

## **Nordic Law in a European Context: Some Comparative Observations**

Jan M. Smits\*

### **1. Introduction**

The aim of this contribution is not so much to compare the several Nordic jurisdictions with each other – as most contributions to this book do – but to look at Nordic law as a whole and see how it fits the broader European picture. There is every reason to do so, since it is usually assumed that Nordic law has some unique features that distinguish it from the main legal families of Europe. This hypothesis has however never been systematically tested and certainly not for all areas of the law. This contribution cannot offer such a systematic overview either – this would take an elaborate research project in which Scandinavian and other European scholars work together – but what it *can* do is to provide the reader with some preliminary thoughts on the place of Nordic law in the European context and show what type of research may be useful to elaborate these ideas. The key question is the extent to which other European jurisdictions share the same characteristics as Nordic law. Before we start, two preliminary remarks have to be made.

The first remark is on the approach adopted. At the present time, it is difficult to compare legal systems without entering into the debate on European legal

unification. In the field of private law in particular – from which I will take most of my examples – one is tempted to let any comparison of jurisdictions follow a normative view of what the ‘best’ legal system for the European Union is. I could not completely resist this temptation: when discussing the features of Nordic law, not only will a comparison be made with some other European jurisdictions, but an attempt will also be made to establish the extent to which Nordic law can be *a model* for future European law. A ‘model’ simply means an enlightening example, providing persuasive authority because of its inherent quality. The other side of the coin of course is that if Nordic law *cannot* be a model, it may mean that other European legal systems offer the better solution and the Nordic legal identity will come under pressure.

The second remark is about methodology. In this contribution, Nordic law is taken to consist of one legal family. This implies that I take the legal systems of Finland, Sweden, Norway, Denmark and Iceland to have the same general characteristics, even though there may be differences among these countries (in particular between a ‘West-Scandinavian’ and an ‘East-Scandinavian’ group)<sup>1</sup>. Neither I go into the debate about the extent to which Nordic law is actually one legal family on its own or a branch of the civil law family:<sup>2</sup> for the sake of this contribution, it suffices to say that Nordic law does have some specific characteristics that distinguish it from other groups of legal systems.

In the following, four different although interrelated features of Nordic law will be discussed. These are the view of law as a tool for social engineering (section

---

\* Professor of European Private Law, Maastricht University.

<sup>1</sup> In this chapter, the terms ‘Nordic’ and ‘Scandinavian’ are used interchangeably, although it is submitted that Finland and Iceland do not form part of Scandinavia geographically.

<sup>2</sup> On this question, see Jaakko Husa, ‘Classification of Legal Families Today’, *Revue de Droit Comparé* 56 (2004), 11 ff.; Ole Lando, ‘Nordic Countries, a Legal Family? A Diagnosis and a Prognosis’, *Global Jurist Advances* 1 (2001), article 5; Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law*, 3<sup>rd</sup> ed., (Oxford: OUP 1998), 277.

2), the legitimacy of lawmaking in Scandinavia (section 3), pragmatism (section 4) and Nordic legal cooperation (section 5). These will be followed by some concluding remarks (section 6).

## **2. Law as a Tool for Social Engineering**

Nordic legal systems are well known for their emphasis on law as a tool of social engineering, thus law as a tool to achieve social ('leftist oriented') purposes. The social purpose that is usually associated with this is the creation of a welfare state, described by Pihlajamäki as 'public measures taken to remedy the social problems caused by *laissez faire* capitalism.'<sup>3</sup> It has led, in all Nordic countries, to a highly regulated society with a high level of social security, a large public sector and a high degree of organisation and state influence generally.<sup>4</sup> The elevated level of consumer protection and of protection of weaker parties generally can also be seen as part of this welfare state.<sup>5</sup> Looked at from an economic (cost-benefit) perspective, protection through open-ended norms like unconscionability and good faith is also part of a Nordic legal culture in which general welfare is usually regarded as being promoted most by State intervention (sometimes including intervention by the judiciary), no matter what economic or empirical evidence there may be against this view. For example, it seems that insights from public choice theory about government failure have not found fertile soil in Scandinavian countries, nor have models of regulatory

---

<sup>3</sup> Heikki Pihlajamäki, 'Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared', *AJCL* 52 (2004), 473.

<sup>4</sup> Cf. Juha Pöyhönen, *An Introduction to Finnish Law*, (Helsinki: Finnish Lawyers' Publishing, 1993), 20 ff., Borge Dahl et al. (eds.), *Danish Law in a European Perspective*, (Copenhagen: Gadjura 1996), 51.

<sup>5</sup> See the many writings of Thomas Wilhelmsson on social contract law: for example, 'The Philosophy of Welfarism and its Emergence in the Modern Scandinavian Contract Law', in: id., *Twelve Essays on Consumer Law and Policy*, (Helsinki: University of Helsinki, 1996), pp. 3 ff.

competition that are presumed to lead to more efficient outcomes than State intervention.

How should we consider this characteristic (often referred to as the ‘Swedish model’) in comparative terms? Is it really true that this feature of using the law as a social tool is unique to the Scandinavian countries? At first sight, the answer is emphatically no: since in large parts of the rest of Europe, a welfare state has also been built up since the 1950s. The main points of the welfare state – aptly summarised by Rendtorff as better working conditions, better housing and the cultural and educational enlightenment of the people<sup>6</sup> – can be found as a program in all Western-European societies. Still, there may be two relevant differences with the situation in, for example, Germany and France.

The first difference is that the view of law as an instrument to achieve a leftist-oriented agenda (thus to serve distributive purposes) and the corresponding building up of the welfare state seems to have met with much less criticism in the Scandinavian countries than elsewhere in Europe. This may have to do with the primordial role of the social democratic parties in the Nordic countries – as in Sweden, where the social democrats were in control of government between 1942 and 1976 – but it is more likely that the political consensus itself is the result of a highly homogeneous society (even though this may have changed somewhat since the 1980s). It is this society – with ‘Lutheran Protestantism as a general ethical and moral reference frame’<sup>7</sup> – that allowed the making of these welfare states. It is telling that the building up of the welfare state was not interrupted in periods of more conservative or liberal government. Comparative research on the extent to which

---

<sup>6</sup> Jacob Rendtorff, ‘The Danish Welfare State: Philosophical Ideas and Systematic Reality’, in: Mikael M. Karlsson & Olafur Pall Jonsson (eds.), *Law, Justice and the State: Nordic Perspectives* (ARSP Beiheft 61), (Stuttgart: Franz Steiner Verlag, 1995), 29.

<sup>7</sup> Jaakko Husa, ‘Guarding the Constitutionality of Laws in the Nordic Countries: a Comparative Perspective’, *AJCL* 48 (2000), 380.

these welfare states were recognised by the political community and in society at large in Scandinavia and elsewhere seems necessary (provoking the need for a political science perspective).<sup>8</sup>

A second difference is closely related to the first one. If society is culturally and politically homogeneous, the law can indeed be used as a tool for social change and does not have to deal with political conflicts in society.<sup>9</sup> It is likely that in Germany and France the law had to fulfil this role much more than in Scandinavia or the Netherlands. Hence, the function of the *Bundesverfassungsgericht* and *Conseil Constitutionnel* in safeguarding fundamental rights is more important than that of the Scandinavian constitutional courts (as the role of the American Supreme Court is far more important where the law also fulfils the role of keeping the nation together). This is in line with the findings of Jaakko Husa that constitutional review does not take place very frequently in the Nordic jurisdictions.<sup>10</sup>

How does the Nordic approach appear in the European perspective? Can law as a tool for social engineering be a model for the European Union? The question is of interest because parts of the law that fall under the competence of the EU are covered in the broad approach of the welfare state adopted in the above. Among these are employment law and contract law. In fact, the so-called ‘study group on social justice in European private law’ recently defended the idea that a European view of social justice should be developed to guide the European institutions in codifying European

---

<sup>8</sup> This is not to say that such research does not exist. Cf. Niklas Luhmann, *Politische Theorie im Wohlfahrtsstaat*, (Wien: Olzog, 1981) and Hans Bak et al. (eds.), *Social and Secure? Politics and Culture of the Welfare State*, (Amsterdam: VU University Press, 1996).

<sup>9</sup> Cass Sunstein, *Legal Reasoning and Political Conflict*, (Oxford: OUP, 1996).

<sup>10</sup> Jaakko Husa, ‘Guarding the Constitutionality of Laws’, 345 ff.

contract law.<sup>11</sup> This view should highlight the importance of social justice as a counterbalance for the marketplace.<sup>12</sup>

There is little doubt that this view comes close to an implementation of the Scandinavian model in the European Union. It is however doubtful whether this model can indeed inspire the European Union. Apart from the fact that it may be *impossible* to establish one shared concept of social justice for Europe (because it presupposes that all 27 member states share the same values on what is a just society), it seems *undesirable* to do so. What the Finnish regard as socially just may simply not be shared by the Spanish or the Polish. This is one of the main reasons why the European Union, at least in the field of private law, has always satisfied itself with minimum harmonisation, allowing some member states to offer more protection for weaker parties than others. This allows national preferences to diverge. Frank Easterbrook has warned against a uniform *minimum* level of law by stating that ‘producing a level playing field by chopping down the heights, forcing all of us to live in the valleys, has nothing to recommend it.’<sup>13</sup> A similar argument can be made against introducing one uniform *maximum* level: it seems wrong that the economic development of the Czech Republic or Poland is hampered by Western-European or Nordic views on what a ‘fair’ level of protection is for the consumer or the

---

<sup>11</sup> Study Group on Social Justice in European Private Law, ‘Social Justice in European Contract Law: a Manifesto’, *European Law Journal* 10 (2004), 653 ff.

<sup>12</sup> ‘Social Justice in European Contract Law’: ‘At the heart of the social justice agenda beats the concern about the distributive effects of the market order. The rules of contract law shape the distribution of wealth and power in modern societies. (...) A modern statement of the principles of the private law of contract needs to recognise its increasingly pivotal role in establishing distributive fairness in society’, 665.

<sup>13</sup> Frank Easterbrook, ‘Federalism and European Business Law’, *Int. Rev. of Law and Economics* 14 (1994), 132.

environment.<sup>14</sup> In this respect, the Nordic model may not be successful as a competitor in the European idea market.

### **3. Legitimacy of Law(making): The Role of the Citizen**

A second feature of Scandinavian law relates to the legitimacy of lawmaking. Compared to other jurisdictions, Nordic law attributes a primary role to the citizens in making the law. This is apparent from the substantial role of Parliament in the making of statutes and of lay people in the judicial process. This characteristic is closely related to the view of law as a tool for social engineering: to establish the social needs and values of society and monitor how these change, a permanent input from society is needed and the best way to guarantee this input is to allow the citizen an important role in lawmaking.<sup>15</sup>

This enhanced role of Parliament and the citizen can be illustrated in various ways. Reference was already made to Husa, who clearly shows that in the Nordic countries it is difficult to attack a statute of Parliament on the basis of a violation of the Constitution.<sup>16</sup> In the court system, laymen play a large role. Thus in Swedish criminal law and family law, both the court of first instance and the appeal court consist of professional judges and lay people (*nämndemän*). In Finland, Denmark and

---

<sup>14</sup> The full argument can be found in Jan Smits, *European Private Law: a Plea for a Spontaneous Legal Order*, in: Deirdre Curtin, Jan Smits et al, *European Integration and Law*, (Antwerpen-Oxford: Intersentia, 2006), 55 ff.

<sup>15</sup> Also see Thomas Wilhelmsson, 'The Legal, the Cultural and the Political: Conclusions from Different Perspectives on Harmonisation of European Contract Law', *European Business Law Review* 2002, 551.

<sup>16</sup> See the many details in, Jaakko Husa, 'Guarding the Constitutionality of Laws in the Nordic Countries', 345 ff. who characterises this as 'Nordic cautiousness.'

Norway lay people are part of the (lower) courts.<sup>17</sup> Pihlajamäki even characterises the Nordic judiciary as ‘lay-dominated’.<sup>18</sup>

An interesting question is whether a large role for Parliament (and consequently for the legislature) has important consequences for the role of the courts. One would expect that if there is a legislature that already provides for the social needs of the citizens, the courts do not have to be very active. In this respect, Nordic law does however not provide a coherent picture – perhaps also caused by the fact that it is by no means easy to compare the levels of judicial activism in different jurisdictions.<sup>19</sup>

Still, some evidence can be found that Nordic courts do indeed play a less important role in lawmaking compared to their civil law counterparts. In Nordic private law for example, the weight attached to open-ended concepts like unconscionability and good faith (fairness and reasonableness) seems to be less than in German or Dutch law. Sections 33 and (in particular) 36 of the Scandinavian Contracts Act do allow the courts to avoid or modify unreasonable contracts, but it may very well be the case that Nordic courts do not often need to have recourse to these provisions. One reason for this is the existence of specific statutes on consumer protection.<sup>20</sup> In tort law, the role of Nordic courts may also be less important in protecting weaker parties. Where Western-European courts need to have recourse to general tort provisions to protect victims, Nordic countries often have compensation funds or insurance schemes. Thus, in a case in which an employee was exposed to asbestos and contracted a disease (*mesothelioma*) that only manifested itself after the

---

<sup>17</sup> See for details Gerhard Ring & Line Olsen-Ring, *Einführung in das skandinavische Recht*, (München: Beck, 1999), 47 ff.

<sup>18</sup> Pihlajamäki, ‘Against Metaphysics in Law’, 484, also discussing reasons for this.

<sup>19</sup> See, e.g., D. Neil MacCormick & Robert S. Summers (eds.), *Interpreting Precedents: A Comparative Study*, (Aldershot: Dartmouth, 1997).

<sup>20</sup> See, for example, the Consumer Sales Law (1973), Consumer Credit Law (1979) and Consumer Insurance Law (1981) for Sweden.

stipulated prescription period of 30 years, the Dutch Supreme Court had to apply a very audacious interpretation of the general good faith principle to allow the employee to claim compensation from his former employer.<sup>21</sup> In Sweden, there is an insurance scheme for such cases: each employer pays an annual amount to the Labour Insurance and if an occupational disease occurs, the victim will be compensated for medical costs, loss of income and even pain and disability. An individual only has very limited scope to claim directly from the employer.<sup>22</sup> This makes the need for an audacious court obsolete.

This feature of Nordic law can also be related to the Nordic approach to a career magistracy. There is little doubt that Nordic courts usually judge in line with the ruling majority, making the judge more of a civil servant than an independent actor. In Nordic legal doctrine, one finds the fear of an overly independent judiciary that may jeopardise democratically enacted legislation regularly expressed.<sup>23</sup> In 1960, Wetter qualified the Swedish junior judge as ‘an intellectually somewhat subdued administrator, with a strong spirit of officialdom ingrained in his attitude to life.’<sup>24</sup> Whether this is really different from the civil law judiciary remains an open question, but it is typical that both in Sweden and Finland, there have been ‘instructions for the judge’ since the Middle Ages, telling him (amongst other things) to apply the law and not violate statutes (at least as long as applying statutes leads to acceptable results).<sup>25</sup>

---

<sup>21</sup> Hoge Raad 28 April 2000, *Nederlandse Jurisprudentie* 2000, 430 (Van Hese/Schelde Groep BV).

<sup>22</sup> Also see Christian von Bar, *Gemeineuropäisches Deliktsrecht*, 1. Bd., (München: Beck, 1996), 267: ‘Wenn es wirklich so etwas wie ein Spezifikum der Nordischen Deliktsrechtssysteme gibt, dann ist es die ausgeprägte Verzahnung von Haftungsrecht und Versicherungsschutz.’

<sup>23</sup> Thus, e.g., Sundberg, ‘Civil Law, Common Law’, 203. Cf. Husa, ‘Guarding the Constitutionality’, 354, discussing a possible difference in attitude of Finnish and Swedish courts on the one hand and Norwegian and Danish courts on the other.

<sup>24</sup> Quoted by Sundberg, ‘Civil Law, Common Law’, 203.

<sup>25</sup> See Aulis Aarnio, ‘Statutory Interpretation in Finland’, in: D. Neil MacCormick & Robert S. Summers (eds.), *Interpreting Statutes: A Comparative Study*, (Aldershot: Dartmouth, 1991), 147 ff.

Likewise, Danish courts are very reluctant to make any politically sensitive decisions.<sup>26</sup>

It will take more extensive research to evidence the assumption that there is less judicial activism in Nordic countries than elsewhere. If such research is undertaken, it is essential to take into account the prevailing method of interpretation of statutes (which is supposedly more teleological<sup>27</sup>) and to look more closely into the assumption that Nordic law attaches great importance to precedents,<sup>28</sup> which seems hard to reconcile with the above.<sup>29</sup>

Can this large role for the citizen also be an enlightening model for lawmaking in other European countries or even in the European Union? One would certainly hope so, but I think some scepticism is called for. The role of national parliaments is on the wane, law is increasingly created by way of private ordering, that is, by parties themselves through codes of conduct, professional norms, customs, conditions of branch organisations, arbitration awards, sets of principles, etc. This makes lawmaking increasingly independent of nation-states.<sup>30</sup> It also means that the conduct of private parties is less and less governed by national law established in a democratic way: globalisation leads to national law being overtaken, prompting the need for new forms of control.<sup>31</sup> At the European level as well – and despite the efforts of the European institutions to obtain as much stakeholder input as possible – it is difficult to see how this democratic deficit can be resolved. In this respect the Nordic experience and daily European practice seem to be worlds apart.

---

<sup>26</sup> *Danish Law in a European Perspective*, 50.

<sup>27</sup> See below, section 4.

<sup>28</sup> See, e.g., Inge Dübeck, *Einführung in das dänische Recht*, (Baden-Baden: Nomos, 1996, 23).

<sup>29</sup> See Jaakko Husa, 'Precedent in Finland – Paradigm in Transition' in: ed. Erkki J. Hollo, *Finnish Legal System and Recent Development* pp. 7-23, (Edita, Helsinki 2006), who also offers a possible explanation for this.

<sup>30</sup> See Gunther Teubner (ed.), *Global Law Without a State*, (Aldershot: Dartmouth, 1997).

<sup>31</sup> Noreena Hertz, *The Silent Takeover; Global capitalism and the death of democracy*, (London: Heinemann, 2001).

#### 4. Pragmatism

A third characteristic often attributed to Nordic law is that it is pragmatist.<sup>32</sup> Zweigert and Kötz refer to ‘the realism of the Scandinavian lawyers and their sound sense of what is useful and necessary in practice.’<sup>33</sup> It is useful to distinguish three different aspects of this: pragmatism in legal science, legal reasoning and the drafting of statutes.

First, Nordic legal science is supposed to be more practical than legal scholarship in most civil law countries. There is no tendency towards conceptualism and construction of large theoretical systems.<sup>34</sup> The reason usually given for this lack of formalism is that Roman law was less influential in Scandinavia than in most civil law countries<sup>35</sup> and, in the 19<sup>th</sup> century, when German law scholarship blossomed and influenced most European civil law jurisdictions, Scandinavia stood apart and only took over from German *Begriffsjurisprudenz* what it considered useful.

I am not completely convinced that Nordic law in this respect really stands apart from (other) civil law jurisdictions. It is indeed true that German textbooks are much more thorough and detailed in nature than Nordic textbooks,<sup>36</sup> but it must seriously be doubted whether the comparison with German law is the appropriate one. German legal scholarship is hard to beat in the civil law tradition, not only as a result of the number of German legal scholars but also because of the cultural-intellectual

---

<sup>32</sup> See e.g. Rudolf B. Schlesinger, Hans W. Baade, Peter E. Herzog & Edward M. Wise, *Comparative Law*, 6<sup>th</sup> ed., New York (Foundation Press, 1998), p. 304, Zweigert & Kötz, *Introduction to Comparative Law*, 277 ff. and *Danish Law in a European Perspective*, 35. Cf. Pihlajamäki, ‘Against Metaphysics in Law’, 486.

<sup>33</sup> Zweigert & Kötz, *Introduction to Comparative Law*, 277 ff.

<sup>34</sup> Jaakko Husa & Jussi Tapani, ‘Germanic and Nordic Fraud: A Comparative Look Under the Surface of Commonalities’, *Global Jurist Advances* 5 (2005), issue 2, article 2, 14.

<sup>35</sup> However, still of considerable influence. See Jacob W.F. Sundberg, ‘Civil Law, Common Law and the Scandinavians’, *Scandinavian Studies in Law* 13 (1969), 198.

<sup>36</sup> For an insightful comparison of textbooks: Husa & Tapani, ‘Germanic and Nordic Fraud’, 21 ff.

climate in Germany generally. It would probably be a more paradigmatic representation to compare Nordic scholarship with the output of Dutch or French legal academia. If one does so, it is likely that Germany is at least in this respect the odd one out in the civil law family.

Second, Nordic legal reasoning also is said to be pragmatist. Husa and Tapani claim that Nordic pragmatism, partly created by the lack of comprehensive codifications, has generated a specific legal mind.<sup>37</sup> Scandinavian jurists would not engage in abstract and systematic thinking, but be more practical and policy-oriented. For example, if a court is confronted with a difficult case, it will come to a solution that is appropriate in the circumstances of the case and will refrain from high-level moral considerations.

One is tempted to relate this pragmatist view to Scandinavian realism and in particular to the views of Alf Ross (1899-1979), who denied that there is a separate normative world outside of the empirical one and that legal rules are only valid because people, or the society for which they are supposed to have value regard them as valid.<sup>38</sup> This anti-metaphysical and pragmatist view of the law as something that is *made* in social interaction between citizens, citizens and the State, courts and the legislator, etc.<sup>39</sup> seems to fit the pragmatist way of legal reasoning very well.

Still, it remains to be seen how far this 'limited, pragmatic utilitarianism'<sup>40</sup> is very different from the adjudication process in other countries. It may be true that the law and legal language were not so much monopolised by legal professionals in Scandinavia in the past than in the rest of Europe, but present-day Nordic law does

---

<sup>37</sup> Husa & Tapani, 'Germanic and Nordic Fraud', 15.

<sup>38</sup> Alf Ross, *On Law and Justice*, (Berkeley: University of California Press, 1959).

<sup>39</sup> See Mark Van Hoecke, 'Ross v. Kelsen: het belang van het Scandinavisch Realisme in de 21e eeuw', *Netherlands Journal for Legal Philosophy and Jurisprudence* 29 (2000), 115.

<sup>40</sup> Hans Petter Graver, Law, 'Justice and the State: Nordic Perspectives', in: Mikael M. Karlsson & Olafur Pall Jonsson (eds.), *Law, Justice and the State: Nordic Perspectives* (ARSP Beiheft 61), (Stuttgart: Franz Steiner Verlag, 1995), 25, who relates this to Scandinavian Realism.

not seem to be so different from the situation in most European countries. Even in Germany, abstract and conceptual thinking does not decide cases. Any research agenda on Nordic law in a comparative perspective should take up this point and start with a more precise definition of pragmatism, which is certainly not the same as the American pragmatism proposed by Posner,<sup>41</sup> followed by a comparison *inter alia* of ways of interpretation of statutes and contracts, motivation of court decisions and *travaux préparatoires* of statutes in some selected countries (not restricted to Germany). In doing so, it may be useful to start from a functional perspective: what is it that makes the law coherent, manageable and intelligible? If this is primarily the organisation of the law through comprehensive codifications in Germany and the system of precedent in the common law, what is it then in Nordic countries? What guarantees Nordic law its legal certainty? Perhaps it is its focus on statutes and the way these are interpreted (primarily in a teleological way)<sup>42</sup>. Until such research is carried out, it is not possible to come to any real conclusions on the pragmatist character of Nordic legal reasoning.

A third aspect of Nordic pragmatism relates to the style of drafting statutes. The Nordic codes are supposedly drafted in a simple and clear style, providing detailed rules and not so many abstract generalisations. In private law, there is no comprehensive codification or a German-like ‘general part’ in some specific statute. All this cannot be denied, but we should again be cautious in drawing the conclusion from this more fragmentary organisation of the law that there are no general rules being used by the courts in the same way as in other civil law countries. It may well

---

<sup>41</sup> Richard Posner, *Overcoming Law*, (Cambridge Mass.: Harvard University Press, 1995), 11: Posner’s pragmatism is ‘practical, instrumental, forward-looking, activist, empirical, skeptical, antidogmatic, experimental’.

<sup>42</sup> Cf. Aarnio, in: *Interpreting Statutes*, 141 ff., Ring & Olsen-Ring, *Einführung in das skandinavische Recht*, 9 and Husa & Tapani, ‘Germanic and Nordic Fraud’, 16 ff. Finland may not be true to this tradition (cf. Ring & Olsen-Ring, *ibid.*).

be that such general rules do exist, but are developed by doctrine and subsequently applied by the courts.<sup>43</sup> There is also a lot of evidence that particular existing rules are used by analogy in new cases.<sup>44</sup> It could therefore well be that reasoning by analogy is more common in Scandinavian countries than in jurisdictions with comprehensive codifications although, again, more research on this is needed.

If Nordic law is indeed as pragmatist as is assumed, it can inspire judicial reasoning in the other member states of the European Union. The absence of encompassing codifications and a more fragmentary organisation of the law resemble European law, which is fragmentary almost by necessity (because of the limited competence of the European Union). The *acquis* in private law consists, for example, of many detailed rules without much internal consistency. To deal with this is a relatively new task for the national courts in civil law jurisdictions<sup>45</sup> and it is likely that they can draw inspiration from the Scandinavian experience in this respect in particular when they have to reason by analogy.

## 5. Legal Cooperation

Looking at Nordic law from outside, there is a fourth aspect that merits our attention, the far-reaching legal cooperation among the Nordic countries.<sup>46</sup> This is part of a broader cooperation in many areas (the activities of the Nordic Council are internationally perhaps the best-known), but it has been particularly successful in the

---

<sup>43</sup> See Lando, 'Nordic Countries, a Legal Family?' 7.

<sup>44</sup> Also see Zweigert & Kötz, *Introduction to Comparative Law*, 277 ff.

<sup>45</sup> See Jan M. Smits, 'The Europeanisation of national legal systems: some consequences for legal thinking in civil law countries', in: Mark Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law*, (Oxford: Hart Publishing, 2004), pp. 229 ff.

<sup>46</sup> On which, see S. Jörgensen, 'Abbestellungsrecht und nordische Gesetzeszusammenarbeit', 12 (1971) *Zeitschrift für Rechtsvergleichung*, 12 ff.; Zweigert & Kötz, *Introduction to Comparative Law*, 277 ff.; Gebhard Carsten, 'Europäische Integration und nordische Zusammenarbeit auf dem Gebiet des Zivilrechts', *ZEuP* 1 (1993), 335 ff.; Ring & Olsen-Ring, *Einführung in das skandinavische Recht*, 4 ff.

law. Thus, there are Nordic law journals, there is a Nordic law society and there has been well-known cooperation in the field of legislation since the 19<sup>th</sup> century. This led to statutes in the field of negotiable instruments (1880), sale of moveable goods (1905-1907 and amended in 1982-1990<sup>47</sup>) and contract law (1915-1918<sup>48</sup> and amended in the 1970s), as well as in maritime law and insurance contracts. With regard to the implementation of European directives, Nordic countries consult each other on the best way to do this.

In view of the debate on European integration, there are two interesting aspects to this Nordic cooperation. The first is that it is only successful where there is a practical commercial need to create uniform law; mainly the law of contract and some related areas. Even within contract law, the Scandinavian Contracts Act only contains rules in so far as they are useful for legal practice, like rules on formation, agency and invalidity of contracts. It is just as interesting to see to what this cooperation did *not* lead: despite the initial wish to draft a complete Nordic Civil Code,<sup>49</sup> this never happened. Efforts to create a common Nordic act on family law also failed. This confirms the experience of the United States, where only the Uniform Commercial Code creates uniformity among the private laws of the respective states. In this respect, it seems wise of the European Commission to limit efforts to create a common private law primarily for the law of contract.<sup>50</sup>

Second, it is interesting to see how Nordic uniformity is created, not by some binding instrument, but on basis of voluntary and informal cooperation. The joint

---

<sup>47</sup> The various national sale of goods acts were again amended when Scandinavian countries adopted the CISG in the late 1980s. See Jan Ramberg, 'Unification of Sales Law: A Look at the Scandinavian States', *Uniform Law Review* 8 (2003), 201 ff.

<sup>48</sup> Finland introduced the Scandinavian Contracts Act in 1929.

<sup>49</sup> Expressed by Larsen in 1899 and Kruse in 1948; cf. Zweigert & Kötz, *Introduction to Comparative Law*, 277 ff.

<sup>50</sup> See Communication ... on European Contract Law and the Revision of the *Acquis*: the Way Forward, COM (2004) 651 final, OJ EC 2005, C 14/6.

legislative products do not have to be enacted in the various countries and if they are enacted, they can be modified to meet specific national needs. Implementation of the 'Nordic acquis' is only something that is striven for, not imposed upon the various countries. When Sweden was led in the 1970s by an ambitious social democratic government that wanted to go further than other countries in, for example, protecting consumers, other Nordic countries simply refused to go along. I find this view of legal unification an appealing one for the European Union as a whole:<sup>51</sup> it allows a 'bottom up' harmonisation where the need for uniform law is felt most, even though it may be true that Nordic cooperation is stimulated by the close political, historical and cultural ties between the Nordic countries (and by the fact that the citizens of the five countries usually can find a common language to speak among each other) and that this is not the case in the European Union as a whole. However, flanking measures for common legislation, such as Nordic law journals<sup>52</sup> and Nordic law reports,<sup>53</sup> are instrumental for this kind of harmonisation and set an example for the European unification process.

## **6. Concluding Remarks**

The ambition of this contribution to look at four features of Nordic law and reflect upon these from a comparative perspective was quite modest. This did not lead to any definitive answer to the question of whether Nordic law really stands apart in Europe. But if one studies the literature on Nordic law, one is tempted to wonder whether most authors simply take over what their colleagues have written on the particular

---

<sup>51</sup> This had already been claimed by Mario Matteucci, 'The Scandinavian Legislative Co-operation as a Model for a European Co-operation', in: *Liber Amicorum of Congratulations to Algot Bagge*, (Stockholm: Norstedt, 1956), 136 ff.

<sup>52</sup> The most famous one is *Nordisk Tidsskrift for Retsvitenskap* (since 1888).

<sup>53</sup> *Nordisk Domssamling* (since 1958).

Nordic characteristics without too much investigation of whether these characteristics really exist. This contribution shows that this approach is wrong and that more thorough research is needed on the place of Nordic law within Europe.