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European Harmonisation of Civil Law from a Nordic Perspective

1. A Nordic perspective?

According to the title of my paper, I am supposed to provide a Nordic perspective on European harmonisation of civil law. I am sorry to disappoint you — such a promise is impossible to fulfil. The ongoing discussion in the Nordic countries shows almost as many perspectives as there are speakers.*¹ Opinions differ strongly, with some being critical and others enthusiastic. I can only offer you my personal views and perhaps feel a bit sorry for my colleagues who are not presenting their views here.

2. Legal transplants

Let me begin from a less controversial angle, with some historical facts. Here I will take Finland as an example: a small, rather young nation on the periphery of Europe. In many ways, we in Finland share our history with our neighbours: the Scandinavian countries, Estonia, and Russia. For more than 700 years, until 1809, Finland was a part of Sweden, and the intellectual heritage of this time is still strong in our legal

¹ Some recent examples are C. von Bar. A Civil Code for Europe. – *Juridisk Tidskrift (JT)* 2001/2, pp. 3–14; U. Bernitz. En europeisk civillag? — aktuell utveckling och svensk hållning. – *JT* 2003–2004, pp. 503–521; E. Eftestøl-Wilhelmsson, T. Wilhelmsson. Att använda *acquis communautaire* som källa vid utformningen av en europeisk kontraktsrätt. – *Juridiska föreningens tidskrift (JFT)* 2005, pp. 434–451; T. Håstad. Inför en europeisk sakrätt — några principfrågor. – *JT* 2002/3, pp. 745–777; T. Håstad. En europeisk civillag och den nordiska kontraktsrätten, *Nordiska jurismötets förhandlingar i Helsingfors*. Bd I. 2002, pp. 341–366; O. Lando. European Contract Law in the 21st Century. – *JFT* 2005, pp. 560–571; D. Michalsen. Hvad er 'europeisk rettskultur'? *Tidskrift for Rettsvitenskap* 2004, pp. 20–49; C. Ramberg. Mot en gemensam europeisk civillagstiftning. – *Svensk Juristtidning* 2004, pp. 459–474; L. Sisula-Tulokas. To be or not to be — harmonisering av den europeiska avtalsrätten. – *JFT* 2001, pp. 708–720; and T. Wilhelmsson. En EU-kontraktsrätt eller en europeisk experimentell rätt? Ett nordiskt svar. – *JFT* 2001, pp. 736–753.

² This was probably around 1530. See, e.g., P. Letto-Vanamo. *Internationella idéer och nationella realiteter*. Helsinki: Festskrift till Lars Björne 2004, pp. 117–120; J. Tontti. Some general rules that a judge should closely abide by. *Associations* 2000, pp. 113–128; and L. Sisula-Tulokas (ed.). *Twenty Cases from the Finnish Supreme Court*. Helsinki 2001, p. 11.

culture. One of the real pearls of our common legal tradition is Olaus Petri's Guidelines to the Judges, dating back to the beginning of the 16th century.*² We still print these guidelines on the first pages of Swedish and Finnish law books. They contain elements from the old Roman law, from Jewish legal tradition, and from *ius commune*, as well as German and Swedish (Germanic-family) traditions. They provide a true mixture of legal transplants and local tradition. The rule that is my personal favourite is number 9:

What is not just and fair cannot be law either, for it is on account of the fairness that dwells in the law that the law is accepted.

From 1809 until our independence in 1917, Finland had an autonomous position as a grand duchy in connection with Russia. Even in the Russian era, we had our own parliament, a separate currency, and our own legal institutions. The old Swedish laws were still followed. In many of the new Finnish laws from those days one can trace a strong European influence. One of the most obvious examples is the Maritime Code of 1875, which replaced the old code from 1667, originally written by a Dutchman living in Stockholm. The new Finnish Maritime Code was firmly anchored in the new Swedish, Norwegian, German, and Russian legislation.

Since our independence, we have behaved more or less in the same way: we have been borrowing ideas from here and there, albeit mostly from Sweden and the other Nordic countries. For instance, we managed many decades without a Sales of Goods Act because we used the Scandinavian Sales Act and called it trade usage. To put it bluntly, throughout our legal history we have never been afraid of stealing ideas, of using legal transplants, whenever suitable.

3. More or less organised co-operation

At the same time, however, another characteristic feature of the Nordic legal culture is a more or less organised co-operation between our countries. It all began with the first Nordic Lawyers' Meetings in 1876. Since then, these meetings have been held regularly. Today, they are huge social happenings where about a thousand lawyers congregate. These meetings still strengthen the feeling of belongingness, as in the very beginning.

At the meeting in 1948, the Danish professor Fr. Vinding Kruse presented his first draft of a Nordic civil code, which gave rise to much discussion. He presented his second draft in 1962. The draft covered many of the same subjects that the Study Group has been working with but also addressed family and inheritance law. The code consisted of almost 1,500 articles.*³ We all know that these drafts never led to a common Nordic civil code.

As a result of the long-standing Nordic co-operation, many of our basic legal acts, especially within civil law, are more or less common. Take, for instance the Contracts Act, the Sales of Goods Act, the Tort Liability Act, and so on, and so on... They are Nordic but, of course, strongly influenced by European law. The 90-year-old Contracts Act serves as a good illustration. The great Nordic scholars behind the act openly borrowed ideas from French, German, English, Swiss, and Hungarian law. The Contracts Act is also an example of Nordic co-operation at its best.

But the co-operation has not always been a walk in the park. For instance, the much younger Nordic Sales of Goods Act, from the 1980s, illustrates less successful co-operation. The Swedish and Finnish acts are identical, as is also the Norwegian act in substance*⁴, while Denmark never accepted the new act. They still have the old Sales Act from 1906.

Our new sales acts follow closely the CISG, but they are not merely simplified versions of the convention meant for internal use. We have also added some special Nordic features. Some of these have been heavily criticised, and rightly so, but I will not go into that.

The fate of the CISG reveals something of the Nordic soul, I am afraid. Proud of our Nordic legal tradition, our countries made two reservations as to the application of the convention. According to the first one, we do not apply the CISG in sales between the Nordic countries, even if these sales no doubt are international in nature. Instead, we each use our respective Nordic Sales Act*⁵, despite the fact that one of them, the Danish, strongly differs from the rest. But it does not stop here. According to reservation number two, the Nordic countries do not apply CISG Part II, the part dealing with the formation of a contract.*⁶ Instead, we apply our

³ Fr. Vinding Kruse. *En Nordisk Lovbog*. 2. udg. Copenhagen 1962.

⁴ In Norway, the CISG is integrated — in a translated and, in some respects, rewritten form — into the Sales of Goods Act. This act contains provisions concerning consumer sales also.

⁵ CISG, article 94.

⁶ CISG, article 92.

old Contracts Act. It is fortunate that the old act does not differ very much from the CISG. In fact, one has to be an expert to know the differences among the systems. My point here is that the Nordic countries nourish the idea, the feeling, that we are a little bit special: we have a common legal heritage and culture, and we just love it.

The success of Nordic legal co-operation is said to be based on common legal values, not, as in the EU, on common legal goals.⁷ It has been based on free will, not dictated from above. In the end, each country has felt free to accept the results as they stand, to accept them only partly, or to reject them. The Nordic approach has, at the same time, been practical. For small countries, co-operation saves resources on many levels, beginning with the law-making process. It is a well-known secret that we Finns very closely study the developments in Sweden. There are voices saying that we often copy the Swedes. That is, of course, not true, but now and then it happens that we make use of our neighbour's mostly well-prepared groundwork (*travaux préparatoires*). It is true that the Swedes always use too many words, so we have to cut down the text to a readable level and translate it.

The resource-saving effect does not stop here. The legal co-operation results in a much richer source of case law and jurisprudence, in common model contracts, and so on. For a long time now, we have had common law reports⁸ and legal journals⁹, and at our universities we use each other's textbooks and other literature.

To sum up, since the last century we have had a well-functioning harmonisation at regional level in many fields of civil law. It has been based on a sense of having a common legal tradition, and on free will and practical considerations.

4. Readiness to accept a European harmonisation of civil law

And now we come to the basic question: Are we ready to accept a European harmonisation of civil law? If the Nordic countries are as accustomed to legal transplants and regional co-operation as I have tried to prove, the question must be purely rhetorical. It is not. And a question like that can be answered only with a clear 'no'.

Firstly, what are we supposed to accept? Through the EU, we are all blessed with more and more European legislation, but the directives and conventions have not yet touched the fundamentals of our civil law — at least we believe and hope not. Something called a European Civil Code or even a Common Frame of Reference is much more frightening. Before the question makes any sense, we have to know what we are discussing.

If somebody 20 years ago had asked whether we were ready to accept a European Contracts Act, I bet the answer would have been a unanimous 'no'. Today, we have the PECL, and the importance of these principles is widely recognised. The text is balanced and solid; it takes into account well-known international instruments, such as the CISG and UNIDROIT Principles; and it contains broad principles at the same time as it tries to answer practical questions. In addition, and perhaps most importantly, the PECL do not serve as mandatory law. In other words, before the question of a European harmonisation makes any sense, we need to have drafts to discuss and analyse.

If one wishes to quickly kill the discussion of a European harmonisation, one need only describe the idea as an attempt to write a complete, perfect civil code that is going to solve every legal problem, for now and forever, and that will be forced upon every European country within a couple of years. One must carefully avoid such words as 'simplicity' — broad principles rich in implications, logic, and structure.

If one wants to analyse the idea more closely, one has to describe it as an honest attempt to test the possibility of creating, step by step, common rules serving practical needs within a common market. The core question is: can this ever be achieved? In other words, we have already reached the point where we need to discuss the concrete drafts. As we all know, the Lando Group has done a brilliant job. Now the Study Group is stepping into the legal crossfire. The working groups are producing and publishing drafts. It is time to discuss these. Some of them may be easily accepted, somewhat in the same way as the PECL. Others, no doubt, are going to give rise to criticism, rethinking, and rewriting, and they may have an uncertain future. Nevertheless, an honest discussion brings the different national systems closer to an understanding, and the next attempt might turn out to be more successful. It is, of course, the case that some parts of civil law are easier to

⁷ See, e.g., P. Letto-Vanamo in *Civilrättens integration ur Nordisk synvinkel*. S. Tuominen (ed.). Helsinki 2001, p. 11.

⁸ Such as *Nordiske domme i sjøfartsanliggender*, since 1900, and *Nordisk domssamling*, since 1959.

⁹ Examples include *Nordisk Försäkringstidskrift*, published since 1919; *Nordiskt Immateriellt Rättsskydd*, since 1931; and *Scandinavian Studies in Law*, since 1957.

harmonise, while others need more time. I may remind you that the CISG, providing non-mandatory rules concerning international sales of goods — after all, a very narrow subject — needed 60 years to become the success it is today.

Secondly, the harmonisation of civil law opens up many related questions — for instance, how to create functioning systems for amendments when so many countries are involved and what the role of the European Court of Justice is to be. But I think such questions belong to the next stage in the development.

Thirdly, I have asked myself what kind of Nordic values we are afraid to lose in a European harmonisation. When we look at the real world, the world outside the law, the picture of today is confusing. Including Iceland, we are five small countries without a common language, without a common currency; some of us are members of the EU, some not; and some are members of NATO while others are not. Yes, in all of our countries the winters are long and dark, we drink too much alcohol, and we have special heart diseases. But we share the same music, literature, films, soap operas, and fashion as with the rest of Europe; we eat the same pizzas; and we have the same shops everywhere. On this level, the European similarity is almost boring.

Trying to answer the question of what could be specific, Nordic legal values, one should not only use cold, scientific analyses but also take into account the sometimes irrational feelings of belongingness. After all, legal approaches and practice are much easier to change. I am not able to give you a common Nordic answer. Some of us may speak about the level of abstraction of the legal norms in combination with a very practical, down-to-earth legal reasoning, some of us may stress the social orientation in law, and some may speak about the flexibility of our legal system. Our politicians always mention as our basic values the ideology of the welfare state, the standard of education, and — nowadays — our international competitiveness, as well as all of those other wonderful things. But these are not values monopolised by the Nordic countries. As always, the answers depend on whom you ask. My personal answer is that a European harmonisation is not a legal revolution from a Nordic perspective. It is not going to lead to the loss of our legal identity. But the time is ripe, I think, to consider new forms of Nordic co-operation and to invite the Baltic states to take part in this work if they are interested.

What I am trying to say is that we have reached the point where a general ‘yes’ or ‘no’ discussion on the harmonisation is no longer of interest and should be left to rest for a while. It is more fruitful to discuss the new drafts coming from, for instance, the Study Group; to analyse them one by one, book by book; to find out their weaknesses and strengths; and to suggest improvements. I am looking forward to an intense and creative European legal discussion in which the Nordic countries, in a broad sense, will participate constructively.