

The Scandinavian Law of Obligations

Viggo Hagstrøm

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1 Introduction

The Scandinavian law of contract and obligations is the result of several centuries of development where the seeds of a unity of legal interest were seen to emerge from at least the middle of the 19th century. The period was witness to an extensive exchange of ideas and, somewhat later, formalized legal cooperation aimed at achieving legal unity. With a common Scandinavian law of obligations, case law and theory from the other Scandinavian countries had to be largely equated with internal, national sources of law. As a result, the small Scandinavian legal communities gained access to material and ideas that would otherwise have been impossible to achieve at national level.

2 Development of the Fundamental Concepts of the Law of Obligations

If there should be given an overall characterization of the law of obligations of our countries, it would be to say that it has developed in an interaction between case law, legal science and legislation. Consequently, the law of obligations has evolved into a down-to-earth, problem-oriented discipline, free of speculative abstractions. The field has been sufficiently open as to enable the uptake of external impulses, for example from German law, but in such a way that foreign ideas have been adjusted to our legal culture. In this respect, legal science has been instrumental in processing case law and legislation, and thereby developing the formation of concepts, often inspired by the major legal systems of Europe.

In the beginning, it could be said that legal science was the discipline that played the leading role in developing the law of obligations. As we know, none of the Scandinavian countries adopted a civil code during the 19th century similar to other continental European codes. However, Section 94 of the Norwegian Constitution of 1814 did provide that “measures should be taken for the issue of a new general civil and penal code at the first, or failing this, the second ordinary Storting (national assembly).” By 1842 a penal code was in place, but nothing ever came of a civil code.

For Norway, this meant that although the union with Denmark had been dissolved, civil law continued to rest on a joint Dano-Norwegian foundation for quite some time - in fact until joint Scandinavian cooperation in the field of the law of obligations produced new legislation. Hence it was to Denmark Norwegian lawyers would primarily turn when the young nation’s law of obligations was to be described. And this joint Dano-Norwegian foundation was Ørsted’s extensive literary work.

Anders Sandøe Ørsted (1778-1860) could be said to represent an early form of Scandinavian realism. It has also been claimed that Ørsted was a legal pragmatist who was strongly problem-, experience- and consequence-oriented, whereby legal science should be called on to address the problems that the law and lawyers faced in society. This was the attitude that served as the point of departure for Danish and Norwegian legal science in its process of establishing the fundamental concepts of the law of obligations.

In Norway, the law of obligations became one of the first academic disciplines to be founded on systematic presentation, with a strong emphasis on the formation of concepts, already manifested in the first collective account of the law of obligations by Fr. Hallager (1816-1876). In the years 1841-44, he gave as a young man lectures on the law of obligations which were subsequently published. Even though Hallager's work was strongly dependent on Ørsted's many monographs, he presented the material in a clear and straightforward system. And it was indeed an overall presentation he provided, which he tried to root in case law. The text is distinguished by its pragmatic simplicity.

Thus the foundations were laid, and these writings were subsequently followed up by L.M. Aubert in a new edition in 1879. In the preamble, Aubert himself stated that the publication had failed to sufficiently reflect developments in German legal science since Ørsted.

Other ideals were, in fact, in the process of taking over the legal arena. In the very first edition of *Tidskrift for Rettsvitenskap* (Journal of Legal Science) in 1888, Francis Hagerup published his article "Nogle Ord om den nyere Retsvidenskabs Karakter" (A short commentary of the nature of the modern legal science). This heralded an entirely new move in relation to the Ørsted tradition - the academic approach to the discipline was now no longer to simply seek to be a theory on legal knowledge, but a legal science involving all the requirements that this would entail. Hagerup compared the mission of the legal scientist to that of the natural scientist: "*Once it has been possible to trace legal principles back to certain general concepts, the task ahead must be to examine the reciprocal relationship of these concepts, in much the same way as a chemist would do when examining the properties and affinities of chemical elements and thereafter arrange them in a system of genera and species based on their logical relationship*" (TfR 1888 p. 23). Inspired by German theory, he introduced the "constructive method", one of whose principal purposes was the development of concepts and systematic thinking.

Hagerup's primary contribution happened to fall outside the law of obligations. The constructive school of thought later became the object of considerable – and exaggerated – criticism. There is little doubt that the very method of the law of obligations, which is based on syntheses of legal rules and case law, on the basis of which it seeks to establish principles and concepts, is an important legacy of the historical school and of pandect science. It brought valuable impulses into the Scandinavian law of obligations, both in terms of concept formation and in terms of the requirement of comparative research. It is this method, in combination with a pragmatic problem-oriented approach in keeping with the Ørsted tradition, that has moved the law of obligations many important steps forward. But it was primarily others than Hagerup who came to erect the structure that the law of obligations in Scandinavia came to represent, and did so without any special doctrinaire foundation.

If I were to pinpoint one single publication that has had a strong impact on practical law as well as on legal science, it would have to be Julius Lassen's Handbook on the Law of Obligations – General Part. This great work was completed as early as in 1892 and it covered, at the same time, all Danish practice of any significance - Fredrik Stang himself wrote in Julius Lassen's obituary that the Handbook "*gradually became a critical register of the entire*

body of Danish judgments ...”, placed all the material in a comparative context and implemented “*the logical separation and division of the material and the synthetic joining of the grand and impressive spiritual structure, that his handbook represents*”(TfR 1921 p. 444 and p. 446).

With this publication Scandinavian legislative cooperation also found itself equipped with a solid frame of reference. And, as we know, it was the legislators who laid the foundations for all further development of the law of obligations. Scandinavian legal cooperation was initiated by the first Scandinavian meeting of lawyers in Copenhagen in 1872, a true-born child of Scandinavism. A fruit of which was the common Scandinavian sale of goods acts of 1905-107. They could hardly be characterized as purely domestic products. They were more of a successful conversion and simplification of foreign rules drawn from the major legal systems, chiefly from German, French and English law. The laws were pragmatic – involving the use of simple concepts. With their sober problem-oriented approach, their rules were well-suited to trading activities in Scandinavia of the times, which were largely dominated by commodities trading. Furthermore, the Scandinavian sales of goods acts, despite their modest preparatory works, found themselves the object of thorough theoretical review, shortly after the adoption of the Swedish act, in Tore Almén’s comprehensive and comparatively based commentary (1906-1908). This commentary came to form one of the cornerstones of practical and theoretical law in Scandinavia.

Thereafter followed the common Scandinavian acts on the formation of contracts (1915-1918). It should be added, however, that contract law in Scandinavia came to evolve largely independently of this act.

The foundations were now laid for a general law of obligations. The formation of contracts acts applied to the full scope of application of the law of obligations, and the sale of goods act (1905-07) was from early on regarded as a bearer of general principles of the law of obligations. The law of obligations was further developed by the interactions of the relevant legislation, case law and theory. There can be little doubt that this theory came to play an instrumental role in further developments.

In Norway, Fredrik Stang took over in 1897 - only 30 years old - the professorship “with a specific obligation to lecture on the Norwegian law of obligations in force”. Stang gave lectures on the Norwegian Law of Obligations – General Part during the autumn of 1900 and spring of 1901. The lectures were published in a report for the first time in 1902. For some 40 years the report represented the most important basis for the study of law in Norway and had a strong influence on prevailing thought in this field of law. By comparison with Hallager and Aubert, Stang’s presentation was radically modern. Lassen’s Handbook had undoubtedly served as an important source of inspiration. Unfortunately, nothing came of a general law of obligations from Stang’s hand. Stang’s primary contribution came in the field of the law of contracts and damages, with his two important monographs “An introduction to the law of obligation and property” (1911) and “Liability for damages” (1919).

The man who more than anyone came to command this field of law, not only in his home country, but probably just as much in Norway, and presumably also in Sweden to much the same extent, was Henry Ussing (1886-1954). When

Henry Ussing published “Danish Law of Obligations – General Part” in 1937 this book and its later editions were just as prized in Norway as in Denmark. For generations of Norwegian lawyers, Ussing was looked upon almost as a Norwegian. Early on, Ussing had introduced the doctrine of “Contractual Assumptions” (1918), inspired by German law, but with a practical problem-solving approach. It quickly gained support in court decisions also outside Denmark, and is still being considered by courts in Scandinavia on a par with rules of law.

The interaction established between case law and theory continued in post-war years with new editions of Ussing’s works and, as far as Norway was concerned, with the 1st edition of Per Augdahl’s “The Norwegian Law of Obligations – General Part”, published 1953. It remained a classical publication for all of 50 years. In Sweden Knut Rodhe’s “Law of Obligations” (1956) stood out; despite its somewhat complicated systematics, it is still a work of considerable interest both for theory and practice.

Further developments should be known to all – the Law of Obligations has been maintained as an academic discipline until the present time, at least in Denmark and Norway. In Sweden the discipline has been met with certain scepticism, because Swedish legislation on the law of obligations has created a divided picture. All the same, Jan Hellner, for example, goes quite far in his “Law of Contracts II” (1996) in analyzing general topics.

At the global level, it well known that the adoption of the UN Convention on the International Sale of Goods (CISG) entails no real break with the common Scandinavian law of sales from 1905-07. When standardizing work came under way under the auspices of UNIDROIT before World War II, the Scandinavian law of sales was already recognized as a successful, pragmatic transformation of more complex rules from the major European systems. At Ernst Rabel’s initiative Almén’s comprehensive commentary of the sale of goods act had been published in translation in Germany as early as 1922. As a result, the Scandinavian law of sales came to influence quite significantly international work in this area. The CISG has achieved considerable success, is widely accepted and has been an important supplier of terms for the two projects dealing with the law of obligations, UNIDROIT Principles of International Commercial Contracts (1994) and Principles of European Contract Law (PECL). Like CISG, the concepts used and the formulation of rules are quite similar to those of Scandinavian law.

For Norwegian law, the implementation of the CISG in the form of the *Sale of Goods Act* of 13 May 1988 No. 27, which applies to national and international sales alike, has consequently counteracted a tendency toward the splitting up and fragmentation of the law of obligations. At the same time, newer and more comprehensive legislation has emerged with the Sale of Goods Act as its yardstick. In connection with the reforms of the law of obligations that have taken place since 1988, the Sale of Goods Act has been instrumental in providing a structure, partly even serving as a direct model. In this way, the general law of obligations can be said to have recaptured its position through legislation. In Norway, we have in many ways developed CISG-based, modern contract legislation and, as a result, UNIDROIT principles and the PECL have

become fairly important sources also of Norwegian national law. The situation is probably not quite the same in the other Scandinavian countries.

3 Future of Scandinavian Law of Obligations

While the developments I have described so far would suggest that the Scandinavian law of obligations should have consolidated its position, it must be recognized that it is today under considerable pressure, particularly from the Anglo-American legal tradition. This is reflected not only in USA's dominant position in economic and cultural life, but even more so in increased globalization. One clear trend is that contracts are increasingly being drafted in English, with the use of English legal terms, even between contractual parties domiciled in Scandinavia. Another sign of the times is the use of Anglo-American models in contract practice.

Consequently, we are faced with an apparent paradox. On the one hand, we have disciplines strongly rooted in history, whose fundamental concepts have developed in an interaction between legislation, case law and theory, and, on the other hand, we are seeing a trend in contract practice throughout all of Scandinavia where traditional concepts are being abandoned and substituted with Anglo-American contract models.

The question then arises whether there have been developments internationally warranting this kind of abandonment of Scandinavian concepts of law of obligations.

Internationally, developments can be described partly on the global level, partly on a community level within the EU. In my opinion, there have been no movements in either of these areas suggesting that Scandinavian concepts have become obsolete – quite to the contrary. The CISG, UNIDROIT Principles and PECL are, as I have already pointed out, very close to our own legal traditions.

Nor do developments within the EU appear to signal that our basic concepts will be put under pressure. The EU Directive on the sale of consumer goods (99/44 EF) is closely linked to the CISG and does not therefore entail any reshuffling of concepts. The European Commission's communication of July 2001 on the European law of contracts, which in reality entails a very radical harmonization of not only the law of obligations but also of the law of property, still faces a very uncertain outcome.

The Study Group on a European Civil Code is one of the most ambitious projects taking part in the drawing up of what is called "the academic Common Frame of Reference". Interestingly enough the Study Group has based its project on the foundations of the PECL. There appears to be broad acceptance for the PECL, and if the PECL becomes an integrated part of the Common Frame of Reference, Scandinavian basic principles in the fields of law of obligations and contract will be significantly strengthened.

4 Conclusion

It is too early to draw any final conclusion – the jury is still out and discussions are still ongoing. Nevertheless, I believe that the fundamental concepts of our law of obligations constitute an important part of our cultural heritage. They have withstood the tests of time and are worth defending.