

Nordic Legislative Cooperation in the New Europe – A Challenge for the Nordic Countries in the EU Perspective

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1 Introduction

As is well known the Nordic countries assumed a new position in the context of European cooperation. Denmark, Finland and Sweden are members of the EU – Denmark since 1973, Sweden and Finland since 1 January 1995, whereas for Norway and Iceland the EEA Agreement appears to remain a more permanent solution than was first thought.¹

The situation presents a great challenge to the juridical collaborative effort of the Nordic countries and their spirit of community in the legal field.² As we well know, the EU is characterized by a strict legal structure, as well as extensive legislative activity, and has far-reaching ambitions as regards harmonisation of the law. A generation ago it was not unusual to perceive the Nordic countries and their collaboration in the area of law as an alternative to cooperation within the EEC, and now the EU. We can hardly look at these matters from this perspective any longer. It is a fact that the Nordic countries have been firmly integrated into Europe, and therefore also into European co-operation in legal matters within the framework of the EU and the EEA.

In this situation it is clearly necessary to reconsider the purposes as well as means of cooperation in legal matters in the Nordic countries. What is to be our role, and what do we want to achieve? Will the current developments bring about an extensive decrease in this cooperation, or will it continue and perhaps develop even further? These are the issues that lie behind this article. Its main objective is to examine the future possibilities of cooperation between the

¹ The article is based on the author's article *Nordiskt lagstiftningssamarbete i det nya Europa – Utmaningen för Norden i ett unionsperspektiv*, published in *Nordiskt lagstiftningssamarbete i det nya Europa*. Skrifter utgivna av Juridiska fakulteten i Stockholm, No. 48, Stockholm, 1996 (Publications published by the Faculty of Law, Stockholm University).

² The reader may want to refer to an investigation conducted by Swedish law faculties at the request of the Swedish government, *Europagemenskap och rättsgemenskap*, printed by *Iustus Förlag*, Uppsala, 1992. See also Bernitz, *Svensk lagstiftning och rättsvetenskap inför EG*, *Juridisk Tidskrift (JT)* 1992–93, pp. 235 ff.

Nordic countries in the field of law in a transformed Europe. The central questions that have to be answered concern the kind of changes in the forms of cooperation that may be necessary, the areas that the Nordic cooperation will have to concentrate on, or perhaps abandon, and the risks and problems that will require special attention.

2 Four Basic Theses

As a point of departure for this article I would like to state four basic theses to be discussed in more detail in the following sections.

The first thesis relates to the legal unity of the Nordic countries broadly understood, rather than mere cooperation in the field of legislation. The Nordic countries share a common legal culture and heritage, which is, in a way, an important prerequisite for successful cooperation in the field of legislation, but which goes much further than that.

The second thesis is that European law, i.e. the legal system applied within the EC/EU, including the European Convention on Human Rights, is beginning to stretch over an ever-increasing number of legal areas. Because of this the remaining space left for legal cooperation in “reserved” areas outside the European scope of collaboration is getting progressively smaller.

The third thesis, which is really an elaboration of the second, suggests that cooperation between the Nordic countries should function more as a complement to the European cooperation, rather than as its alternative.

The fourth thesis states that in these changed circumstances there is an evident need for new initiatives and suggestions concerning legal cooperation between the Nordic countries, whose forms have become rigid, not to say stagnant, when looking at the swift changes taking place in the surrounding world.

3 The Legal Unity of the Nordic Countries

The legal unity of the Nordic countries is often taken for granted, even though it seems to have been only sparingly analyzed. It has never been subjected, for example, to any extensive or exhaustive analysis from the point of view of comparative law by Scandinavian legal scientists. Contributions in this area would most certainly be welcome. The available material shows that reports and discussions taking place at the institutionalized Meetings of Nordic Jurists, held every third year for over 100 years now, play a major role in this context. The centre of attention seems to have been focused on cooperation in the preparation of new legislation, which, although certainly of paramount importance, does not give the whole picture.

What is of decisive importance for the scope of legal unity between countries is the degree of congruity between the fundamental premises of their legal theory, consistency in the formation of their basic legal concepts, uniformity of their methodology of codification, the doctrine of precedent, and the choice of the sources of law. The above should not be judged by the narrow perception of the differences that doubtlessly exist, but rather from the point of view of the

way in which other legal systems, such as for example, the English, the German or the French system, handle the equivalent questions.

Viewed in this way, it is my opinion that the Nordic countries are remarkably similar to each other as regards the basic perception of the legal system, its design and methodology.³

As I see it, legal discussions often show a tendency to get hung up on smaller differences in the legislation of the Nordic countries concerning specific questions, and to disregard the basic parts and principles common to them all.

If we, as a concrete example, take a well-known book on legal theory and the method to apply legal sources, e.g. the Norwegian legal scholar's Torstein Eckhoff's highly valued work *Rettskildelære*⁴ (The Sources of Law), it is clear that even though the main subject of this work is Norwegian law, most of what is said also applies to Swedish law, even though a Swedish writer might have placed the emphasis somewhat differently on occasion. A similar situation would apply also to Danish or Finnish law. If, on the other hand, a comparative study should be made between German, French or English theories of legal sources and the one used in Swedish law, important differences would certainly be noticed. On the whole, the ease with which legal doctrine is applied inter-nordically indicates clearly that the legal unity of the Nordic countries is actually quite deep-seated.

In this context it may be interesting to investigate the position of Nordic legal science, as it is perceived in the framework of the division into legal families, which has been developed in the field of comparative law.

Åke Malmström, a law professor in Uppsala and Scandinavian pioneer in comparative law, presents a classification of the system of legal systems (*Rättsordningarnas system*) in *Festschrift* in honour of Håkan Nial (1966).⁵ Malmström reviews the existing classifications of legal systems and legal families. He comes to the conclusion that within the Western (European–American) legal group four legal families can be distinguished: the legal systems of Continental Europe (with a German and a Romanistic subgroup), the Latin–American system, the Nordic (Scandinavian) system and the Common Law system.⁶ It can be added that in common with other authors of the time Malmström's classification also lists a group embracing the legal systems of the socialist (communist) countries. Malmström views the Nordic legal family as being positioned laterally in relation to the systems of Continental Europe and the Common Law systems, and therefore located at the same level as the latter.

³ See Wilhelmsson, T. *Den nordiska rättsgemenskapen och rättskällevärdet*, *Tidsskrift for rettsvitenskap* (cit TfR) 1985, pp.181 ff.

⁴ Eckhoff, T. *Rettskildelære*, Oslo 1971 (and later editions).

⁵ Malmström, Å. *Rättsordningarnas system. Några synpunkter på ett klassifikationsproblem inom den jämförande rättsvetenskapen. Festschrift till Håkan Nial*. Stockholm 1966, pp. 368 ff. Malmström's investigation has been published also in English: *The System of Legal Systems. Notes on a Problem of Classification in Comparative Law*, *13 Scandinavian Studies in Law*, 1969, pp. 127 ff.

⁶ Malmström, *op. cit.*, pp. 401 ff.

In their well-known textbook “An Introduction to Comparative Law”⁷ Zweigert and Kötz construct a taxonomy based on the division into the following “legal families of the world”:

- The Romanistic legal family (based on the French Civil Code)
- The Germanic legal family (Germany, Austria, Switzerland)
- The Anglo–American legal family
- The Nordic legal family
- The socialist legal family
- Other legal families (The Far Eastern legal family, Islamic law, Hindu law)

Zweigert and Kötz share therefore Malmström’s point of view, stating that Nordic law should be seen as a separate legal family on the highest level. Recapitulating the authors’ point of view in support of this conclusion the following passage may well serve the purpose:

“Nordic legal science... has always paid attention to events on the continent, and in the nineteenth century it unquestionably got its legal wares from the pandectists’ shop. But the tendency to undue conceptualism and the construction of large–scale integrated theoretical systems has never really been followed in the North, thanks to the realism of the Scandinavian lawyers and their sound sense of what is useful and necessary in practice. Thus while the Scandinavian legal systems have participated in the legal development of Continental Europe they have also maintained their local characteristics, and this justifies us in allocating them to a special Nordic group within the Civil Law.”⁸

Zweigert and Kötz suggest yet another reason for incorporating Nordic law into a separate legal family, and that is the less intensive influence of Roman law upon Nordic law, as well as the lack in Nordic law of large, systematically constructed private law codifications. They also point out another characteristic feature of some importance, not only as regards the area of private law. The use of all–embracing legal principles plays a more limited role in Nordic law than in, for example, French or German law. Instead, frequent use is made of analogies taken from available legislation, particularly in the law of obligations. The topic of legal classification has been recently treated by Michael Bogdan, professor at Lund University, in his textbook *Komparativ rättskunskap*⁹ (Comparative Legal Science). Similarly to the Stockholm professor Jacob Sundberg,¹⁰ Bogdan means that Nordic law belongs to the family of the legal systems of Continental Europe, showing more similarities to these systems than to those belonging to the Anglo–American family. On my part, I am inclined to share this latter point of view, but there are justifiable reasons for dividing this main group into

⁷ Zweigert, K. & Kötz, H., ed. *Introduction to Comparative Law*. 2nd revised ed., Oxford 1987 (reprinted 1992).

⁸ Zweigert, K. & Kötz, H., *op. cit.*, end of Ch. 22.

⁹ Bogdan, M. *Comparative Law*, Göteborg 1994, pp. 88 ff.

¹⁰ Sundberg, J. *Civil Law, Common Law and the Scandinavians*, 13 *Scandinavian Studies in Law*, 1969, pp. 179 ff. See also Gomard, B., *Civil Law, Common Law and Scandinavian Law*, 5 *Scandinavian Studies in Law*, 1961, pp 27 ff.

smaller subgroups, such as the Romanistic and the Germanic groups, and for considering Nordic law as a similarly independent subgroup.

Irrespective of the exact details of the classification scheme used for the purposes of comparative law, one thing is clear enough, and that is the fact that Nordic law has been internationally accepted as a separate, easily discernible system among the other European legal systems. This in itself constitutes an admission of the legal unity of the Nordic countries, and an important point of departure.

The driving force behind Nordic cooperation in the area of law has been first of all cooperation in the field of legislation, activated by the desire to achieve similar, preferably identical legislation in all the Nordic countries in the central areas of law.¹¹ The work was conducted chiefly by the Ministries of Justice of the Nordic Countries, and it was aimed at bringing about permanent, high-quality codes. The work was performed by highly-qualified, learned jurists (primarily qualified judges and legal scholars) in a spirit of confidentiality and cooperation, far away from the political conflicts of the day. Cooperation in the field of legislation has a certain legal basis in the form of the Helsinki Agreement – the general inter-Nordic agreement on cooperation – signed in 1962.¹²

The substantial rules of this Agreement outline the main principles of cooperation between the five Nordic countries in the legal, cultural, social and economic areas, as well as in the area of communications – mostly through general provisions that do not include clear obligations. As regards the field of law, Art. 2 of the *Helsinki Agreement* stipulates that:

“Enactment of laws and other types of legal rules in any Nordic country shall follow the principle stating that the citizens of the other Nordic countries shall be treated on a par with the country’s own citizens. The above shall apply in the territories embraced by the Agreement.

Exceptions with regard to the first paragraph can be made, however, if citizenship is constitutionally required, being necessary due to other international commitments, or, when owing to special reasons, it is generally considered as necessary.”¹³

It is further stipulated that the contracting parties shall continue legislative cooperation in order to attain the greatest possible uniformity in private law, that they shall strive to make uniform provisions regarding crime and its legal consequences, and try to achieve mutual coordination of other types of legislation in any fields deemed as appropriate. The contracting parties shall furthermore work to provide that rulings of any court or other authority in another Nordic country shall be executed also within the territory of the said party (Art. 4–7).

¹¹ See, amongst others, Sevón, L., *Några reflexioner kring det nordiska lagstiftnings-samarbetet*, *TjR* 1988, pp. 509 ff, and Sevón, L., *Statutory Lawmaking. A Nordic Perspective*, *De Lege*, Vol. 5, Uppsala 1995, pp. 179 ff.

¹² See, for Sweden, Government Bill 1962:154. The Agreement was extended in 1971, 1974 and 1985; see Swedish Government Bills 1971:53, 1974:114, 1983/84:24, and 1995/ 96:33.

¹³ English translation of Government Bill 1995/96:33, Article 2.

The actual cooperation in the legislative field has been conducted mainly in the form of rather informal, continuous contacts and meetings between respective ministries and legislative committees currently in progress.

The common legal texts resulting from this effort were normally finalized separately in each country. Even though the Helsinki Agreement is a binding document from the point of view of public international law, its formulations are rather vague, and it has usually been the interest in the subject matter and the good will of all the involved that constituted the pillars of cooperation and brought about the results. The provisions of the Helsinki Agreement have never been incorporated into national law, and are not applied by the courts. Briefly, the decision-making mechanisms governing Nordic judicial cooperation are conspicuously weak, whereas those governing the EC's legislative activity are particularly strong.

The main result of the Nordic cooperation in the legislative field is the general conformity that has been achieved through the years in such areas as sales of goods, instruments of debt, the law of obligations, the law of contract, tort law, etc. On the other hand, similar cooperation has never sprung up in the area of property law. Other important areas of legal cooperation can be found within family law, maritime law, intellectual property law and company law. Legislation concerning citizenship should also be mentioned. In general, the areas chosen for legal cooperation are found among those lying somewhat outside politically sensitive matters, and where new legislation was expected to be long-lasting. The Nordic congruity of laws relating to the central areas of the legal system is considered to be of value in itself, and constitutes grounds for inter-Nordic cooperation within jurisprudence, and, in a wider sense, for the very existence of Nordic law.

Let us now contrast what has been said above about Nordic legal cooperation with the harmonisation of law within the EU. The differences are striking. The basic aim of the harmonisation of EC law is to promote integration. One of the basic principles laid down in The Treaty of Rome states that achievement of the Union's purposes shall include the approximation of the laws of the Member States to the extent required for the functioning of the common market (Art. 3h of the Treaty of Rome). As is well known, the EU aims at the elimination of such legal differences that would prevent free movement of goods, persons, services and capital, or distort the internal competition prerequisites for business activities in different Member States. The basic condition for the satisfactory functioning of the internal market is namely that the different actors have the same opportunities for competition, irrespective of their geographical location in the EU. The internal market requires, as it is often put, "a level playing field".

This is the basic difference, as compared with the Nordic cooperation described above. Even though it has been always considered advantageous for communications and trade to be governed by similar regulations in the Nordic region, the legal cooperation has not been coupled with any kind of integration objective. On the contrary, legislation concerning areas such as right of establishment or competition were traditionally excluded from cooperation. An illustrative example of differences in aims between EU harmonisation and inter-Nordic legal cooperation can be found in insurance law. Nordic legal cooperation has been focused mainly on the introduction and preservation of

common legislation regarding insurance contracts, whereas legislation relating to insurance business has not been coordinated. On the contrary, until the coming into being of the EEA and the EU membership it was difficult, or rather almost impossible, for an insurance company located in one Nordic country to establish itself in another Nordic country. With the coming of the EU, the opening of the insurance market to competition over the national borders of the member states has been an important element in the creation of the internal market, leading to the issuing of far-reaching harmonisation directives in the insurance area. On the other hand, the EU did not consider it necessary to harmonise the law of insurance contracts, at least not until now. One can see that the two main areas of insurance law have been prioritised in exactly the opposite way in the two models.

Also the working methods differ considerably. The Nordic cooperation has been directed towards obtaining common legislation covering larger areas, aiming, in other words, at the unification of laws. Within the EU the work has been directed towards the harmonisation (approximation) of laws, often with the purpose of obtaining relatively quick results in limited areas. As we all know, it is up to the Member States to decide in what way a given directive should be implemented in their national law, as long as the result meets the directive's requirements. The main part of the work on the harmonisation of laws within the EU concerns subjects or fields which have the character of technical trade barriers, and which are far removed from what we refer to as the core areas of law. However, this does not always apply.

An important example of the above is constituted in the progressive harmonisation of company law through a large number of harmonisation directives issued in this area. This can be compared with the Nordic cooperation in the area of company law, where the main aim has been to achieve and preserve uniform Nordic company laws. In a similar way, in the field of copyright law there can be noticed progressive harmonisation of the laws, performed through the issue or preparation of directives embracing an increasing number of areas. One can mention here, for example, the directive concerning extension of the term of protection of copyright to 70 years *post mortem auctoris*.¹⁴ Since the 1960s the Nordic countries have had, on the other hand, copyright acts so similar to each other on most points as to be considered almost uniform. The difference between harmonisation and unification is not, however, always very clear. Some EC directives, e.g. a directive on product liability,¹⁵ contain provisions embracing such a suspicious amount of detail that they resemble a ready-made statutory text.

Differences can also be seen when looking at working methods and the authority to make decisions. In Nordic legal cooperation there is a lack of equivalent authority to initiate and coordinate proceedings that have been vested in the European Commission. It has never been intended that such a role, even in the most modest form, should have been assigned to the Nordic bodies in

¹⁴ Directive 93/98 EEC.

¹⁵ Directive 85/374/EEC.

question. Neither have we ever attained any real coordination of decision-making forms.

In summary, it can be said that the legal unity of the Nordic countries is well-established and deep-seated, to the extent that in comparative law Nordic law is considered as one of the special subgroups that make up the legal system of Europe, apart from the common law countries. Its guiding spirit has always been long-term cooperation in the field of law, weakly bound to specific obligations, but focused rather on the production of common legislation (unification) within certain central legal areas. This cooperation has always been carried on independently of the purposes of integration which are at the heart of the EU's work on the harmonisation of laws.

4 Remarks on the Ongoing Development of European Law

As already mentioned, European law stretches over progressively larger areas of law. European law refers here primarily to EC law, but it also encompasses the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁶

Harmonisation work within the EU includes both limited questions of highly concrete and practical nature, as well as topics which are of central importance in law. What can be noticed, however, is the fact that the objectives have expanded over time as regards both the selection of the subject areas, and the aspiration level of the law applied. Amendments to the existing treaties have also had the effect of bringing in new areas into the EU's sphere of interest, e.g. environmental protection and consumer protection. Other important areas of civil law which are deeply affected by the legislative work of the EU are company law, labour law and intellectual property law. In principle, the central issues of the law of obligations and the law of property have, until now, been outside the areas of interest and harmonisation measures applied by the EU. This is not quite the whole truth, however. The EC's directive on product liability is highly applicable to the central area of tort law. The EC's new directive on unfair contract terms goes to the heart of contract law, even though in its final form it has been restricted to refer to consumer contracts.¹⁷ The EC's directive concerning consumer credit is becoming a regulatory instrument for all of the statutes in this area.¹⁸

The EU's intensive activity in the field of intellectual property law has already been mentioned. A further example of the EU's vitality in this sphere is the fact that Regulation 40/94 on Community Trade Marks¹⁹ introduces a complete legal regulatory system as regards Community trademarks. Through registration with a new EU organ, a system of exclusive rights for the

¹⁶ See, amongst others, Jensen, A. *EF:s betydning for det nordiske lovsamarbejde*, *TfR* 1988, pp. 524 ff, and Bernitz, U. *Europarättens grunder*, Stockholm, 1994. For an overview, see Slot, P.J., *Harmonisation*, *21 English Law Review*, 1996, pp. 378 ff.

¹⁷ Directive 93/13/EEC; see Bernitz, U. in *Svensk Juristtidning*, 1995, pp. 625 ff.

¹⁸ Directive 87/102/EEC.

¹⁹ Regulation 40/94 EC.

Community trademark has been created, with direct legal effects in all Member States.

With the aid of Art. 220 of the Treaty of Rome, but falling outside the Treaty's system of rules and regulations, two conventions in the area of private and procedural law have been introduced by the Member States, that are of vital importance internationally: firstly, the Brussels Convention of 1968 on the Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters (equivalent to the Lugano Convention as regards the EEA countries), and secondly, the Rome Convention of 1980 on Law Applicable to Contractual Obligations. In this way European codification of important parts of international private law has been accomplished. The European convention on bankruptcy should also be mentioned.

Progress can also be noticed in European constitutional law, partly through the application of EC law, and partly through the impact that the European Convention for the Protection of Human Rights has had. It is expressly stated in the Treaty of Maastricht, Art. F, that the basic principle of Community law is contained in the fact that the Union shall respect fundamental rights, as guaranteed by the European Convention. This also creates a common constitutional foundation at the national level in the Nordic countries, inasmuch as this principle has been incorporated into the national legal systems of Denmark, Finland and Sweden. Its implementation should also be forthcoming in Norway. What must be noted here, though, is the fact that the above has come about under pressure from the European cooperation – the Nordic countries have not reached this level of conformity of legal protection by themselves.

It is not necessary to go into the details of the current development of European law and its progressively becoming more stable, concrete and consolidated through application and case law both in the European Court of Justice in Luxembourg and the European Court of Justice for Human Rights in Strasbourg. The reader should keep in mind, however, that this development is concerned not merely with the Treaty's articles and secondary law, but also with the development of general, common legal principles. In the area of general legal principles there is a more well-established tradition in the legal systems of Continental Europe, as compared to Nordic law with its more positivistic orientation.

The principle of proportionality can be taken as an example. The idea that measures taken by public authorities shall not be more severe than that which is necessary to achieve the intended goal is not new in Nordic law. On the other hand, the principle of proportionality has probably been strengthened by European law which is now forcing its way into Nordic national laws in a more manifest way than previously.²⁰

In the future we may find that European cooperation in the field of law may set even more ambitious goals in certain fields. The European Parliament made a statement to this effect in 1989, requesting preparation of a common European

²⁰ Decisions of the Swedish Supreme Administrative Court from 1996 clearly express for the first time the relevance in Swedish law of the general principle of proportionality, referring to EC law. *Regeringsrättens Årsbok*, 1996, Ref. 40 and 44.

Code of Private Law.²¹ Even though until now the European Commission has not shown much enthusiasm for this idea, it has awakened the interest of many legal scholars, and spurred on several research projects in this direction.²² It is, of course, difficult to say at the present moment if and what results can be achieved by these efforts, but we should probably reckon with gradual, step-by-step development.

An interesting discussion concerning this topic can be found in the recently published anthology "Towards a European Civil Code",²³ containing many different contributions. An important work concerning this sphere of interest is being conducted by Professor Ole Lando in Copenhagen,²⁴ and has to do with remedies in the law of contracts. This is a private initiative, backed up by the European Commission. A new, important issue is the possible European harmonisation of the law of property, e.g. as in the case of a real-estate mortgage (Euro-mortgage).²⁵

It is reasonable to expect that the legislative work of the EU is going to proceed along the present lines, embracing a growing number of legal areas.²⁶ A certain limit may be imposed by the principle of subsidiarity established in the Treaty of Rome (Art. 3b) and invoked also in the Maastricht Treaty (Art. B). The relevant articles of these treaties proclaim that in areas which do not fall within its exclusive competence, the Community shall take action only if, and in so far as, the objectives of the planned action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale and effects of the planned action, be better achieved at the Community level. Nevertheless, it does not seem very plausible, in my opinion, that the principle of subsidiarity could seriously prevent expansion of the legislative work within the EU. As a rule, it is certainly easier to indicate advantages to be gained from setting up harmonized rules, especially as regards trade in goods and services across national borders.

5 Nordic Legal Cooperation in the European Perspective

As indicated earlier, it is my thesis that the remaining scope of Nordic legal cooperation, independent and "reserved" from European legislation, is getting progressively smaller. This point of view brings up the question as to whether the new role of Nordic cooperation in the field of law would be to function more

²¹ *Official Journal of the European Communities*, 1989, No. C 158/400.

²² See e.g. Kötz, H., *Comparative Legal Research and its Function in the Development of Harmonized Law. The European Perspective*. De Lege, Vol. 5, Uppsala, 1995 pp. 21 ff.

²³ Hartkamp, A.S. et al, ed. *Towards a European Civil Code*. Nijmegen, 1994. See also, Müller-Graaf, P.Ch. (ed.), *Gemeinsames Privatrecht in der EG*, Nomos Verlag, 1993.

²⁴ Lando, O. *Performance and Remedies in the Law of Contracts. Towards a European Civil Code*. pp. 201 ff. See recently published Lando-Beale, *The Principles of European Contract Law*, Part I: *Performance, Non-Performance and Remedies*, The Hague, 1995. See also Wilhelmsson, T., *Mot en europeisk kontraktsrätt, Europeisk rätt i utveckling*, Helsinki, 1990, pp. 267 ff.

²⁵ Wehrens, *Real Security Regarding Immovable Objects. Reflections on a Euro-Mortgage. Towards a European Civil Code*, pp. 391, ff.

²⁶ For a survey, see e.g. Schwartz, I. *Perspektiven der Angleichung des Privatrecht in der Europäischen Gemeinschaft, Zeitschrift für Europäisches Privatrecht*, 1994, pp. 553 ff.

like a complementary element of the European cooperation rather than as a separate alternative.

The objectives and future of Nordic legal cooperation have been the recurring topic of discussion at the Meetings of Nordic Jurists. In accordance with the traditional view it has been held that Nordic cooperation in the field of law would not be threatened or become restricted in any significant degree by the EEC activities. In this context it was especially emphasized that Nordic cooperation concentrated on the core areas of law, particularly the law of obligations and family law, whereas the harmonisation of laws in the EEC was aimed primarily at selected topics of limited scope.

Discussions conducted at the 27th Meeting of Nordic Jurists, taking place in Reykjavik in 1975, exhibit all the typical characteristics of the outlook described above.²⁷ Many of the participants seemed to be convinced on that occasion that the EEC was going to confine its interests to a relatively limited scope, and at the same time there was the highly unrealistic expectation that the EEC would be willing to actively participate in the legislative work of the European countries outside the Community, e.g. within the scope of the Council of Europe.

The subject matter came up for a discussion once again at the Meeting of Nordic Jurists held in Copenhagen in 1993, when Niilo Jääskinen from Finland delivered his report concerning the influence of EC law on the legislation methodology and the application of laws in Scandinavia.²⁸ Jääskinen advanced a thesis proposing that the significance of the influence of EC law on the fundamentals of Nordic legal culture should not be exaggerated. Among other things, Jääskinen pointed out various deficiencies in the EC's legislative methods, and the incompleteness of the regulatory system of Community secondary law. He compared EC law to an alien branch that must be grafted onto the stem of the existing national system. He argued that the national legislator should be as conservative as possible in trying to withstand the pressure exerted by EC law, and strive to preserve the systematic structure of the underlying concepts of the national legislation. He stated further that:

“When we say 'the North' we think of the community of values, not of objectives and goals, as in the case of the EU. Through the harmonisation of laws within such central areas as civil law, the Nordic legal community gives expression to the popular values shared by the community. The comparison between the harmonisation of laws within the EC and the Nordic community has led me to the view that EC law does not have any greater effect on the intellectual and ideological structures that usually constitute a legal culture, even though it may cause significant changes in the normative layer of our legal systems.”²⁹

Jääskinen's point of view is, in my opinion, not convincing. He seems to underestimate the importance of EC law, its effectiveness and potential for expansion even in the so called 'central' areas of law. EC law is indeed not

²⁷ *Forhandlingerne ved det 27 Nordiske Juristmøde i Reykjavik* (Deliberations at the 27th Meeting of Nordic Jurists in Reykjavik), 1975, pp. 175 ff. and Annex. 5.

²⁸ *Forhandlingerne ved det 33 Nordiska Juristmøde i København* (Deliberations at the 33rd Meeting of Nordic Jurists in Copenhagen), 1993, part II, pp. 563 ff.

²⁹ *Op. cit.* at p. 577.

without ideological ambitions. Moreover, we may also ask ourselves which of the branches of law deserve to be considered as 'central'. The key areas of the EC's substantive law concerning non-discrimination, free movement and free competition all deserve to be considered as equally central as, for example, the law of instruments of debt or tort law.

In my opinion one must thus consider the fact that already now (and even more so in the future) the range of legal fields that have not been affected by European cooperation within the EU to any great degree, and that can be considered as the 'reserved' areas of Nordic cooperation, is diminishing. This does not mean, however, that Nordic legal cooperation in these areas can be said to have had its day. As I see it, it is rather that this cooperation will become increasingly complementary as compared to the wider, more comprehensive scope of European cooperation.

6 Outlining the Future of Nordic Legal Cooperation

Nordic legal cooperation has had its golden age as well as its period of weakness. The golden age of Nordic legal cooperation is associated especially with the 1950's and 1960's, even though some of the initiatives then taken and the foundation work done in that period bore fruit only later on. At that time a number of highly advanced legislative products were generated in various important areas of law by legislative committees set up simultaneously in Denmark, Finland, Norway and Sweden, working on a long-term basis. Codification included, among other areas, tort law, company law and almost all of intellectual property law.

The responsibility for bringing this fruitful period of legal development to a sudden end lies, unfortunately, largely with Sweden. I personally was the witness of how the appearance of the Swedish Marketing Practices Act in 1970 drove the first nail into the coffin of that development by the way in which Sweden rejected the proposals for legislation on unfair competition, drafted in cooperation with the other Nordic countries and discussed during inter-Nordic ministerial sessions.³⁰ This turning point became particularly noticeable owing to the sharp remarks delivered by Carl Lidbom, Member of the Swedish Cabinet, at the Meeting of Nordic Jurists in Helsinki in 1972.³¹ Carl Lidbom complained about Nordic legal cooperation procedures being unnecessarily protracted and cumbersome, and staked out Sweden's claim to the right to lead the way, acting as a groundbreaker and pioneer among the Nordic countries. He also suggested that Nordic cooperation should be less restricted in form, and that any specific demands for large-scale harmonisation should be rejected. Even though Lidbom's pronouncements have been rebutted on many occasions,³² the weakening of the main current and direction of Nordic legal cooperation, so

³⁰ In Sweden Bill 1970:57, Statens Offentliga Utredningar 1966:71, *Otillbörlig konkurrens* (Unfair Competition).

³¹ *Negotiations at the 26th meeting of Nordic jurists* in Helsinki in 1972 on the subject of *Current problems of the Nordic body of law*, pp. 53 ff.

³² See, e.g., Curt Olsson, *Behövs nordiskt lagstiftningssamarbete?*, in: *Nordiskt lagstiftningssamarbete i det nya Europa* (see footnote 1), pp. 221 ff.

clearly marked by Lidbom's pronouncements, influenced the way in which the legislative work came to be conducted from then on in the capital cities of the North. The fact that Nordic legal cooperation never had, and still does not have, any fixed regulatory system, and that it was dependent primarily on the collaborators, has made this cooperation especially vulnerable.

Nordic legal cooperation sank to a low point with the implementation of the EC's secondary law in 1992–1993, following the coming into being of all the new internal market directives and the implementation of the EEA Agreement. What happened then is, in a way, quite intelligible in the light of the fact that the work was performed under great pressure, and that it was complicated by changes in the external circumstances introduced rather too late, e.g. Switzerland's rejection of the EEA Agreement in its December 1992 referendum – just a few weeks before the expected coming into force of the Agreement. All the same, it is quite extraordinary that the Nordic countries were unable to coordinate their efforts better as regards the changes in inter-Nordic legislation called for by EC directives. In some cases, even the implementation of the same directive in the different Nordic countries resulted in differences in the statutory text relating to one, previously common, inter-Nordic law, greater than was the case before the implementation. Nordic trade mark law can be mentioned as an example. One should also recall the package tours directive³³ and the treatment it has received in each Nordic country, despite the fact that it refers to fields of law perceived traditionally as the core areas of Nordic legal cooperation (contract law, transport law, tort law, and marketing practices law). Here, each Nordic country has gone its own way as regards the implementation of the directive.

It is indeed difficult to explain what has gone so wrong with the Nordic implementation of the EEA legislation. The pressure of time and the large amount of work involved should have been precisely the factors that should have encouraged the Nordic countries to pool and coordinate their resources when designing the alterations in the inter-Nordic laws. That this did not occur must have been caused by the lack of sufficient interest of the parties involved and the absence of leadership.

The implementation work has entered a slower phase now. This will, it is hoped, make it possible to find satisfactory forms of inter-Nordic cooperation for the implementation of directives, especially as regards fields where there is inter-Nordic legislation. One good sign is the fact that after the preliminary talks concerning implementation of the EC directive on unfair terms in consumer contracts, a more or less uniform Nordic policy regarding this matter has been established, which has led to similar implementation of this directive.³⁴

³³ Directive 90/314/EEC.

³⁴ EC directive 93/19 EEC on unfair terms in consumer contracts. See also Swedish Bill 1994/95:17, Bernitz, *Swedish Standard Contracts Law and the EEC Directive on Contract Terms in Enhancing the Legal Position of the European Consumer* (ed. J. Lonbey), London 1997 pp. 188 ff.

In the future, it should be possible for Nordic legal cooperation to apply different models, so that it can be carried out at different levels.³⁵ Three main models can be distinguished in this context:

- the traditional model
- the model of negotiations
- the model of supplementary work and in-depth cooperation in selecte areas

Legal cooperation according to the traditional model means first and foremost collaboration between the Nordic countries, carried out independently of any international commitments. The fact that the scope for such collaboration has diminished, owing to all the work being done within the EU and by other international organisations, nevertheless does not make such efforts impossible; there should still be enough free scope for such initiatives. When seen from the Swedish perspective, my impression is that the legislator's interest has come to focus on smaller law amendments, more easily made, that are to be performed within the framework of the existing legislation, whereas only a limited scope has been left for more comprehensive, long-term projects of legal reforms. I would therefore like to see some new, inter-Nordic legislative projects of some importance; that would certainly be a new, invigorating experience.

Collaboration in the area of negotiation proceedings on matters of legislation conducted at an international level is a time-honoured custom in the North. The existing level of legal unity described previously makes it natural for the Nordic countries to adopt a similar approach towards matters under consideration. In international negotiations a united front means more effectiveness and greater strength. In the present situation, inter-Nordic coordination within the EU is particularly important with regard to questions concerning common Nordic legislation and the topics pertinent to it. We should ask ourselves, however, whether, in practice, this spirit of cooperation is really being put to best use, and whether it is being properly safeguarded.

Nordic legal cooperation can express itself best in complementary collaboration and in-depth studies. The framework of international cooperation within the EU and with other international organisations often leaves enough space for a closer and deeper interaction between the Nordic countries when it comes to the implementation of a project. Even though the position of the EFTA countries Norway and Iceland is different as compared to that of the three EU members, Denmark, Finland and Sweden, this situation should be seen as a challenge rather than as an obstacle. The EEA Agreement presupposes continuous adjustment of the EEA countries to the changes occurring in EC law, in which the Nordic countries could play an important role of a connecting link within the EU.

The relationship between Nordic law and EC law does not concern, however, only the implementation of various specific legal acts, but also a more general question concerning the use of legal sources, which bear on the principles of EC

³⁵ See Sevón, *Nordisk lagstiftning i integrationsperspektiv*, *JuridiskTidskrift*, 1994–95, pp. 668 ff.

law's applicability to Nordic law, the general effect on the application of legal sources and the practice of national courts of law.

Finally, Nordic legal unity is not only a practically determined phenomenon and a question of the technique of legal cooperation. It is based, in principle, on a common legal tradition which forms part of the larger community of culture and social life of the North. It will be a challenge for the future to promote and cultivate this common Nordic legal culture and heritage within the more extensive framework of European cooperation.