aspects of the decentralization. Such negative areas include those situations, where the old law has been amended by a new law. Now, we could have two preparatory materials, on the more or less same area. Should these preparatory materials be somewhat contradictory against each other, we would have to evaluate, what is the hierarchy of these two preparatory materials against each other. No

⁶⁶ In principle, we could also ask, who is this we, when no such debate even exists currently.

⁶⁷ Sagkyndige betænkninger.

⁶⁸ Bemærkninger til lovforslag.

⁶⁹ Skatteministerens svar på spørgsmål fra skatteudvalget.

⁷⁰ See Dam et al. (1998) 55.

definite principle exists for such situations. Moreover, the whole issue could have been avoided in the beginning, when the laws were drafted clear enough. In other words, also the preparatory materials increase the contextuality of interpretation in the taxation process. Thus, when we want to put an end to the contextuality of interpretation in the taxation process, we must draft thoroughly clear laws, which enable us to make similar interpretations, no matter what the stage of the legal forum happens to be in each particular case. The positive aspect of the current situation is, that the most relevant preparatory materials are being published and also, some of the materials can be found from the online database *retsinformation*. The analysis of the motives and objectives of the preparatory organ, is to be carried out, when preparatory materials are being used as an aid in the factual interpretation. This ensures a more correct interpretation of the article in question. The degree of the binding effect of the preparatory materials, is dependent on several factors in Scandinavian countries. The determination of the degree of the binding effect, depends both on the other sources of law and preparatory materials' clarity, age and quality⁷¹. Von Eyben (1991) argues, that it is correct to talk about an interpretation according to the law's objective, if the objective is clearly expressed in the references⁷² to the law⁷³.

1.2.4.1.6. Other Danish sources of law

There are also naturally plenty of other sources of law in Denmark, which to some extent, regulate mutual fund investments. However, as our narrowly focused synthesis tries to only explain the most common sources of law, some categories are left out. We shall only briefly list some of these other sources of law here: legal literature, administrative practice, decisions of the ombudsman, custom and circumstantial factors. Certainly, these sources have an important role in the yearly taxation process too, but how often do we ask the question, how could they be replaced by the clearly written domestic tax law instead?

⁷¹ This opinion is expressed in Herala (1997) 73.

⁷² See the previously mentioned sources of preparatory materials.

⁷³ See Von Eyben (1991) 38-39. Zahle (1986) 753 notes however, that the courts can take the preparatory materials into consideration, but they are not being bound by them.

1.2.5.1. Finnish sources

1.2.5.1.1. Finnish Constitution

The Finnish Constitution, hereafter PL, was thoroughly modernized recently⁷⁴. The new Finnish Constitution⁷⁵ entered into force on 1 March 2000. This reform and collection of Constitutional level Acts into one coherently integrated Act, made the Finnish Constitution more clearly constructed. Before this change, the Constitution consisted of four separate Constitutional level Acts⁷⁶. In this context we can say, that the Finnish legislators have realized the importance of ratification of single texts, which cover the subject area. The new Constitutional Act consists of 131 sections. The following articles, which we more or less only list are the ones, that we consider to have relevance to mutual funds taxation in Finland and we would like to point out here, that the discussion of the following articles is, as we have noted in the introduction, only descriptive. In other words, we touch the issues only at the surface level, because the constitutional articles are just too important to be left out of this kind of a comparison. On the other hand, we could as easily say, that each article would deserve more in-depth discussion. Perhaps the future researchers would like to extend this discussion, if considered worthwhile. PL § 2 (3) is concerned with democracy and the rule of law. From here we can explicate, that the exercise of public powers shall be based on an Act. Also, in all public activity, the law shall be strictly observed. The legal literature⁷⁷ notes also, that the legality principle, as well as the avoidance of arbitrariness in administration, are both being supported by the fundamental principles of administrative law. Problems will naturally materialize, when there does not exist valid law for some problematic interpretation, which derives from mutual fund investments. Problematic interpretations have taken place also in Finland recently, for example, when the yearly profit share paid by a Finnish mutual fund to a

⁷⁴ The government proposals, HE (1/1998) 1 and PeVM (10/1998) 3, had their main objectives the unification and modernization of the Finnish Constitution.

⁷⁵ The Constitution of Finland 11 June 1999 (731/1999).

⁷⁶ The Constitution repealed the following Constitutional Acts, as amended: 1.) The Constitution Act of Finland of 17 July 1919. 2.) The Parliament Act of 13 January 1928. 3.) The Act on the High Court of Impeachment of 25 November 1922. 4.) The Act on the Right of Parliament to Inspect the Lawfulness of the Official Acts of the Members of the Council of State, the Chancellor of Justice and the Parliamentary Ombudsman of 25 November 1922.

⁷⁷ Ryynänen (2000) 248.

non-resident, was not considered to be a dividend⁷⁸. Broadly speaking, PL § 2 (3) increases legal certainty and is a strong argument, when appealing a case to the Tax Authorities or courts. PL § 21 (1) handles protection under the law. Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice. The Finnish Tax Administration has, in general, a reputation of being capable to resolve tax complaints from the taxpayers in a reasonable time span. Some of the critics toward the Finnish Tax Administration come from those businessmen, who have been using tax havens as a means of gaining tax benefits, yet without much success. Getting a precedent from KHO could however, easily take several years. Legislative initiatives become domestic tax laws under certain Constitutional criteria. Under PL § 70, the proposal for the enactment of an Act is initiated in Parliament through a government proposal submitted by the government or through a legislative motion submitted by a Representative. For the time being, the Internet⁷⁹ provides us with a good way of following how the government proposals become ratified. PL § 41 (2) considers matters of actual voting. Decisions in plenary session are made by a simple majority of the votes cast, unless specifically otherwise provided for. A simple majority is generally known as a simple vote, meaning that the motion will pass if it gets over half of the votes given. However, in the event of a tie, the decision is made by drawing lots, except where a qualified majority is required for the adoption of a motion. PL § 81 (1) defines the legal grounds for state taxes and charges. The state tax is governed by an Act, which shall contain provisions on the grounds for tax liability and the amount of the tax, as well as on the legal remedies available to the persons or entities liable to taxation. The delegation⁸⁰ of legislative powers, has also been made possible in PL § 80 (2). Other authorities may be authorised by an Act to lay down legal rules on given matters, if there is a special reason pertinent to the subject matter and if the material significance of the rules does not require that they be laid down by an Act or a Decree. The scope of such an authorisation shall be precisely circumscribed. In any case, PL § 81 (1) is probably the most important

⁷⁸ See KHO 1999:34.

⁷⁹ Such news services are being provided, in the Parliament's and Edilex webpages.

⁸⁰ See also the discussion of Myrsky (2000b) 98 and (2000c) 23-25.

single article of the Finnish Constitution, when it comes to mutual fund investments, because legal certainty is tremendously increased and thus, the yearly tax consequences of the mutual fund investments becomes easy to predict for both the individual and companies as well. Against this background, the Constitution protects the mutual fund investors in a reliable way. PL § 106 defines the primacy of the Constitution. If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution. This article neatly encapsulates inside the legal principle of *lex superior derogat legi inferiori*. In other words, neither the courts nor the Tax Administration are entitled to apply norms, which are in conflict with the Finnish Constitution. Yet, it seems, that the Tax Administration is currently applying norms, which discriminate other European companies. For this reason alone, we should establish an independent EU agency, which would control the national level legislators. As with Denmark, the tax neutrality of similar financial instruments and discrimination aspects, would be on the top of such an agency. Naturally, this area belongs to the ECJ itself, but how often do we see small firms suing Governments or national Tax Administrations? Do I really need to make further arguments here? Moreover, such an agency could also harmonize the financial markets in the whole of Europe, not just in the Scandinavia. The idea, that the big European Union member states would not have discriminatory legislation, is illusionary⁸¹. Furthermore, as there are members of the European Parliament that do not like the idea of federal Europe all that much, such is the situation also to some extent at the level of national Parliaments. Although, the discriminatory tax norms are probably more a result of the corporate interest protection than with some anti-Europe ideology.

1.2.5.1.2. Finnish international tax treaties

Under TVL § 135, the government have the right, *inter alia*, to remove or alleviate international double taxation, on a reciprocal basis with a foreign state, for certain income⁸² by dividing the taxation right between Finland and a foreign state. This is the legislative starting point for the formulation of tax treaties, which can be either bilateral or

⁸¹ For a further discussion, see Newton (2001).

multilateral. The multilateral convention between the Nordic countries for the avoidance of double taxation with respect to taxes on income and on capital, entered into force in May 1997 in Finland⁸³. This convention is generally referred to as the Nordic treaty of double taxation. The legal literature suggests, that tax treaties can reduce not extend taxation rights⁸⁴. This interpretation applies also to Nordic income and the capital tax treaty. If a certain section of a tax treaty is contradictory to European tax law or domestic tax law, then the following principles, which determine the priority order for different types of legal sources, are to be applied in the interpretation:

- i) The principle of lower tax. The tax treaty will supersede domestic tax legislation, if it reduces the taxation based on domestic tax legislation. On the other hand, the taxation rights can never be extended on the basis of a tax treaty⁸⁵.
- ii) *Pacta sunt servanda*. Every treaty in force is binding upon the parties to it⁸⁶.
- iii) *Bona fide* i.e., good faith. Every treaty in force is binding upon the parties to it and must be performed by them in good faith⁸⁷. In addition, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose⁸⁸.
- iv) *Lex superior derogat legi inferiori*⁸⁹. Both primary and secondary EC law supersede treaties concluded between two European Union member states and this applies both to old and new treaties⁹⁰.
- v) *Lex specialis derogat legi generali*. Tax treaty shall take precedence over domestic tax law in a conflict situation. Article 27 of the Vienna Convention on

⁸² Similar authorization for certain assets, are determined in section 40 of the VVL.

⁸³ Decree (412/1997). Toifl (1998) 81 showed that, as a rule, all tax treaties, which the EU Member States have concluded with each other are similar to the OECD Model Conventions of 1963, 1977 and 1992. According to Andersson et al. (1986) 20, this is the case also with the Nordic treaty of double taxation. However, the multilateral Nordic treaty is not without criticism as Mattsson (2000) 301 points out: "The fact that other countries have not followed the Nordic example could, however, be an indication that a multilateral treaty is a failure or a mistake. The Nordic countries may merely have failed to recognize this, or alternatively, they may have realized their mistake but been too stubborn to admit it". See Mattsson (2000) 302 also for a discussion of the historical steps, towards the present Nordic treaty. Ault (1993) 61-65 point out, that the OECD model convention commentaries are an important source of authority in determining the scope and content of the tax treaty articles. Both tax administrators, courts and taxpayers frequently refer to the model commentary, despite the introduction of the model convention commentary, and specifically rejects the status of legally binding international instruments.

⁸⁴ See Viherkenttä (1990) 49, Myrsky (1996) 144, Verohallitus (1998) 6.3 and Helminen (1999) 44.

⁸⁵ For further examples and discussion, see Verohallitus (1998) 6.3.

⁸⁶ Article 26 of VCT.

⁸⁷ Article 26 of VCT.

⁸⁸ Article 31 (1) of VCT.

⁸⁹ Aarnio (1988) 254 analyzed categories (iv-vii) at a general level and labelled them as standards.

⁹⁰ This opinion is expressed in Helminen (1999) 48-49.

Treaties, hereafter VCT, determines that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty⁹¹.

vi) Lex posterior derogat legi priori⁹². A new tax treaty will take precedence over the old treaty, unless that is not the intention of the new treaty. The supremacy of new domestic tax legislation over existing tax treaties is unlikely because of the above mentioned ii-iii principles. Administrative decisions ex officio, must not be based solely on unilateral domestic tax law when tax treaties determine the situation as well. For such decisions would be indicators of mala fide and thus, in conflict with the general rule of interpretation as manifested in the VCT.

vii) Lex posterior generalis non derogat legi priori speciali. The new domestic tax legislation does not override a previous tax treaty, unless that is the intention of the new Act⁹³.

The lex specialis nature of the international tax treaties means simply, that the tax treaties will remain, as an individual source of law category, also in the foreseeable future. For this reason alone, it is inevitable, that we know how to correctly interpret the previously mentioned principles. The positive aspect of all of these principles is, that there does not exist any major conflict in their direct applicability.

1.2.5.1.3. Finnish domestic tax law

Only three laws directly regulate, the taxation of mutual fund investments in Finland. These include the national income tax Act, TVL⁹⁴, net wealth tax Act, VVL⁹⁵ and LähdeVL for non-residents. All of these Acts can be classified as framework laws: they are very short and vague. Therefore, one is always well advised to analyze the precedents in relation to a certain article. Such an advanced level of interpretation and analytical systematization, provide a more accurate understanding of the valid law and the resulting tax consequences. There are ofcourse dozens of other tax laws, in the field of taxation. A couple of tax law compilations also exists, where the main tax laws are being put under just one cover. Yet, we have not seen, that anybody had suggested, that all the tax laws be united into a single law commentary book: the commentary on Finnish tax laws. This kind

⁹¹ This rule is without prejudice to article 46 of VCT.

⁹² Helminen (1999) 44 supports the use of these (v-vi) principles.

⁹³ According to Metzger (1996) 218, the leading opinion in Swiss doctrine is, that an international treaty will in any event prevail over national laws, even if such laws are more recent than the treaty.

⁹⁴ Tuloverolaki (1535/1992).

⁹⁵ Varallisuusverolaki (1537/1992).

of tax law commentary, could cover all aspects of taxation. We could also easily expand the existing tax law compilations, into this kind of tax law commentary, which would be updated annually. This idea is not, however, new in the rest of Scandinavia. Outside of Finland, there exists a law commentary called: Karnov⁹⁶. This book, or should we say the legal bible, is being updated annually by the leading experts, in the main legal areas. This book includes also the sectors of taxation, to some extent. Therefore, it is easy to argue, that the Finnish tax laws could be integrated into a single tax law commentary and more importantly, these laws could be commented upon annually, by the leading Finnish tax experts. When the tax laws were being commented by the leading tax experts, we would not even have to re-write the complex articles. Also, broadly speaking the understandability of each article would increase significantly, when most or all of the relevant sources of tax law were being commented in the footnotes as well. All this implies also, that the administrative taxation decisions and the possible further decisions from the above courts, would be more similar. In other words, the contextuality of interpretation would decrease. Should this be the case, we would get the “real” justice more often, already at the tax office level. Who could complain, or should we even complain about this?

A Decree is a binding administrative order, which in the field of taxation is normally issued by the Ministry of Finance, the Government or President of the Republic. These Decrees are meant to supplement and clarify certain sections of tax laws. With the existence of these Decrees, the interpretation of certain tax law section paragraphs becomes easier for all parties, be they private or public. Moreover, PL § 107, which clarifies the subordination of lower level statutes, gives a solid ground for valid interpretation of these sources of law:

“If a provision in a Decree or another statute of a lower level than an Act is in conflict with the constitution or another Act, it shall not be applied by a court of law or by any other public authority”.

⁹⁶ Karnov is available in Sweden, Norway and Denmark. Also online versions are available.

The Ministry of Finance and National Board of Taxation can also issue decisions, which may also deal with mutual fund taxation consequences. Such are for example, a Ministry of Finance's obligatory decision to give declaration of one's taxable incomes and assets⁹⁷. In addition, the National Board of Taxation gives yearly a decision⁹⁸ for the correct taxation values of securities, which includes the taxation value of mutual fund units. Naturally, both the decrees and decisions could be included in the hypothetical; The commentary on Finnish tax laws. The issue of hierarchy could be sidelined, by ratifying these decrees and decisions as separate sections in TVL, soon after they have become established and have shown to work well in the taxation process.

1.2.5.1.4. Finnish precedents

Under PL § 3, the Supreme Administrative Court is allowed to exercise judicial powers independently as the highest instance, in the field of taxation. The factual legislative organ of Finland is Parliament⁹⁹. This is written in PL § 3 (1), which delegates the legislative powers to the Parliament. However, in Finland also the Supreme Administrative Court has a role, which is factually a norm creating, or should we say, a legislative one. As such, we can say that precedents serve a meaning, which cannot be found from the written domestic tax law. The precedent can be defined as the by-product of a guiding nature, from the exercise of independent judicial powers on behalf of the Supreme Administrative Court¹⁰⁰. Rather interestingly, to date, there does not exist legislation or doctrine in Finland, which would definitely tell us how to define the applicability of several possible precedents for the purpose of tax assessment and implementation¹⁰¹. One common judgment supporting tool is to define the core facts (*ratio decidendi*), by eliminating

⁹⁷ Valtiovarainministeriön päätös ilmoittamisvelvollisuudesta 28.12.1995/1760, § 1 (1). These kinds of decisions become renewed usually on an annual basis.

⁹⁸ Verohallituksen päätös eräiden arvopaperien verotusarvoista 1999. The norm creating authority, has been delegated to the National Board of Taxation in the § 2 (2) of Verohallintolaki (1557/1998).

⁹⁹ Finnish EU-membership, starting from January 1 1995, gave also important legislative powers to the official EU-organs.

¹⁰⁰ Aarnio (1997) 80 defines the meaning of a precedent as follows: "a decision which the deciding court expressly adopts or formulates to guide future decision making".

¹⁰¹ This doctrinal perspective was observed by Aarnio already in (1993) 271. Aarnio (1997) 85–87 illustrates the kinds and degrees of normative force for a supreme court precedent. The current discussion on the theory and practice of precedents indicates, that there is a lack of tradition among the judiciary on how to apply precedents in a way, which would not cause *systemic imbalances*, as Siltala (2000) 262 puts it.

irrelevant aspects (obiter dictum) of a case and then use these ratios as a legally binding argument¹⁰². However, now precedents might be a generalized way too far¹⁰³. The Finnish tax office practice usually does not follow such a long analyzing procedure, in the assessment and implementation of taxation. Internal guidelines illuminate the legislative sections together with the relevant Supreme Administrative Court precedents¹⁰⁴. Also, central tax boards, hereafter KVL¹⁰⁵, decisions have argumentative value in the taxation of mutual funds. However, in comparison their binding effect is weaker, than the precedents from the Supreme Administrative Court. One can always complain further about the KVL decision. The precedents from the Supreme Administrative Court can be categorized¹⁰⁶ into three classes, subject to their degree of binding effect.

- i) Yearbook cases. Long citations, which are being published in the Supreme Administrative Court's yearbook, give a better overall picture of a case. As the yearbook does not include all cases, the judges can decide for themselves, which are the most important ones.
- ii) Database cases. Short citations of a case, causes a lack of information. As such, their importance is smaller than those precedents published in the yearbook.
- iii) Unpublished cases.

Rather interestingly, both KVL and KHO rule cases, which end up being not publicized. Although some legal scholars use them as an additional argument in their research, it does not follow from here, that they have any argumentative weight in the yearly taxation process or in the courts. Broadly speaking, we do not give such unpublicized cases any

¹⁰² This is a common methodological interpretation practice within the judiciary, both in the US and in the Commonwealth common law systems. Mikkola (1999) 208 stresses the importance, of dividing ratio from obiter dictum in English precedents. Such a categorization is meant to help to separate precedents, the binding effect part from the non binding part. The term *ennakkopäätössääntö* is used in Finland, to describe the ratio. See also Siltala (2000) 112, 261 for the external determinants and a wider context, of the ratio of a case.

¹⁰³ Klami warned about this already in (1986) 173 as did Saarenpää (1984) 150. The problem here is, that official citations of a so-called database case, can to some extent be subject to interpretation, thus creating misleading norms for tax offices. This is a real threat in the cross-border mutual fund investment process, because the great majority of the tax office personnel do not have a higher academic education in the field of jurisprudence. Furthermore, in most cases only the database citation of a case is being analyzed, whereas the whole text of a case is sidelined. MacCormick (1987) 157 argues that ratios are systematically misleading forms of expression which convey an illusion of reference and thus of legal stability and certainty, while the legal reality is one of change. Constant changes in Finnish domestic tax laws further highlights the difficulties in the long-term tax minimization of a mutual fund investment.

¹⁰⁴ These are the so-called database cases, which means that the citations are kept short.

¹⁰⁵ The Central Tax Board works in conjunction with the national board of taxation and is capable of giving decisions, which have factual binding force within the tax administration. The Act on the Central Tax Board, i.e., laki keskusverolautakunnasta (535/1996) determines the legislative basis of KVL.

¹⁰⁶ Niskakangas (1998) 3.10 Henkilöverotus.

value whatsoever, because they are not equally available to everyone. In addition, if the Tax Authorities or courts have, what we call, a common sense touch with reasonability, then they do not accept argumentation based on these cases at all. But then again, assuming the tax collector to be reasonable, it is only a theoretical assumption at the very best. In the context of polycentricity of the sources of law, we must ask, that why do we want to create internal divisions inside the category of precedents? Why do we not try to systematize something lasting and more concrete instead, such as public citations of the ratio's of all of those cases, ruled by both the KHO and KVL. What would be the benefits of all this? To begin with, the Supreme Administrative Court could publish all their precedents, when only the ratio's were mentioned. As we know, the unpublished cases of the Supreme Administrative Court, are available often only for the research purposes, in an environment, that makes the research itself almost impossible. Secondly, the judges of the Supreme Administrative Court should not have to wonder, what are the most important cases each year and thus, what becomes published in the yearly casebooks of the Supreme Administrative Court. When we had all the precedents from the KHO and KVL publicly available, we could very easily see, where the legislation needs improvement. Better yet, every now and then we could collect the precedents together and thoroughly evaluate, which area was regulated unsatisfactorily, then make the necessary amendment law or decree, and thus the weight of these precedents become smaller for good. When this happens, the Parliament has taken the power back to itself, the way the people have wanted in the first place. Publicly published ratio's also make the interpretation of the valid domestic tax laws, much more correct, because we do not have to speculate or argue on and on, as to what is the correct interpretation for each precedent. After all, good verbalism and deep understanding of the legal theory, can easily give us many alternative insights, as to what the correct interpretation in each case happens to be. When every precedents ratio's become publicly available, the contextuality in the interpretation will also decrease tremendously. This is so, because both the tax offices and the courts of law, shall now interpret precedents somewhat similarly. Fortunately, the taxation guidelines used by the Finnish tax offices, do not include any hidden interpretation rules for different cases. In most situations, domestic tax laws and precedents give enough space for the tax collector to make a solid judgment. Furthermore,

all guidelines and other handbooks are purchasable by the taxpayers¹⁰⁷. However, knowing the handbooks thoroughly well, is not always enough. We should remember, that the previously mentioned precedents are factually generally directive and thus often binding norms for the tax collector, when formally expressed rules do not exist on the conflict issue. Needless to say, due to the constant changes in tax laws yearly, there are always new precedents to search for between the publication day of handbooks and the last day of tax returns return day. So, would a certain fresh precedent become applicable in the taxpayers yearly taxation, after the tax return was received by the tax office?. Also, taxation decisions in Finnish tax offices on individual taxation are being made by personnel, whose educational backgrounds do not support a critical level analysis all that often. A higher academic degree with jurisprudence studies is not a formal requirement for the personnel, who complete the majority of tax returns. These reasons can, in a worst case scenario, change the tax subject's taxation from what was anticipated originally. Summa summarum, we define the binding effect degree of precedents as follows: not binding by valid law but highly followed¹⁰⁸ by the tax offices and courts of law. The reason for the high following degree is the framework law nature of the Finnish tax laws coupled with the Constitutional requirement for equal treatment before the law. Also, the national board of taxation must promote correct and equal taxation within the tax administration¹⁰⁹. This partially explains too, why the KVL cases are occasionally very relevant, in the yearly taxation.

1.2.5.1.5 Finnish preparatory materials

The Government proposal¹¹⁰ is the most often seen instrument, before the ratification of a domestic tax law. From Government proposals one can occasionally find important argumentation as well. These arguments might show the motives and objectives of legislators. The preparatory material's binding effect has been studied in the legal

¹⁰⁷ KHO precedents can be retrieved from the Finlex database in Finland. These precedents are updated monthly. For further discussion, see Koskinen et al. (1996) 63.

¹⁰⁸ Myrsky (1991) 28, explains this to be a certain, *lex imperfecta* phenomenon.

¹⁰⁹ § 2 (2) of verohallintolaki (1557/1995).

¹¹⁰ Hallituksen Esitys, HE.

literature on and on. However, the consensus on the degree of their binding effect is missing. As one sharp observation¹¹¹ goes:

“the formulation of constant doctrine, for the argumentation value of preparatory materials citations, is hardly possible”.

The preparatory material’s binding effect has been defined¹¹² as follows:

“Preparatory materials do not have the same formal juridical¹¹³ binding effect compared to a law text”.

Viherkenttä (1990) further eliminates their binding effect by making an observation, that preparatory materials do not provide real help¹¹⁴ for the interpreting person. This is a result of the time limitations¹¹⁵. Besides, preparatory materials are often not even available in the local tax offices. Therefore, we should mostly analyze the degree of binding effect from the perspective of legality and reasonability. PL § 2 (3) determines, that in all public activity, the law shall be strictly observed. In addition, PL § 3 (1), separates the legislative powers to the Parliament, not to the law preparation committees, which often includes non-MP’s. The code of judicial procedure’s¹¹⁶ § 11 of chapter 1 determines, that a judge should, inter alia, examine *the basis of the law*, when making judgments. This ancient clause can be interpreted in such a way, that it could mean the present-day preparatory materials. Although, we do not believe, that a concept of preparatory material even existed in the year 1734, as we know it. However, as the valid legislation does not clear verbally support the usage of preparatory materials as a source

¹¹¹ Laakso (1993) 118.

¹¹² Viherkenttä (1990) 50-51.

¹¹³ Formellt juridiskt.

¹¹⁴ Taipale (1990) 27 provides a list of factors, which determine the significance of a given preparatory material. These include the following: clarity of arguments, depthness of consideration, indisputable, later precedents from the courts, the extent to which the law was prepared and the age of the preparatory material. We would like to add to this list an interpretation, which does not violate the spirit of PL § 2.3. The lawyers are commonly known as a group of people, who can easily twist the words to suit their own purposes. Vaguely drafted preparatory materials, which provide contextual arguments of relevance are weakly binding sources and furthermore, the judges in Finland are not supposed to follow such arguments by valid law. The Finnish judges are well aware of this, although the same does not necessarily apply to all levels of the Tax Administration, which does, however, implement the great majority of tax assessments in Finland.

¹¹⁵ According to Saarnilehto (1990) 4 and Taipale (1990) 31, the courts refer to preparatory materials only rarely in Finland. Helin (1990) 39 points out, that academic scholars in Finland do not consider preparatory materials to be very relevant in the field of legal dogmatics. He also reminds us, that the development of the ECJ cases, will probably replace preparatory materials in legal research in the future.

¹¹⁶ Oikeudenkäymiskaari (4/1734).

of law, their usage should be minimized, if not stopped. Besides, the taxpayers often have no knowledge of such documents. The info materials given out by the national board of taxation is constantly silent on these binding aspects of preparatory materials. Therefore, stopping their usage in the taxation process¹¹⁷ is reasonable. It would also make the taxation process faster for both parties: taxpayer and tax collector. Furthermore, to date, preparatory materials, in the field of taxation, are not available in all public libraries. Tax payers can study them, for example, in the Parliament's webpages or by purchasing an access to an intranet site called: vero-info¹¹⁸. Also, if the academic scholars nor judges, cannot reach a workable consensus on the binding effect issue, then it is most reasonable to make the following generalizations. It is not an acceptable situation¹¹⁹ that in some cases preparatory materials may have binding effects, whereas in some other cases they have no binding effects at all. This is not even analogous to legislation at a general level¹²⁰. We believe it is high time to end speculation around the matter in the field of taxation and interpret the Constitution's *legality* principle¹²¹ and code of judicial procedures § 11 of chapter 1 as follows: preparatory materials should not have any binding effect on their own. This is the task of valid law. If the Finnish legislators want to support the use of preparatory materials as a source of law in the field of taxation, then they should use legislative means to create a clearly worded clause, for example, for the code of judicial procedure, which would enable that. To date, this is not the case¹²². Another approach to this problemacy is, that we start ratifying thoroughly clear laws and the preparatory materials lose their factual importance this way. Should the valid laws become at least, a bit more easier to interpret in the future, then surely we would reach

¹¹⁷ The taxation process in this context, means the yearly assessment and implementation of taxation, for both the individual person and companies.

¹¹⁸ This online service is no longer available for outside customers.

¹¹⁹ However, the fact is, that the preparatory materials have occasionally much relevance in the Finnish courts of law. My point is however, that I do not find the current situation acceptable, because of the reasonability arguments in the broad sense.

¹²⁰ The legislation has a binding effect, if it is in force, unless an interpretation according to a legal principle of *desuetudo* is judged to be an acceptable one.

¹²¹ According to PL § 81 (1), state tax is governed by an Act, which shall contain provisions on the grounds of tax liability and the amount of the tax. In addition, PL § 2 (3) further determines this fundamental democratic principle; in all public activity, the law shall be strictly observed.

¹²² One explanation to the usage of the preparatory materials in Finland is simply, that the history of the Finnish legal system, supports their usage as persuasive arguments. Also, the importance of preparatory materials in Sweden has traditionally been acknowledged. So, in the comparative perspective it is rather easy to argue, that if the argumentation based on the preparatory materials is being allowed in Sweden, then why could this not be the case also in Finland, when the valid norms seem to be rather similar.

more and more similar conclusions, in the tax offices as well as in the courts of law. This would effectively decrease, the contextuality of interpretation. Both options would increase the centralisation of the legislative branch and are thus, recommendable solutions.

1.2.5.1.6. Other Finnish sources of law

Decisions and guidelines from the National Board of Taxation. Custom¹²³. Jurisprudence may occasionally affect judgments. In addition, a Securities Board¹²⁴ was established, by the leading financial markets' regulatory organs¹²⁵ in March 2002. Decisions of the Securities Board are recommendations by their nature. The Financial Institutions are not expected to follow the recommendation, from the Securities Board under the valid domestic law. However, the Financial Institutions have made an effort to harmonize the industry practice in Finland, when they established the Securities Board. In civil law terms, these recommendations would naturally become categorized, as good financial market practice to some extent. Thus, these recommendations have persuasive power in conflict situations between the Financial Institutions and small investors. Yet, only the future will tell their true nature. Much depends naturally on, how these recommendations are made available to the general public.

¹²³ Custom is also mentioned in the code of judicial procedure's chapter 1 § 11. Traditionally, custom has more significance in the fields of civil law than in the public law. We see custom as a top concept for such sources of law as precedents, Public Administration decisions, good accounting practice and business practice in the sector of civil law. We can probably best observe the custom as a set of fragmented principles within the Tax Administration. For example, the Tax Administration is not going to start collecting € 1 if the probable costs from this are € 20. We could perhaps also propose here a term *good industry practice* in the context of fund investments, which would refer, inter alia, to custom, precedents, Tax Administration decisions, good accounting practice and business practice. See also Myrsky (2002) 27-31 for a recent discussion of the custom inside the Finnish tax law.

¹²⁴ Arvopaperilautakunta.

¹²⁵ Arvopaperivälittäjien Yhdistys, Suomen Sijoitusrahastoyhdistys, Rahoitustarkastus, Osakesäästäjien Keskusliitto, Suomen Pankkiyhdistys.

1.2.6.1. Swedish sources

1.2.6.1.1. Swedish Constitution

Swedish Constitutional sources include several separate Acts: The Instrument of Government¹²⁶, The Riksdag Act¹²⁷, The Freedom of The Press Act¹²⁸, The Act of Succession¹²⁹ and The Fundamental Law on Freedom of Expression¹³⁰. In the context of mutual fund investments, the most relevant Constitutional Act is The Instrument of The Government, which consists of 13 chapters with a total of 155 sections. As with the other Scandinavian countries, we should not insist on the abolishment of the Constitutional articles, which play a central role in the sector of taxation. The following descriptions should illustrate, why this is the case. Those Constitutional articles, which closely affect mutual fund investments, include the following ones. In chapter 1 article 1, we can find *inter alia*, that public power is exercised under the law. This sentence implies, that also the factual taxation is based on valid law. The legal principle citing that tax shall follow from law, is known in Swedish law as the legality principle¹³¹. Legal literature¹³² mentions, that the legality principle improves the taxpayers' ability to forecast taxation, when courts are bound to follow the valid law and preparatory materials. Perhaps one of the key issues with the legality principle, is the actual norm interpretation in a conflict situation. In other words, when the valid domestic law or regulation is in conflict with the Swedish Constitution, then the Constitution supersedes them¹³³. Chapter 1 article 4 determines, *inter alia*, the competent legislative organ: the Riksdag¹³⁴ enacts the laws, determines taxes and decides how public funds shall be used. This authority cannot be delegated to another organ¹³⁵. This is not the case with Finland. Although, the factual role of the Swedish RSV has been questioned, because the norms from the RSV are not formally

¹²⁶ Regeringsformen (152/1974).

¹²⁷ Riksdagsordningen (153/1974).

¹²⁸ Tryckfrihetsförordningen (105/1949).

¹²⁹ Successionsordningen (926/1810).

¹³⁰ Yttrandefrihetsgrundlagen (1469/1991).

¹³¹ See Hultqvist (1995) 517, who also encapsulates this principle in the maxim "no tax without law" (*nullum tributum sine lege*).

¹³² See Lodin et al. (1999b) 540.

¹³³ See Bengtsson (1998) 57. Also, according to Hultqvist (1995) 526 the prevailing norm hierarchy in Sweden is such, that a constitutional prohibition may not be set aside by statute.

¹³⁴ The Swedish Parliament.

¹³⁵ For this opinion see Lodin et al. (1999) 12. However, the Government may, upon authorization by law, issue regulations by statutory instrument concerning matters other than taxes.

binding, yet they function as if this was generally the case¹³⁶. Generally speaking, it should not matter, if the Tax Administrations determine the taxes and the way they are being technically collected. What is of importance is, that the tax rates should be based on the valid law as well and the Tax Administrations should not change them. Chapter 2 article 10, includes the prohibitive order for retroactive taxation: No State taxes, charges or fees may be levied except insofar as they were laid down in provisions which were in force when the circumstance arose which occasioned the liability to tax, charge or fee. This increases legal certainty considerably and makes the prediction of final tax consequences from the mutual fund investment more reliable. Surely, any retroactive norms could ruin the reputation of a single country, in the face of cross-border investors for a long time. Yet, we could as reasonably ask, whether the foreign investors or even the domestic investors pay any attention on the retroactivity issues, when they allocate their capital. Chapter 8 article 3 determines, *inter alia*, that provisions concerning the relations between private subjects and the public administration which relate to obligations incumbent upon private subjects or which otherwise encroach on the personal or economic affairs of private subjects shall be laid down by law. These provisions include, *inter alia*, taxes payable to the State. This article further increases the legal certainty and the predictability of final tax consequences resulting from mutual fund investments.

1.2.6.1.2. Swedish international tax treaties

Chapter 10 article 1, of the Instrument of the Government determines, that agreements with other States or with international organizations shall be concluded by the Government¹³⁷. However, before any tax treaty becomes part of the valid domestic law, several bureaucratic steps needs to be taken: signing, incorporating, ratifying and publishing, to name just a few considerations¹³⁸. According to the Swedish legal literature, the double taxation convention can only reduce or maintain the taxation, never

¹³⁶ See Pahlsson (1995).

¹³⁷ However, Chapter 10 article 2 of the Instrument of the Government determines, that the Government may not conclude, *inter alia*, any international agreement binding upon the Realm without Riksdag approval, if the agreement presupposes the amendment or abrogation of a law or the enactment of a new law, or if it otherwise concerns a matter which is for the Riksdag to decide. See also § 72 (2) of KL (370/1928).

¹³⁸ For a thorough analysis of a treaty process, see Tiv us (1997) 22-24.

extend it¹³⁹. For example, if a certain income is not subject to tax according to the domestic tax law, then the tax treaty, which possibly allows the taxation, is not applied¹⁴⁰. Sweden has also, to a great extent followed, the OECD's model tax treaty and the ratified treaties themselves are always binding for both the taxpayer and the Tax Administration, not to mention the courts¹⁴¹. On the other hand, if a certain clause of a tax treaty fails to provide a clear norm for the taxation, then the preparatory materials of that treaty are given great significance in the interpretation of the case in hand. It is mostly the following legal principles, which determine the priority order between the different sources of law.

- i) Pacta sunt servanda. Every treaty in force is binding upon the parties to it¹⁴².
- ii) Bona fide i.e., good faith. Every treaty in force is binding upon the parties to it and must be performed by them in good faith. In addition, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose¹⁴³.
- iii) Lex superior derogat legi inferiori. EC law supersedes tax treaties¹⁴⁴.
- iv) Lex specialis derogat legi inferiori. According to article 27 of VCT, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty¹⁴⁵.

¹³⁹ See for further discussions, Samuelson (1989) 88, Lodin et al. (1999b) 475, Johansson et al. (1999) 243. See also Lindencrona (1994) 24 and Pålsson (1998) 89 who are calling this interpretation principle, as the *golden rule* of a double taxation treaty.

¹⁴⁰ See Johansson et al. (1999) 243, 248 for this opinion.

¹⁴¹ See Lodin et al. (1999b) 503 for these opinions. See also Johansson et al. (1999) 531.

¹⁴² Article 26 of VCT.

¹⁴³ Article 31 (1) of VCT.

¹⁴⁴ This argument is based on the supremacy case 6/64, i.e., ECJ 15 July 1964 Flaminio Costa Vs. E.N.E.L. The 3rd reasoning provides us with the following perspective: "By contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have permanently limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves. The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure can, therefore, not apply if it is inconsistent with that legal system. The law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights".

¹⁴⁵ This rule is without prejudice to article 46 of VCT.

These interpretation principles apply, both to the multilateral Nordic treaty of double taxation and to other bilateral double taxation treaties as well. In addition, these principles are generally accepted in the legal community.

1.2.6.1.3. Swedish domestic tax law

The individuals mutual fund taxation is based mostly on the following tax laws: National income tax Act¹⁴⁶, tax payment Act¹⁴⁷ and taxation Act¹⁴⁸. However, the Swedish tax code as a whole includes dozens of other laws, which could possibly play a role, in the mutual fund investment process for the individual person¹⁴⁹. The actual mutual fund investments for their part, are being regulated by the mutual funds Act¹⁵⁰. Although there exists a Karnov's legal commentary in Sweden, the sector of financial services in general, remains difficult to regulate. The financial services are complex and in all probability, will become even more so in the foreseeable future, because of the capital market innovations. Another problem with the Swedish legislative culture is, that there is no tendency in the ratification of easily interpretable tax laws. This implies, that also the different interpretators take different positions at the same case. When the interpretations chance between the levels of tax office and court, it should be clear, that there exists a problem, that needs to be corrected in the name of reasonability and legal certainty at the very least. Yet, nobody seems to care about this issue, all that seriously. Perhaps in all the Scandinavian countries, the general judicial thinking is very similar: when there is no discussion of a problem, there is no problem. Why do we want to fool ourselves? When the interpretations can change in the tax office level and in the court of law, we have a serious problem. A problem, which exists universally and also, at the Scandinavian level, deserves more attention, than what is currently the case. The creation of an integrated single tax law commentary book, which is being annually commented by the leading tax experts, is one way to ease the contextuality of the interpretations. I do not believe, that

¹⁴⁶ Lag om statlig inkomstskatt (576/1947).

¹⁴⁷ Skattebetalningslag (483/1997).

¹⁴⁸ Taxeringslag (324/1990).

¹⁴⁹ For a comprehensive list of Swedish tax laws, see Rabe's (1999) Skattelagstiftning.

¹⁵⁰ Lagen om värdepappersfonder (1114/1990). This Act is based on the EC UCITS directive, i.e., a Council directive on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (85/611/EEC).

there is all that many tools in our toolbox, to correct the problems of contextuality in the interpretations. Thus, we must learn to do the right things, no matter what the excuses would be. Surely, the objective of the legislation in some general conceptual or principal level, is not to keep the bureaucracy alive, but to maximize the common good or should we dare to suggest: to maximize utility.

Hierarchically, a norm of the Instrument of the Government¹⁵¹ supersedes legal and regulation level norms. Although, according to the legal literature, the valid domestic law is the primary source of law¹⁵². The primacy of laws in this context, refer to the factual usage of laws over the Constitutional paragraphs: the laws are simply much more often used than the Constitutional paragraphs. This primary importance of laws derives mostly from the Constitutions' legality principle, which is written into the Constitution as follows: public power is exercised under the law¹⁵³. In other words, the courts and the Tax Administration are bound to follow the valid law in their judgments. Furthermore, the Government may issue, by statutory order, regulations, which are not under fundamental law to be issued by Parliament¹⁵⁴. Usually, such regulations are meant to supplement and clarify the valid domestic tax law, not to repeal it. Should the Swedish tax law become into existence in the future, then the regulations could often be ratified also in the form of law. In addition, also the legal principles are of some relevance, in the Swedish tax law. The legal principles of *lex specialis derogat legi generali* and *lex posterior derogat legi priori* are being applied case by case, because of their limited argumentation value¹⁵⁵. These principles have limited argumentation value, because they are not based on valid domestic tax law, unlike the *lex superior derogat legi inferiori* principle, which is to some extent, based on the ECJ case law.

¹⁵¹ The following discussion uses the term Constitution, which refers to the Instrument of the Government.

¹⁵² See Lodin et al. (1987) 12, Strömholm (1996) 334, Pelin (1997) 27, Lodin et al. (1999) 14 and Johansson et al. (1999) 571.

¹⁵³ Chapter 1 § 1 of the Instrument of Government.

¹⁵⁴ Chapter 8 § 13 (2) of the Instrument of Government.

¹⁵⁵ For this opinion, see Pålsson (1998) 68-69.

1.2.6.1.4. Swedish precedents

According to the Swedish Constitution's chapter 11 article 1, the Supreme Court is the highest court of general jurisdiction, and the Supreme Administrative Court is the highest administrative court. Moreover, the right to have a case tried by the Supreme Court or by the Supreme Administrative Court may be restricted by law. These two reasons make it clear, that precedents have relevance, in the determination of valid domestic tax law. The judicial decisions from the Swedish Supreme Court¹⁵⁶ are known by the terms *praxis* and *prejudikat*, i.e., precedents. The contextual determination of the degree of binding effect of a precedent in the domestic tax law, starts from the notion, that only a Supreme Court precedent is considered to have binding effect at some level¹⁵⁷. Furthermore, the following principles are being applied in the interpretation of the degree of binding effect of a precedent:

- i) A well-defined *praxis* supersedes preparatory materials, RSV recommendations and Doctrine¹⁵⁸.
- ii) Consistent *praxis* over the years, overrules new possible interpretations¹⁵⁹.
- iii) A case where judges voted differently, is weaker than a case where there were an unanimous decision¹⁶⁰.

The polycentric question making implies, that it is possible to improve the understandability of the domestic tax laws, by ratifying amendment laws in those difficult areas, where there exists several precedents. Also the rulings from the Council for Advance Tax Rulings, could be illuminative, when we were to analyse the necessary changes in the valid domestic tax law. This would also give the Parliament more factual legislative power, when the role of the Swedish Supreme Administrative Court decreases.

¹⁵⁶ The tax cases are being decided in the Regeringsrätten and are published in the Regeringsrättens Årsbok (RÅ). The most important cases are also being commented on the leading Swedish taxation journals: *Skattenytt* and *Svensk Skattetidning*.

¹⁵⁷ See Samuelson (1990) 90 and Lodin et al. (1999) 15-16. Rulings from the Council for Advance Tax Rulings (Skatterättsnämnden) are often of relevance in the yearly tax assessment. However, these rulings are, in general, not to be classified, as precedents of equal weight compared to those, from the Supreme Administrative Court. Moreover, these advance rulings only bind the Tax Administration, not the taxpayer nor the Supreme Administrative Court.

¹⁵⁸ See Lodin et al. (1999b) 543.

¹⁵⁹ Lodin et al. (1999b) 544.

¹⁶⁰ This opinion is expressed in Johansson et al. (1999) 577.

In addition, if we were provided with publicly published ratio's of the Supreme Administrative Court, then also the valid domestic tax laws would become easier to correctly interpret. This would surely decrease also the contextuality of interpretation in the Swedish Tax Administration and in the courts of law as well. Thus, in principle, everybody would win.

1.2.6.1.5. Swedish preparatory materials

According to the Swedish Constitution's chapter 1 article 4, it is Parliament which, *inter alia*, enacts the laws. As the public power is exercised under the law, the Swedish preparatory materials, lack the similar legal status when compared to domestic laws. However, the usage of preparatory materials in the interpretation of binding valid domestic law is common¹⁶¹. Generally, the determination of the degree of binding effect depends both on the preparatory materials age and also, quality¹⁶². The most common preparatory materials are the Government Proposals¹⁶³ and Committee Reports¹⁶⁴. Sweden is perhaps that country in the Scandinavia, which puts most effort and resources for the preparation of preparatory materials. The tendency might as well be, in the creation of thoroughly clear domestic laws. Yet, this is not the case, as far as we are concerned. The Swedish domestic tax laws are vague, that is a fact. This means, that the contextuality of interpretations can take place, in the taxation appeal process. Thus, we are factually decreasing the legal certainty, when we ratify vague laws. The fact that we have a nice collection of preparatory materials, does not offer much comfort, when we have to appeal our case to the highest ladders, until we get "real" justice. Clearly, if the Swedish authorities placed as much effort to the drafting of the actual laws, as is currently the case with the preparatory materials interviews where experts tell their opinions, then surely there would be, less and less cases to be ruled in the courts of law. One solution to

¹⁶¹ Kellgren (1997) 90-91, lists ten well known scholars and their opinions on the degree of binding effect of Swedish preparatory materials. They all emphasize the importance of preparatory materials in the interpretation of domestic tax laws. However, none of these scholars makes reference to the valid law or more importantly, to the fact, that the usage of preparatory materials is not backed up by a valid norm at the level of legislation. In this context, members of the legislative committees factually become legislators, which unfortunately seems to be accepted even by the Supreme Court judges of Sweden.

¹⁶² This opinion is expressed in Bernitz et al. (1998) 99.

¹⁶³ Regerings Propositioner.

¹⁶⁴ Kommittébetänkandena, better known as, Statens offentliga utredningar (SOU).

the improvement of the domestic tax laws would be, to ask the experts their opinions twice or more. First round of interviews would take place, before the new law was actually drafted. The second round would take place, when the law was drafted and the experts could try to find possible loopholes from it or make further recommendations, in order to avoid future problems in the interpretation of a certain article. In any case, it is not enough, that we only consult the experts of a certain field, when we develop a certain law. In order to avoid the contextuality of interpretation, we should also consult the tax assessors and judges, so that we receive the necessary feedback, as to how they would interpret such and such article. When we would see, that the tax assessors and judges have different opinions on certain issues, we could make the necessary alterations into the law before it was ratified. Thus, these kinds of totally unnecessary interpretation differences, would not take place in the future and the contextuality of interpretation decreases, when the new law was interpreted similarly at all levels of a legal system.

1.2.6.1.6. Other Swedish sources of law

As with the previous country analyses, we only briefly list the other Swedish sources of law here. These include mainly the administrative practice¹⁶⁵ and legal doctrine. It goes without saying, that this list is by no means comprehensive. However, the previously discussed sources cover, in our opinion, most of the tax assessments and implementation of the taxation itself.

1.2.7.1. Norwegian sources

1.2.7.1.1. Norwegian Constitution

The Constitution of the Kingdom of Norway entered into force as, early as 17 May 1814. However, the original text has changed over the years after new amendments have been ratified. The present Norwegian Constitution consists of 112 sections, out of which the following have the most relevance for mutual fund investments. The Constitution's § 75

¹⁶⁵ Such as, RSV recommendations. Pålsson (1995) strongly criticizes RSV recommendations. In the Constitutional context RSV's competence is limited by the principles of legality and objectivity, yet it is not always clear from the RSV documentary, whether a certain norm is binding or not.

determines, inter alia, that it devolves upon the Storting¹⁶⁶: to enact and repeal laws; to impose taxes, dues, customs and other public charges, which shall not, however, remain operative beyond 31 December of the succeeding year, unless they are expressly renewed by a new Storting¹⁶⁷. This means that Parliament is forced to consider each year, whether a certain tax is still necessary¹⁶⁸. The Constitution's § 97 is of significant importance for the predictability of final taxation, resulting from mutual fund investments. This article states, that no law must be given retroactive effect¹⁶⁹. The Making of amendments to the Norwegian Constitution is about as difficult, as it is to get new modifying clauses for any other Scandinavian countries Constitutions. However, the legal literature does not indicate, that this would affect mutual fund investment decisions in any significant way. We should remember, that the role of the Constitution in Norway, as in any other Scandinavian country, is to direct the legislation by dictating certain requirements in advance. Both of these Constitutional articles partially determine, how the actual legislation is going to develop in the future. The retroactivity clause is very important for the long run investment calculations. According to the *lex superior derogat legi inferiori* principle, the Norwegian Constitution takes precedence over domestic tax law¹⁷⁰. As such, we can say that valid domestic tax law can be given a high degree of reliability in the context of legal development, in the field of Norwegian tax law. Moreover, this lessens the risks involved with Norwegian mutual fund investments, both for foreign and domestic investors.

1.2.7.1.2. Norwegian international tax treaties

Under § 26 (2) of the Norwegian Constitution, treaties on matters of special importance, and in all cases, treaties whose implementation according to the Constitution, necessitates a new law or a decision by the Storting, are not binding until the Storting has given its consent thereto¹⁷¹. This means that a tax treaty becomes binding for taxpayers only, when

¹⁶⁶ The Norwegian Parliament.

¹⁶⁷ These unofficial translations are provided by Flanz (1999) 14.

¹⁶⁸ See Brudvik (1999) 42.

¹⁶⁹ Flanz (1999) 19.

¹⁷⁰ See Bertnes (1993) 156 for the Norwegian hierarchy of legal norms.

¹⁷¹ Flanz (1999) 5.

it is transformed into domestic Norwegian law¹⁷². According to valid Norwegian law¹⁷³, the tax treaty becomes domestic Norwegian law upon ratification. The legal principle of *lex specialis derogat legi generali*, is applied in Norway. This legal principle means generally, that a tax treaty supersedes domestic tax law should they be contradictory of each other on the same issue¹⁷⁴. However, tax treaties can only reduce the taxation based on domestic tax law, not extend it¹⁷⁵. To date, Norway has entered into approximately 70 tax treaties, which have the aim to avoid double taxation¹⁷⁶. Norway participates also, in the multilateral Nordic treaty of double taxation.

1.2.7.1.3. Norwegian domestic tax law

There are three main laws¹⁷⁷ in Norway, which regulate the direct taxation of property and income: the tax Act¹⁷⁸, the tax procedure Act¹⁷⁹ and the tax payment Act¹⁸⁰. The old tax Act was repealed by the renewed tax Act in 1999, after having served for almost a century. In addition to these three laws, there exist over twenty other laws, which provide stipulations for direct taxation¹⁸¹. Categorically speaking, the individual taxation laws include, mainly national income tax¹⁸², municipal income tax¹⁸³, national net wealth tax¹⁸⁴ and municipal net wealth tax¹⁸⁵. The Norwegian Security Fund Act¹⁸⁶ of 1981, hereafter Vpfl, applies to securities funds and the management of securities funds. Vpfl § 1 (2) provides the definition¹⁸⁷ for the securities funds: the securities fund is an independent body of assets essentially comprising securities deriving from deposits of

¹⁷² Brudvik (1999) 48, 98.

¹⁷³ See article 1 of, lov om adgang for kongen til å inngå overenskomster med fremmede stater til forebyggelse av dobbeltbeskatning m.v. (15/1949) and Constitutions § 78.

¹⁷⁴ Brudvik (1999) 48.

¹⁷⁵ For these opinions, see Zimmer (1992) 52, Zimmer in Karnov (1996) 704 and Brudvik (1999) 99.

¹⁷⁶ Brudvik (1999) 100. See also Wikborg (1997) 684, for abolishing double taxation by the RISK-method.

¹⁷⁷ Eckhoff (1997) 24 mentions that the word *lawtexts*, can mean not only domestic laws but also the Constitution, King's Resolutions etc. We find it as a useful synonym to describe the formal materials, but do not consider it as a useful category, when creating a comparative synthesis for several different sources of law.

¹⁷⁸ Lov om skatt av formue og inntekt/skatteloven (4/1999).

¹⁷⁹ Ligningsloven.

¹⁸⁰ Skattebetalingsloven.

¹⁸¹ Venstad (1999) 101.

¹⁸² Fellesskatt til staten.

¹⁸³ Intektsskatt til kommunen.

¹⁸⁴ Formuesskatt til staten.

¹⁸⁵ Formuesskatt til kommunen.

¹⁸⁶ Lov om verdipapirfond (52/1981).

capital from an indefinite range of participants. In addition, Vpfl § 1 (3) further clarifies, *inter alia*, the legal nature of the Norwegian securities fund: an activity whose purpose is to receive deposits from an indefinite range of persons for the purpose of collective participation in the purchase and sale of securities shall be organized as a securities fund managed by a management company in conformity with the provisions of this Act. But instead of just giving some meaningless list of laws, which play a role in the mutual fund investments and some descriptions of their contents, let us now consider the role, which the one integrated tax law commentary book could play in Norway. As a general rule we can say, that when the new domestic legislation is being passed in Norway, the new laws incorporate existing legislation¹⁸⁸. This means basically, that when we have new amendment laws, they become integrated automatically into the existing law. Now, if we had an updated tax law commentary book in Norway, then all the futures amendment laws and administrative circulars, could very easily be integrated into this single tax law commentary book, especially if it was to be published in the online form via internet. Also, if each section of this single tax law commentary were clearly argued, and if this tax law commentary was actively commented upon by the leading Norwegian tax experts, then surely the field of tax law would become a lot more easier to interpret in Norway. Although Norway is not a full EU member state, it would also be possible to take the relevant European tax law issues into more careful analysis, because the leading experts could analyse the effects of the European tax law into the Norwegian taxation in detail in the footnotes of this single tax law commentary¹⁸⁹. Karnov is a good example of this in a general level. The importance of legal doctrine could also receive the necessary comments, in the footnotes of this hypothetical tax law commentary. After all, the legal doctrine and especially the legal principles, have relevance also in Norway in the field of taxation and in the other areas of jurisprudence as well. For example, the legal principle of *lex superior derogat legi inferiori* is expressed in § 17 in the Norwegian Constitution.

¹⁸⁷ Unofficial translation from Kredittilsynet.

¹⁸⁸ Bertnes (1993) 57. For an illuminating example, see the new tax Act, *lov om skatt av formue og inntekt* (14/1999). However, in the long run, incorporation may well cause unnecessary confusion in the comprehension of the domestic legislation's contents. The finance committee's report (Innst. O. nr. 40 1998-1999) notes, that the main objectives of the new tax Act was to produce taxation norms, which would be both simple and in a clear form, so that they would be accessible to more users.

¹⁸⁹ Jacob Jarøy Forlag publishes the most comprehensive tax law compilation in Norway currently. The book is titled: *Norsk skattelovsamling*. This text is approximately 1300 pages long and it includes the Nordic treaty of double taxation as well. This book could be transformed into an up-to-date tax law commentary rather easily.

From this article we can determine, that the Constitution and the laws passed by Parliament supersede lower level regulations. Regulations and Circulars, are being issued by the public administrations.

1.2.7.1.4. Norwegian precedents

The term *prejudikat*, i.e. precedent, can be interpreted as previous judicial decisions¹⁹⁰. However, only the Supreme Court decided cases are referred to as precedents, although the cases from lower level courts¹⁹¹ can have a certain weight¹⁹². It was the Constitution of the Kingdom of Norway, as laid down on 17 May 1814, which gave Norway its Supreme Court. The famous French philosopher, Montesquieu, has influenced the structure of the judicial power also in Norway. We can best observe this from the Constitution's § 88. Accordingly, the Supreme Court pronounces judgment in the final instance¹⁹³. It naturally follows from here, that a Supreme Court precedent is generally seen as the highest ranking one in terms of binding effect. Another factor, which gives the Supreme Court precedent higher ranking is that not every case has a right to be brought before the Supreme Court. Are the Supreme Court cases equal to domestic legislation in terms of binding effect then, one might ask. The answer to this is generally no. The Supreme Court is not required by the valid law¹⁹⁴ to follow its own previous precedents in Norway, although it is likely to do so, as do the lower courts¹⁹⁵. The legal literature offers the following perspective, for the identification of ratio decidendi of a case:

“In Norwegian doctrine, the binding rule must have a connection to the facts of the case: these facts function both as a source of and limit to the rules that could be accepted as the ratio(nes) of the case¹⁹⁶”.

¹⁹⁰ Reynolds et al. (1998) 3: 6.

¹⁹¹ Lower level courts include byrett, herredsrett and lagmannsrett.

¹⁹² See Eckhoff (1997) 169-179 and Brudvik (1999) 51. Andenæs (1997) 45 noted, that there is not a consensus among the Norwegian authors on the binding effect degree of lower level courts, which makes it hard to see where the real disagreements are.

¹⁹³ This unofficial translation is from Flanz (1999) 18.

¹⁹⁴ § 1 of lov om forandring i lovgivningen om Høiesterett (2/1926).

¹⁹⁵ For further discussion, see Reynolds et al. (1998) 3: 6 and Bertnes (1993) 156.

¹⁹⁶ See closer Eng (1993) 20, for his doctrinal perspectives.

Another well established principle in Norway is, that the previous court decisions are relevant arguments for the solution of subsequent cases¹⁹⁷. The reason why the Supreme Court cases are being followed so much in Norway, is almost self-evident. Other sources of law do not provide equally weighty arguments, for those interpretations that are being debated upon¹⁹⁸. In addition, when there does not exist a legal culture, which takes the difficult interpretation problems into account by the ratification of an additional amendment law, then it is a natural consequence, that the precedents are being given more weight as sources of law in the future's similar cases. After all, the ratification of amendment laws in those areas where there are several precedents, would in all its simplicity, decrease the relevance of precedents. However, we are unable to define the exact degree of binding effect for the Supreme Court precedents, because other relevant sources of law interact with each other in the legal decision-making process. In other words, the Supreme Court precedent's weight is relative¹⁹⁹. Fortunately, the current legal literature²⁰⁰ provides us with some generalizations, which to some extent, determine the argumentative weight of a precedent:

- i) The age of a precedent. The value of a precedent reduces as the time goes by, if new precedents do not come later on.
- ii) The quantity of precedents within the subject area. With more similar cases in the same subject area, the safer the interpretation becomes.
- iii) If the judges delivered an unanimous decision, it is weightier compared to a case where the judges disagreed on issues.
- iv) A case which delivers well-defined arguments, is weightier than a case where there is uncertainty as to what ratio(s) conclude from it.

A relevant thing to remember here is of course, that these categories are only generalisations. Each case will always receive a judgment, based on its own particular facts. As with the other Scandinavian countries, the public publishing of the precedents ratio's, would enable us to make much correct interpretations of the valid domestic law. Needless to remind, also the tax offices and courts of law would thus, also interpret the

¹⁹⁷ For further discussion of this topic, see Aarbakke et al. (1982) 211.

¹⁹⁸ Eckhoff (1997) 159.

¹⁹⁹ See Aarbakke et al. (1982) 211 for this referring to relative weight.

²⁰⁰ See Eckhoff (1997) 21, 182-192.

precedents more correctly and the possible contextuality of interpretation could, to some extent, be avoided.

1.2.7.1.5. Norwegian preparatory materials

There are several material sources of law in Norway, which can be categorized as preparatory materials²⁰¹. A publication called, preparatory materials of legislation²⁰², includes usually all the latest preparatory materials and is therefore the best reference for further information, which may be needed, when interpreting Norwegian valid domestic tax law. Unfortunately, the current Norwegian Constitution does not determine the binding effects for the preparatory materials, which is not the case for the valid domestic law. As such, in the context of binding effect, preparatory materials can have relevance mostly through their argumentation value²⁰³. The concept of argumentation value is based on the logic, that by finding the motives and objectives behind any legislation, the judicial interpretation becomes more rational. This argumentative value is at its peak, when the new law becomes ratified and no previous precedents exist. Also, as we have noted earlier, the older the Norwegian Supreme Court precedent is, the weaker the degree of binding effect. The treatment of old preparatory materials is similar, although we could never estimate for sure the real degree of binding effect. In other words, the preparatory materials are somewhat similar to circumstantial factors: sometimes they have relevance and sometimes, they have no relevance at all. The latter alternative is however, probably the more common one. The best generalization we can conclude here, is in the form of a graphical presentation, which illustrates the degree of binding effect. This can be called a *lifetime line*:

²⁰¹ Andenæs (1997) 24, mentions the following sources: 1.) Government Proposal (Ot prp). 2.) Parliamentary Committee Report (Innst O). 3.) Special Committee Report, Published in *Norges Offentlige Utredninger*/NOU. 4.) Parliamentary debates and resolutions in the Odelsting and Lagting.

²⁰² Forarbeid til Lovene.

²⁰³ Andenæs (1997) 25, calls this argumentation value also as a persuasion value. According to Andenæs, the interpretation of the actual lawtext becomes simpler when the difficulties can be solved with the preparatory materials. However, we should keep in mind that finding the preparatory materials and factually interpreting the core arguments of any given preparatory material is usually far from ideal. Especially when there are several preparatory materials determining the same section of the law. Therefore, it would seem more logical that the law preparation committees and alike, draft more widely understandable laws. A general observation of the Scandinavian tax code suggests, that the ratification of so-called *framework* tax laws is not an oddity but the common tendency.

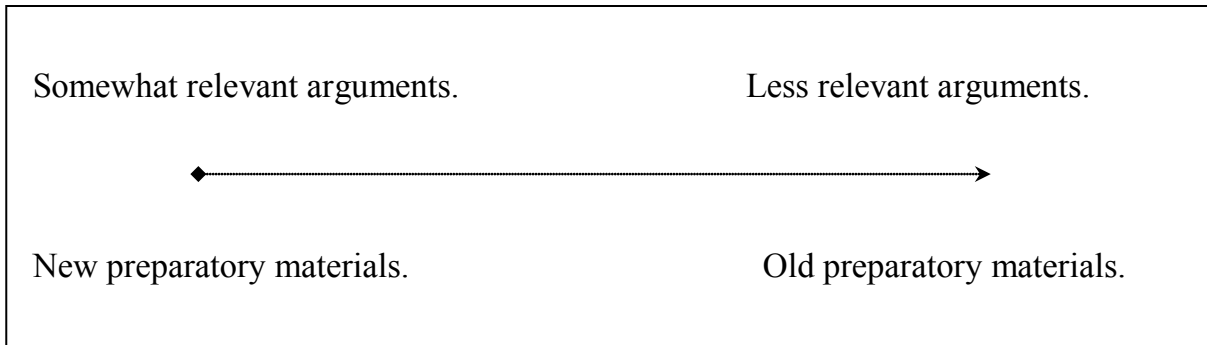


Table 3. The lifetime line of a Norwegian preparatory material.

Undoubtedly, courts regard references to preparatory materials as relevant arguments in the interpretation of laws, but if the valid law and preparatory materials aim in different directions, then the valid law will usually be given supremacy²⁰⁴. But clearly it is the case with Norway too, that when we ratify thoroughly clear laws²⁰⁵, there is no factual need whatsoever, to further consult the preparatory materials. On the other hand, should the laws become, a bit less vague for similar interpretation purposes in the near future, then surely we would also see, a decrease in the number of tax appeals. Moreover, if the tax assessors rely more in the arguments of the preparatory materials in their rulings, whereas the courts do not consider them to be equally weighty arguments, then the contextuality of interpretation is a fact. This could be avoided too, by trying to ratify more systematically clear laws and by publishing an up-to-date tax law commentary book, covering all or most of the Norwegian tax laws. Karnov has proved to be working more than satisfactorily. Why not extent this idea more broadly, to the field of taxation? Surely this would show a good example also to the countries outside of Scandinavia, as to how the tax laws can be best applied at all levels of the legal system.

²⁰⁴ This opinion is expressed in Eckhoff (1997) 78-82.

²⁰⁵ However, the legal cultures around the world teaches us in no uncertain ways, that the ratification of thoroughly clear laws, is generally just not possible.

1.2.7.1.6. Other Norwegian sources of law

As with the other Scandinavian countries, also Norway has additional sources of law, when it comes to mutual fund investments. Again we believe, that these other sources of law are of little use in the context of this study. These other sources include, inter alia, the following ones: administrative decisions and opinions, custom, jurisprudence and considerations of reasonability²⁰⁶.

1.2.8. General observations

This brief introductory analysis discussed, the main valid sources of law in the Scandinavian countries, in the field of international taxation. Currently, no serious research effort, have been carried out in this subject area. Thus, I believe, that I have filled an important information gap. The knowledge of the various legal sources and more specifically, the knowledge of the various sources degree of binding effect against each other, should be understood by all market operators. This data provides us also with an insight, as to what the Scandinavian judge ideology represents in its basic level. The lack of previous studies in this area indicates however, that the knowledge of the various sources of law and their binding effects, is to some extent missing both on a national and on an international level. The previous country analyses show also, that some national variations can be found in the degree of binding effect in various sources of law. However, I can quite simply make the following generalizations:

- 1.) There are more similarities in the degree of binding effect in various sources of law than there are variations.
- 2.) The variations are rather insignificant in the cross-border fund investments.

But how could these generalizations serve jurionomical research approaches? Well, for example, the innovation of more efficient jurionomical models in various organizatorial and project management contexts becomes easier, when we can extent our focus outside

²⁰⁶ See Eckhoff (1997) 210-277, 320-351, Andenæs (1997), Brudvik (1989) 77-80 and aarbakke et al. (1982) 189-222, who also add to this list the regulations from the municipal council. However, they have little, if any, relevance to mutual fund investments.

of national boundaries. The following synthesis, illustrates the various sources of law in Scandinavian countries. It also provides us with a view to the degree of binding effect in each source category.

	DENMARK	FINLAND	SWEDEN	NORWAY
EU/ETA materials	+	+	+	+
Constitution	+	+	+	+
International tax treaties	+	+	+	+
Domestic tax law	(+)	+	+	+
Precedents	(+)	(+)	(+)	(+)
Preparatory works	(-)	(-)	(+)	(-)
Other sources ²⁰⁷	(-)	(-)	(-)	(-)

+ = Always binding. (+) = Subject to other arguments. (-) = Relevance subject to context.

Table 4. The degree of binding effect of various sources of law in Scandinavia.

There are many underlying causes, for the development of somewhat similar, legal functioning within the Scandinavian countries. However, I left the exploration of these causes unexamined, because of different research objectives. It is interesting to notice, however, that in the Scandinavian countries, the various sources of laws are being interpreted rather similarly. This enables mutual fund investments from foreign countries to be standardized to a great extent, when broadly speaking all Scandinavian countries can be seen against a rather united norm framework. As such, further research should be done, in the area of European tax law principles implications to the interpretation of domestic laws in each of the Member States of the EU. These European tax law principles could work, as heuristic frameworks, for the creation of domestic interpretation principles, which might potentially enable new insights into the legal systems of individual Member States. I also made very strong recommendations for the development of the current legislation in all of the Scandinavian countries. I believe, that such tax political recommendations were good and easily implementable solutions to those problems, which the polemic on the polycentricity of the sources of law had highlighted during the 80's and 90's. These recommendations could not, however, make the taxation related norms perfect, in the positive sense of the word. The recommendations fall under three categories. Firstly, we would have to decrease the *decentralization* of legislative powers, which means basically the centralization of the legislative powers. In all its simplicity, we

would have to ratify more laws instead of depending so much on the lower level sources, such as precedents, preparatory materials or administrative practice. Also, if the ratio's of all the relevant precedents became publicly published, we could correct the present legislation with amendment laws more often. By doing so, the precedents would effectively lose their importance in the taxation process, although not completely. Therefore, the role of the legislation would increase, as I believe it should. After all, in the end, the Scandinavian Parliaments would take more and more of the legislative powers back to themselves, instead of factually delegating such powers to the undemocratically chosen government officials. Secondly, we would have to try to avoid the ratification of *vague* framework laws. Legal certainty and reasonability arguments lead us to require, that we know the resulting tax consequences in advance, before the Supreme Tax Courts rule a certain issue. The vagueness of the legislation could be minimized, by allocating more resources to the drafting of a new law. In addition, if we had available the ratio's from all the relevant precedents in the field of taxation, we could see, where the current interpretation problems are and how they could, to some extent, be avoided. Thirdly, we would have to avoid the *contextuality* of interpretations. By ratifying more thoroughly clear laws and by decreasing the usage of lower level sources, the interpretations would start to be more and more similar, irrespective whether the case was ruled by the tax office or higher courts of law. Thus, the interpretations would become more correct and we would not have to appeal on and on, until we get "real" justice. In addition, if an independent agency at EU level was established, which would monitor the domestic legislation and the way it reflects the European tax law, then there would surely be less and less cases, where the domestic laws are not based on the requirements deriving from the sector of the European tax law. Placing more time and resources to the law preparation committees is not always the solution, either. The opinions presented in the preparatory materials may well note, that should this and this article become ratified, it would to some extent be against the principles and requirements, deriving from the European tax law sector. Yet, this kind of articles, have been ratified anyhow. This has been possible in the past, because the harmonization of tax norms within the European Union, has not been the top issues for the European Commission. The future is likely to

²⁰⁷ As our comparison focused mainly on the sector of taxation, the role of the regulations deriving from the

be different, however. This so, because the current legislative cultures of the Scandinavian countries, leave a lot of room for the legislative improvements. Yet, only the future can show us, whether the legislation becomes more equitable in the broad meaning or whether the national tax norms, to some extent, continue to reflect the ideals of legal chaos and economic turmoil.

1.3. Conclusions

This text briefly described two different themes, which had a relevant linkage to each other. One was the transdisciplinary jurionomics and the other one was the Scandinavian institutional sources of law framework within the sector of international taxation. Figure 1 in the page 6, illustrated the nature of transdisciplinarity of jurionomics and the concluding synthesis can now finally be added in that figure. This provides us with a more holistic single view as to, how to conduct our future jurionomical researches in the areas involving international taxation aspects in the Scandinavian region.

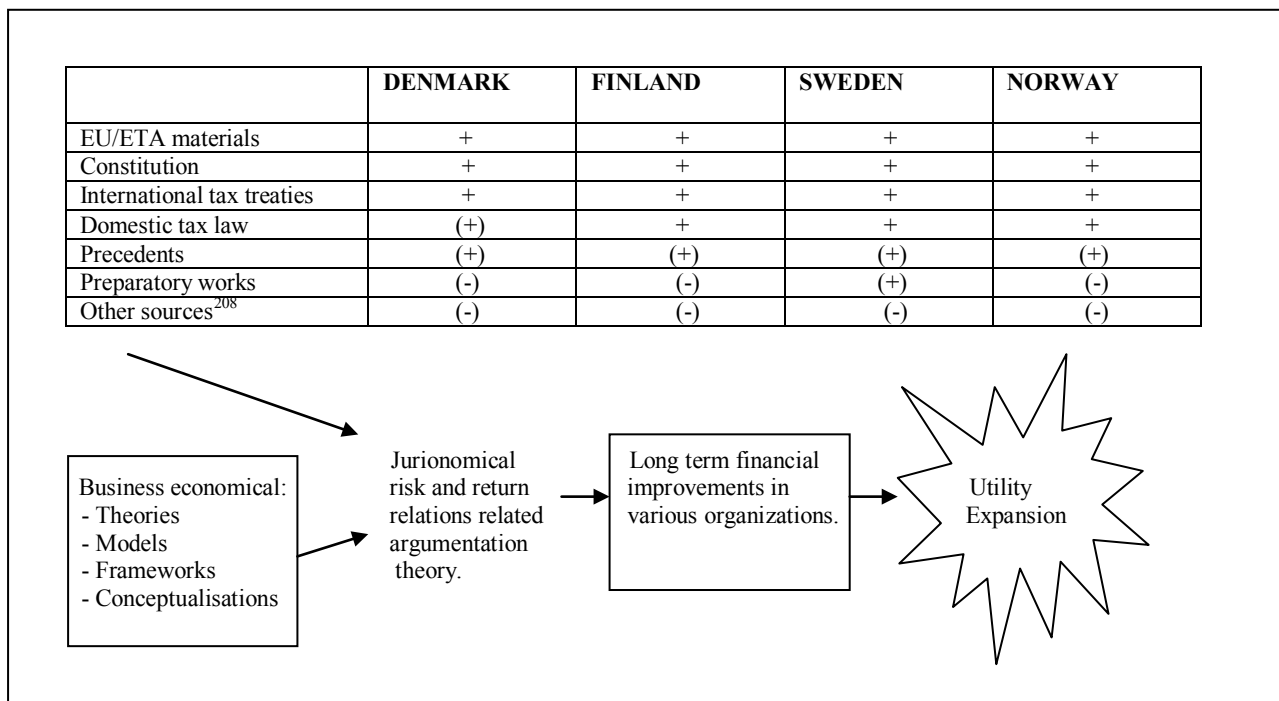


Figure 2. The nature of jurionomical research in the sector of international taxation.

Financial Supervision Authorities, such as *Rahoitustarkastus* in Finland, were not discussed at all.

²⁰⁸ As our comparison focused mainly on the sector of taxation, the role of the regulations deriving from the Financial Supervision Authorities, such as *Rahoitustarkastus* in Finland, were not discussed at all.

Tom Railio

A BRIEF DESCRIPTION OF THE TRANSDISCIPLINARY JURIONOMICS AND
THE SCANDINAVIAN INSTITUTIONAL SOURCES OF LAW FRAMEWORK

HELSINGIN KAUPPAKORKEAKOULU
HELSINKI SCHOOL OF ECONOMICS
WORKING PAPERS

A BRIEF DESCRIPTION OF THE TRANSDISCIPLINARY JURIONOMICS AND THE SCANDINAVIAN INSTITUTIONAL SOURCES OF LAW FRAMEWORK

SUMMARY

This paper focuses on describing and discussing two somewhat different themes, which have however, a relevant linkage to each other in jurionomical context. Firstly, I describe a novel transdisciplinary research approach and secondly, I create a synthesis of the Scandinavian institutional sources of law within the sector of international taxation. I conclude the paper, by uniting both the jurionomical research approach and sources of law framework into a single perspective. This provides us with a more holistic view as to, how to conduct future jurionomical researches in the areas involving international taxation aspects in the Scandinavian region.

TABLE OF CONTENTS

List of figures

List of tables

1. A BRIEF DESCRIPTION OF THE TRANSDISCIPLINARY JURIONOMICS AND THE SCANDINAVIAN SOURCES OF LAW FRAMEWORK

1.1. Introduction.....	1
1.1.1. The definition of transdisciplinary jurionomics.....	1
1.1.1.1. The levels of interdisciplinarity.....	1
1.1.2. Jurionomical argumentation theory.....	2
1.1.3. The objective of jurionomics.....	4
1.1.4. Positioning jurionomics.....	6
1.1.5. The factual research methodology of jurionomics.....	8
1.1.6. The ideals of jurionomics.....	9
1.1.6.1. Towards neutral dialogue.....	9
1.1.6.2. Towards existing judge ideology.....	11
1.1.6.3. Towards utilitarianism and interest group wide utility.....	12
1.1.6.4. Towards economical imperialism.....	13
1.1.7. Future development of jurionomics.....	15
1.2. Introductory analysis of the sources of law in the field of international taxation in the Scandinavia.....	19
1.2.1. Introduction.....	19
1.2.1.1. On the binding effects.....	20
1.2.1.2. The relevance of Constitution.....	21
1.2.1.3. On the polycentricity.....	22
1.2.2.1. European tax law.....	25
1.2.2.1.1. The primary materials.....	25
1.2.2.1.2. The secondary sources.....	26
1.2.3.1. International tax law.....	27
1.2.4.1. Danish sources.....	28
1.2.4.1.1. Danish Constitution.....	28
1.2.4.1.2. Danish international tax treaties.....	29
1.2.4.1.3. Danish domestic tax law.....	31
1.2.4.1.4. Danish precedents.....	33
1.2.4.1.5. Danish preparatory materials.....	35
1.2.4.1.6. Other Danish sources of law.....	36
1.2.5.1. Finnish sources.....	37
1.2.5.1.1. Finnish Constitution.....	37
1.2.5.1.2. Finnish international tax treaties.....	39
1.2.5.1.3. Finnish domestic tax law.....	41
1.2.5.1.4. Finnish precedents.....	43
1.2.5.1.5. Finnish preparatory materials.....	46
1.2.5.1.6. Other Finnish sources of law.....	49

1.2.6.1. Swedish sources.....	50
1.2.6.1.1. Swedish Constitution.....	50
1.2.6.1.2. Swedish international tax treaties.....	51
1.2.6.1.3. Swedish domestic tax law.....	53
1.2.6.1.4. Swedish precedents.....	55
1.2.6.1.5. Swedish preparatory materials.....	56
1.2.6.1.6. Other Swedish sources of law.....	57
1.2.7.1. Norwegian sources.....	57
1.2.7.1.1. Norwegian Constitution.....	57
1.2.7.1.2. Norwegian international tax treaties.....	58
1.2.7.1.3. Norwegian domestic tax law.....	59
1.2.7.1.4. Norwegian precedents.....	61
1.2.7.1.5. Norwegian preparatory materials.....	63
1.2.7.1.6. Other Norwegian sources of law.....	65
1.2.8. General observations.....	65
1.3. Conclusions.....	68

LIST OF FIGURES

Figure 1. The nature of transdisciplinarity of jurionomics. (p. 6).

Figure 2. The nature of jurionomical research in the sector of international taxation. (p. 68).

LIST OF TABLES

Table 1. The generalizing explanatory principled variables of Railio's jurionomical argumentation theory. (p. 2).

Table 2. The key differences between Law & Economics and Jurionomics. (p. 7).

Table 3. The lifetime line of a Norwegian preparatory material. (p. 64).

Table 4. The degree of binding effect of various sources of law in Scandinavia. (p. 66).