

Scandinavian Law in Practical Implication: Characteristic Features, Solutions of International Interest, Social Dimension

Ole Lando

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1 The Social Scene and the Theme

The Nordic countries have a common legal tradition and there are a number of Nordic Associations of Lawyers, where common problems are discussed. The Danish, Norwegian and Swedish languages are closely related, and except for the Icelanders and the Finnish speaking Fins each speaks his own language at a Nordic meeting. They read and review books written by their Nordic colleagues. They teach at each others' universities using their own language or a mixture of their own language and the language of the students.

I understand that focus should be on those solutions in Scandinavian law that are characteristic and have practical implications. One such feature is the social dimension of Scandinavian law, the high degree of social security. The very important public assistance aspect of it is public law, which is not my speciality having worked in the field of private law. So I will mostly treat the private law, which, however, also has a social dimension.

2 The Hegemony of European law

If we leave the primitive, the socialist and the religious (Moslem and Hindu) laws out of account, the private laws of the world are Western European in the sense that they have a Western European origin. As *Basil Markesinis* has said: "In the European world one finds the most developed ideas likely to deserve careful study". This holds true of both South and North America and in patrimonial matters (property and obligations) of Chinese and Japanese law, which have been framed after a West European, mostly German model. When the socialist countries began to move towards a market economy in the 1990ies, they adopted the West European solutions in their new laws.

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 a French treatise he or she is familiar with most of the terms used.

The influence of German law has been significant over the years. In the 19th century young Nordic jurists went to the universities of Germany where they listened to and came to read the writings of the German professors. *Julius Lassen*, one of the Danish jurists, wrote in the preface to a text book on the law of obligations published in 1892: "On the whole, the legal science of no other country has surpassed the German one" (*ingen nyere Retsvidenskab i sin Helhed er naaet saa vidt som den tyske*).¹ The way in which the Danes reasoned was and still is similar. I once read a chapter on Danish private international law in a book from 1894 written by the Copenhagen professor *Deuntzer*², who in 1901

1 *Haandbog i Obligationsrettens almindelige Del*, 1892, quoted from *Ditlev Tamm*, *Retsvidenskaben i Danmark*, 1992 198 note 57.

2 *J.H. Deuntzer, Kort Fremstilling af Retssystemets, navnlig Privatrettens almindelige Del*, Copenhagen 1894 pp. 106-109.

became prime minister in Denmark. I discovered that in this chapter *Deuntzer* had translated some pages of the German author *Ludwig von Bar's* book on Private International Law almost word by word.¹³ The translation was well done, but *Deuntzer* did not mention his source. If you had not read *von Bar* you would think that the thoughts expressed in the passages were those of *Deuntzer*. The German legal thinking and style could easily be used in a Danish textbook. Many of our statutes still have strong German influences. In the law of obligations we use German concepts. Also the basic concepts of our criminal law have strong German traits, our laws of civil procedure too. We also have rules and institutions that we have borrowed from French law⁴ and the English common law.⁵

3 The Nordic Peculiarities

However, Nordic law has specific features:

1. One is the fact mentioned above that Roman law never governed in the Nordic countries as it did in great parts of the European continent.

2. Today the Nordic countries have no modern civil code⁶. The idea of making a civil code has been aired on several occasions. In the late 19th century it seemed to have been accepted by the Scandinavian academia to prepare a uniform commercial code, but the Swedish parliament was sceptical, and the idea was abandoned. Nowadays there does not appear to be any sentiment for raising the issue.

This, it is submitted, is regrettable.

The Nordic countries have a substantial number of important statutes. In the field of contracts there is a Nordic Contracts Act dealing with the formation of contracts in general, the authority of agents and invalidity due to mistake, fraud, duress etc. In addition there are Nordic statutes on the sale of goods, insurance, carriage of goods and some other specific contracts. These and several other acts are the result of Nordic co-operation and this is another specific feature. The Nordic are not very litigious. The idea that there should be a '*Kampf ums Recht*', that it is good when people go to court to get justice done, has never appealed to the Northerners. None of the five countries have the experience that a rich case law offers. It is therefore a great help if they can pool their experiences.

3 Ludwig von Bar, *Theorie und Praxis des internationalen Privatrechts*, Vol II, 1889 Vol. II p. 15.

4 The works of Poul Andersen changed Danish administrative law in giving the citizens a better protection against the administration's arbitrariness. Poul Andersen was influenced by French law, notably the case law on the *recours en annulation* of administrative decisions developed by the French *Conseil d'État*, see *Tamm*, op cit 230 f.

5 The Danish Law of Procedure of 1915 introduced orality, the principle of immediacy and 'the day in court' partly under influence of the English common law procedure.

6 Only very few provisions of the Danish and Norwegian Codes, *Danske Lov* (from 1683) and *Norske Lov* (from 1687) and of the Swedish Code of 1734 are still in force.

However, a substantial part of our patrimonial law has remained uncodified. There are no statutes providing general rules on interpretation, implied terms, performance, breach of contracts, hardship and force majeure, stipulation in favour of third parties, set off, substitution of new debtor, suretyship, guarantees, and plurality of parties. Denmark has no statutes on services and mandate in general, lease of movables and gifts.

The Nordic courts have in some cases applied the statutory provisions by way of analogy to issues not codified. The former Nordic Sale of Goods Act enacted in Sweden, Denmark, Norway (in 1905-07) and Iceland (1922) had rules on the effects of the sale of goods, on non-performance and on remedies for non-performance, which included specific performance, termination, withholding of performance, price reduction and damages.⁷ Guided by the writers, the courts have applied its provisions to a number of uncodified specific contracts, and on this basis an important case law has been established. This and other acts have served as a substitute for a code, and one may ask what the advantage of that approach is.

Hitherto Denmark has kept the old Act, whereas Finland, Iceland, Norway and Sweden have enacted a New Uniform Nordic Sale of Goods Act, which has many rules in common with CISG. The new Act has given rise to the problem whether the provisions of the old or the new Act are to be applied to the uncodified contracts by way of analogy. For instance, based on the old Act the debtor's fault (*culpa*) has as a general rule been a requirement for his liability in damages for breach of contract. The new Act introduces strict liability. What shall the courts do now?

In other fields, where no relevant rule can be found in a statute or precedent, the courts often follow the writers, who to some extent are guided by foreign, often German law. It is not always clear from the grounds they give whether the courts do as the Swiss Civil Code art 1 (2) prescribes and some writers recommend, namely to apply the rule the court would have established if it had been the legislator. One gets the impression that without making any attempt to formulate a rule the courts have often rendered the decision they found reasonable in the circumstances. To seek guidance from such a decision as a precedent is not easy.

A lawyer who is called upon to argue or a judge to decide a case on a point of law with which he is not familiar will have difficulties in knowing his way around the vast collection of statutes and the many volumes of law reports. He has to consult the legal literature. The Nordic writers mostly systematise the private law as they do in Germany and other Continental countries. The Nordic countries would profit from a code, which could bring system to the law and add general principles to the law of obligations and movable property, which they badly need.

3. The Nordic Ombudsman is the trustee for the citizen *vis à vis* the state and the local government. He or she is an official appointed by parliament, who is charged with representing the interests of the public by investigating and addressing complaints reported by individual citizens. Many Danes believe that

⁷ The provisions of the Nordic Sales of Goods Act were also applied by the courts of Finland, which only had ancient and outdated statutory rules on sales.

the ombudsman, who was introduced in Denmark in 1955, is a Danish invention. It is not. It was established in Sweden in 1809. It is however true that Stefan Hurwitz, the first Danish ombudsman, was an eager advocate for the institution, and that he helped to make it known outside of Scandinavia. The word *ombudsman* and its specific meaning, Swedish in origin, have since been adopted into English as well as other languages, and *ombudsmen* have been instituted by several governments and organizations such as the EU.

4. A Consumer Ombudsman (CO) acts for the consumer in Denmark, Norway, Finland and Sweden. He or she can take action against misleading advertising and marketing, unfair contract terms and dangerous products. The Swedish Consumer Agency, which the CO leads, has been particularly active in these respects and has proved that an extensive protection of the consumer promotes a healthy market economy.

5. One of the fields of Nordic legal cooperation has been family law. Uniform laws on marriage and divorce and on the effects of marriage, notably the patrimonial regime were enacted in the 1920es. This uniformity has now been partly abandoned. However, the Nordic countries were the forerunners in ensuring equal rights for men and women, equality of legitimate and illegitimate children, and easier access to divorce. Influences are sometimes difficult to trace, but the clear trends in these directions in the laws of the world⁸ may be partly due to the Nordic influence.

6. The Nordic approach to the theory of law is specific.

The Nordic lawyers shy theoretical constructions. Among the jurists we find few who have based their writings on a single dominating global theory. The realist jurists of the 20th century, *Hägerström*, *Ross*, *Hedenius*, *Olivecrona* and others have taught us to see law as a product of the environment, past and present, and to reject all *a priorism*, be it religious or conceptual. Our German friends call us *unbegrifflich*, which does not mean that our law is incomprehensible, but that we are careful in our use of concepts, and that we do not draw conclusions from them.

The story of the *tû tû* is a classic in the Nordic countries. *Tû tû* was invented by *Alf Ross*⁹. In the primitive societies of the *Noitcif* islands, *Ross* said, the *Detnevni*¹⁰ tribe has some taboos. If you have met your mother in law, if you have killed a totem animal, or if you have eaten some of the food reserved for the chief you are seized by an evil magic power called *tû tû*. You are threatened by disaster and you are also unclean. You then have to stay in isolation in one of the *tû tû* huts for a fortnight, and you have to go through various cleaning ceremonies.

Alf Ross used *tû tû* to show that even in our civilized societies legal concepts are believed to have magic power. They are useful concepts, but they only have the meaning given to them by their conditions and their effects. Instead of

8 Boele Woelki, Braut, Summer (eds.) *European Family Law in Action, Volume 1: Grounds for Divorce*, Antwerp 2003.

9 In *Festschrift for Henry Ussing* (1951) p 468 ff, also in 70 *Harvard Law Review* (1956/57) 812 ff.

10 Noitcif and Detnevni spelled backwards are...?

saying: He who has met his mother in law is *tû tû*; when you are *tû tû* you have to go through a cleaning process, you can say; he who has met his mother in law must go through a cleaning process. Instead of saying: he who has bought a house has acquired property; he who has acquired property of the house can sell it or lease its apartments to others, you can say that he who has bought a house can sell it or lease its apartments to others.

The same concept may have different meanings in different contexts. This applies to property. Some laws will prevent the creditors of A who has sold a moveable to B from seizing the movable when the contract has been concluded and the object identified claiming that at that stage “property” has passed to B. The same laws prevent the creditors of C who has bought a movable from D from seizing the movable before it has come into C’s possession claiming that until then “property” has not passed to C. Property is not a unitary concept in these two relationships, because it passes at different stages, or in other words, the time when A’s creditors and C’s creditors can seize the movable when it is sold is different.

The Nordic realism is not far from the American realist school of thought and there are related schools in other countries. The comparatist will inevitably be led to become a realist. As far as I know, *Ernst Rabel* did not mention the realist school, but he shared its results.¹¹ He agreed that there was no need to link the passing of risk in the sale of goods to the passing of property; he rejected the Roman principle of *casus sentit dominus*. Risk in sales should pass when it is economically expedient to let it pass, which is when the seller abandons control of the goods. Rabel adopted the Scandinavian concept of delivery. He could also see that the seller’s “implied guarantee” against defects in goods sold is a fiction.

¹¹ Ernst Rabel, *Das Recht des Warenkaufs*, Berlin I 1935, II 1957.