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Why the approach to legal reasoning matters

♦ *Lawyers are trained into a particular way of thinking about legal problems. They rarely reflect on the fact that there are other ways to approach them. This article examines two such approaches. A substantialist approach builds solutions from the content of legal concepts. A functionalist approach builds solutions from the interests at stake between the parties. The article asks why the choice between them matters. Two real cases serve as illustrations: a wage-deduction dispute decided by the European Court of Human Rights, and a Swedish dispute between two buyers of the same boat. In both cases, the reasoning the judges appear to have used turns out, on closer analysis, to be something other than it seems. In one case, it is a value judgment dressed up as a concept. In the other, it is a fiction disguised as substance. Both have real consequences for the legitimacy and the outcome of the decisions. Contrasting each judgment with the alternative approach the judges did not use shows that neither approach is inherently superior. Quality in legal reasoning has more to do with methodological self-awareness than with the choice of approach itself. This article is an original research article written för NCLR.*

Professor of private law, jur. dr Claes Martinson – University of Gothenburg

1. An analysis of the programming of lawyers

Lawyers are trained, through their education, into a particular way of thinking. There are however not only one lawyer's way of thinking, but several ways. Typically, a lawyer does not reflect much on which way of thinking that is used. The lawyer does not consider that he or she uses an approach that differs from other approaches. Often, the lawyer is not even aware that there is more than one way of approaching law and the various questions lawyers work with. The situation can be described by saying that every lawyer is »programmed« in a certain way. This metaphor helps to show that a lawyer's performance is both shaped and limited by his or her approach. It also indicates how far-reaching the effects are, and why they often go unnoticed. The programming is standard and not simply personal. It follows from the lawyer's legal culture, and different legal cultures favour different approaches. The programming is also shaped by how arguments are conducted within different fields of law. Because of these factors, the theme has several layers.

With this article I like to contribute to the theme. I present some analyses of why the approach to law and legal issues matters. To do this I describe how different approaches affect the handling of a few concrete legal problems. In doing so, I want to show the reader, first, that different approaches exist, and second, that these approaches affect the quality of a lawyer's work. This is particularly relevant for an international readership, since readers from different legal cultures will typically already be trained (or even programmed) into one of the two main approaches discussed here.

The first main approach can be described by the terms conceptual and substantial.[1] By this I mean an approach that attaches great weight to normative concepts, and to the idea that these concepts form a structure that is coherent at an abstract level. This approach tends to flourish in legal cultures built around codifications, such as the Code Civil, the ABGB, the BGB, and the ZGB.[2] The second main approach can be described by the terms relational and functionalist. This is an approach that flourishes in legal cultures without a tradition of codification, as is the case in civil law systems with fragmented legislation, such as Sweden's Sveriges rikes lag, Norway's Norges lover, and Denmark's Danmarks lov.[3]

This tension has a classical pedigree, most famously in the dispute between Friedrich Carl von Savigny and Rudolf von Jhering over the nature and protection of possession: Savigny's systematic, concept-based method came to represent substantialism, while Jhering's purpose-driven critique of it came to represent functionalism. That is at least a useful perspective on the matter.[4] My aim here is however not to revisit that classical dispute. I just like to point at the dilemma it expresses, that formalisation and generali-

1 See for example: Oskar Mossberg and Jonatan Schytzer (eds), Substantialism & funktionalism: Norsk-svenska perspektiv på en klassisk motsättning [Substantialism and Functionalism: Norwegian-Swedish Perspectives on a Classic Opposition], Iustus 2026; Johan Sandstedt, Sakrätten, Norden och europeiseringen: Nordisk funktionalism möter kontinental substantialism [Property Law, the Nordic Countries and Europeanisation: Nordic Functionalism Meets Continental Substantialism], Jure 2013.

2 See for example: Konrad Zweigert and Hein Kötz, An Introduction to Comparative Law, 3rd edn, OUP 1998. Reinhard Zimmermann, »Codification: History and Present Significance of an Idea«, ERPL 1995, pp. 95–120.

3 See for example: Sverre Blandhol, Nordisk rettspragmatisme: Savigny, Ørsted og Schweigaard om vitenskap og metode [Nordic Legal Pragmatism: Savigny, Ørsted and Schweigaard on Science and Method], DJØF 2005, pp. 51–73; Jørgen Dalberg-Larsen, Pragmatisk retsteori [Pragmatic Legal Theory], Jurist- og Økonomforbundets Forlag 2001; Pia Letto-Vanamo and Ditlev Tamm, »Nordic Legal Mind« in Pia Letto-Vanamo, Ditlev Tamm and Bent Ole Gram Mortensen (eds), Nordic Law in European Context, Springer 2019, pp. 1–19; Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäki (eds), Nordic Law: Between Tradition and Dynamism, Intersentia 2007; Håkan Andersson, »The Tort Law Culture(s) of Scandinavia«, JETL 2012, pp. 210–229.

4 See for example Jens Andreasson, »Savigny och Jhering: Substans och funktion« [Savigny and Jhering: Substance and Function] in Oskar Mossberg and Jonatan Schytzer (eds), Substantialism & funktionalism: Norsk-svenska perspektiv på en klassisk motsättning [Substantialism and Functionalism: Norwegian-Swedish Perspectives on a Classic Opposition], Iustus 2026, pp. 439–530, examining how Savigny's and Jhering's opposing treatments of possession instantiate the substantialist and functionalist approaches respectively, and concluding that legal scholarship suffers whenever it confines itself too narrowly to one type of analytical category, a diagnosis this article shares, though it addresses the point from the perspective of conscious methodological choice rather than historical analysis; Cf Roscoe Pound, »Mechanical Jurisprudence«, Columbia Law Review 1908, pp. 605–623, at-

sation bring standardisation and predictability at the cost of pragmatism and fairness in the individual case. This dilemma is, in my view, unavoidable. What this article offers instead is a way of working with that dilemma, making the lawyer's choice of approach explicit and deliberate, rather than an unreflected default, so that the lawyer can better judge how much of each quality a given case calls for.

To show how different approaches affect the handling of concrete legal problems, I have analysed the reasoning in two court cases. I have assessed the judges' arguments against the characteristics of each approach, and on that basis assessed which approach the judges used. In both cases, the approach looks, on the surface, as though it follows one of the two main approaches, but on closer analysis turns out to be either a further approach or a methodological failure. I have chosen cases of this kind deliberately, because these kinds of cases are particularly illustrative, not least because they reveal how easy it is to end up doing something other than what one intended.

I should point out here that the scrutiny I apply to the judges' reasoning demands a higher level of methodological awareness than is customary within the judicial role. The judges have done what is expected of them within the limits that role sets. What I comment on is not their performance as such, but the fact that their reasoning, when subjected to legal-scientific analysis, can be described in terms of approach. In addition, my knowledge of the cases is limited to what appears from the reasons given for the judgments. I do not know the judges' deliberations beyond that, and I am not as familiar as the judges were with how the parties argued their case, which of course shaped what the judges had to decide. It cannot therefore be ruled out that I have, on some point, misunderstood something the judges in fact understood correctly. Against that background, the criticism that follows from my analysis is unfair to the judges and should be read with that reservation.

Part of the method is, as already mentioned, that I assess the judges' arguments against the characteristics of each approach. I then take a further, and more important, step. For each case, I use the other of the two main approaches, the one the judges do not appear to have used, to construct a line of argument that serves as a basis for comparison. This use of contrast is the most decisive element of my analyses. It is because I examine the judges' reasoning through both approaches that I have something to present on why the approach to legal reasoning matters.

On the basis of this comparison, I have made a number of observations about how the reasoning and the result are affected by the choice of approach. From these observations, I have drawn conclusions about why the choice of approach matters. The fact that the choice of approach affects the handling of a case is, admittedly, to be expected. What makes the result relevant is that lawyers nonetheless choose a particular approach without reflecting on this choice, or even on whether their own work is coherent.[5]

Part of my method is also that I have analysed the judgments discussed here in other contexts. I have presented these earlier analyses in two separate articles,[6] and I have presented my analyses to international audiences on several occasions.[7] The analyses I present here differ from those earlier ones in that my purpose here is to answer the question of why the approach to law matters, whereas the earlier analyses served other purposes. One such purpose was to present an analysis of how lawyers with a preference for a relational functionalist approach can deal with private-law conflicts of interest, given the language that fundamental rights can convey. Another purpose was to clarify the peculiarities, strengths, and weaknesses of the Scandinavian legal tradition in an effort to develop and maintain methodological awareness. Both of these earlier contributions were addressed primarily to Nordic lawyers. My analyses in this article, by contrast, are concerned with showing why the approach to law matters. This purpose has shaped the analyses, which cover more aspects and finer nuances than the earlier ones. The result I reach here is accordingly a different research result too, one that is more general than either of the other two.

Prior research on this theme has not, as far as I am aware, been directed at why the approach matters.[8] My contribution nonetheless has affinities with comparative projects that compare how lawyers in different systems would handle a given legal question, in order to gain new insights into how those systems function in light of the

tributing to Jhering the pioneering shift from a Begriffsjurisprudenz (»jurisprudence of conceptions«) to a Wirklichkeitsjurisprudenz (»jurisprudence of results«).

5 See also: Wolfgang Faber and Claes Martinson, »Can Ownership Limit the Effectiveness of EU Consumer Contract Law Directives? A Suggestion to Employ a »Functional Approach«, Austrian Law Journal 2019, pp. 85–123; Claes Martinson, 'Fiktionalism – som medel för att få ut något av olika förhållningssätt till juridisk hantering« [Fictionalism – As a Means of Getting Something Out of Different Approaches to Legal Handling] in Oskar Mossberg and Jonatan Schytzer (eds), Substantialism & funktionalism: Norsk-svenska perspektiv på en klassisk motsättning [Substantialism and Functionalism: Norwegian-Swedish Perspectives on a Classic Opposition], Iustus 2026, pp. 211–263; Claes Martinson, »Proportionalitetens risker – Del I: Några allmänna farhågor givet rättskulturella aspekter« [The Risks of Proportionality – Part I: Some General Concerns Given Aspects of Legal Culture] in Patrik Emblad and Urban Strandberg (eds), Proportionalitet: Idéer och uppslag till forskning om proportionalitetens nya innebörder inom olika rättsliga fält [Proportionality: Ideas and Suggestions for Research on the New Meanings of Proportionality in Various Legal Fields], Jure 2024, pp. 127–138; Claes Martinson, »Proportionalitetens risker – Del II: Lagstiftaråtgärder, antagna effekter och hur de kan hanteras« [The Risks of Proportionality – Part II: Legislative Measures, Assumed Effects and How They Can Be Handled] in ibid, pp. 139–153.

6 Claes Martinson, »Äganderätten och egendomsskyddet (del I av II) – Om förutsättningarna för en relationell hantering av civilrättsliga intressemotsättningar och en av de grundläggande rättigheterna« [Ownership and Property Protection (Part I of II) – On the Conditions for a Relational Handling of Civil-Law Conflicts of Interest and One of the Fundamental Rights], SvJT 2021, pp. 317–341. Claes Martinson, »The Scandinavian Approach to Property Law, Described through Six Common Legal Concepts«, Juridica International 2014, pp. 16–26; Claes Martinson, »Något om behoven av att underhålla och utveckla den nordiska (funktionalistiska) rättstraditionen – Segelbåtsfallet' [Some Remarks on the Need to Maintain and Develop the Nordic (Functionalist) Legal Tradition – The Sailing Boat Case] in Gorton and others (eds), Festskrift till Göran Millqvist [Essays in Honour of Göran Millqvist], Jure 2019, pp. 461–480.

7 I like to thank several colleagues for co-presentations on several occassions. Thank you J Michael Rainer, Pia Letto Vannamo, Ditlev Tamm, Irene Kull, Pascal Pichonnaz, Andrew Steven, Eleonor Kristoffersson and Filippo Valguarnera!

8 See however: Wolfgang Faber and Claes Martinson, 'Can Ownership Limit the Effectiveness of EU Consumer Contract Law Directives? A Suggestion to Employ a »Functional Approach«, Austrian Law Journal 2019, pp. 85–123.

contrasts that emerge.[9] It is also, to some extent, connected to projects with the ambition of finding well-functioning normative solutions.[10] There is also research specifically on the functionalist approach, which comparative studies have shown to stand in fairly sharp contrast to the continental approaches.[11] There are however also contributions from outside the Nordic countries as well.[12] The American version of functionalism (legal realism) also belongs to this context.[13]

2. The First Case: A Union Fee Challenged as a Property Rights Violation

The first case concerns the terms of an employment relationship. As such, it is a case about a private-law issue. It was nevertheless a case dealt with by the ECtHR in Strasbourg.[14] The Court decided in favour of the employees, who complained that the Swedish state

9 See for example: Mauro Bussani and Ugo Mattei, »The Common Core Approach to European Private Law«, Columbia Journal of European Law 1997–98, pp. 339–356; Mauro Bussani and Ugo Mattei (eds), The Common Core of European Private Law, Kluwer Law International 2003. For an example of the method applied to a specific topic, see James Gordley (ed), The Enforceability of Promises in European Contract Law, CUP 2001.

10 Cf Christian von Bar and Eric Clive (eds), Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition, Sellier 2009.

11 See for example: Johan Sandstedt, »Comparative Property Law and the Profound Differences between Nordic Functionalism and Continental Substantialism – The (Ir)relevance of Ownership« in Annina H Persson and Eleonor Kristoffersson (eds), Swedish Perspectives on Private Law Europeanisation, Hart 2017, pp. 53–75; Johan Sandstedt, Sakrätten, Norden och europeiseringen: Nordisk funktionalism möter kontinental substantialism [Property Law, the Nordic Countries and Europeanisation: Nordic Functionalism Meets Continental Substantialism], Jure 2013; Erlend Baldersheim, Til tingsrettens teori [On the Theory of Property Law], Cappelen Damm 2017; Oskar Mossberg and Jonatan Schytzer (eds), Substantialism & funktionalism: Norsk-svenska perspektiv på en klassisk motsättning [Substantialism and Functionalism: Norwegian-Swedish Perspectives on a Classic Opposition], Iustus 2026; Kåre Lilleholt, »Europeisering av nordisk tingsrett?« [Europeanisation of Nordic Property Law?] in Lars Gorton and others (eds), Festskrift till Göran Millqvist [Essays in Honour of Göran Millqvist], Jure 2019, pp. 385–395; Kåre Lilleholt, »Ownership of Goods in the Draft Common Frame of Reference« in Göran Lambertz, Stefan Lindskog and Mikael Möller (eds), Festskrift till Torgny Håstad [Essays in Honour of Torgny Håstad], Iustus 2010, pp. 447–454; Torgny Håstad, »Derivative Acquisition of Ownership of Goods«, European Review of Private Law 2009, pp. 725–741; Karoline Rakneberg Haug, »The Historical Development of the Scandinavian Functional Approach to Transfer of Ownership: A Tale of Change and Continuity«, EPLJ 2017, pp. 236–271, at pp. 238–240; Karoline Rakneberg Haug, »Transfer of Movables: A Comparison of the Unitary Approach and the Scandinavian Functional Approach«, University of Amsterdam 2021; Astrid Millung-Christoffersen, »The Scandinavian »Functional« Approach to Movable Property from a Danish View – Including the Question of »Tradition«, EPLJ 2019, pp. 4–22; Patrik Lindskoug, »Property and Its Limits« in Letto-Vanamo, Tamm and Mortensen (eds), Nordic Law in European Context, Springer 2019, pp. 135–151; Eleonor Kristoffersson, »Unjust Enrichment in Swedish and EU Law« in Persson and Kristoffersson (eds), Swedish Perspectives on Private Law Europeanisation, Hart 2017, pp. 41–52; Joel Samuelsson, »Harmoniseringen av den europeiska privaträtten och funktionalismens funktionalitet« [The Harmonisation of European Private Law and the Functionality of Functionalism], Europarättslig tidskrift 2009, pp. 63–86; Martin Lilja, Transfer of Movable Property under U.S. Law Discussed from a Functional Perspective, Peter Lang 2014; Martin Lilja, »National Report on the Transfer of Movables in Sweden' in Wolfgang Faber and Brigitta Lurger (eds), Rules for the Transfer of Movables in Europe, Volume 5: Sweden, Norway, Denmark, Finland, Spain, Sellier 2010, pp. 1–204; Claes Martinson, Transfer of Title Concerning Movables Part III – Eigentumsübertragung an beweglichen Sachen in Europa Teil III: National Report Sweden, Peter Lang 2006; Claes Martinson, 'Ejendomsrettens overgang – Norden kontra verden« [The Transfer of Ownership – The Nordic Countries versus the World], Nordiska Juristmötet 2008 (online), and in Forhandlingerne ved det 39. nordiske juristmøde 2011, pp. 823–843; Claes Martinson, »Något om behoven av att underhålla och utveckla den nordiska (funktionalistiska) rättstraditionen – Segelbåtsfallet« [Some Remarks on the Need to Maintain and Develop the Nordic (Functionalist) Legal Tradition – The Sailing Boat Case] in Gorton and others (eds), Festskrift till Göran Millqvist [Essays in Honour of Göran Millqvist], Jure 2019, pp. 461–480; Claes Martinson, »Det nordiska funktionalistiska angreppssättet och obehörig vinst – Dieselfallet« [The Nordic Functionalist Approach and Unjust Enrichment – The Diesel Case], Juridisk Tidskrift 2019–20, pp. 148–148–170; Claes Martinson, »Blev vi nordiska jurister lämnade i sticket eller har det obemärkt runnit vatten under broarna? – Bensinfallet« [Were We Nordic Lawyers Left in the Lurch, or Has Water Quietly Flowed under the Bridges? – The Petrol Case] in Jan Kleineman (ed), Pragmatism v principfasthet i nordisk förmögenhetsrätt [Pragmatism versus Adherence to Principle in Nordic Property and Obligations Law], SCCL 2019, pp. 239–259; Claes Martinson, »Är den nordiska rättskulturella tanketraditionen ofullgången? – En illustration utifrån exemplet civilrättsliga sanktioner mot nyttjande av annans egendom« [Is the Nordic Legal-Cultural Tradition of Thought Incomplete? – An Illustration Based on the Example of Civil-Law Sanctions against the Use of Another's Property], TfR 2019, pp. 209–268.

12 Wolfgang Faber, »Scepticism about the Functional Approach from a Unitary Perspective« in Wolfgang Faber and Brigitta Lurger (eds), Rules for the Transfer of Movables: A Candidate for European Harmonisation or National Reforms?, Sellier 2007, pp. 97–122; Christian von Bar, Foundations of Property Law: Things as Objects of Property Rights, Jason Grant Allen tr, OUP 2023; Luise Pelzer, Die funktionale Methode im dynamischen Sachenrecht Schwedens aus deutscher Perspektive, V&R unipress 2021.

13 Karl N Llewellyn, »Through Title to Contract and a Bit Beyond«, New York University Law Quarterly Review 1938, pp. 159–209; David Frisch, »Remedies as Property: A Different Perspective on Specific Performance Clauses«, William & Mary Law Review 1994, pp. 1691–1750; Hanoch Dagan, Reconstructing American Legal Realism and Rethinking Private Law Theory, OUP 2013; cf Joseph William Singer, »The Reliance Interest in Property«, Stanford Law Review 1988, pp. 611–751.

14 On this phenomenon, fundamental rights bearing on private-law relationships, see generally Hans Fredrik Marthinussen, »Om europeiseringen av tingsretten – særlig i lys av Den europeiske menneskerettighetsdomstols avgjørelser i Pye-saken« [On the Europeanisation of Property Law – With Particular Reference to the European Court of Human Rights' Decisions in the Pye Case], Tidsskrift for Rettsvitenskap 2008, pp. 179–208, analysing a comparable dynamic in J.A. Pye (Oxford) Ltd v United Kingdom App no 44302/02 (ECtHR, 30 August 2007), where the Grand Chamber's use of Article 1 of Protocol No. 1 was found to intrude into national property-law doctrine in ways not anticipated by domestic property lawyers; Svante O.

had allowed a private regulatory system on the labour market that infringed their fundamental rights.[15]

2.1 The Facts: An Employer, Five Employees, Two Organisations and a Fee

A workers' union had concluded a standard-setting contract (a collective agreement) with an association of employers. One of the terms of that contract was that each employer should deduct 1.5% of each employee's salary and pay that amount to the workers' union. This amounted to approximately € 30 per month per employee.

The workers belonging to the union had agreed to be bound by the collective agreement, and so had the employers belonging to the association. Under its terms, the union's members agreed to have their salaries reduced by the same amount. The rationale was that the agreement had the potential to increase the employees' salaries, since the fee was meant to fund the union's monitoring of employee productivity. The fee was allegedly larger than the union's costs, however, so the union also made a profit from the arrangement.

Five employees who were not members of the union opposed the system. Although they too benefited from it, they argued that the union was taking what was theirs, namely 1.5 % of their salaries.

Their employer, who belonged to the employers' association, also opposed the system. He supported the five employees by not deducting anything from their salaries and by not paying the union the equivalent amount.

The judges resolved the case by applying the ECHR. For them, the question was whether the state, having allowed such a system, should be held responsible for depriving the applicants of their possessions within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1 to the ECHR: *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*[16]

The ECtHR held:

52. The Court notes that, in accordance with the rules of the Collective Agreement, deductions of 1.5 % on the applicants' wages were made to cover the monitoring fee. The Court finds that these deductions deprived the applicants of their possessions within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1. [17]

In the part of the judgment concerning the legal ground of ownership (paragraphs 52–64), the judges provide no further reasoning on the requirements laid down by the Convention, namely possession, peaceful enjoyment, and deprivation. Instead, they state that they found the interference to have been in the public interest, but not proportionate. In support of the proportionality requirement, they refer to their own case law.[18] The proportionality assessment is set out at much greater length (paragraphs 55–64) than the assessment of whether ownership was at stake (paragraph 52), but in substance it amounts only to the judges' view that, despite the small amounts involved, the system was not sufficiently transparent, given the ideological interests at stake.[19] They also attached weight to evidence suggesting that the union made a profit from the system.[20]

Beyond this decisive part of the reasoning, the judges also set out how they understood the relationship between the Swedish collective agreement and the individual employment contracts of members and non-members of the union. They describe how they understood the monitoring system and the evidence submitted on whether it benefited the employees. They also note how these legal questions had been addressed by Swedish courts, and that the ideological interests at stake had been considered there, though on other legal grounds than ownership.

2.2 Ownership as the Starting Point: A Judgment That Looks Substantialist

Looking at the decisive argument used by the judges, it is reasonable to classify their reasoning as conceptual. The judges applied the rule that gives persons protection for the peaceful enjoyment of their possessions. In other words, they used the concept of owners-

Johansson, »Något om avtalsfrihet, obligationsrätt och grundläggande fri- och rättigheter« [Some Remarks on Freedom of Contract, the Law of Obligations and Fundamental Freedoms and Rights], Tidsskrift for Rettsvitenskap 2013, pp. 666–683, at pp. 679–683; Tom Barkhuysen and Siewert Lindenbergh (eds), Constitutionalisation of Private Law, Martinus Nijhoff 2006; Claes Martinson, »Äganderätten och egendomsskyddet (del I av II) – Om förutsättningarna för en relationell hantering av civilrättsliga intressemotsättningar och en av de grundläggande rättigheterna« [Ownership and Property Protection (Part I of II) – On the Conditions for a Relational Handling of Civil-Law Conflicts of Interest and One of the Fundamental Rights], SvJT 2021, pp. 317–341.

15 Evaldsson and Others v Sweden App no 75252/01 (ECtHR, 13 February 2007).

16 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entered into force 18 May 1954) ETS 9, art 1.

17 Evaldsson and Others v Sweden App no 75252/01 (ECtHR, 13 February 2007), p. 52.

18 Cf Camilla Antoft, »Proportionalitetsprincipen enligt Europakonventionen« [The Principle of Proportionality under the European Convention], ERT 2007, pp. 138–146. Ellen Verde, »Konstitutionell proportionalitet – en enkelriktad väg?« [Constitutional Proportionality – A One-Way Street?] in Patrik Emblad and Urban Strandberg (eds), Proportionalitet: Idéer och uppslag till forskning om proportionalitetens nya innebörder inom olika rättsliga fält [Proportionality: Ideas and Suggestions for Research on the New Meanings of Proportionality in Various Legal Fields], Jure 2024, pp. 23–29, criticising the Swedish Supreme Court's proportionality assessment of the constitutional right to property in NJA 2018 s 753 (»Parkfastigheten«) on comparable grounds, namely that the proportionality test operates as an empty vessel filled with predetermined interests.

19 The requirement of transparency has been described as the fundamental systemic flaw in the monitoring-fee system, Kent Källström, »Granskningsarvoden och äganderätt« [Monitoring Fees and Ownership] in Ronnie Eklund and others (eds), Skrifter till Anders Victorins minne [Writings in Memory of Anders Victorin], Iustus 2009, pp. 315–324, at p. 320.

20 Evaldsson and Others v Sweden App no 75252/01 (ECtHR, 13 February 2007) [p. 55]: »An interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights«; [p. 64]: »Thus, even having regard to the limited amounts of money involved for the applicants, it was not proportionate to »the public interest« in the case to make deductions to their wages without giving them a proper opportunity to check how that money was spen«t; [p. 62]: »This was even more important as they had to pay the fees against their will to an organisation with a political agenda which they did not support«; [p. 59]: »… even a very careful analysis would appear to show that the budgeted costs of the inspection work were considerably lower than the costs attributed to these activities in the annual reports«.

hip to construct a solution. By deciding that the employees had been deprived of what was theirs, namely their salaries, the judges found that the employees' rights had been infringed.

The conceptual reasoning the judges used can in other words appear to follow a substantialist approach. This is an approach in which the concepts themselves are treated as though they have substance. The concepts have substance in the sense that the decision is meant to follow from an understanding of what ownership »is«. Through their knowledge of what ownership is, those who apply the rule can reach a correct legal decision. Where there is no direct precedent to rely on, the assessment consists in comparing the case at hand with other, similar situations. If the case to be assessed matches the characteristics of the known instances of ownership, ownership is found to exist. With this substantialist approach, the legal balancing exercise consists in comparing the circumstances with the meaning and substance of the concept. The decisions follow from these comparisons.

The judges did also carry out a proportionality assessment. They would, however, not have reached the assessment they did on proportionality without first having found that the employees owned their future wages. It is also mainly in this part that the substantialist character of the decision lies. Given the finding that the employees owned their future wages, that finding also becomes the starting point for the proportionality assessment. When the judges assess proportionality, they take as their starting point that the employees own their wages, and it is therefore, at least in part, this ownership that leads them to construct a requirement of transparency, and to require that this requirement be sufficiently met. Ownership has a similarly decisive influence as a starting point for the judges' assessment of the ideological interests at stake for the employees, as well as of the fact that the union made a profit from the system. If the judges had not had ownership of future wages to rest their reasoning on, they simply could not have applied the value they perceived in the circumstances, namely that ideological interests should be decisive. Had the ECtHR judges based their decision on that value alone, it would not have been a legally grounded decision. If we instead, hypothetically, assume that employees do not own future wages, then this is precisely what the ECtHR judges did. They based their decision on that value judgment alone.

2.3 Testing the Label: Why a Future Wage is Not a »Possession«

On closer analysis of what the judges actually did in this case, however, there is reason to doubt that they truly applied a substantialist approach. Even at a basic level, there is reason to distinguish between paying, or bearing, a fee and being deprived of one's ownership or possession. Paying for a service or a benefit is simply something different from being dispossessed of what one owns or holds. More fundamentally, a future wage is not normally regarded as an object that falls within the scope of ownership. Still less is it an object capable of being »possessed«.[21]

The basic dividing line used to define legal objects runs between claims and rights in rem.[22] It is a dividing line between claims to specific items of property and claims that do not concern specific property, because the debtor remains free to perform with whatever part of his or her assets he or she chooses.[23] Claims are also entirely dependent on the circumstances of the underlying relationship. A claim is affected by how the creditor and the debtor act towards one another and by their dealings. It is affected by whether the creditor performs in accordance with whatever gives rise to the claim. It is also affected by qualitative and quantitative factors. A claim can be set off. Its amount can be affected by costs connected with various aspects of the relationship, such as the costs of payment. That a creditor, for one reason or another, has to pay a fee, and that the claim to that fee is deducted or set off against the underlying claim, is not an infringement of ownership.

As regards the question whether a claim should be regarded as an object of ownership, it should be noted that many (maybe all) legal systems draw a conceptual and linguistic distinction between ownership and the right to a claim. A person who acquires a claim is not described as its owner, but as the holder of the claim or the new creditor.

Against this background, it is fairly clear that a claim is not a legal object in the relevant sense. Seen from the perspective of the relationship between creditor and debtor, a claim is, if anything, the opposite of something capable of being owned or possessed. In other respects, however, a claim can be regarded as an object. Claims count among the objects in the sense that they can be transferred. In the relationship between the creditor and those who wish to take over the creditor's position, claims are objects. They are an intangible object whose value depends on who the debtor is and on the debtor's relationship with the creditor, but a particular claim can usually be distinguished from others, and in that sense the claim is an object.

The present case is not about a creditor transferring a claim. It is about the relationship between creditor and debtor. Seen from that perspective, there is no normative basis for treating the claim as an object.[24] What is at stake is a claim, not an object capable of ownership. Still less is it an object capable of »possession«. Yet the judges in this case reasoned as though the employees' future claims to wages fell within their » ownership«. In applying the ECHR rule,

21 Cf the ECtHR's settled formula that »future income cannot be considered to constitute possessions unless it has already been earned or is definitely payable«: Centro Europa 7 SRL and Di Stefano v Italy App no 38433/09 (ECtHR, 7 June 2012) p. 172; Anheuser-Busch Inc v Portugal App no 73049/01 (ECtHR, 11 January 2007) p. 64. In the present case, the wages in question were, arguably, already earned; the point made here is a different one, namely that even an earned wage claim remains a claim, not an object of ownership; See generally Stig H Solheim, »Beskyttelse av fremtidige inntekter« [Protection of Future Income], Lov og Rett 2019, pp. 171–194, especially pp. 178–180 on future wage claims.

22 See for example: Barry Nicholas, An Introduction to Roman Law, Clarendon Press 1962; W W Buckland, A Text-Book of Roman Law from Augustus to Justinian, 3rd edn, Peter Stein rev, CUP 1963; Ditlev Tamm, Roman Law and European Legal History, DJØF Publishing 1997; Pascal Pichonnaz, Les fondements romains du droit privé, 2nd edn, Schulthess 2020; J Michael Rainer, Einführung in das römische Privatrecht, UTB 2021.

23 See for example: Erika P Johansson, Property Rights in Investment Securities and the Doctrine of Specificity, Springer 2009.

24 Cf Carl Lebeck, »Äganderättsskyddets tredjepartsverkan – något om Evaldsson-målet« [The Third-Party Effect of Property Protection – Some Remarks on the Evaldsson Case], ERT 2007, pp. 894–901, at p. 896, noting that the Court did not explain why the wage deduction should be characterised as engaging ownership at all, rather than simply reflecting the terms of the employment contract; Cf Jan Thörnhammar, »Egendomsskyddet enligt konventionen i ett skatterättsligt perspektiv« [Property Protection under the Convention from a Tax Law Perspective], ERT 2003, pp. 131–145, at pp. 136–138, noting that the Court has repeatedly treated claims as falling within the concept of »possessions«, even claims not yet established, provided there is a legitimate expectation that they will arise.

they treated the future wages as the employees' »possession«.[25] This tells against describing their approach as substantialist. That is not to say that the example and their reasoning fail to illustrate what a substantialist approach is; quite the opposite. What I have described illustrates how a substantialist approach works. It takes as its starting point whatever is considered to be the relevant legal concept, and the assessment consists in classifying the circumstances by reference to that concept and to what it is considered to be, its substance.

2.4 Nominalism Exposed: A Value Judgment Wearing the Language of Ownership

In this case, the judges did not set out any assessment based on what the concept of ownership is considered to be. Had they carried out such a substantialist assessment, they ought to have concluded that future claims to wages are not objects of ownership. They ought to have assessed whether future wage claims share the various characteristics of other objects of ownership. What they did instead was to decide on the basis of what they considered a legitimate need. They applied a value judgment. That value judgment is grounded in ownership and is, in a sense, ownership's very core. Distinguish between mine and yours and do not take what belongs to someone else. A regulatory system that permits this is illegitimate. The value judgment leads to the conclusion that the system the Swedish state allowed the labour-market parties to establish is illegitimate. More precisely, it means that someone who is not a member of a trade union should not have to contribute to that union's profit. The judges do not state that this is how they reasoned, but the analysis of their argumentation suggests that it is precisely ownership as a value, rather than as a concept, that they applied.[26] It should also be noted that the rights under the ECHR include both the right to organise and the right not to organise.[27] This was very much a norm the judges had reason to consider in this context. Yet, to judge by how they justify their decision, this is not the decisive aspect. As noted, their stated justification is that the regulatory system amounted to an infringement of ownership.

Normatively speaking, the judges' reasoning is remarkably weak. Legal reasoning should not allow value judgments to carry such weight that they, as here, run directly counter to the conclusion the other arguments in the case point to. Had the judges genuinely applied a substantialist approach, they would not, to judge by their reasoning, have given the value judgment such weight. But the judges' reasoning is weak for other reasons too. Had they set out to give a more norm-based assessment, they could have pointed to norms that protect employees' need for wages. Various countries have several rules designed to protect employees' need to receive regular wage payments. One type of such regulation limits an employer's right to set off an employee's wage claim against the employer's own claim against the employee, for instance for credit the employer may have extended to the employee; such regulation may provide, for example, that the employee is entitled to at least the greater part of his or her wages at each pay date.[28] Another type of regulation limits the state's power to enforce its own and other creditors' claims by attaching a debtor's wage claims. Under such regulation, private individuals may be entitled to retain, from each wage payment, an amount corresponding to the existence minimum for the employee and his or her family.[29] Yet another norm that has been claimed is a general principle according to which future

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25 Evaldsson is not an isolated instance. The expansive ambition regarding »possessions« that the ECtHR has considered it necessary to develop through its case law has resulted in it no longer being possible to discern any remaining connection to the classical concepts, or to conventional property protection. An interesting phenomenon is that this line of case law is, from an official quarter, presented in almost marketing-like terms, as in this guidebook: Aida Grgić, Zvonimir Mataga, Matija Longar and Ana Vilfan, The Right to Property under the European Convention on Human Rights, Human Rights Handbook No 10, Council of Europe 2007; For a somewhat accommodating perspective on this development and its consequences, see Frédéric Sudre, »Le droit au respect de ses biens au sens de la Convention européenne de sauvegarde des droits de l'homme«, Cahiers du GRIDAUH 2005, pp. 67–80; For a more critical perspective, see Matthias Hartwig, »Der Eigentumsschutz nach Art. 1 des 1. Zusatzprotokolls zur EMRK«, RabelsZ 1999, pp. 561–579; This expansive style of interpretation has itself drawn institutional pushback, illustrated by the fact that the Norwegian Supreme Court has advised national courts to resist what it termed the ECtHR's »too dynamic [a] style of reasoning« (»ikke bør anlegge en for dynamisk tolking av konvensjonen«), Rt 2000 s 996; see also Inger-Johanne Sand, »Judicial Review in Norway under Recent Conditions of European Law and International Human Rights Law – A Comment«, Nordisk Tidsskrift for Menneskerettigheter 2009, pp. 160–169, at p. 166, noting that while this cautious stance is defensible as a matter of dividing roles between the European and national courts, it is also legally questionable; See also e g Johan Nordin and Malcolm Pettersson, »Egendomsskyddet enligt Europakonventionen – Vad skyddas och hur kränks det? En studie av rättspraxis under senare år« [Property Protection under the European Convention – What Is Protected and How Is It Violated? A Study of Recent Case Law], ERT 2008, pp. 1018–1028, documenting a broader pattern in the Court's case law of extending »possessions« well beyond its ordinary meaning – to economic rights grounded in contract, legislation, judgments, restitution, and administrative permits, and even to »legitimate expectations« not grounded in any of these. Note that such an expansive application of the Convention text could have been undertaken in a more considered way, had the judges made explicit, and reflected on, the approach, substantialist or functionalist, they were using; See also: Tom Allen, Property and the Human Rights Act 1998, Hart Publishing 2005; Maya Sigron, Legitimate Expectations Under Article 1 of Protocol No. 1 to the European Convention on Human Rights, Intersentia 2014; Douglas Maxwell, The Human Right to Property: A Practical Approach to Article 1 of Protocol No.1 to the ECHR, Hart Publishing 2022.

26 For general critical remarks on this phenomenon, see Håkan Andersson, »The Tort Law Culture(s) of Scandinavia«, JETL 2012, pp. 210–229, at pp. 227–229. For criticism of what is perceived as judicial activism in the ECtHR's interpretive practice, see Mads Bryde Andersen, Misforståede menneskerettigheder: Hvordan ureflekterede syn på menneskerettighederne har skadet demokratiet og retsstaten [Misunderstood Human Rights: How an Unreflective View of Human Rights Has Damaged Democracy and the Rule of Law], Gads Forlag 2026.

27 This aspect was also addressed by the ECtHR in the case. See also: Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, art 11; Young, James and Webster v United Kingdom App nos 7601/76 and 7806/77 (ECtHR, 13 August 1981); Sigurður A Sigurjónsson v Iceland App no 16130/90 (ECtHR, 30 June 1993).

28 ILO Convention concerning the Protection of Wages (No 95, 1949) art 8 (restriction on set-off against wages).

29 Utsökningsbalk (1981:774) Ch. 7 Sec. 4–5 (protected minimum amount on attachment of wages).

wages cannot be transferred.[30] On the strength of norms such as these, the judges could have established a general principle that employees are entitled to their wages, and that any claim for compensation for something like the union's monitoring service would have to be directed against the individual employee. Admittedly, even such reasoning would be weak, given that the regulations mentioned do not rule out some deduction from wages by the employer; but with such reasoning, the judges would at least have attempted to justify their decision with normative support.

One way of describing what the judges did is to say that they used what I here call a *nominalistic approach*.[31] With a nominalistic approach, the lawyer is content to use the word as a label, without committing to its content.[32] This description fits well with the judges' use of »possession« without genuinely testing whether the claim has the characteristics ownership requires.

This nominalistic approach does not mean, however, that the judges were indifferent to whether the decision was correct and legitimate. They justify their decision on the basis that the regulatory system the Swedish state allowed the labour-market parties to establish is illegitimate. They do not say this in so many words, but the fact that the regulation affects non-unionised employees is a circumstance that is at least implicitly given weight. That the ECtHR judges act in this way and use a nominalistic approach, can also be justified. The Court's role is to signal when a state has acted in a way that affects individuals too severely. This line cannot be drawn with much precision using norms as sparse as the text of the ECHR. It is a matter of handling relationships and circumstances of very different kinds with very blunt norms. To use a metaphor, the ECtHR has a very small toolbox, with extremely few and very blunt tools, for handling questions that appear in many different guises and in very different kinds of contexts.[33] Under such circumstances, it can appear legitimate to use an approach whereby the judges apply a fundamental value, such as ownership, to signal disapproval of a state that has allowed something at odds with that value. That employees who have chosen not to join a trade union are nonetheless covered by regulation requiring them to contribute to that union's profit is remarkable. As noted, the rights under the ECHR also include the right to organise and the right not to organise. When judges with the mandate the ECtHR judges have, use their role to reach a decision that spares employees such regulation, there is a measure of legitimacy in the decision. The regulation simply has effects that are too far-reaching, as a matter of principle.

What I am pointing to, in any event, is that the judges' handling of the case is weak.[34] As regards the justification of their decision, their performance is directly deficient in legal terms.[35] As far as can be judged from the material, they have not reflected on how they approached the case either, and this has consequences.[36] For the purposes of this article, one reason for this is that the judges, as far as can be seen, did not use a conscious approach. That this is so becomes even clearer when their handling of the case is contrasted with what a functionalist approach would involve and produce.

30 A norm noted by Kent Källström, »Granskningsarvoden och äganderätt« [Monitoring Fees and Ownership] in Ronnie Eklund and others (eds), Skrifter till Anders Victorins minne [Writings in Memory of Anders Victorin], Iustus 2009, pp. 315–324, at p. 321. I would argue, however, that this norm should be given only limited relevance in the present context, since the circumstances here differ from those of a transfer. The employees have not transferred anything and can still demand full payment. Källström, however, raises the possibility of understanding the circumstances such that the employees have accepted the monitoring fee by accepting the terms of employment.

31 The term is here coined for the purposes of this article. The phenomenon it describes is, however, closely related to Alf Ross's classic »Tû-tû«, an empty concept functioning merely as a connecting link between legal facts and legal consequences: Alf Ross, »Tû-tû« in Oscar Alfred Borum and Knud Illum (eds), Festskrift til professor, dr. juris Henry Ussing 5. maj 1951 [Essays in Honour of Professor Henry Ussing], Nyt Nordisk Forlag 1951, pp. 468–484; Cf also Max Lyles, »En horisontell förståelse av proportionalitetsbegreppet« [A Horizontal Understanding of the Concept of Proportionality] in Patrik Emblad and Urban Strandberg (eds), Proportionalitet: Idéer och uppslag till forskning om proportionalitetens nya innebörder inom olika rättsliga fält [Proportionality: Ideas and Suggestions for Research on the New Meanings of Proportionality in Various Legal Fields], Jure 2024, pp. 117–126, drawing the same connection in the context of the proportionality principle.

32 Cf Roscoe Pound, »Mechanical Jurisprudence«, Columbia Law Review 1908, pp. 605–623, criticising the tendency to apply legal concepts as though self-executing, without regard to the interests and purposes they serve – a tendency closer to what this article calls a nominalistic approach than to a rigorously applied substantialism; Note also the connection to what can be seen as a Scandinavian, non-cognitivist and »rights hostile« strand of legal realism, according to which rights have no substance of their own beyond what the legislature has enacted, a position Alf Ross illustrated with his concept of »tû-tû«, an empty word functioning only as a connecting link between facts and legal consequences. See e g the comment of Sten Schaumburg-Müller, »Parliamentary Precedence in Denmark – A Jurisprudential Assessment«, Nordisk Tidsskrift for Menneskerettigheter 2009, pp. 170–184, at pp. 182–183.

33 See generally George Letsas, A Theory of Interpretation of the European Convention on Human Rights, OUP 2007, on the Court's use of broad, evaluative, autonomous concepts, such as »possessions« here, as an interpretive method, and on the tension between such an approach and legal certainty. Cf Ulf Bernitz, »Rättighetsskyddets genomslag i svensk rätt – konventionsrättsligt och unionsrättsligt« [The Impact of Rights Protection in Swedish Law – Under Convention Law and Union Law], JT 2010–11, pp. 821–845, on the broader penetration of Convention- and Union-based rights protection into Swedish law; Jørgen Dalberg-Larsen, »Pragmatisme og menneskerettigheder« [Pragmatism and Human Rights], Mennesker og Rettigheter 2002, pp. 61–72, arguing for a pragmatist reading of human rights judged by their consequences rather than as fixed entities; Andreas Follesdal and Marlene Wind, »Nordic Reluctance towards Judicial Review under Siege«, Nordisk Tidsskrift for Menneskerettigheter 2009, pp. 131–142, at pp. 140–141; Cf Karin Åhman, »Europakonventionen, äganderätten och Sverige – två nya rättsfall … igen« [The European Convention, Ownership and Sweden – Two New Cases … Again], ERT 2008, pp. 221–236, at p. 235, noting that the outcome in Evaldsson came as a surprise to many.

34 Cf Jan Smits, »Private Law and Fundamental Rights: A Sceptical View« in Tom Barkhuysen and Siewert Lindenbergh (eds), Constitutionalisation of Private Law, Martinus Nijhoff 2006, pp. 9–22, arguing that fundamental rights have only limited value in deciding private law cases; contrast Hans Nieuwenhuis, »Fundamental Rights Talk: An Enrichment of Legal Discourse in Private Law?« in ibid, pp. 1–8, taking the opposite stand.

35 Cf Carl Lebeck, »Äganderättsskyddets tredjepartsverkan – något om Evaldsson-målet« [The Third-Party Effect of Property Protection – Some Remarks on the Evaldsson Case], ERT 2007, pp. 894–901, at p. 898, making a similar observation that the Court's proportionality reasoning in this case was »very limited«, and that its use here mainly increases the Court's discretion without contributing much to legal certainty.

36 An illustration of the downstream uncertainty this kind of underdetermined reasoning can leave behind in domestic law is Högsta domstolen (Supreme Court of Sweden), NJA 2015 s 899, paras 22–23 and 26–27, where the Supreme Court held that the ECtHR's statement in Evaldsson that market-re-

3. The Functionalist Alternative: Interests, Not Concepts

3.1 Method: Mapping Relations to Find the Real Problem

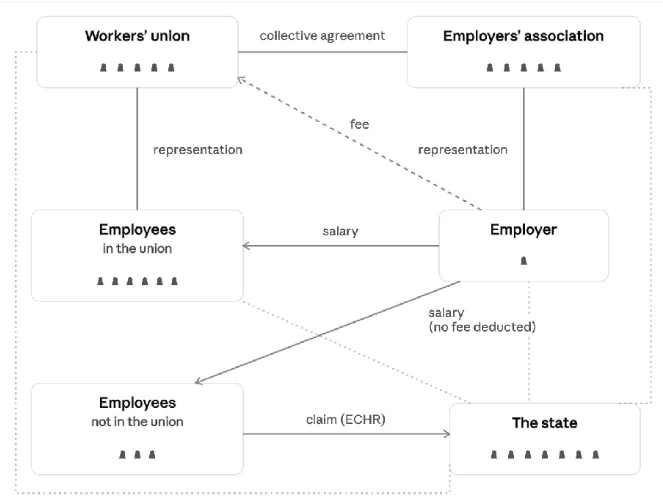
When a lawyer approaches the case from the preceding section using a functional approach, the handling of the case becomes focused on the various relationships involved. A lawyer using this approach identifies which subjects are involved and maps the conflicts of interest within each relationship. For lawyers accustomed to this approach, it is common to describe what they are doing as identifying the real problem.[37] The lawyer wants this real problem clarified in order to look, against that background, for norms that can be used to resolve the conflict of interest. What matters here is not the actual conflict of interest between the two particular subjects involved in a given case, but the typical conflict of interest between subjects who find themselves in that kind of situation.

Since more than two subjects may be involved, there may be more than one relationship to consider. There may accordingly be more than one conflict of interest, and more than a single real problem. The lawyer does not, however, need to deal directly with more than the relationship actually at issue. It is not necessary to reach a solution that resolves the conflicts of interest in every relationship. The lawyer may nonetheless need to consider the consequences of the solution reached with the help of the applicable norms. A solution in one relationship can have consequences for another relationship, and such consequences at least need to be considered within the functionalist approach.

3.2 Locating the Real Problem: Not the Fee, but the Union's Profit

In the case of the employees who sued the Swedish state before the ECtHR, there are five different kinds of subjects. There are also five relationships in which the subjects have a direct contractual relationship with one another. In addition, there are the relationships that they all have with the state.

The relationships can be sketched as follows:



The conflict of interest at issue in the ECtHR case stands between the employees not in the union and the Swedish state.

The employees not in the union have an interest in Swedish law not imposing regulation that requires them to contribute to the system by paying the workers' union. More specifically, their interest is in not having to pay the workers' union anything that constitutes profit for the union. As long as they pay only what it costs to perform the monitoring service, the employees benefit. They gain the potential for a higher salary through having a monitoring system in which pay is determined by performance.

The Swedish state has an interest in maintaining an arrangement in which the labour-market parties regulate matters themselves through collective agreements. Such delegation has proved successful, because it allows the various issues to be regulated close to the reality concerned (subsidiarity). The Swedish state therefore also has an interest in non-unionised employees not receiving better terms than unionised employees, since that possibility could make it difficult for the labour-market parties to reach agreements. In concrete terms, the Swedish state has an indirect interest in non-unionised employees paying as much as unionised ones. The Swedish state has, however, no interest in any employee having to pay more for a benefit, here the union's monitoring service, than the cost of providing it, simply because of a collective agreement.

By mapping assumptions of this kind, the lawyer using a functional approach can identify that the conflict of interest between the parties really concerns the part of the fee that produces profit for the workers' union. This is where the real problem lies. For the typical subjects involved, this is also where the ideological interest lies, in this economic effect.[38]

A solution addressing this genuine conflict of interest, the real problem, would mean that the ECtHR judges determine that the Swedish state must ensure that the labour-market parties do not regulate matters so that fees can exceed the cost of providing the monitoring service. To reach that solution, the judges would need normative support. They would need normative tools capable of making such a solution possible.

As noted, the tools available to the ECtHR are few and blunt. The ECHR is a rights instrument with a distinct ideological character. Where someone sues a state under the Convention, the judges must assess whether the individual's fundamental rights have been infringed. The language operates at a level where the question is essentially whether the state has committed an abuse against the individual.

It should also be noted that individuals need not have only the typical interests a lawyer using the functionalist approach assumes. Individuals may have deep-seated ideological interests that lead them to oppose the balance struck by a given regulation. In this case, that could mean the individuals object to being indirectly regulated by collective agreements at all. Their interest in the matter may, in fact, be more ideological than economic.

gulating organisations »must be held accountable for their actions« could not, without more, be relied upon to impose direct third-party damages liability on the trade union itself, since the statement had been made in the context of assessing state responsibility.

37 The expression »real problem« is not a term of art, but reflects an experience shared among scholars working across the two traditions, cf Johan Sandstedt, Sakrätten, Norden och europeiseringen: Nordisk funktionalism möter kontinental substantialism [Property Law, the Nordic Countries and Europeanisation: Nordic Functionalism Meets Continental Substantialism], Jure 2013, on the communication difficulties between Nordic functionalists and continental substantialists.

38 As mentioned, the judges in the ECtHR identified that the profit were very relevant, but rather as an aspect than as the central issue or the real problem.

For these reasons, the legal questions that reach the ECtHR are typically transformed into blunt questions of right or wrong.[39] Even where the issue is that only a certain aspect of a national regulation, or only part of its effects, is such that the individual is found to have been wronged, the rights instrument produces an answer that rejects the national solution or approach as a whole. The scope for a balanced weighing of interests becomes small, although the judges have techniques to achieve such a balancing, for example by constructing a principle of proportionality. Responsibility for reaching a balanced solution is however typically placed on the state. That this can sometimes be difficult, given the ideological burden a state may carry after being found in breach by the ECtHR, is a separate matter. The scope for it nonetheless exists.

In the present case, however, the ECtHR judges could have decided that the employees' rights were infringed only to the extent that their fees produced payments constituting profit for the workers' union. With a functionalist approach this would have been evident. The rule on ownership in the first paragraph of Article 1 of Protocol No. 1 to the ECHR admittedly concerns only infringement of an individual's ownership, but one and the same act can be partly an infringement and partly legitimate. For example, an expropriation of land may be partly justified by a genuine public interest and partly driven by some other interest, such as a wish to retaliate against the landowner.[40] If it can be assessed, with hindsight, that a certain part of the land was genuinely needed in the public interest, the ECtHR judges ought to be able to decide that only the remaining part of the expropriation constituted an infringement.

It follows from what I have set out in this section that a functional approach would have made a difference. Had the judges used such an approach, they would have handled the case on the basis of a different understanding of the circumstances. They could have worked with greater precision and could thereby have legitimised their decision to a greater degree.

I can, however, present further parts of my analysis to show still more clearly how the choice of approach matters. With a functionalist approach, it turns out that it can seriously be questioned whether the employees were wronged at all, or whether the real story is simply that they were too accommodating towards their employer.

3.3 What Should Already Have Happened: The Case for No Violation at All

As I have mentioned, a functionalist approach also means that the lawyer considers the consequences of the various solutions under consideration. In the case of the employees and the fees they opposed, the consequences concern what happens in the various relationships depending on the solution the ECtHR judges construct. One question, then, is what the consequence ought to be if the ECtHR decided that the employees' rights had not been infringed. This question can here also be framed as a question about what should already have happened between the various parties. That question is interesting also because it bears on the assessment of whether the employees' rights were infringed at all.

What should already have happened in the relationship between the employees and their employer is that the employees should have demanded payment in full. They should have required their employer to pay them their full salary, without any deduction for the fee. That, after all, is what they were entitled to under their contracts of employment with the employer. From the facts of the case, it seems that the employees would have been paid by their employer,[41] but if the employer had resisted the employees could have demanded payment through the judicial system just as any creditor.

The consequence of the employer having paid the employees their full salary is, first, that the employer would have had to bear the fee to the workers' union himself. Given that the employer is indirectly bound by the agreement the employers' association made with the workers' union, it is unsurprising that the employer should be held responsible. A party bound by incompatible contracts with two different subjects must answer for that predicament. The other contracting parties should not suffer for it.

A second consequence of the employer having paid the employees their full salary is that the workers' union would have claimed damages from the employer for breaching the contractual term requiring deductions from the employees' wages. The union could impose sanctions for that breach of contract and claim damages from the employer. The financial component of such damages would, however, be negligible, so long as the employer had paid the fees the union was entitled to under the agreement. This part of the sanction is therefore of little consequence. Whether any further sanction should follow depends on the terms of the collective agreement. In principle, the union could have a clause entitling it to non-pecuniary damages because the employer favoured the non-unionised employees. Whether such non-pecuniary damages would truly be warranted is questionable, however, given that the fee exceeded the union's costs. The non-pecuniary interests here can be weighed against one another, and a judge would have done that if it had become a court case.

Taking these aspects into account, it becomes clear that the matter need not be viewed as any infringement of the employees' fundamental rights at all. The employees were entitled, throughout, to their salary in full, without any deduction for the fee. They simply never demanded it.

That an individual who has not claimed his or her entitlement should assert that his or her fundamental rights were infringed because that entitlement was not received is remarkable. That the ECtHR judges did not dismiss such a claim is more remarkable still.

Admittedly, the employees may have had reason to be loyal to their employer and not demand full pay, knowing that the employer would then have to bear the fee himself. But even if such loyalty is the explanation, it still does not amount to an infringement of fundamental rights. Nor can the fact that a demand for full pay would have required the employees to act against the established system created by the collective agreement give rise to a finding of infringement. Such an infringement would arise only if a Swedish court had actually rejected the employees' claim for full pay against the employer. There is no reason for a Swedish court to rule that way, since the terms of the individual employment contract govern. The normative effect a Swedish collective agreement may have should not be given priority over the terms of the individual contract of employment.

39 In this case, however, this was arguably not so, as pointed out by both Kent Källström, »Granskningsarvoden och äganderätt« [Monitoring Fees and Ownership] in Ronnie Eklund and others (eds), Skrifter till Anders Victorins minne [Writings in Memory of Anders Victorin], Iustus 2009, pp. 315–324, at p. 323; and Iain Cameron, »Europadomstolen och granskningsarvodena: Domen har verkan för framtiden – men knappast retroaktivt« [The European Court and the Monitoring Fees: The Judgment Has Effect for the Future – But Hardly Retroactively], EU & Arbetsrätt 2007, pp. 1–2.

40 One ECtHR case illustrating mixed motives is James and Others v United Kingdom (1986) Series A no 98.

41 Evaldsson and Others v Sweden App no 75252/01 (ECtHR, 13 February 2007), p. 11.

It is not possible to tell from the material why the ECtHR judges failed to notice that the employees were entitled to their full salary, and that no infringement of their fundamental rights was therefore in issue at all.[42] Nor is it my aim here to establish the actual facts. The relevant issue is that the ECtHR judges did not reveal any analysis of this aspect. From what is known from the ECtHR decision, neither did the parties. Since they did not I can use this case as an illustration of why approach matters.

What my analysis points to is a general risk. It is the risk that the approach used will matter in a way that has decisive effect on the outcome. This risk is a serious one, because it can affect the legitimacy of the ECtHR's judgments. It concerns a central part of what the ECtHR judges are supposed to do, namely to carry out the analysis that determines whether an infringement exists at all.

Admittedly, the particular judgment in question can be defended on the ground that the Swedish system was not a balanced solution, particularly since it allowed the union to profit from people who, for ideological reasons, did not support it. But legitimacy is not achieved by judges deciding legal questions on the basis of a value judgment alone, without a legally grounded analysis of whether an infringement actually exists. What I suggest is that one way to achieve it, is through an explicit and legally grounded analysis of the approach used.

3.4 Wages Are Not Objects: Employment as a Dynamic Relationship

A functionalist approach does not stop at noting consequences such as the ones I have set out above. It is also relevant that an employment contract is a long-term relationship: a contract whose terms are renegotiated over time. The terms are not fixed, they are dynamic.

For the circumstances of this case, this means that an employee whose salary has been reduced because of the monitoring-fee deduction has ample opportunity to negotiate a salary level that compensates for it. Employment relationships are such that an employee and an employer can agree in ways that render a negative feature, such as a deduction for a fee, entirely immaterial. Employment relationships virtually always contain elements of this kind. One example is contractual terms on unsocial working hours. These involve not only an obligation to work at unsocial hours but also higher pay. An employer who wants to buy labour during unsocial hours has to pay for it.

The same holds for the present case. If an employer feels obliged to pay a fee to a workers' union, and additionally agrees to a 1.5% deduction from the employees' wages, he can of course also agree with the employees to compensate them for that deduction. If the deduction amounts to € 30, the consequence could be that the employees receive € 30.46 more in salary (rather than exactly € 30, since the additional amount is itself subject to the same 1.5% deduction), giving them the same, or an even greater, return on their work than before. Alternatively, the employees might receive shorter working hours, or more generous lunches. Employment relationships are simply dynamic in ways such as this, among others.

The fact that one consequence of an employer deducting from employees' wages most probably is that the employment contract gets renegotiated in one way or the other, underlines how odd it is to use ownership of wages as the legal basis for a claim. Ownership concerns objects. What is exchanged under an employment contract is not an object, but a dynamic flow of mutual performances.

3.5 Market Price Versus Ideology: What Fundamental Rights Are Not For

Since employment relationships are dynamic, the functionalist approach can ask whether the employees' perception of the situation corresponds to the actual function of wages.

Wages are consideration for work performed. The wage level is the price the buyer pays. That price is set, in essence, according to market principles, even though the labour market has certain peculiarities, among them the often fairly significant transaction costs involved in choosing to sell one's labour to a new buyer.

In the present case, the market and the price of labour were regulated through the collective agreement. The regulation affected the market price of labour for all employees. What the employers agreed to, through the employers' association, was that the price level would be influenced by an assessment of individual work performance. That assessment carried a cost. The parties behind the regulation considered that cost worth incurring, and chose to set the market price of labour in a way that included it. What the employees receive in wages is, in that sense, the market price of labour.

With a functionalist approach, and the analyses that follow from it, the employees' claim of a violation of fundamental rights appears to be purely ideological in nature. In substance, the issue was not that they received less than the market price. It was that they did not want the workers' union to benefit from the system used to calculate wages. Another way of putting it is that the employees have an interest in the service the union provides being exposed to competition, so as to achieve efficiency at a market price. Such an arrangement could lead to a lower price, but it need not: not if the union can combine the monitoring task with other parts of its activities. In that case, the price of the union's monitoring service could be the lowest on the market. If so, the employees' underlying objection clearly becomes an ideological one, not an economic one.

The regulation of fundamental rights does extend to ideological aspects too. One example is the right to organise and the right not to belong to an organisation. The rules protecting ownership are also, in part, about ideology.[43] The regulation concerns ownership in general and says nothing specific about the value of the property, even though value is to be taken into account where property is lawfully taken. An individual's ownership must nonetheless be protected against unlawful interference even where the property concerned has no market value. The regulation thus means that ideological interests, too, are protected under the rules on fundamental rights.

For a violation of an ideological interest to be in issue, however, that interest must fall within the scope of the regulation. In this case, the judges decided that what was at stake was a violation of »possession«, and hence of ownership. The analyses I have set out above in this section cast doubt on whether that was really so. Given the judges' decision, a relevant question is nonetheless whether it could possibly be justified by reference to precisely this ideological aspect of the case. As has emerged, one possible reading of the judges' decision is that it was precisely this ideological aspect that led them to decide as they did.

In this case, the ideological aspect concerns employees not wanting their employer to benefit a particular party they disapprove of. Gi-

42 But, as mentioned, the judges of the ECtHR were aware of the regulatory effects of the collective agreements, and their limitations. Evaldsson and Others v Sweden App no 75252/01 (ECtHR, 13 February 2007), pp. 19–20.

43 Cf Jeremy Waldron, The Right to Private Property, Clarendon Press 1988.

ven what I have explained about what a wage is, this is really the only aspect the matter concerns. The situation can be compared to employees not wanting their employer to do business with actors they wish, for ideological reasons, not to be associated with; for example, employees might object to their employer buying goods from sellers who are suspected of tax fraud, or does not care about workers environment. Such an ideological interest may be easy to sympathise with. Even so, it is hardly an interest it is appropriate to protect through the regulation of fundamental rights. The consequence of such an arrangement would, in principle, be that employees are entitled to impose sanctions as soon as their employer contracts with anyone the employees have ideologically acceptable grounds to object to as a contracting partner. If the regulation of fundamental rights were given that meaning, it would have the potential to affect the market economy at large. It would, moreover, be a rather surprising conclusion that fundamental rights should give one category of individuals the right to impose sanctions because of whom another individual chooses to contract with. This gives rise to a collision between rights.

What the consequence analysis in this section suggests is that decisive weight should not be attached to ideological aspects either, in circumstances such as those in this case.

3.6 A Second Ground Tested: The Right Not to Organise

The ideology and market analysis in the last section showed that it is ultimately the employer, not the employees, who bears the cost of the union's fee. The result is the same, in principle, even in an analysis where the right not to belong to an organisation is the legal basis relied on.[44] It is simply not the employees who contribute to the workers' union. It is the employer who does.

One way of explaining this is that the employees are entitled to »full pay« from their employer. If they claim the full amount, without deduction, the employer must pay it, in accordance with the employment contract.

Another way of looking at this is that the employees could, in principle, have received higher pay had the employer not incurred costs under the agreement with the workers' union. But many other factors also bear on an employer's capacity and willingness to buy labour. Through the recurring pricing process, they receive the wage the market sets for their services. The idea that the employees could have received higher pay had the employer not incurred costs under the agreement with the workers' union is relevant, but many other factors bear on an employer's capacity and willingness to buy labour. As noted, the monitoring system also has the potential to lead to higher wages despite the fee; that is the assessment the employers' association made in adopting the system.

Since, on this analysis, it is not the employees who contribute to the workers' union, there is no ideologically grounded interest in invoking the right not to belong to an organisation. The employees do not belong to the union, nor do they contribute to it financially. That their employer contributes to the union by purchasing its services, and that the price of labour is determined with the help of those services, does not change this.[45]

3.7 Consequences and Alternatives: What the Judges Could Have Prompted

With a functionalist approach, the result could be that the ECtHR judges should decide that the Swedish state had not infringed the individual employees' fundamental rights. At the same time, both the judges and others may take the view that the system the Swedish regulation established is unfortunate. It is unfortunate since it leads to conflict. The fact that the workers' union makes a profit can also be criticised. As mentioned, the service the union provides could possibly be bought at a lower price than the one the union agreed. Even where the ECtHR judges decide that the Swedish state has not infringed the employees' fundamental rights, they can point this out. In doing so, the judges can encourage the Swedish state to adopt a different regulatory arrangement.

As part of this consideration, a functionalist approach requires the ECtHR judges to reflect on the consequences within Sweden. They can then make assumptions about alternatives to the regulation at issue.

One alternative to the current regulation would be for the workers' and employers' unions to adjust their collective agreements. It would be simple to design the system so that it does not involve anything described as a wage deduction. If the ECtHR were to just make a remark on the importance of regulation of this kind being framed clearly enough not to invite misunderstanding, that would very likely influence the labour-market parties. The parties could make the next collective agreement clearer, and the collective agreement itself could also explain why the price of that service is favourable.

The initiative for this need not, in any case, have come from the ECtHR judges. The labour-market parties could have acted along these lines even before the matter reached Strasbourg. The lawyers who represented the Swedish state before the ECtHR could also have explained the circumstances in a way that would have led the ECtHR to understand the system in functionalist terms.

Another possible consequence of a remark from ECtHR is that the conflict of interest could have been dealt with by a Swedish court. A Swedish court could have used contract-law rules to adjust the collective agreement so that the price for monitoring would be based on cost coverage alone. This would require the employers' association to have brought proceedings on the matter. The likelihood of that would have increased had the ECtHR judges indicated that they viewed the regulation as problematic, even while finding no infringement of any fundamental right under the ECHR.

A third possibility could be for the Swedish state to intervene in the regulatory space of the labour-market parties. Given an indication from the ECtHR judges that they viewed the regulation as problematic, the state would have reason to negotiate with the labour-market parties to avoid the controversial contractual terms. In those negotiations, the Swedish state could point to the possibility of legislating to prohibit the labour-market parties from using terms of this kind.

How far these three possibilities are realistic is a separate question. As I have indicated, however, making such assumptions is not a task solely for the ECtHR judges. Every lawyer involved has the opportunity to apply the functionalist approach and carry it through

44 One judge had a concurring opinion and argued that the employees' rights to freedom of peaceful assembly and association, including the right to form and join trade unions, article 11, were infringed. She voted with the majority. Evaldsson and Others v Sweden App no 75252/01 (ECtHR, 13 February 2007), p. 24.

45 Cf the assessment that the ECtHR judges appear to have been inclined not to find in the employees' favour on the ground of a violation of freedom of association, Kent Källström, »Granskningsarvoden och äganderätt« [Monitoring Fees and Ownership] in Ronnie Eklund and others (eds), Skrifter till Anders Victorins minne [Writings in Memory of Anders Victorin], Iustus 2009, pp. 315–324, at p. 320.

with analyses that lead to assumptions of this kind. In that way, the conflict of interest can be brought to a resolution.

3.8 A Striking Contrast, and a Preview of Functionalism's Own Weaknesses

Against the background of the preceding sections of this chapter (3), it becomes clear that the approach to law matters. The difference between the approach the ECtHR judges appear to have used and what follows from a functionalist approach is, indeed, striking. The outcomes of the two approaches differ, and the handling itself differs considerably too. What I have shown is that, in a case like this one, it is of decisive importance for every lawyer involved to reflect on these facts.

In this particular case, the circumstances are such that the functionalist approach has a great deal to contribute. That is not always so. There are also weaknesses that can follow from the functionalist approach. Some of these weaknesses emerge in the example I address in the sections that follow.

4. The Second Case: Two Buyers, One Boat, One Bankrupt Seller

The second case I use in this article concerns two buyers who bought the same sailing boat from a seller who subsequently went bankrupt. The case was heard by two Swedish courts, at first and second instance; it was not taken up for review by the Supreme Court. The court of second instance, the Svea Court of Appeal, decided in favour of the first buyer.[46]

4.1 The Facts: A Replacement Ordered, a Boat Resold, and an Insolvency

A woman ordered a new sailing boat from a local dealer for the boat brand in question. The price was € 125.000. The seller ordered a boat from the manufacturer in accordance with the woman's specifications.

At the beginning of the summer, the woman received delivery of the boat (boat 273). She paid € 100.000, and agreed to pay the remaining € 25.000 four months later.

After the first weekend of sailing, she noticed that several features of the boat did not match what she had ordered: the engine was too weak, the mast was of a different construction than she had ordered, and the finish was substandard, among other things. The woman and the seller therefore agreed that the seller would replace the boat with another one, and the seller ordered such a boat from the manufacturer. In the meantime, over the summer, the woman was given the right to use the first boat and to keep it in a berth at the seller's boatyard.

During the summer, the seller sold the first boat, boat 273, to a man who was a former employee of the seller. The man paid € 100.000 for the boat.

When the summer was over, the man contacted the woman and demanded that she hand over the keys and clean the boat. She was reluctant to do so, but did it to avoid trouble, and because the man was insistent.

Shortly afterwards, the seller went bankrupt. The seller had not paid the manufacturer for the second boat, so the manufacturer would not deliver it.

The judges resolved the case by finding that the woman had acquired ownership from the seller through her purchase, and that she had not subsequently done anything that, in a legal sense, transferred ownership to the man. The judges put it this way:

The Court of Appeal considers that the evidence shows that [the first buyer] entered into a contract for the purchase of boat 273, that it was delivered to [the woman], and that [the woman] acquired ownership of boat 273. [...] The Court of Appeal finds that [the woman] agreed with [the seller] on a replacement delivery in accordance with the contract and the rules on defects in the Consumer Sales Act. Neither the Consumer Sales Act nor the contract supports the conclusion that [the woman], through the agreement on replacement delivery, lost ownership of boat 273. [The woman] has denied that she waived her right to boat 273 through her conduct in September 2013. There is no evidence to support that [the woman]'s intention in emptying the boat and handing the keys to the cabin over to [the man] was to waive her ownership of the boat. The Court of Appeal considers, in summary, that [the woman] has established that she acquired ownership of boat 273 and that she still owns it. (author's translation)[47]

I should note that the Court of Appeal also considered whether the man had made a good-faith acquisition, and found that he had not.[48] In the rest of my analysis, I proceed on the basis that the scope for good-faith acquisition is very limited in cases of this kind, which is what makes the issues I address here pressing.

4.2 Placing Ownership: A Solution Built on a Fictional Intent

Looking at the decisive argument used by the judges, it is reasonable to classify their reasoning as substantialist. The judges used the concept of ownership to construct a solution. They drew their conclusion from the premise that ownership lay with the woman. Since ownership has the substance of something that is to be protected, their placement of ownership became their starting point. Because the woman held ownership, anyone claiming otherwise bore the burden of showing that she did not.

What the judges do with their substantialist approach is to lift the case to an abstract level. They convert the actual circumstances, and the interests the two buyers have, into an operation governed by the logic of where ownership is located. Probably without realising it, they choose to let the chronology of events determine where ownership should be regarded as lying. This choice becomes their starting point. All that remains for them to assess is whether anything should be regarded as disturbing that placement.

In substance, the judges' assessment of whether anything should be regarded as disturbing that placement is fairly nuanced. They consider the woman's intention and assess whether there is evidence supporting that she intended to grant the second buyer (the man) any greater benefit, relative to her own position, than his receiving the keys, a cleaned boat, and possession. They frame the question, however, as one of whether she intended to »relinquish her ownership«.

In reality, the woman had probably never even considered that she was bearing the risk of the seller's possible insolvency. She probably did not think of the risk that she would not receive a second boat and would suffer financial loss as a result. The judges attach weight to the woman's intention even though, in all likeli-

46 Svea Court of Appeal (Svea hovrätt), judgment of 26 April 2016, Case No T 4954-15.

47 Svea Court of Appeal (Svea hovrätt), judgment of 26 April 2016, Case No T 4954-15, p. 4–5.

48 Lag (1986:796) om godtrosförvärv av lösöre (Sweden); compare cf Bürgerliches Gesetzbuch (Germany) § 932; Allgemeines bürgerliches Gesetzbuch (Austria) § 367; Code civil (France) art 2276; Zivilgesetzbuch (Switzerland) arts 933–934. For a markedly more restrictive common law approach, see Sale of Goods Act 1979 (UK), p. 21–25.

hood, and certainly on the evidence, she had none. Instead, the judges handle this absence of intention through the concept of ownership and through the placement of ownership. In doing so, they lift the matter to an abstract level, where the abstractions, rather than the actual circumstances, decide the outcome. They let the woman win because their conceptual manoeuvre points to her winning. Compared with what she actually thought, she is lucky. On the corresponding assumption about what the man thought about the risk of the seller's insolvency, namely nothing at all, he is unlucky. Although neither party had considered the risk, the judges act as though they had, indirectly, by using the concept of ownership as a placeholder.

The point here can be sharpened since it is illustrative. It can be sharpened by comparing the majority's solution with two further positions taken in the case, that of a dissenting judge in the Court of Appeal, and that of the District Court. Also, these two judicial positions can be classified as substantialist. None of them asks what the woman and the man actually agreed, implicitly, through their conduct in connection with the handover of the boat to the man. Instead, each classifies the woman's status *in relation to the seller*, a different relationship altogether. They derive her right against the man from that classification.

The majority in the Court of Appeal label the relationship as one of ownership. Since nothing indicated that she had given up her ownership to the man, she was given the boat. They do not reflect on the fact that they have established her ownership on the basis of her relationship with the seller, and then treat that ownership as generally relevant against the man too. They do so even though Swedish lawyers are schooled in refraining from doing so. For that reason, it may also be asked whether the judges were not themselves influenced by the values underlying ownership.

The dissenting judge instead labels the relationship as a right of use.[49] Because the woman held only a right of use, he reasoned, she had no better right to the boat than the man when the time for use was up. In his view, she had already given up her right to withhold the boat once she agreed with the seller to receive a different boat instead. His choice of concept for her relationship with the seller thus drove the conclusion. He appears to overlook that a holder of a right of use can have a right to withhold the property to secure a claim against the grantor of that right. He would presumably, however, have regarded that right as irrelevant too, given that she handed over the boat.

The District Court judges, for their part, label the relationship as ownership or, alternatively, a security right, without fully deciding between the two.[50] Compared with the Court of Appeal majority's solution, this classification implies a potentially weaker right than ownership. This is so not the least because ownership itself can seem to carry a certain normative weight. This is what devalues the woman's right somewhat. By labelling it as possibly something less than ownership, the District Court judges proceed on the footing that what she is giving up is, at most, a right that protects nothing more than her financial exposure to risk. That makes it easier not to give her the boat. She had, after all, »only« a security right, and »only« an economic interest in limiting her risk. The judges do not argue this, but they do use the rights concept in relation to the seller to draw a conclusion in the other relationship, with the man.

All three substantialist variants stand in contrast to the question of what the woman and the man actually agreed, implicitly, through their conduct in connection with the handover of the boat. That question asks what, in the woman's conduct, gave the man reason to believe that she was relinquishing whatever entitlement she might have to be protected against the risk of the seller's insolvency. Whether she in fact held such an entitlement is a separate question, one between her and the seller and that should be decided later. Framed this way, it becomes relevant that the woman was reluctant and the man was insistent, factors taken up in the functionalist solution in section 5. Under the substantialist solution, these realities recede into the background, even though, in an ordinary two-party relationship, they would carry considerable weight for the interpretation of a contract.

4.3 Genuine Substantialism, Arbitrary Outcome: Intent Was Not the Only Option

Unlike the judges' handling of the first case, classifying their approach here as substantialist is apt. The idea that ownership passes through consensus or agreement between the parties is a conception that belongs to substantialism. The idea that an agreement between seller and buyer can, by itself, transfer ownership is a standard substantialist construction. The only question is where the line for that transfer should be drawn, and what is required for it to be regarded as having occurred.

The judges resolve that question by requiring intention. The question becomes whether the woman intended to relinquish her right. It is not self-evident, however, that intention is the requirement a substantialist solution must be built on. A substantialist solution could equally well be built on the idea that lawfully acquired possession is decisive, at least where the person who acquired possession is a buyer. Possession, rather than an introspective inquiry into the former owner's state of mind, is a no less substantialist way of establishing where ownership is located. The principle that possession creates the appearance of ownership, corresponding to the continental maxim *en fait de meubles, possession vaut titre*, belongs to substantialism's classic toolbox.[51] With such a construction, the judges could have reached a solution that was at least as substantialist as the one they chose, but in favour of the man rather than the woman.

What becomes decisive in the judges' construction instead is intention, and that intention is a pure fiction. The judges' construction gives no answer as to why this particular fictional intention, the intention not to bear the risk of the seller's insolvency, should be given weight over other conceivable substantialist solutions. This might not be so remarkable if the circumstances were read as placing a buyer in the woman's position in a vulnerable position, deserving of protection from her own ignorance of the risk. In relation to a man such as the man in this case, however, a buyer like her is not weaker. As a buyer, he is in exactly the same position as she is, and he has no greater reason than she does to be aware of the risk of the seller's insolvency.

If this need for protection cannot carry the result, what becomes decisive instead is the fact that the man, as a former employee of the seller and as a buyer of a boat he was to receive only later, might be regarded as being in bad faith. But if that is the underlying rationale, it is this bad faith that should have been held against him, not the woman's fictional intention. That construction, too, has its flaws: the man probably did not think about the risk of the seller's insolvency either, and in that sense he was not in bad faith with respect to precisely the risk at issue.

49 Svea Court of Appeal (Svea hovrätt), judgment of 26 April 2016, Case No T 4954-15, p. 8–9.

50 Stockholm District Court (Stockholms tingsrätt), judgment of 30 April 2015, Case No T 7736-14, p. 14–15.

51 Code civil art 2276, see also above.

Substantialism conceals all of this. By lifting the matter to the abstraction of where ownership is located, the process is simplified, and the competing, mutually incompatible ways of justifying the result that I have set out above become invisible. Such abstract reasoning can appear to deliver predictability, one of substantialism's watchwords. The question, however, is whether the result in a case like this is not, rather, an expression of arbitrariness. The judges simply land on one of several possible substantialist solutions, often without justifying why that particular solution should be chosen over the others.

4.4 A Method Without a Home: Substantialism in an Unfamiliar Legal Culture

A further aspect of this case is that Swedish judges have no tradition of using a substantialist approach. The concept of the transfer of ownership has been all but abandoned in the Swedish legal tradition,[52] and in any event does not carry the significance it has in legal cultures familiar with a substantialist approach, such as those built around codifications like the Code Civil, the ABGB, the BGB, and the ZGB.[53]

The judges in this case nonetheless use an approach of this kind, substantialism with an element of fiction, without the familiarity and the supplementary doctrines that normally constrain and guide such an approach within the legal cultures where it belongs. That is telling. The construction is not merely foreign to their own legal tradition. As I have shown in the preceding section, it also amounts to a normatively arbitrary solution. The judges have, in practice, chosen one of several possible substantialist constructions, without being aware that they made a choice, and without the knowledge of substantialism's rules of the game that could have made that choice conscious and reasoned.

This very point, that the approach is used without familiarity with it and without any awareness that it was used at all, underscores the relevance of lawyers knowing that the approach to law matters. Had the judges been aware that they were using a substantialist approach, matters might have looked different. Had they also possessed the familiarity with it that is standard in the legal cultures where it belongs, they would probably have been forced to take a position on the competing substantialist solutions I have set out above. As it stands, the choice remains hidden. The reader, like the judges themselves in all likelihood, is left with the impression that the solution was self-evident. Yet it rested on a fiction, and at least one other solution would have been at least as well grounded in substantialist terms.

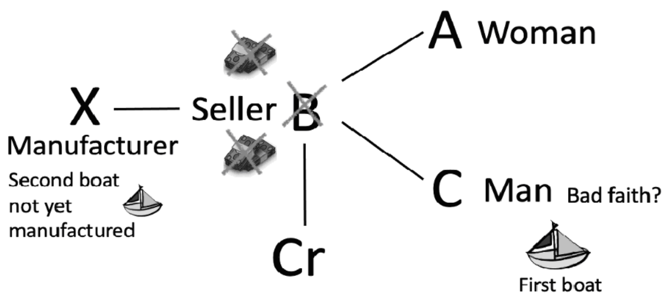
5. The Functionalist Alternative: What the Two Buyers Wanted

2.1 Method Revisited: Finding the Real Problem in a Property Dispute

When a lawyer approaches the case from the preceding section (4) using a functional approach, the handling of the case becomes, as noted, focused on the various relationships. A lawyer using this approach identifies which subjects are involved. For each subject, the lawyer analyses what interest a typical subject in that position would have. In this way, the lawyer maps the conflicts of interest that arise. For any given lawyer, however, it is usually only one relationship that stands at the centre, because that is the relationship actually being dealt with in practice. For that relationship, the lawyer needs to identify what the typical conflict of interest, the real problem, is.

5.2 Mapping the Norms: Retention, Priority, Bad Faith, and Implied Agreement

A sketch of the relationships appears in the following illustration. As described, the boat is now with the man. The second boat has been ordered but not yet built, and the seller has not paid the manufacturer either. The bundles of money to the left of the seller illustrate that the seller was paid twice, by both the woman and the man. That they are crossed out symbolises that the money is now gone, after the seller went bankrupt. That the seller is crossed out marks that the seller went bankrupt after the two sales, to the woman and to the man.



In this case, mapping the relationships shows that the central conflict of interest between the two buyers is not as acute as it might first appear. This is because the woman had already agreed that she does not want the first boat. She wants the second boat, which has not yet been built. To obtain that boat, she needs funds corresponding to what she paid the seller, and presumably also compensation for her trouble. The man, by contrast, wants the boat he already has. He chose to buy precisely that boat, and nothing indicates that he has changed his mind, still less that he has a legally relevant basis for wanting anything other than the boat.

52 Henrik Hessler, Allmän sakrätt [General Property Law], Norstedts 1973, p 18: »The question used to be asked – and sometimes still is today – when ownership of, say, a movable thing passes from the seller to the buyer. Having decided that this occurs either at the conclusion of the contract or upon the transfer of possession, the reasoning went that, because ownership passes at that point in time, it follows that the buyer is, from that moment, entitled to demand specific performance, that he is protected against the seller's creditors, that he is protected in the event of a double sale, and so on. There is, however, manifestly nothing that simply »passes«, on its own, from seller to buyer. What must actually happen is that the point in time at which the various legal consequences relevant to a transfer take effect must be determined. If it is found that, under the applicable law, protection against the seller's creditors arises only upon delivery, one can express this by saying that ownership, to that extent, passes at that point in time. But that latter observation is then, of course, fairly uninteresting.« (author's translation); See also for example: Claes Martinson, »How Swedish Lawyers Think about »Ownership« and Transfer of Ownership – Are We Just Peculiar or Actually Ahead?« in Wolfgang Faber and Brigitta Lurger (eds), Rules for the Transfer of Movables: A Candidate for European Harmonisation or National Reforms?, Sellier 2008, pp. 69–95.

53 Cf Luise Pelzer, Die funktionale Methode im dynamischen Sachenrecht Schwedens aus deutscher Perspektive, V&R unipress 2021, examining from a German perspective the Swedish claim that ownership is largely irrelevant in transfer-of-title situations, with particular attention to three-party conflicts of the kind at issue in the present case.

In the central relationship, the real problem, for the reasons given, is whether the man should have to pay the woman anything.

To handle this real problem, the lawyer using a functional approach identifies which norms are relevant. In this case, a Swedish lawyer, looking through Swedish legislation, would note that there is no directly applicable rule.

But, under consumer legislation, a buyer who rightfully cancels the contract need not return the goods until the seller provides the payment, or replacement goods, in return. The Swedish Consumer Sales Act, Chapter 8, Article 2, reads, in the relevant parts: *Where the cancellation is due to a breach of contract by the trader, it shall be at the trader's expense. The trader shall, without undue delay, repay what the consumer has paid for the goods. ... Each party may withhold what has been received until the other party hands over what is to be returned and pays, or provides acceptable security for, any damages and interest that party may owe.*[54] *(author's translation)*

This statutory rule applies between seller and buyer. It does not, as here, apply between buyer and buyer. The norm can nonetheless be used to hold that the woman was entitled, against the seller, to keep the boat until she was given back the payment (or its equivalent). That a buyer such as the woman has a right to withhold the goods is something that could be used in a solution vis-à-vis a second buyer too, namely the man. Such a second buyer could be regarded as deemed to know the statutory rule, or at least as having to accept that he cannot acquire a better right than the seller had.

This latter idea constitutes a general principle. The principle is laid down in the Swedish Promissory Notes Act, which is regarded as embodying general principles of the law of obligations.[55] In this case, it would involve the rules providing that a buyer can acquire a better right against a third party than the seller had only if the third party has agreed to this in a negotiable instrument. This statutory rule and the general principle it embodies therefore provide a second norm that can be used to construct a solution.

The lawyer using a functional approach will also identify a third norm. This is a very general norm that simultaneously represents a value generally given great weight, the norms on bad faith. There are several norms, including legislative provisions, under which bad faith excludes priority.[56] According to this kind of general principle, bad faith should therefore not be rewarded with priority. Giving priority to bad faith might encourage troublesome behaviour.

The norm concerning bad faith can be used to hold that the man must pay the woman what the seller should have given her had she returned the boat to the seller. Such an application has considerable potential for legitimacy. The lawyer handling the case knows that other lawyers attach importance to bad faith, and that they consider the consequences of not holding bad faith against a party to carry significant weight.

The next norm the lawyer identifies is that parties can agree on matters such as risk allocation. A risk such as the one at issue in this case is, in fact, precisely the kind of thing parties typically regulate by agreement, even though the allocation of risk can in some cases follow from statute. In this case, the allocation of risk is not regulated by statute. Nor do the two buyers appear to have regulated the question of the risk of the seller's possible bankruptcy in any express agreement. It is, however, relevant to ask whether the parties, through their conduct, can be regarded as having reached an agreement on the risk.

On this question, the lawyer notes that an agreement can be concluded through actual conduct. The woman's conduct consisted in handing over the boat after the man demanded it. The circumstances establish that she was reluctant to do this, but did it to avoid trouble, and because the man was insistent. What she did appears to have been driven by no ambition other than avoiding trouble with the man. The trouble seems to have been that the man, who had bought the boat and had an interest in it as a boat, should be the one to take charge of it, unlike the woman, who no longer had any interest in the boat beyond her reluctance. The man must be taken to have understood that this, and nothing more, was the woman's aim, since she was reluctant and he was insistent. Her conduct could therefore be given this effect, namely that the woman agreed with the man to be spared trouble in her dealings with him.

On the strength of these norms, a lawyer using a functional approach could resolve the real problem by letting the man keep the boat, but obliging him to pay the woman the reimbursement she was entitled to from the seller.

Given that the woman was reluctant, the lawyer using a functional approach could arrive at an even more elaborate solution. The lawyer could conclude that the interaction between the woman and the man amounts to an agreement that the woman did not wish to bear any of the risks that would follow from handing over the boat, and that the man implicitly agreed to this.[57]

5.3 Two Solutions Compared: A Fiction Versus a Result Both Parties Could Live With

For the sake of clarity, it may be worth pointing out here that the solution I have described differs from the substantialist one. In the functionalist solution, the lawyer works by interpreting what content the parties gave their agreement. In the substantialist solution, the content of the agreement follows from the placement of ownership. The difference may seem small, given that even a lawyer using a functionalist approach makes assumptions about what the parties intended. As a matter of principle, however, there is a difference in precision. This follows above all from the fact that only in the functionalist solution is the parties' conduct interpreted without the starting point already being fixed. Only in the functionalist solution

54 Konsumentköplag (2022:260) Ch. 8, Sec. 2(3) (text quoted above). The provision the courts actually applied was s 43(3) of the former Konsumentköplag (1990:932), which is, in the relevant respect, substantively identical: »Where the seller is to make a replacement delivery, the buyer may withhold what he or she has received until the replacement delivery is made«, (author's translation). The current wording is quoted in the main text because it states the underlying principle more generally, and because it is the law now in force.

55 Lag (1936:81) om skuldebrev, particularly Sec. 15 and Sec. 27, applied by analogy as a general principle of the law of obligations.

56 Cf Lag (1986:796) om godtrosförvärv av lösöre; Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område (»Avtalslagen«) Sec. 33 (invalidating reliance on a transaction where a party knew or ought to have known of circumstances making it dishonest to invoke it), and Sec. 39–41 (protection of good-faith third parties in agency situations); Jordabalk (1970:994) Ch. 18 (rights of possessors in good and bad faith) and Ch. 4 Sec. 21 (priority between successive purchasers of real property); Aktiebolagslag (2005:551) Ch. 8 Sec. 42 (protection of a third party acting in good faith against internal limitations on a representative's authority), etc.

57 Given how the given circumstances are proved and interpreted it is of course also possible to come to the assessment that the woman gave up her right to the boat by handing over the keys to the man. The judges in the first instance decided the case in such a way, pointing out that it did not matter if she was considered to give up her ownership or her security right in the boat. Stockholm District Court (Stockholms tingsrätt), judgment of 30 April 2015, Case No T 7736-14, p. 15.

is the question of what the woman and the man actually agreed on ever asked. Only with such an approach does the assessment of the circumstances become reasonably unprejudiced. Neither the woman nor the man had probably thought about the risk of the seller's insolvency, but the significance of no term on that risk having become part of their agreement is taken into account only under the functionalist approach. Under the substantialist approach, the solution follows from a fiction, namely the fiction that the woman did not intend to relinquish her ownership. Under the functionalist approach, the assessment consists in understanding what the parties did and did not mean, and the solution follows from that.

The difference is, of course, also more than methodological. It carries through into the result. Under the substantialist solution, the woman gets the boat, even though she does not want it; she wants the other boat, and the funds corresponding to what she paid. The man, who wants, and has used, precisely the boat he bought, loses it, on the strength of a fiction that the woman did not intend to relinquish her ownership. Under the functionalist solution, the man gets to keep the boat he wants. The woman receives the compensation she needs to complete her own transaction, whether with the seller's bankruptcy estate or, possibly, another seller. Neither party is forced into a position he or she does not want. This alone, that one and the same dispute can be resolved in a way that gives neither party what they want, or gives both parties what they want, depending solely on which approach the lawyer uses, is perhaps the clearest evidence in this article that the approach to law matters.

What I have pointed out in the last paragraph is, indirectly, part of the consequence analysis that comes with a functionalist approach. A solution's failure to address the real problem has consequences even where the parties can, in practice, negotiate their way to the same result afterwards. Here, the man would probably have been able to pay the woman to keep the boat, even if the court had given her priority. But relying on such subsequent negotiation is risky. It presupposes that the parties have information about each other's positions, that neither is unwilling to negotiate on principle, and that the transaction costs of getting there are low. Where the aim of the solution is to resolve something other than the conflict of interest that actually exists, the lawyer therefore risks placing the burden of reaching a workable solution on the parties themselves, rather than resolving it in the judgment.

5.4 Stress-Testing the Solution: Insolvency Risk, Market Security, and Disloyal Sellers

A functionalist approach does not stop at constructing a solution to the real problem. The approach also involves considering further consequences of the solution devised, including consequences for relationships other than the one at the centre. In this case, some such consequences could concern the more concrete outcome for the various parties involved.

A first consequence concerns who bears the risk of the seller's insolvency. If the man pays the woman the amount she should have recovered from the seller, a claim arises for the man against the bankruptcy estate for the corresponding amount. For that amount, the man has a right of recourse against the seller on sales-law grounds. Under the functionalist solution, it is the man, not the woman, who must accept receiving only a dividend in the bankruptcy, to the extent the estate's assets are insufficient for payment in full. The woman instead receives compensation for her repayment claim directly from the second buyer, who is typically a solvent counterparty.

This allocation of risk appears fairly well balanced. The man's protection may be limited to cases where he makes a good-faith acquisition. In cases where he does not, he appears to be the party with the closest connection to the risk that his counterparty, the seller, turns out to lack the means to pay. Given the sequence of events, he is also the buyer best placed to have noticed that the seller risked running into such difficulties. Letting the man bear this risk, rather than the woman, is also typically consistent with the general norm on bad faith that I have already identified as relevant to the case.

A second consequence concerns the woman's actual ability to solve her real problem, namely obtaining a boat that works. Under the functionalist solution, she receives a fixed sum of money from a solvent counterparty. She can use that sum directly to negotiate with the manufacturer over delivery of the boat she ordered, or to buy a boat from another seller. Under the substantialist solution, she instead receives a boat she does not want. To realise any value from that boat, she must sell it, with the time, the transaction costs, and the price risk that such a sale entails. The solution therefore appears less well suited to what the woman actually needs, even leaving aside the question of who bears the risk of the bankruptcy.

A third consequence concerns the security of transactions in a broader sense, that is, the interest in a buyer of movable property from someone who holds it in his possession being able to rely on the acquisition.[58] A rule under which an earlier buyer can always reclaim the property from a later acquirer, regardless of possession and regardless of good faith, makes every acquisition of second-hand property uncertain. The buyer can never be sure that the seller genuinely has the right to sell, even where the seller holds the property in his possession and presents himself as the owner. The functionalist solution, which lets the man keep the boat but obliges him to compensate the woman, protects the security of transactions in practice just as well as the possession-based substantialist construction I discussed in section 4.3, but without needing to rest on that particular construction.

Finally, the consequences for sellers in general can be mentioned. A rule under which an earlier buyer takes priority over a later buyer, regardless of possession, creates scope for disloyal sellers to sell the same property more than once at limited risk to themselves, since the burden of such a double sale then falls, in the first instance, on the buyers to resolve between themselves. The functionalist solution, under which the party who benefits from the transaction (the man) also bears the financial consequence of the seller's disloyalty, directs the burden instead towards the party with the closest connection to the flawed transaction.

Taken together, the consequences I have identified suggest that the functionalist solution may be better suited to the interests that arise in the adjacent relationships, that is, in relation to the bankruptcy estate's other creditors, the security of transactions, and the interest in discouraging disloyal conduct by sellers generally. These assumptions about consequences are not decisive for the solution, but they serve as a check confirming that the solution is likely to work better than the alternatives.

A check of this kind belongs to the functionalist approach. It is itself part of why the approach matters, though it is of course also true that lawyers using a substantialist approach reflect on the consequences of what they do. That consequence analysis is accepted as a conventional part of the functionalist approach is, however, an aspect that probably affects how the lawyer handles the case.

58 See generally Saul Levmore, »Variety and Uniformity in the Treatment of the Good-Faith Purchaser«, Journal of Legal Studies 1987, pp. 43–65, on the law-and-economics rationale for, and the cross-jurisdictional variation in, rules protecting the good-faith purchaser of movable property.

6. A Further Complication: The Relation Nobody Litigated

In this section, I build further on the sailing-boat example, the woman and the man, from sections 4 and 5. I do so to show a further difference between the two approaches, and thereby why approach matters.

6.1 Financing in the Background: A Fact the Courts Chose to Ignore

In this case, the Court of Appeal did not take into account how the woman and the man, respectively, had financed their purchases. The Court of Appeal mentions this aspect in its account of the background without attaching any relevance to it in the judgment.[59] The court of first instance, the Stockholm District Court, also mentions the matter in its account of the background.[60] The district court judges were aware that the man knew that the woman, under the terms of her agreement with her financier, had given the financier the right to reclaim the boat if she failed to pay. The man, it turned out, had the same financier for his own purchase, and contact with the financier can be assumed to have been arranged by the seller. The financier was a bank.

That the judges knew how the purchases were financed, without taking this into account in their handling of the case, is probably because the claim concerned title to the boat, and because it was the first buyer who sued the second buyer. It can therefore be assumed that the judges did not consider the relationships with the financiers relevant. Given that the claim was framed as it was, the woman and the man, evidently did not consider their relationships with their financiers relevant either.

6.2 Following the Functionalist Route: A Claim Against the Bank, Not the Man

For the lawyer using a functionalist approach, however, the relationships with the financier appear to be not merely relevant, but more or less decisive for how the conflict of interest between the woman and the man ought to be resolved. These relationships affect the very scope of that conflict of interest.

With a functionalist approach, it is relevant to identify the conflict of interest in the relationship between the woman and her financier. The woman owes a debt to the financier. The financier has a claim against the woman because it paid the seller € 100.000 towards her purchase. When the woman realises that the seller has gone bankrupt, and that she will therefore receive neither a second boat in place of the first nor any repayment from the seller, a conflict of interest arises with the financier. The woman does not want to pay her debt. The financier wants to be paid.

Whether a debtor must pay a debt that has arisen in this way is a regulated question. It is regulated both under Swedish law and under EU law.[61] The regulation means that, in the case of a purchase on credit, the buyer may, in response to the creditor's claim for payment, raise the same defences based on the purchase as he or she may raise against the seller. The buyer may also object on the grounds that he or she has already paid the seller or has an agreement with the seller. And, if, as a result of the purchase, the buyer is entitled to a refund, damages, or any other monetary payment, the creditor is jointly and severally liable with the seller for the fulfilment of that claim. The creditor is not, however, obliged to pay more than the amount received from the buyer in connection with the credit.

The rule means that the risks consumers take on when making consumer purchases are spread across the collective. By having traders engaged in extending credit bear the risk, that risk is distributed across all consumers through the price of credit. The risk is further affected by the fact that credit-granting traders acquire a self-interest in monitoring the various sellers, so that they deliver what they have agreed to as far as possible.

Given this rule, the woman should be able both to avoid paying anything further on the credit from the financier, and to recover what she has already paid the financier. Her problem would then, in principle, be solved. In any event, she would have no reason to sue the man. Since she does not sue him, he keeps the boat without any need for further action on his part. He does, of course, still have to pay off his own credit to the financier, since he received what he bought and has no claim against the seller.

The reason why the woman nonetheless sued the man, instead of directing her claim against the financier, cannot be gleaned from the judgments of the Court of Appeal and the District Court. One possible explanation, however, could be that the lawyers representing her did not use a functionalist approach.

If that is the explanation, the man's lawyers ought also to have pointed this possibility out to the woman. That, however, presupposes that they had carried out a functionalist analysis. Since the claim proceeded through two courts, the explanation may well be that they, too, did not use a functionalist approach.

The question of whether the judges of the District Court and the Court of Appeal ought to have pointed out to the parties' lawyers that the matter could have been resolved differently, can perhaps be answered in a similar way. Had the judges used a functionalist approach, they would have identified that the relationship with the financier would have the consequence described. A separate question, however, is whether judges are permitted to alert parties to the possibility of directing their claim against someone else.[62]

59 Svea Court of Appeal (Svea hovrätt), judgment of 26 April 2016, Case No T 4954-15, p. 4–5.

60 Stockholm District Court (Stockholms tingsrätt), judgment of 30 April 2015, Case No T 7736-14, p. 3, 9 and 11.

61 Konsumentkreditlag (2010:1846) Sec. 29; Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66, art 15 (right of the consumer to pursue the same remedies against the creditor as against the supplier under a linked credit agreement, where the consumer has first pursued the supplier without obtaining satisfaction; Member States retain discretion as to the extent and conditions of that right, and the provision does not preclude national rules on joint and several liability, which is precisely what s 29, second paragraph, KKrL provides). Directive 2008/48/EC is repealed with effect from 20 November 2026 by Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC [2023] OJ L2225; the corresponding provision there is art 27 (»Linked credit agreements«), per the correlation table in Annex IV to that Directive.

62 Rättegångsbalk (1942:740) Ch. 42 Sec. 8, Ch. 43 Sec. 4(2), and Ch. 46 Sec. 4(2) (the judge's duty, at the preparatory stage, before the main hearing, and during the main hearing respectively, to seek clarification of the parties' claims and the grounds relied on through questions to the parties); see further e g Mika Launiala, »Materiell processledning i tvistemål« [Material Case Management in Civil Litigation], SvJT, preprint published 16 June 2026, accessed 17 July 2026. What a judge is permitted, and required, to do under circumstances such as these can be addressed elsewhere, but in practice a judge who reviews the relationships would probably ask why the parties are in conflict and if the parties have considered if they should have directed their issue elsewhere.

The answer to that question depends, to some extent, on the fact that the financier in this case had financed both the woman's and the man's purchases. Whichever of them ultimately prevailed, the losing party could still raise a defence against the financier's claim and also sought repayment of the amount already paid.

6.3 Substantialism Reconsidered: Would Tracing Title Lead to the Same Answer?

For the lawyer using a substantialist approach, the consumer-credit regulation just described is, of course, just as relevant as it is for the lawyer using a functionalist approach. As long as the lawyer, and in particular the woman's own lawyer, notices her options under that regulation, the choice of approach makes no difference.

A relevant question, however, is whether the lawyer using a substantialist approach is more, or less, likely to notice the possibility of solving the problem through the consumer-credit regulation. In theory, it might seem that the lawyer using a functionalist approach has a better chance of identifying this possibility, on the ground that the functionalist approach includes mapping the relationships and conflicts of interest among everyone involved. Yet the substantialist approach also includes a corresponding step, in that ownership is traced and placed. Such tracing must extend to subjects other than those who have brought the conflict for legal resolution.

In this case, a substantialist approach could mean that the lawyer handling the problems and claims arising from the seller's bankruptcy analyses, at an early stage, where ownership is located. The lawyer would then, in principle, follow the various steps of the sequence of events, beginning with the earliest link in the chronology. That means the lawyer sees that ownership first lay with the manufacturer, and passed to the seller through a sale. In connection with the sale to the first buyer, the seller in turn transferred ownership to the financier. The financier took over the seller's retention of title and, in that sense, holds ownership of the boat, even though in reality this amounts to a security right, since the right is conditional on the buyer paying the financier's claim. When the seller, in connection with the sale to the second buyer, purports to transfer ownership to the financier a second time, the substantialist regards that transaction as ineffective: the seller cannot transfer ownership he no longer has (compare nemo dat quod non habet), and the financier cannot become owner when it is already the owner. The transfer of ownership must have occurred in connection with the sale to the first buyer. Ownership therefore lies with the financier, and has done so since the first purchase. This means the second buyer does not hold ownership. The party capable of doing something about the second buyer having the boat is the financier. The first buyer has no standing to bring proceedings. If the first buyer demands that the financier bring such proceedings, and the financier fails to do so, the first buyer will resist paying off the credit. In that context, the first buyer will come to notice the possibility of invoking the consumer-credit regulation, which gives the right to withhold payment and also the right to reclaim what has already been paid.

What I have set out illustrates that the substantialist approach would, in principle, be the alternative giving the lawyer a greater chance of noticing where the legislature, without specifically thinking of cases like this one, placed the risk. The substantialist starting point in ownership holds the analysis together in a way that produces this effect. Under the functionalist approach, there would be a greater risk of missing that the legislature had, in fact, regulated where the risk should lie when a consumer buyer has used a financier. This is because the functionalist approach carries a risk of overlooking the significance of relationships other than the one immediately at issue.

It should be noted, however, that what I have described as the substantialist approach involves several steps, and that the outcome at each step need not be as I have stated. That only the financier, as the owner, would have been allowed to sue is one such uncertain outcome. There are, for instance, relevant arguments for allowing the first buyer to bring proceedings at least in respect of the conditional right the buyer holds, even though that right does not count as ownership. The idea that the financier can acquire ownership only at the first acquisition (the woman's) is another step with an uncertain outcome. If the first buyer had agreed with the seller that ownership of the boat should revert to the seller, the seller ought to be able to transfer ownership afresh. Alternatively, such an arrangement between buyer and seller might be regarded as conditional on the financier's consent, and the circumstances of this case could be assessed as satisfying that condition.

The fact that the substantialist approach involves several steps of assessment, each capable of turning out differently, affects its potential to help the lawyer notice the possibility of solving the problem through the consumer-credit regulation. Whether the substantialist or the functionalist approach has the greater potential in this respect is something I have no basis for assessing.

7. Conclusion: Why the Approach Matters, and What That Does Not Mean

What I have shown in this article is that the approach to law matters, though not always in the way a lawyer would expect.

In the first example, the case before the ECtHR, I have shown that the judges' handling, which looked substantialist on the surface, has weaknesses on closer analysis. The judges used the concept of ownership as a label, not as a bearer of substance. The nominalistic approach I have identified produced a normatively weak result, built on an unspoken value judgment rather than on a completed conceptual analysis. The contrast with a functionalist handling of the same case is striking. With a functionalist approach, the judges could have worked with greater precision. By identifying the real problem, they could both have legitimised their decision better and have reached a result they themselves would probably have found more satisfying, since they would then have shown, publicly, an understanding of the complexity of the matter they were asked to handle.

In the second example, the sailing-boat case, the situation was partly the reverse. This time, the judges' handling was genuinely substantialist, but substantialism nonetheless failed to deliver what it typically promises, namely predictability. Because several, mutually incompatible substantialist constructions were possible, and because the judges appear to have been neither aware that they had made a choice of approach nor familiar with the approach they used, the result was a fiction rather than a considered application of the concept's substance. Tellingly, each of the three substantialist positions taken in the case imported a concept from the woman's relationship with the seller to decide her right against the man, rather than asking what the woman and the man had actually agreed between themselves. The functionalist solution, by contrast, addressed that relationship directly, unburdened by borrowed concepts. This functionalist alternative solution instead produced a result tailored to what the parties actually wanted and needed, one that also withstood a deeper consequence analysis concerning the adjacent relationships, including the bankruptcy estate's other creditors and the security of transactions.

The second example, however, also revealed a more complicated side of the theme. I identified a solution, grounded in the consumer-credit regulation, that could have solved the woman's real problem without her ever having to sue the man, a solution that neither the woman's nor the man's lawyers, nor the courts, appear to have noticed. That solution, however, is not unambiguously approach-neutral. Even the substantialist approach, consistently applied, contains a mechanism capable of capturing precisely this type of solution. The requirement to establish where ownership is located forces the lawyer to trace the chain of transfers through every link, which in this case brings the financier into the analysis and draws attention to where the legislature placed the risk. At the same time, the substantialist chain analysis rests on several links whose outcome, at each stage, appears fairly uncertain, so that this approach, too, offers no guarantee that the solution will be noticed. There is accordingly no basis for determining which of the two approaches has the greater potential in this particular respect. What this part of the analysis shows, instead, is that the approach matters without, on its own, guaranteeing a result of sufficient quality. Diligence and thoroughness in investigating the legal relationships are virtues that neither approach can replace.

What the article shows, taken as a whole, is therefore not that one approach is superior to the other. Substantialism has its strengths, not least the predictability a completed conceptual analysis can offer within a legal culture familiar with the method. Functionalism has its strengths, not least the ability to identify the real problem and to hold the solution accountable for its consequences across all the relationships affected. The reader who identifies with one or the other of the two main approaches need not therefore read this article as a defence of the other side. What the article shows, instead, is that both approaches require awareness and familiarity in order to work well, and that the absence of such awareness, rather than the choice of approach as such, is the real source of the weaknesses I have identified in the two cases.

I began this article by describing the lawyer as programmed in a particular way, a form of programming the lawyer does not reflect on. The two cases I have analysed illustrate what this lack of reflection can lead to, namely reasoning that looks like substantialism but is not, and reasoning that is substantialism but is built on a fiction whose alternatives are never considered. In both cases, awareness of approaches could have made the difference between a piece of legal work that withstands scrutiny and one that does not. The answer to the question of why the approach to law matters lies more in this than in the choice between substantialism and functionalism as such. To deal with the real dilemma of law, awareness of approaches matters.