

Harmonization or Separation? Deep Structures in Nordic Legal Cultures

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Ten years ago Pierre Legrand published his frequently quoted article with the provocative title *European Legal Systems are not Converging*.¹ The thesis he defended in this article was that the legal systems of the member states in the European Union due to their epistemological backgrounds actually were more diverging than converging. Historical and cultural phenomena explained his statement. As long as the legal education, the concept of national law schools, and the professional careers of the lawyers demonstrated such obviously different concepts in the European countries regarding systematization, argumentation and history, as long would also the legal systems in Europe diverge. The different legal cognitive structures are demonstrating a strong contra force to the merging legal system within the European communities.

Pierre Legrand's thesis may be right, questionized or even wrong, but his statement is interesting and important, and it has had an important impact for the discourses and constructs regarding law and jurisprudence in the Nordic countries in the late modernity.

In my view our time, the *late modernity* of the 21st century, is a new time of romanticism to a great extent similar with that of the early 19th century.² Old archetypes of law are rediscovered, contextualization of the law gives new historical and cultural perspectives of law, and deep structures of law are again made visible not only within legal science but also within judicial jurisprudence. The theme of this volume is conforming this statement.

1 Pierre Legrand, *European legal systems are not converging*, 45 *International and Comparative Law Quarterly* (1996), 52 ff.

2 Kjell Å Modéer, *Living ruins of the law*, Från Schlyters Lustgård, vol. 7 (December 2007).

Ulrich Beck has identified the late modernity as “the second modernity” or a “reflexive modernity”.³ He is demonstrating that modernity no longer as in the 20th century is a categorical question of *either – or*. Today it’s a question of *as well – as*. As well law as justice, as well Art. 6 in the European Convention for Human Rights as the national Swedish Procedural Act. Open boundaries have introduced legal pluralism, including poly-centricity and pluralistic value systems.

In the late modernity focus has also shifted focus within comparative law and its traditional emphasize on private law. This tradition can be traced back to the German *pandectists* of the 19th century. Every modern comparative-law construct and each of the famous introductions of comparative law in the post-World War II-period was also related to Western private law. In current late modernity, however, also the geopolitical perspective has changed. After the break-down of the Soviet Union the focus on Scandinavian law has changed into law in the Baltic Sea area. Furthermore, one comparative law discourse is emphasizing that the modern construct of René David of Western legal families is obsolete,⁴ and postcolonial theories have identified quite new legal constructs which not any longer are related to the traditional functional and rule-orientated comparative law within the modernity. Instead constructs like legal cultures and legal traditions are used in a new way which help the global lawyer to identify late modern law with help of traditions and historical argumentation.

Shift of focus has at the same time resulted in a crisis of jurisprudence. This crisis is to a great extent related to the narrow-minded pragmatic jurisprudence which dominated the later part of the 20th century and which e.g. gave the preparatory work of the legislation such a dominating role in the Scandinavian countries. It’s however important to emphasize that the judicial application of the broader aims of the legislation, *die Motiven*, became a topic for the Scandinavian law journals already in the 19th century. It started an implementation of the views of the legislator in the Scandinavian courtrooms which has led to a specific tradition and a deep structure of the legal culture. This nation-state related tradition is, as all of us know, threatened in current transparent Europe.

There is no tradition regarding federalism in the Nordic countries. All five Nordic countries are autonomous nation-states with a constitution, in Denmark and Norway, the West Nordic countries, emanating from the idealistic liberal era of the 19th century, in the East-Nordic countries Sweden and Finland more modern and welfare-state orientated constitutions from the 20th century. In that respect there is a division regarding the deep structures in constitutional law, which is made visible within the role of the judiciary, its views regarding independence and the relations between law and politics in these countries.

In post-war Europe constitutions were looked upon as an important part of the national identity. Sweden, in that respect, – to compare with other Nordic

3 Ulrich Beck, *Entgrenzung und Entscheidung: Was ist neu an der Theorie reflexiver Modernisierung?* Suhrkamp Taschenbuch: Frankfurt/Main 2004.

4 Hein Kötz, *Abschied von der Rechtskreislehre?*, *Zeitschrift für Europäisches Privatrecht* 1998, 493 ff. – Jaakko Husa, *Legal Families and Research in Comparative Law*, *Global Jurist Advances*: Vol. 1 : Iss. 3 (2001), Article 4.

countries especially Norway – demonstrates an obvious lack of constitutional consciousness. Constitutional culture as identified with help of concepts like fundamental values, civil religion, and constitutional faith is not regarded as a vivid discourse within Swedish constitutional law. Within the field of comparative constitutional law, however, these concepts have been very important. Especially in post-colonial countries comparative constitutional law has developed into an increasingly important academic discipline.

The erosion of the legal institutions – and even their values – in the strong Nordic nation-states is an effect of the new relationships to supranational entities like the European Council, the European Union, and to discourses on transnationality and globalization.

Harmonization is not any longer a topic within Nordic legislation. The current harmonization and merging projects are instead important in relation to the contemporary European project. The contra force of divergence, however, is also legitimized with help of the Maastricht treaty and its clause about respect for the member-states' language, culture and history. European and national legal identities are consciously diverging. It's again with Ulrich Beck not *either – or*, it's *as well – as*.

Another jurisprudential aspect of the late modernity is related to legal customs and customary law. Historically there were different aspects on customary law as a legal source in the Nordic countries, e.g. Norway and Sweden. In Per Augdahls classical work on Legal sources, *Rettskilder*, there was a substantial chapter on customs and customary law.⁵ In comparable works on Swedish legal sources, customary law got a very rudimentary description.⁶ In a nation state in which assimilation of foreign ethnic groups into the nation-state was the main policy, their customs were regarded as peripheral, but in our late modern society, where immigrants and other new citizens – also with visible religious symbols – have to be integrated into the society, customary law has become an important part of their legal identity. The Sami's different legal positions in Norway and Sweden can be mentioned as one example. Norway has ratified the ILO Convention nr 169 regarding ethnic minorities, Sweden has not. The Supreme Court in Norway has had a more open evaluation of customary law arguments, which also has resulted in a more positive attitude to ethnic minority rights than what Swedish courts have made in similar cases. The modern Swedish position that only customs which are legitimized by the legislator are regarded as valid law, have created a dilemma for the Swedish judges.

A third legal source involved in this crisis of jurisprudence is the international public law. Scandinavian legal realists (like Östen Undén) looked upon international public law as a sort of natural law. The Swedish negative attitudes in the 1950's regarding the European Convention for Human Rights are well documented in the auto-biographies by leading Swedish diplomats like Lennart Petri⁷ and Stig Ramel.⁸ In that respect there is a quite different deep

5 Per Augdahl: *Rettskilder*, 3. ed., Aschehoug & Co.: Oslo 1973.

6 Stig Strömholm, *Rätt, rättskällor och rättstillämpning : en lärobok i allmän rättslära*, 5th ed., Norstedts Förlag: Stockholm 1996.

7 Lennart Petri, *Sverige i stora världen. Minnen & reflexioner från 40 års diplomattjänst*, Stockholm 1996, 241 f.

structure in the Norwegian relation to human rights articulated by Frede Castberg⁹ and Carsten Smith¹⁰ as illuminating examples. The Swedish Supreme Court's argumentation in the freedom of speech decision in November 2005 regarding the Baptist priest Åke Green and the implementation of Art. 9 in the ECHR regarding religious freedom also clearly demonstrated the conflict between traditional national jurisdiction and the supra-national one.

My point is that to be able to find the legal identities in the Nordic countries of today we have to rewrite the Nordic legal history. We have to expand the modern concept of legal sources, which was reduced by the black-letter dogmatics of the 20th century, and we have to conquer these sources from other disciplines of law. If international public law 30 years ago was regarded as politics and even "natural law", constitutional law was regarded as part of politics and political theory and to a great extent taken over by political scientists. The crisis of Scandinavian jurisprudence has to be solved by *retraditionalization*¹¹ and by an expansion of the legal sources of the 20th century. Not *either – or*, but *as well – as!*

Interestingly enough the arenas on which the Scandinavian law today is discussed are also changing. During the modernity the harmonization of the legislation in the Nordic countries had priority. In this respect the regular Nordic Convention of Jurists, *Nordiska Juristmötet*, since 1872 convening every third year in the Nordic capitols, in this respect has played an important role. Today this type of harmonization has diminished.

The 1970's introduced a new attitude to harmonization and universalism of Nordic legal relations. The World War II created new identities within the Nordic countries. In the post-war period Sweden as a so called "neutral" country started out with a strong economy and constructed strong regulative welfare-programs. The other Nordic countries had, due to their experiences of the war, other relationships to concepts like human rights. There was e.g. a generation of jurists which kept the traditionally idealistic dream of a harmonized and unified Nordic legislation. When this generation began to step down from their positions around 1970 a new generation without any emotional relations regarding World War II took office. This younger generation were more sceptical to harmonization and to consensus of Nordic law.

Since 1972, when Sweden at this centenary convention of Nordic jurists in Helsinki declared its intention to speed up its own legislative reform and aim to leave the harmonization project, there has been an increasingly visible tension between traditionalists and reformers regarding Nordic legal cooperation. Denmark became a member of the European communities in 1973. In 1994 after referenda in Finland and Sweden those countries applied for membership within

8 Stig Ramel, *Pojken i dörren*, Atlantis Förlag: Stockholm 1994.

9 Frede Castberg, *European Convention on Human Rights*, Oceana Publications: New York 1974.

10 Carsten & Lucy Smith, *Norsk rett og folkeretten*, Oslo 1982, 225 ff. – Carsten Smith, *Loven og livet*, Oslo 1996.

11 Rebecca R. French, *Lamas, Oracles, Channels, and the Law: Reconsidering Religion and Social Theory*, 10 *Yale Journal of Law & Humanities* (1998), 505 ff.

the European Union; Norway and Iceland remained (and still are) outsiders in that respect. This diversion within the Nordic legal family visualized the separation – not necessarily the divorce – in relation to the traditional project of harmonization.

European Union and its legislative activities have taken over the aims to harmonize the Nordic legislation. Several of the Acts adopted in the Nordic countries as a part of Nordic harmonization are also – due to the Europeanization increasingly obsolete. The results of the harmonization of Scandinavian law during the 20th century are nowadays continuously evaluated. The Nordic Contract Act 1915 is today more or less regarded as a dead corpse.¹²

The most interesting work within current Nordic law is from my perspective the ongoing networking among young legal scholars in the Nordic countries. In almost every legal field there are regular meetings between graduate students and their supervisors in the Nordic countries, sponsored by Nordic research organizations. The Nordic legal historians have such a regular network which makes it possible for them to not only to discuss the topic of their ph.d.work but also to construct net-works for the future.¹³

Another network about law, ethics and religion has developed the field of Law and religion in the traditionally secularized Nordic countries with help of annual seminars e.g. regarding religious freedom in the Nordic countries. Two annual seminars on the following topics; legal ruins of the law and the legal pilgrimage are planned for 2008.

A scientific Nordic project in Scandinavian legal history titled *Nordic Legal Maps in Transition* started in 2005 and is now starting its third year. Its first symposium, was an oral history seminar on the impacts of “1968 – and afterwards” and the critical schools within Nordic legal science. It initiated an interesting discourse on the remains and remnants of this political and post-modern event. Sociology of law, Law and Society, was identified as one important expansion of the legal discourses from that period of time.¹⁴

In sum: 1968 broke up the homogenous positivistic and legal realist-orientated school within Nordic law. From that period there was a conflict in Nordic jurisprudence. This conflict, the critical jurisprudence vs. “main stream”, today has been converted into a more constructualist movement in which Nordic legal science more are interested in differences than in similarities. Today we more identify “mixed legal systems”¹⁵ than “legal families”.¹⁶

12 Cristina Ramberg, *The Hidden Secrets of Scandinavian Contract Law*, Scandinavian Studies in Law, Vol. 50, Stockholm 2007, xxx; *Makten över avtalsrätten*, Festskrift to Axel Adlercreutz, Lund 2007.

13 *Legal history on the edge of Europe: Nordic law in the European legal community 1000-2000 A.D.* (REUNA),”www.helsinki.fi/project/reuna/svenska.html”.

14 *Nordens rättsliga kartor i förändring.* ”www.jur.lu.se/internet/forskning/nordenkartor.nsf”.

15 Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: Tradition Today*, Oxford University Press: Oxford 2001.

16 Jaakko Husa, *Legal Families and Research in Comparative Law*, Global Jurist Advances: Vol. 1 : Iss. 3 (2001), Article 4.

In 1975 Morton Horwitz at Harvard started a quite new direction within American legal history. He demonstrated in his nowadays classical work *Transformation of American Law* that the U.S. law always had developed in conflict and not in consensus.¹⁷ This perspective is also fruitful if we are applying it on Scandinavian law since the 1970's. The Romanicism of the law in our late modernity is also a construct in conflict, a visible conflict between diverging histories, cultures, and traditions on one hand and the ongoing “mainstream” tradition from the modernity of the 20th century. This conflict is as such a good example of the *as well – as* model.

17 Horwitz, M., *The Transformation of American Law, 1780 – 1860*, Harvard University Press: Cambridge/Mass. 1977, – *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford Paperbacks) Oxford University Press: New York 1994. – *Review Symposium on the 25th Anniversary of Horwitz' Transformation I*, Law and Social Inquiry, vol 28 (2003).