

What is Scandinavian Law? Concept, Characteristics, Future

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1	Scandinavian Studies in Law 50 Years	14
2	The Themes of the Article	15
3	Scandinavian or Nordic Law? Terminology and Basic Legal Setting	15
4	The Classification of Scandinavian Law Within the Families of Legal Systems	17
5	The Peak and Decline of Inter-Nordic Legal Cooperation	23
6	The Relation between European Legislation and Scandinavian Legal Cooperation	26
7	Final Conclusions	28

1 Scandinavian Studies in Law 50 Years

Scandinavian Studies in Law published its first volume fifty years ago, in 1957. The founder of the publication and its general editor of the first 24 volumes, until 1980, was Professor Folke Schmidt of Stockholm University, primarily known as a pioneer in labour law and characterized by his strong international orientation and wide interests within the field of jurisprudence. Fifty years ago, little was published on Scandinavian law in non-Nordic languages and the traditionally strong scholarly ties between Scandinavian and German legal science, having had their peak in the decades around 1900, had largely been broken since the 1930:s. In the 1950:s, Folke Schmidt was able to understand, more clearly and earlier than most others, that there was a need to communicate Scandinavian law and legal scholarship, including its values, development and jurisprudential thinking, to the outside world and that English had become the modern language of universal communication.¹ Folke Schmidt was succeeded as editor by Anders Victorin, professor of private law with labour and housing law as specialities and wide interests within comparative law. Anders Victorin, editor 1980 - 1993, was a disciple and close collaborator of Folke Schmidt all the way from student years.

Scandinavian Studies in Law has always been published by the Stockholm Institute of Scandinavian Law, attached to and supported by the Law Faculty of Stockholm University. The Faculty was founded in 1907 and the starting up of Scandinavian Studies in Law in 1957 was an important initiative to manifest the fiftieth anniversary of the Faculty. Likewise, the fiftieth anniversary of Scandinavian Studies in Law in 2007 coincides with the Centennial Jubilee of the Stockholm Law Faculty.

Over the years Scandinavian Studies in Law has been able to establish itself as a leading publication in its field, represented in very many law libraries the world over. Over fifty volumes have been published, this Jubilee Volume being No 50. Until 1993, Scandinavian Studies in Law was published as a yearbook comprising selected articles in different areas of law. From volume 38, onwards, the material in the series is arranged according to topic. The aggregated collection of articles published during these fifty years in Scandinavian Studies in Law constitutes the largest bank of information available in English on Scandinavian Law and Scandinavian legal theory, in all over 650 articles. They are accessible on our website, the first 37 volumes in full text.²

It has been considered appropriate to devote this volume to studies related to a core issue from the viewpoint of the purposes and ambitions of Scandinavian Studies in Law, namely *What is Scandinavian Law?*

1 To this point, see in this Volume Strömholm, S., *The Scandinavians: Reluctant and Enthusiastic Club Members* and Hondius, E., *Pro-active Comparative Law. The Case of Nordic Law*.

2 "sisl.juridicum.su.se".

2 The Themes of the Article

Within comparative law, Scandinavian law (i.e. the law of the five Nordic countries, Denmark, Finland, Iceland, Norway and Sweden) is generally regarded either as a subgroup of civil law or as a legal family of its own. Roman law has never been applied as applicable law in Scandinavia and there has been no full reception of any other foreign legal system. There are no general civil codes of French, German, Austrian or Italian model in the Scandinavian countries and no plans to enact such codes exist. On the other hand, statutory law constitutes the basis in most fields of law.

Since long, there has been close legislative cooperation between the Nordic countries, in particular in core private law areas, such as the law of contracts, sales and torts, but also in, e. g., maritime law and intellectual property law. In jurisprudence and academic legal writing one can discern a kind of Scandinavian school. All this is a reflection within the law of the overall tradition of cooperation between the Nordic states and their common historic, linguistic and cultural heritage.

This being said, it is open to discussion how special Scandinavian law really is. Does it merit a position as a particular group of law? In recent years inter-Scandinavian legislative cooperation has lost most of its former impetus. European law, both in the sense of EU law and the European Convention on Human Rights, is playing an ever growing role and there is a strong international influence in commercial law. In this area, the global and expanding English and American law firms are setting their mark.

The basic theme of this article is to present in short Scandinavian law, its position in a comparative law perspective and some of its basic features. Against this background, I will discuss the relation between the ongoing development of European legislation and Scandinavian law and some of the major Scandinavian concerns in this regard.

3 Scandinavian or Nordic Law? Terminology and Basic Legal Setting

What is really meant by Scandinavian law? The choice of terminology is not given, the alternative being the term Nordic law.

In a strictly geographical sense, Scandinavia means the Scandinavian peninsula, situated between the Atlantic Ocean and the Baltic Sea. In that sense, only Norway and Sweden and the northernmost part of Finland would constitute Scandinavia. However, in a more general sense it is obvious that also Denmark belongs to Scandinavia, albeit the Jutland peninsula forms part of the European mainland. Finland is by history and culture firmly a Nordic country. So are also Iceland and the Faroe islands. Greenland is geographically regarded as part of the American continent but also by history and culture primarily a part of the Nordic region.

This region is most commonly referred to as the Nordic countries and, thus, the term Nordic law would be most appropriate. However, internationally the

term Scandinavian law is most commonly used. It was also the term chosen by Folke Schmidt when founding Scandinavian Studies in Law and I will stick to that term.

As well-known, within the region there are five independent countries: Denmark, Finland, Iceland, Norway and Sweden and three territories with a high degree of internal self-governance: The Faroe Islands, Greenland and the Åland Islands; the first two under Danish sovereignty and the latter under Finnish.

The Nordic countries share a common culture and heritage, based on common democratic and social values, nowadays also the welfare state. It is of importance that the Danish, Norwegian and Swedish languages are so closely related that they are largely understood in the other countries. Swedish is official language in Finland and Swedish is normally understood and many times practiced within the Finnish legal community, albeit Finnish is by far the dominating language. Likewise, Danish is normally understood in Iceland. This has been an important prerequisite for the successful cooperation on legal matters.

From a legal perspective, the Nordic countries and territories can be divided into an East Scandinavian and a West Scandinavian group; the former comprising Finland and Sweden (and the Åland Islands) and the latter Denmark, Iceland, Norway (and the Faroe Islands and Greenland). The explanation is historic.

Sweden and Finland were until 1809 one country with a centralized governmental structure. When Finland was separated from Sweden in 1809 and made a Grand Duchy under Russian rule, it was permitted to keep its legal system (which was fully identical with the Swedish one). Finland succeeded to maintain its legal independence under more than 100 years under the rule of the Russian tsars (until 1918) and the tradition of close legal cooperation with Sweden has largely been maintained.

Norway was from the late middle ages until 1814 in a union with Denmark which was heavily dominated by the Danish kings ruling from Copenhagen, something that brought about a high degree of legal and cultural uniformity between Denmark and Norway. In 1814, Norway declared itself independent but was forced into a looser kind of union with Sweden that lasted until 1905. However, that union had little or no effect on Norwegian law, apart from certain aspects of constitutional law.

Iceland, finally, was under Danish rule and (on the whole) Danish law for many centuries until it declared itself fully independent in 1944. Also modern Icelandic law is normally particularly close to Danish law.

All the Nordic countries have advanced social market economies and a distinct international, free trade orientation. The economy is to a large extent based on a number of large companies working globally. However, as is well-known, the Nordic countries have taken different positions in relation to European integration. Denmark entered the EU in 1973 and Finland and Sweden followed in 1995. In Norway, a slight majority of the voters have rejected EU membership twice (in referenda held in 1972 and 1994), opposing the intentions of the majority of the Norwegian establishment. Norway and Iceland have chosen to stay as EFTA countries within the EEA (European Economic Area) for the time being. The Åland islands joined the EU in 1995 together with the

rest of Finland after having had a referendum of its own. The Faroe Islands and Greenland do not belong to the EU.

The EEA appears to remain a more permanent solution than was first thought. However, Iceland and Norway have to adopt most of the EU directives under the far reaching EEA Agreement, as these normally have a relation to the internal market. In spite of this, Iceland and Norway are kept totally outside the EU institutional framework, the preparation of EU legislation included. It is certainly a problem for the position of Scandinavian law within the larger EU legal cooperation that the Nordic countries cannot form a coherent group. The Norwegian voice is largely missing in the EU legal discourse.

Today, there is a growing and quite important cooperation between the Nordic and the Baltic countries, not least in EU related matters. However, there is no common legal tradition in relation to the latter. It is true that Estonia was under Swedish rule from 1558 – 1721 and most of Latvia (incl. the city of Riga) from approx. 1630 – 1721, but Swedish law was not introduced during that time. In 1721, Estonia and the Swedish parts of Latvia came under Russian rule. Lithuania, on the other hand, has strong historic links to Poland. In the Baltic countries the old Roman/Germanic legal tradition has been predominant and partially able to survive centuries of Russian dominance. It has formed a basis for modern codifications in the independent Baltic republics, e.g. the admirable new Estonian civil code.

4 The Classification of Scandinavian Law Within the Families of Legal Systems

The legal similarity between the Nordic countries is often taken for granted, even though it has been only sparingly analyzed. It has not been subjected, for example, to any extensive or exhaustive analysis from the point of view of comparative law by Scandinavian legal scholars. E.g., to my knowledge not a single doctoral treatise exists dealing with these issues. New scholarly contributions in this area would 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, has played a major role in this context. The centre of attention has 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 similarity between countries is the degree of congruity between the fundamental premises of their legal theory, consistency in the formation of their basic legal concepts, affinity in their methodology of codification, the doctrine of precedent, the working of the courts and the choice of the sources of law. These elements 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, German or French systems, handle equivalent issues. Viewed in this way, the Nordic countries are remarkably similar to each other as

regards the fundamental perception of the legal system, its design, methodology and basic principles.³

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 lawyer might have placed the emphasis somewhat differently on occasion. A similar situation would apply also in relation to Danish or Finnish law. If, on the other hand, a comparative study should be made between Swedish law and the use of legal sources in German, French or English law, important differences would certainly be evident. On the whole, the ease with which legal doctrine is cited and applied cross-boarder within the Nordic countries indicates clearly that their legal similarity is actually quite deep-seated.

In this context it may be interesting to investigate the position of Scandinavian law, as it is perceived in the framework of the division into legal families, which has been developed in the field of comparative law.⁵ On this point, scholars have presented somewhat different views. It should be pointed out from the outset that the classification of legal systems certainly is no exact science, it depends to a high degree on the underlying purposes and what parts of the law which are in focus. Often, most attention has been paid to the core parts of private law, e.g., the law of contracts and torts.

Åke Malmström, a law professor at Uppsala University and Scandinavian pioneer in the field of comparative law, presented a classification of legal systems (*Rättsordningarnas system*) in *Festschrift* in honour of Håkan Nial (1966).⁶ 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.⁷ Like many 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

3 Same opinion, Wilhelmsson, T. *Den nordiska rättsgemenskapen och rättskälleläran*, *Tidsskrift for Rettsvitenskap* (TfR) 1985, pp.181 ff.

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

5 For an overview of the issue, Derlén, M., *A Castle in the Air. The Complexity of the Multilingual Interpretation of European Community Law*, dissertation, Departement of Law, Umeå University, 2007 p 53 ff. See also the article by Ewoud Hondius in this Volume, *Pro-Active Comparative Law: The Case of Nordic Law*.

6 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.

7 Malmström, *op. cit.*, pp. 401 ff.

therefore located at the same level as the latter ones. Thus, Malmström regards the differences between Nordic and Continental Law as more significant than the differences between German and Romanistic law.

In their well-known textbook “An Introduction to Comparative Law”⁸ 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 and other legal families (The Far Eastern legal family, Islamic law, Hindu law)

Zweigert and Kötz share Malmström’s point of view on Scandinavian law and state Nordic law should be seen as a separate legal family on the highest level.⁹ The authors’ motivation is worth citing:

“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.”¹⁰

Zweigert and Kötz suggest yet other reasons 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 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 within the law of obligations. They also mention the Nordic system’s “refreshing lack of dogma”.¹¹

In recent Scandinavian legal writing, the topic of legal classification has been treated, i.a., by Michael Bogdan, professor at Lund University, in his textbook *Komparativ rättskunskap*¹² (Comparative Legal Science). Similarly to Professor Jacob Sundberg of Stockholm University,¹³ Bogdan stresses that

8 Zweigert, K. & Kötz, H., ed. *Introduction to Comparative Law*. 3rd revised ed., Oxford 1998.

9 The same position was taken by Arminjon, P – Nolde, B & Wolff, M, *Traité de droit comparé I*, Paris 1950 p 49 ff. They distinguished between seven legal systems: the French, German, Scandinavian, English, Russian, Islamic and Hindu.

10 Zweigert, K. & Kötz, H., *op. cit.*, p 285.

11 *Op cit* p 41.

12 Bogdan, M. *Komparativ rättskunskap*, 2 ed, Lund 2003 p 82 f.

13 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.

Nordic law belongs primarily to the family of the legal systems of Continental Europe, showing far more similarities to these systems than to those belonging to the common law family. On the other hand, Ditlev Tamm, a Danish professor of legal history, has favoured the view Scandinavian law should be regarded as a separate legal family, pointing at three key factors: the limited importance of legal formalities, the lack of modern codifications and the absence of an actual reception of Roman law.¹⁴

As mentioned, there are no general civil codes in the Nordic countries. The idea of creating a comprehensive code of private law has not been on the agenda for a very long time. In Sweden, a high-quality proposal for such a code, partially inspired by the French Code Civil and prepared during a very long time, finally failed to win the approval of the Swedish Parliament in the midst of the nineteenth century; it was found too modern. Had the code been approved, Swedish and perhaps Scandinavian legal history would have taken another course. At least since the 1880:s no major code project of this type has been on the agenda. The situation in the other Nordic countries is largely similar. After the Second World War, a Danish legal scholar, Professor Fredrik Vinding Kruse presented a proposal of his own for a common Scandinavian Civil Code.¹⁵ However, this project was hardly taken seriously.

For the comparison between Scandinavian law and Continental legal systems the Nordic attitude towards codification is a very important factor. In the Nordic countries there are a number of acts (statutes) on different aspects of private law. Some of these acts cover important, basic parts of the private law but they do not cover all parts of the field and are not intended to be complete. Legal problems which are not covered by a specific statutory provision are often solved by applying by analogy principles expressed in the statutes or by supplementing case law. In the uncodified or only insufficiently codified areas legal doctrine plays an important role. A special feature of Nordic legislation is the importance normally attached to the preparatory legislative material (*travaux préparatoires*) to major statutes. The preparatory legislative material, primarily the Government Bills to Parliament proposing the legislation, often contain detailed explanations of the way the different provisions within the proposed statute are to be understood and interpreted. Normally, the courts are inclined to attach great importance to the interpretations recommended in the preparatory legislative material, although these are never binding in a legal sense.¹⁶ This is particularly so in relation to well-prepared modern statutes. On the other hand, as time goes by preparatory legislative material tends to loose in importance.

There is a special *Contracts Act* in force in all the five Nordic countries as a result of early Scandinavian legislative cooperation, largely uniform. The

14 Tamm, D., *The Nordic Legal Tradition in European Context*, in Letto-Vanamo, P (ed), *Nordisk identitet – Nordisk rätt i europeisk gemenskap*, published by KATTI, Institute for International Economic Law at Helsinki University, 1998 p 15 ff.

15 English version: F Vinding Kruse, *A Nordic Draft Code for Denmark, Finland, Iceland, Norway and Sweden*, Copenhagen 1963. The Danish version was published in 1948.

16 For an explanation in English of the preparatory legislative material as a legal source, see e.g. Vogel, H-H, *Sources of Swedish Law in Bogdan, M. (ed.), Swedish Law in the New Millennium*, Stockholm 2000 p 57 ff.

Contracts Act was drafted in the first decades of the last century and took legal force in Sweden, Denmark and Norway around 1915, in Finland a decade later. There has been only one major revision; the inclusion in the mid 1970s and early 1980s of a general clause (Section 36 of the Act) making it possible to set aside or mitigate unreasonable contract terms, in particular in consumer contracts.¹⁷ However, the Act does not cover all aspects of contract law. The first part deals with formation by offer and acceptance, the second concerns authority to contract and the third is on invalidity of contracts and unfair terms. Other aspects of contract law, e.g. interpretation of contracts, are left to case law. As the Contract Act is quite old and its provisions leave many legal issues unanswered, case law is the primary source of law within the Scandinavian law of contracts.

In the first part of this Volume, Scandinavian contract law is treated primarily in the critical article by Christina Ramberg.¹⁸ It is evident the existing Contracts Acts are outdated, save for the general clause inserted in the 1970s and early 1980s. In Kjell Åke Modéer's contribution, the Contract Act is even characterized as a "dead corpse".¹⁹ However, the contract law as applied by the courts and treated in legal doctrine is still remarkably similar in the five Nordic countries. In a doctoral thesis by Claes-R von Post, a comparative study was made of the application of the new general clause by the courts in Denmark, Finland, Norway and Sweden during the years 1976 – 1999.²⁰ He reaches the well-founded conclusion the application of the general clause has developed very similarly in the four countries. As another example, in a recent, comprehensive treatise by Juri Monokka on Contractual Duty of Loyalty,²¹ this emerging principle of contract law has been studied using much material from the other Nordic countries. Also here, there are no real differences between the legal positions taken in the Nordic countries.

Another act of special importance is the *Sale of Goods Act*. In 1905-07 Sweden, Denmark and Norway had enacted practically identical sale of goods Acts, later enacted also in Finland. This Act was considered a great achievement, was carefully studied in the law schools and widely used by analogy. However, later adjustments to international development, primarily the 1980 *United Nations Convention on International Sales of Goods (CISG)*, have been less successful. This development is described and discussed in Jan Ramberg's article in this Volume, *The Vanishing Scandinavian Sales Law*. While Finland,

17 Bernitz, U., *The General Clause on Unfair Contract Terms and the Protection of the Small Businessman*, in Bernitz, *European Law in Sweden – its Implementation and Role in Market and Consumer Law*, Stockholm 2002 p 241 ff (Faculty of Law, Stockholm University Series of Publications No 70).

18 Ramberg, C., *The Hidden Secrets of Scandinavian Contract Law*.

19 Modéer, K Å., *Harmonization or Separation? Deep Structures in Nordic Legal Cultures*.

20 von Post, Claes-R, *Studier kring 36 § avtalslagen med inriktning på rent kommersiella förhållanden*, Jure AB, Stockholm 1999.

21 Monokka, J, *Kontraktuell lojalitetsplikt*, Stockholm 2007. It may be remarked, Monokka has been able to read and evaluate also the material in the Finnish language. Normally, for language reasons, jurists in the other Nordic countries have to stick to the often rather meagre material on Finnish law available in Swedish.

Norway and Sweden enacted new Sale of Goods Acts around 1990 in order to adjust the domestic sales law regime to the CISG,²² Denmark has kept its old Sale of Goods Act of 1906 in force. As explained by Jan Ramberg, the Nordic states made reservations against the CISG in respect both of the provisions on formation of contract and its applicability to sales between the Nordic countries. In retrospect, both these decisions, taken in order to maintain the existing Scandinavian contract and sales law, are highly questionable. Had the issue come up today for decision, it seems likely the international CISG solutions would have been favoured.²³ However, it was not known in 1990 that Denmark would pull out of the Scandinavian sales law reform work. As Jan Ramberg also points out, neither the decision to introduce in the new sales acts provisions differing from the CISG rules on liability for loss as a consequence of breach of contract (based on a distinction between direct and indirect losses) has become a success. The distinction is much criticized and has not been accepted in the very widespread standard contract forms within business.

There are special *Acts on Torts* (damage laws) in the Nordic countries (in Sweden of 1972).²⁴ In a most interesting article in this Volume Christian von Bar is discussing this field, *Non-Contractual Obligations in the Nordic countries: a European's Perspective*. He comes to the conclusion the Scandinavian law of non-contractual liability for damage shows some distinctive particularities which are only to be found in this legal family.²⁵ I.a., he points at the insurance based solutions and the great emphasis on safeguarding basic risks, doing justice in the particular case and protection of the weak and vulnerable in society. He also notes that from his perspective the legislation is incomplete in different ways and that there is a breath of variation within Scandinavia when it comes to the response to particular problems. All these observations describe well the structure of Scandinavian tort law.

As a complement to the specific acts within the field of private law Scandinavian law also recognizes uncodified general principles of contract law (the law of obligations). These principles follow primarily from case law and have been further explored and refined in legal writing (the doctrine).²⁶ E.g., the principle mentioned on duty to observe loyalty in contractual relations constitutes such an uncodified general principle. As has been observed in von

22 For an overview from the perspective of Swedish law, see, e.g., Hultmark (now Ramberg), *C, Obligations, Contracts and Sales in Swedish law in the New Millenium* p 273 ff.

23 This means, taking Sweden as example, that according to the Swedish 1987 Act on International Sales of Goods, CISG is applicable as law in Sweden, with the exception of Articles 14-24 on Conclusion of contracts, on sales between parties in Sweden and all those non-Scandinavian countries that have ratified the Convention.

24 Overview from Swedish perspective, Bengtsson, B., *Torts and Insurance Law in Swedish Law in the New Millenium* p 299 ff.

25 It is worth noting von Bar leaves Norwegian law complete aside. This is certainly fully explainable from a European Union perspective but strange from the perspective of Scandinavian law. This is a striking example of the Norwegian voice missing in the EU legal discourse owing to Norway's EEA membership.

26 See in particular the article in this Volume by Viggo Hagstrøm, *The Scandinavian Law of Obligations*.

Bar's article, *negotiorum gestio* (management of another's affairs) and unjust enrichment are other examples of uncodified parts of Scandinavian law of obligations.

Thus, case law is an important and partially predominant source of law within Scandinavian private law. However, within commercial law reported case law often tends to be fairly scarce. In practice, legal doctrine, particularly established text-books and commentaries, play an important and much used role as supplementary source of law. In the Nordic countries, commercial disputes are solved by arbitration to a very high degree and, thus, there is a certain drought of commercial law cases decided by the ordinary courts. Arbitration awards are very seldom reported and normally kept secret. In practice, Swedish or other Scandinavian law is often referred to as applicable law in international commercial contracts subject to dispute solving by arbitration. In particular, this is the case in relation to contracts between parties in Western Europe and parties in the former Soviet Union countries and China.

The specific features of Scandinavian law within many other fields of law will not be described in this article but have been described and commented upon in a number of other articles in this Volume, dealing with, i.a., maritime law, labour law, family law, insurance law and governance of the judiciary.²⁷

5 The Peak and Decline of Inter-Nordic Legal Cooperation

Traditionally, the driving force behind Nordic cooperation in the area of law has been a desire to achieve similar, preferably identical legislation in all the Nordic countries in central areas of law.²⁸ The work has been conducted chiefly within the Ministries of Justice of the Nordic Countries, and aimed at bringing about permanent, high-quality statutes. The work has been 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 been given a legal basis, albeit rather vague, in the form of the Helsinki Agreement – the general inter-Nordic agreement on cooperation – signed in 1962.²⁹

27 See, in particular, Gorton, L., *Nordic Law in the Early 21st Century – Maritime Law*, Nielsen, R., *EU Public Procurement Law and Nordic Labour Law – Recent Developments and Future Challenges*, Scherpe, J., *The Nordic Countries in the Vanguard of European Family Law*, Beale, H. & Khanom, H., *What is Scandinavian Law? English Lawyers Look at Swedish and Norwegian Insurance Law*, Bell, J., *Sweden's Contribution to Governance of the Judiciary*.

28 The issues discussed in this section of the article have been treated more fully in Bernitz, U., *Nordic Legislative Cooperation in the New Europe*, 39 *Scandinavian Studies in Law* 2000 p 29 ff. In Scandinavian languages, *Nordiskt lagstiftningsarbete i det nya Europa* (eds Bernitz, U., Wiklund, O.) Stockholm 1996 (Skrifter utgivna av juridiska fakulteten vid Stockholms universitet no. 48).

29 See, on the Helsinki Agreement and information about the Nordic Institutions the website "www.norden.org", click English.

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.

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).³⁰

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 these efforts have normally been 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 vague and it has usually been the interest in the subject matter and the good intentions of all involved that has constituted the pillars of cooperation and brought about the results.

The main result of the Nordic cooperation in the legislative field is the general conformity that has been achieved throughout the years in such areas as sale of goods, instruments of debt, 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 inter-Nordic legal cooperation can be found within family law, maritime law, intellectual property law and company law. In general, the areas chosen for legal cooperation are found among those lying somewhat outside politically sensitive matters, and where new legislation has been expected to be long-lasting. Its guiding spirit has been long-term cooperation in the field of law, weakly bound to specific obligations, but focused rather on the production of common but not necessarily uniform legislation within central legal areas, primarily within the private law.

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

³⁰ Nowadays, this task has largely been overtaken by EU and EEA law, i.e. the Brussels Regulations and the Rome and Lugano Conventions.

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.

Already the 1970s and 1980s marked a decline in Nordic legal cooperation. Eager politicians complained about Nordic legal cooperation procedures being unnecessarily protracted and cumbersome, and staked out each country's right to lead the way, acting as a groundbreaker and pioneer among the Nordic countries. The prime representative of this policy was the Swedish social democratic lawyer and politician Carl Lidbom, a close collaborator to Olof Palme, for many years Sweden's prime minister. As a result, Nordic legal cooperation became less ambitious and far more tolerant towards national deviations. In the 1990s and during this decade the watering-down of the inter-Nordic ambitions in the area of legislative cooperation has become even more visible. The fact that Nordic legal cooperation never has had, and still does not have, any fixed regulatory system, and has been dependent primarily on the good intentions of the responsible legislators within each country, has made this cooperation especially vulnerable.

In this respect, the new Company Acts in the Nordic countries are real low-water marks. In the 1970s, the Nordic countries succeeded to draft and enact company acts which were almost similar and the result of close inter-Nordic legislative cooperation. At that time, this was hailed as a major achievement. However, when it was found to be time for new legislation, the company acts have drifted apart. Denmark has opted for a short legal text, based on political deregulation ideas, while Sweden has opted for an expanded, very comprehensive text, the Company Act of 2005, based on the idea that this would reduce transaction costs. Finland and Norway can be found in between. Thus, on surface, the new Nordic company acts are quite divergent. However, there is still much common ground; looking at the fundamental principles one can still clearly discern also a Scandinavian company law.³¹

Also, even if the inter-Nordic legislative cooperation of today has lost most of its former impetus and is only a shadow of what it once was, there is still much communication and interchange between the ministries in the Nordic countries in legislative matters. There are also very many contacts between the law faculties, inter-Nordic meetings of different law associations, inter-Nordic law journals etc. In summary, the legal similarity between the Nordic countries, when compared with Continental Europe and even more so the common law world, is still well-established and deep-seated.

31 See, e.g., Krüger Andersen, P, *Regulation or Deregulation in European Company Law – A Challenge*, in Bernitz, U. (ed), *Modern Company Law for a European Economy. Ways and Means*, Stockholm 2006 p 263 ff.

6 The Relation between European Legislation and Scandinavian Legal Cooperation

Let us contrast what has been said about Nordic legal cooperation with the system of harmonisation of law within the EU. The differences are striking. The basic aim of the harmonisation of EC law is to promote integration. As is well-known, one of the basic principles laid down in the EC Treaty 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. 3(h). As we also know, 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 internal market requires "a level playing field"; normally Art. 95 EC Treaty is instrumental.

This is a fundamental 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 legislation in the Nordic region, the legal cooperation has not been coupled with an integration objective. On the contrary, legislation concerning areas such as right of establishment or competition has traditionally been excluded from inter-Nordic legal cooperation. Efforts to create an inter-Nordic free trade area were never successful and, as mentioned, the Nordic countries have chosen different types of relation with the EU.

Differences are also evident when looking at working methods and the authority to make decisions. In Nordic legal cooperation there is a complete lack of authority to initiate and coordinate proceedings equivalent to what has been vested in the European Commission. It has never been intended that such a role, even in a modest form, be assigned to the existing inter-Nordic bodies (The Nordic Council and the Nordic Council of Ministers). The provisions of the Helsinki Agreement have never been formally incorporated into national law, and are not applied by the courts. In short, the decision-making mechanisms governing Nordic judicial cooperation are weak, whereas those governing the EC's legislative activity are particularly strong.

As well-known there is an efficient and fast moving legislative machinery in the EU, producing a large number of directives and other legislation to be implemented within a short period of time. This has a great practical impact on the legislative machinery in the Member States. In Sweden, it is estimated that the Ministry of Justice devotes more than half of its working time, allocated to legislative matters, to EU related legislation. Already time constraints makes it difficult to coordinate the implementation process in a satisfactory manner with the other Nordic EU countries.³² In addition, there are clear differences in the implementation techniques used. In some cases, the implementation of the same directive in the different Nordic countries has resulted in differences in the

32 Norway and Iceland implement within the framework of the EEA such directives that are of "EEA relevance", i.e., directives related to the internal market, save the agricultural and fisheries sectors.

statutory text of an existing inter-Nordic statute that are greater than was the case before the implementation. Several consumer law and intellectual property statutes may be mentioned as examples. Generally speaking, Sweden is using a more detailed and time-consuming implementation technique than does Denmark.

The rapidly expanding European legislation and the ambitious European legislative projects in progress present a great challenge for the Nordic countries and their spirit of community in the legal field. 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 cannot 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. 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 like a complementary element of the European cooperation.

However, until rather recently, this has hardly been the prevailing view. 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 was held for a long time Nordic cooperation in the field of law would not be threatened or become restricted to any significant degree by the EEC activities. In this context it was especially emphasized that Nordic cooperation was concentrated on the core areas of law, such as the law of contracts, torts and obligations and family law, whereas the harmonisation of laws in the EEC was aimed primarily at selected topics of limited scope, primarily of a more technical nature.

To give an example, the discussions conducted at the 27th Meeting of Nordic Jurists, taking place in Reykjavik in 1975, exhibited all the typical characteristics of this outlook.³³ Many of the distinguished participants in that conference seemed to be convinced the EEC was going to confine its interests to relatively limited fields, and at the same time there was the unrealistic expectation that the EEC would be willing to actively participate in legislative work of the European countries outside the Community, primarily within the scope of the Council of Europe.

The subject matter came up for discussion again at the Meeting of Nordic Jurists held in Copenhagen in 1993, where a Report was delivered concerning the influence of EC law on the legislation, methodology and application of laws in Scandinavia.³⁴ The reporter advanced a thesis proposing that the significance of the influence of EC law on the fundamentals of Nordic legal culture should not be exaggerated. He pointed out various deficiencies in the EC’s legislative

33 *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.

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

methods, and the incompleteness of the regulatory system of Community secondary law. He held the view EC law would not have any greater effect on the intellectual and ideological structures that constitute Scandinavian law, even though it may cause significant changes in the normative layer.

In my opinion, these views grossly underestimate the importance of the European law of today: its effectiveness, its far-reaching general principles and potential for expansion even in the so called 'central' areas of law. European law is certainly not lacking ambitions. Also, it is stretching over an ever increasing number of legal areas, not least via the creation of "an area of freedom, security and justice" which extends the EU law into the criminal and procedural law.³⁵

Thus, the range of legal fields that are not affected by European cooperation within the EU to any greater degree, and thus can be considered as 'reserved' areas of Nordic legal cooperation, is definitely diminishing. This does not mean, however, that Nordic legal cooperation can be said to have had its day and belongs to the past. It is rather that this cooperation will become increasingly complementary as compared to the wider, more comprehensive scope of progressing European legislation.

7 Final Conclusions

Returning by way of conclusion to the issue of classifying Scandinavian law within the system of legal families, it is my view Scandinavian law is clearly civil law as opposed to common law. Normally, the latter has played little or no role for the development of the legal system in the Nordic countries, albeit in recent time contracts drafted on the basis of English or American law have become more and more common in commercial legal practice. For my part, I would underline in particular the fact that nearly all basic legal concepts used in Scandinavian law are derived from civil law, primarily via German law.³⁶

However, there are good reasons for dividing the main group of civil law countries into smaller subgroups, such as the Romanistic and the Germanic groups, and for considering Scandinavian (Nordic) law as a similarly independent subgroup. On this point, the fact that the Nordic countries lack a general civil code and are using a system of less comprehensive statutes supplemented by analogies from statutory provisions, case law and legal doctrine filling the gaps, is a factor of particular importance. Scandinavian law is characterized by its specific legal method, its mixture of statutory and case law and its, in relation to most continental EU countries, less theoretical and conceptualized approach to legal problems. There exists a Scandinavian legal culture.

35 Article 61 EC Treaty.

36 Ole Lando writes in his article *Scandinavian Law in Practical Implication* in this Volume: "Nordic law is European law. Although the Nordic countries never adopted Roman law as part of the law of the land they received Roman influences, partly through Germany, and they use terms of Roman origin. When a Scandinavian reads a German or French treatise he or she is familiar with most of the terms used."

However, as this article has shown, the idea of Scandinavian law is not only about legislative techniques and concepts. It is based, in principle, on a common legal tradition which forms part of the larger community of common culture and social life of the Nordic countries. Also, as has been illustrated here, Scandinavian law often has its special features when it comes to the solutions chosen and the substantive rules. However, it is practically never uniform. When looking for the details, always necessary in the application of the law, there are quite often notable differences between the exact position of the law on a specific point in the five Nordic countries.

It will certainly be a challenge for the future to keep and cultivate this common Nordic legal culture and heritage within the more extensive framework of rapidly progressing European legislation and case law and, in addition, the strong common law-influence in international commercial law. In my view, it is important Scandinavian legislators and jurists do not take a reactive approach towards these challenges but a proactive. An important issue is what contributions Scandinavian law can make to the ongoing development of the law, in particular within Europe. The flexible, not so doctrinaire approach of Scandinavian law might be found attractive also elsewhere. Also its orientation towards social justice might be attractive. As pointed out by Ewoud Hondius in this volume,³⁷ it is also important that the content of Scandinavian law is made better known to all those who cannot read the original languages. However, in my opinion, a prerequisite for success would be that the Nordic countries find ways to restore a closer legal cooperation. This would not only be the responsibility of the politicians and jurists within the ministries. Much more could be done also within the academic community.

Legal reform has always been on the agenda in the Nordic countries, but by way of gradual, step-by-step development and aiming at achieving modernisation and improvement. Many reforms have had a focus on increased social welfare, e.g. consumer protection or reforms of tort law in order to secure adequate compensation in case of injuries. On the other hand, comprehensive new codes of a general character are not in the agenda. The conclusion can be drawn that the type of European legislative projects which would fit Scandinavian law and the general orientation of the Nordic countries best and be likely to be met with approval are such projects which are able to gain wide international acceptance and have a distinct focus on legal reform for the benefit of the economy and welfare of the citizens. Having explained different features of Scandinavian law, it should be easy to understand for the non-Scandinavians that Scandinavian lawyers normally will take a sceptical attitude towards proposals for broadly framed general codes and the like, which lack a clearly discernable reform focus and primarily are motivated by an alleged need for uniform concepts and rules.³⁸

37 Hondius, E., *Pro-active Comparative Law: The Case of Nordic Law*.

38 Cf the article by Mårten Schultz, *Questioning the Questionnaire: The Unheard Message from Scandinavian Tort Law*, in this Volume.