2011

Nordic cooperation in criminal matters

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Särtryck ur:

FESTSKRIFT TILL

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NORSTEDTS JURIDIK

Innehåll

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Nordic cooperation in criminal matters is a concept that can be understood – in a wide sense – to include not only the extensive judicial and police cooperation that exists in the Nordic countries[1] but also the more or less policy-oriented dialogues and practical cooperation among Nordic government ministers, parliamentarians and public officials; legislative coordination with a view to adopting harmonized, if not uniform, norms in all Nordic countries; the identification of and the debate and discussion concerning a (at least perceived) common Nordic penal policy;[2] and the intercourse among academics in the Nordic countries in the fields of criminal law and criminology.[3] Nordic cooperation is often explained by socio-historical factors such as the fact that the Nordic countries share common roots with historical pasts that criss-cross each other,[4] the predominance of the Lutheran religion,[5] as well as

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[1] A description (in the English language) of Nordic cooperation in this sense – albeit in a Swedish perspective – can be found in Petter Asp, *Nordic Judicial Co-operation in Criminal Matters*, Uppsala 1998. In Asp's account, such cooperation comprises extradition, transfer of proceedings, mutual legal assistance and enforcement of sentences. Despite the fact that much of the legislation in this area has been amended and entirely new instruments – such as the European arrest warrant – have replaced the Nordic system in parts, the description given of the Nordic background remains relevant. The only significant development since 1998 that needs to be noted relates to the Nordic arrest warrant to be discussed below. A more recent account of international – including Nordic – cooperation in criminal matters in a Swedish perspective can be found in Iain Cameron *et al.*, *International Criminal Law from a Swedish Perspective*, Intersentia 2011.

[2] See, *e.g.*, the presupposition of a Nordic criminal law and criminal policy in Kimmo Nuotio, 'The rationale of the Nordic penal policy compared with the European Union', *Festschrift in Honour of Raimo Lahti*, Helsinki 2007, pp. 157-174. The Nordic or Scandinavian countries are also often treated together in comparative studies and one speaks not infrequently of a 'Nordic trend' in theories of punishment and political ideology *etc.* – see, *e.g.*, various contributions in the anthology *Crime and Justice in Scandinavia*, U. Bondeson (ed.), Thomson/GadJura, Copenhagen 2005.

[3] The latter form of Nordic cooperation has also been known to lead to unions on a personal plane, sometimes issuing in progenies that are more than merely academic in nature.

[4] For a more detailed, yet still brief, description of the historical inter-connections between the present-day Nordic countries, see Asbjørn Strandbakken, 'Extradition between Nordic countries and the new Nordic arrest warrant', *The European Arrest Warrant in Practice*, K. Keijzer & E. van Sliedregt (eds), T.M.C. Asser Press, The Hague 2009, pp. 368-366.

[5] This should be understood as a contrast to Catholicism in the context of a traditionally Christian society within a secularized State.

the mutual comprehensibility of the Scandinavian languages.[6] Another important social factor has been the parallel development of the welfare state, especially in the period following the Second World War. This has led to similar patterns *inter alia* in the field of social security, the labour market and social and health care, all of which can be linked to criminal policies. The free movement of persons within the Nordic area – with the abolishment in 1954 of passport controls at intra-Nordic borders – has been adduced as a reason for the need of enhanced cooperation in criminal matters. On top of the 'pre-existing' factors described above, one should not underestimate a conscious Nordicism or Scandinavianism[7] that exist in some quarters, in which Nordic unity is strived for, not as a pragmatic solution for current problems, but for its own sake and as a step towards the construction of a Nordic identity.[8]

An obvious centre for the nurturing of Nordic cooperation is the Nordic Council established in 1952, and later also the Nordic Council of Ministers (created in 1971). Cooperation under the auspices of the Nordic Council comprises at present *inter alia* legal, cultural, social and economic cooperation as well as cooperation on transport and communication and in the area of environmental protection. This intra-Nordic cooperation is formally regulated through the Helsinki Agreement of 1962 (amended latest in 1995). Article 5 of the Helsinki Agreement states that:

> The High Contracting Parties should seek to establish uniform rules relating to criminal offences and the penalties for such offences.
>
> With regard to criminal offences committed in one of the Nordic countries, it shall, as far as circumstances allow, be possible to investigate and prosecute the offence in another Nordic country.

Without providing a detailed inventory of the achievement in this area, it is possible to say that in the area of substantive criminal law, 'seeking' to 'establish uniform rules'

[6] Finnish – belonging to the Finno-Ugric language family – is for this purpose not considered to be a Scandinavian language, which belongs to the Germanic family. To appreciate the ready comprehensibility of the Scandinavian languages, compare the word for 'criminal law' in the following different standard languages: '*strafferet*' (Danish), '*refsiréttur*' (Icelandic), '*strafferett*' (Norwegian, 'bokmål') and '*straffrätt*' (Swedish). This may be contrasted with '*rikosoikeus*' (Finnish).

[7] Geographically, Norway and Sweden constitute the Scandinavian peninsula, although Denmark, and sometimes also Finland, are included in the Scandinavian region. However, the term 'Scandinavian' may be used in a linguistic sense (see note 6 above) rather than a geographical one. As a political term, the Nordic region comprises the five sovereign States including the autonomous territories of the Faroe Islands, Greenland and Åland. In most cases, the terms 'Nordic' and 'Scandinavian' (and their derivatives) can be used interchangeably.

[8] See Børge Dahl, 'Har det nordiska lovsamarbejde udspillet sin rolle?', *Forhandlingerne ved Det 37. nordiske Juristmøde i Reykjavik 18.–20. august 2005*, pp. 157-173, on different shades of Nordicism in the context of legislative cooperation. On the particular case of intra-Nordic extradition see Gjermund Mathisen, 'Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond', 79 *Nordic Journal of International Law* (2010) pp. 1-33, esp. at pp. 5-10.

has not had a significant effect, at least when one focuses on the work carried out in the past two decades. Admittedly, there have been studies and consultations, but these have not resulted in *uniform* legislation. For instance, there has been a common Nordic study of the legislation on child pornography,[9] yet the legislation today[10] in the Nordic countries differs quite considerably from each other with regard not only to the type of conduct prohibited by, but also the definition of child pornography as such. The same may be said with respect to penalties.[11] In this connection it may be added that not only is there a difference in the level of penalties, the different legal systems also use different method to determine the sanction, in particular with respect to the level of details in the sentencing guidelines given in law and, consequently, the amount of discretion left to the courts. More success, on the other hand, can be seen regarding the goal to investigate and prosecute criminal offences in another Nordic country, although much of the system of cooperation was already in place before the conclusion of the Helsinki Agreement. A system of intra-Nordic extradition was established early on, which removed traditional obstacles such as the requirement of double criminality and the absolute prohibition on the extradition of nationals.[12] This intra-Nordic system is not based on a binding convention between the Nordic States, but is rather the result of a coordinated legislative process leading to essentially uniform domestic legislation. Another example of cooperation that is not based on a binding international convention is the system of transfer of criminal proceedings between the Nordic countries. The system was set up based on an agreement reached in 1970 by the Prosecutor-Generals – who are civil servants, not government ministers – of the Nordic countries. This agreement was published in Sweden in the form of a circular notice by the Prosecutor-General.[13]

The latest contribution towards the realization of the goal of paragraph 2, Article 5 of the Helsinki Agreement is the system of surrender based on a Nordic arrest warrant (NAW).[14] This new system is inspired by the European arrest warrant (EAW), already applicable between Denmark, Finland and Sweden – the three Nordic States which

[9] See Nord 2001:28 *Børnepornografi på internettet*.

[10] § 230 straffeloven (Denmark), 17 kap. 18, 18a and 19 §§ strafflagen (Finland) 210 gr. almenn hegningarlög (Iceland), §§ 204-204a straffeloven (Norway) and 16 kap. 10a and 10b §§ brottsbalken (Sweden).

[11] See Nord 2003:546 *Strafutmåling i Norden – et forprosjekt* and also the contribution by Helén Örnemark Hansen in this *Festschrift* with respect to conditional release.

[12] The system of intra-Nordic extradition is described in more detail in Strandbakken (note 4 above) and Mathisen (note 8 above).

[13] Circular C65 of 25 Sepember 1970 (no longer part of the collection of rules and regulations *etc.* of the Prosecution Service after an re-organization in 2005).

[14] Convention adopted by the Nordic ministers of justice in Skagen on 21 June 2005 and signed by the competent authorities in Copenhagen on 15 December 2005. See Strandbakken (note 4 above) and Mathisen (note 8 above) for a description of the system. There is no English translation of the Convention, the Swedish text of the Convention can be found as an appendix to Ds 2010:26 *Överlämnande från*

are also Member States of the European Union. It is envisaged that the other two Nordic States, Iceland and Norway, will accede to the system of surrender based on a EAW.[15] When the system of European arrest warrant becomes operational between the countries of the European Union and Iceland and Norway, the NAW-system will form a sub-system to be applied to surrenders between Nordic States. Like the EAW-system, the surrender will be a judicial process with no involvement of the Government as a political organ. The NAW will go further than the EAW-system, *inter alia* by abolishing the requirement of double requirement altogether, reducing the threshold of penalty for which a surrender may be made, imposing shorter time-limits for the execution of the NAW, and simplifying rules such as speciality and accessory surrender.

It is perhaps interesting to note that – instead of the method of coordinated legislative cooperation previously used to set up the system of intra-Nordic extradition – the NAW is introduced by way of a convention, followed by national implementation prepared by the ministry of justice in the respective country. In the case of Sweden, this has turned out to be a lengthy process – probably a reflection more on the priority given to the matter than the complexity involved in the legislation.[16] Voices have been raised whether the era of the 'great' Nordic legislative cooperation project belongs definitely to a golden age of the past.[17] There is a sense that much of the legislative work is driven by initiatives from the European Union, not least in the area of cooperation in criminal matters.[18] The implementation period for such initiatives are usually short and the domestic drafting and consultation process has already been pushed to its limit. There is hardly any room left for reflections through the traditional means of Nordic cooperation. On the other hand, the challenges from the European Union can be seen as an opportunity for enhancing Nordic cooperation, not least through an efficient use of resources and expertise. It is easy to see that a pooling of resources

Sverige enligt en nordisk arresteringsorder, available at the Swedish Government's website. At the end of 2010, legislation implementing the Convention was in place in all the Nordic countries except Sweden. It is expected that the Government will introduce a Bill on the NAW in 2011.

[15] Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, published in OJ L 292, 21.10.2006, pp. 2-19. The Agreement has not yet entered into force.

[16] Finland was the first (in 2007) country to introduce a Government Bill (Rp 51/2007 rd), resulting later in the same year in the statute 'Lag om utlämning för brott mellan Finland och de övriga nordiska länderna 21.12.2007/1383' entering into force on 1 January 2008.

[17] See, *e.g.*, comments by a justice of the Swedish Supreme Administrative Court: Annika Brickman, 'Hör det nordiska lagstiftningssamarbetet till en svunnen tid?', *Forhandlingerne ved Det 37. nordiske Juristmøde i Reykjavik 18.–20. august 2005*, pp. 443-445 and Olle Abrahamson, 'Lagstiftningspolitiken i ett svenskt perspektiv', Nord 2005:516 *Lagstiftningspolitik: Nordiskt Seminarium om Lagstiftningspolitik*, pp. 65-86.

[18] See the contribution by Swedish Supreme Court Justice Agneta Bäcklund in this *Festschrift*.

from all Nordic countries in the preparation is likely to enhance the preparatory work for legislation.[19] For my own part, I would suggest that in this regard standing expert committees in different legal fields – or areas of legal reform – acting in anticipation of forthcoming area of legislation will probably better serve the purpose, as opposed to *ad hoc* cooperation in response to legislation already decided at European Union level.

Legislation, however, is not the only or even a more important element of Nordic cooperation in criminal matters understood in its wide sense. The Nordic 'criminalist' associations[20] have been active in public debates concerning all areas of criminal science at large. The publication *Nordisk Tidsskrift for Kriminalvidenskab* is in this respect a valuable and valued vehicle for the communication of ideas and experiences from the different Nordic countries. Criminal law has also been a given subject at the Nordic Lawyers' Meeting – *Nordiskt juristmöte* – held every year since 1972 and attended by politicians, public officials, judges, prosecutors, practitioners and academics. This kind of institutions contribute towards keeping alive Nordic cooperation in criminal matters.

The 'Nordic Workshop in Criminal Law' is an annual meeting of academics from the Nordic universities;[21] the focus of these workshops have been the work-in-progress of doctoral students. The first meeting was held in 1997 in Lund, Sweden, at the initiative of professor Per Ole Träskman; since then the workshops have perambulated around different Nordic seats of learning and in Freiburg i/B and in Prague. These meetings have provided a natural forum for communication between Nordic researchers in criminal law and contacts made here often prove invaluable in the criminal lawyer's continuing career. In a shorter perspective, the doctoral student will be able to acquire knowledge and to have experts explain to them the content of the law in other Nordic countries that the students need to know for their research. Traditionally, Nordic academic theses in law will contain a more rather than less obligatory (and relatively deep) review of the law and academic writing in the other Nordic countries, so that the classical authors from all the Nordic countries constitute a common doctrine of criminal law.[22] This practice has to a large extent been curtailed in recent years – especially in Denmark and Sweden – due to a preference for shorter doctoral theses.

[19] See, *e.g.*, Fredrik Wersäll, 'Straffrättsligt samarbete i ett gränslöst Norden', 93 *Nordisk Tidsskrift for Kriminalvidenskab* (2006). pp. 122-126.

[20] The term 'criminalist' is used to cover all those interested in 'criminal science', including both the empirical science such as criminology, the humanistic science of philosophy of criminal law and the normative science of criminal law dogmatics. There are more specialized associations for, *e.g.*, criminologists.

[21] Max-Planck-Institut für ausländisches und internationales Strafrecht should perhaps be included here as well through the personal connection of former Referentin Dr. Dr.H.C. mult. Karin Cornils.

[22] An examination of German academic writings used to be a part of this unofficial *obligatorium*, so the German 'greats' will also be part of the common doctrine.

The departure from the typical Nordic doctoral thesis of the past is however not motivated by a preference for brevity alone. Some of the factors that originally shaped Nordic cooperation (in criminal matters) has lost some of its actuality. Admittedly, the historical background remains the same; however, the relevance of this background may have changed – not least as a result of demographic changes. It is not possible here to examine changes in the factors that would have contributed to the demise of a distinct Nordic profile, so one example would have to suffice for the purpose of illustration.

It was mentioned above that a mutual comprehensibility of the Scandinavian languages is a factor that has contributed towards the success of Nordic cooperation. This is, however, not the whole truth. As stated above, Finnish is not a Scandinavian language at all.[23] The Finnish affinity to Nordic cooperation must therefore, in this respect, be explained by the knowledge of Swedish by the Finnish people – whether as the mother tongue by the Swedish-speaking minority or as an acquired language by the Finnish-speaking majority. The ability of other Nordic lawyers to gain access to Finnish sources of law is – on the other side of the coin – dependent on material being written or translated into Swedish. Admittedly, Swedish is one of the official languages in Finland. However, it does not mean that all sources of law are available in both language versions. Without having carried out any comprehensive research, it is noted that whereas Acts of Parliament are available in both Finnish and Swedish, judgments of the Supreme Court of Finland are available only in the language of the case which in most cases is Finnish. As for preparatory works, some government bills are available in Swedish whilst others not. As for academic writings, the only recent monographs in Swedish on criminal law and criminal procedure have been the works by professor Dan Frände. The typical Nordic lawyer will therefore be able to access at first hand some but only a limited part of Finnish sources of law. Looking at the situation from the other side, the use of Swedish by Finnish-speakers has declined. Many younger people may in fact prefer to use English to communicate with their Nordic counterparts, even in cases where they are in fact capable of communicating in Swedish. In this perspective, therefore, the use of the Scandinavian language in Nordic contexts is more of an obstacle than a facility for Finnish-speakers. In the case of Iceland, there has always been a considerable distance between Icelandic and the other Scandinavian languages. The Icelandic vocabulary is distinctive in that it preserves many of the old words and is disinclined to adopt foreign loan-words. As a result, Icelandic differs quite significantly from Danish, Norwegian and Swedish: it is often not possible to 'guesstimate' the meaning of a word either because modern Danish/Norwegian/Swedish has a totally different root, or because the same root is

[23] See note 6 above.

not recognizable due to, for example, vowel mutation or inflections.[24] Thus, Icelandic is, on the whole, not readily accessible by a typical Nordic lawyer.[25] The converse is true of Icelandic speakers. To be able to work with the other Scandinavian languages, the language must be learned. For reason of recent history, many Icelandic scholars are fluent in Danish rather than Norwegian or Swedish. In fact, before the arrival of the textbooks on criminal law written in Icelandic by professor Jónatan Þórmundsson, the standard textbook used at the University of Iceland for the teaching of criminal law was the standard work by the Danish author Stephan Hurwitz. However, as in Finland, the younger generation in Iceland has shown a preference for using English. As for Danish, Norwegian and Swedish, I venture to say that mutual comprehensibility is still the rule – although this may require some effort. However, it is not uncommon that interlocutors may prefer to switch to English if the concentration required proves to be too demanding. On top of this, one may also add the increasing number of doctoral students who come from countries outside of the Nordic region. Thus, English appears to be the new *lingua franca* even in the context of Nordic cooperation, especially when Finland and Iceland are involved. Furthermore, many of the research projects in criminal law no longer deal with the content of domestic law – *e.g.* the Swedish law on fraud. Research trend has shifted towards on the one hand European or international criminal law, and on the other, questions concerning general principles and theories of criminal law. For both of these topics, there is no reason why a doctoral thesis should be written in a Nordic language with a relatively limited circle of potential readers. Even in such situations, English is usually the preferred language of communication. In this case, the choice of language is dictated by the choice of subject. It is submitted, therefore, that the use of a Scandinavian language should not – dogmatically – be treated as an indispensable ingredient of Nordic cooperation. In the past mutual comprehensibility of the Scandinavian languages has facilitated Nordic cooperation and will certainly continue to do so in the future in the right context. What would be unfortunate would be the exclusion from Nordic cooperation – on dogmatic grounds – of persons who for one reason or another are unable or unwilling to use a Scandinavian language as a preferred means of communication.

Another matter that ought to be taken up in this cursory look at Nordic cooperation is the reflection that one must make at the crossroads between a Nordic and a European direction. The need for this reflection has already been alluded to above in the context of legislative cooperation. At the time of writing, three of the five Nordic countries are Member States of the European Union. Iceland has lodged a membership application.

[24] Modern Danish and Swedish are by and large un-conjugated and inflected only in numerus and gender. Icelandic verbs conjugate after numerus and gender and have a middle voice as well as a subjunctive mood, Icelandic nouns inflect after numerus, gender and casus.

[25] However, it must be added that – through personal experience – it is surprising how much Icelandic a Danish, Norwegian or Swedish speaker actually understands after a few months' study of the language.

Regardless of what happens to the Icelandic application, and the position of Norway, all Nordic States will – in one capacity or another – be part of the cooperation in criminal matters within the European Union.

As mentioned above, the latest development in Nordic legislative cooperation in criminal matters concerns the implementation of a system of surrender based on a Nordic arrest warrant. This may be said to be an enhanced Nordic cooperation within the general framework of the European Union – thus pointing towards both a Nordic and a European direction. In has even been discussed whether the Nordic arrest warrant may actually inspire further developments of the surrender system in the European Union.[26] The philosophy behind enhanced cooperation is that some States will serve as the vanguard who are willing to commit themselves to deeper cooperation, with the underlying thought that other States may wish to join this cooperation when the time is ripe and such cooperation is shown to be beneficial. There is nothing wrong with the Nordic States serving as a testing ground for new ideas. It should be noted, however, that the Nordic experiment with Nordic arrest warrant will create a sub-system within the European Union. One may choose, instead, to speak of fragmentation. It is probably no big deal to indulge the Nordic States in a particular instance, but what if other constellations of States also wish to start their own experiments? Why not a sub-system for the Benelux States? How about Germany–Austria–Switzerland–Luxemburg, Spain–Portugal–Italy–Morocco? Is there a limit to fragmentation that the European Union can tolerate?[27] There are good reasons *for the Nordic States* to enter *inter se* into deepened cooperation; but these are not reasons *for other European Union Member States* that the Nordic States enter into this cooperation. The proliferation of deepened cooperation will in the end fragmentize the system to such an extent that the system itself becomes incomprehensible as a result of the numerous exceptions that it must accommodate. So one is confronted with a potential conflict between Nordic self-interests and consideration due to loyalty towards the coherence of a larger system.

It is suggested that the next question to discuss is not the to-be-or-not-to-be of Nordic cooperation, but rather how we are to reconcile a Nordic outlook and a European outlook when pursuing cooperation in criminal matters.

[26] See Mathisen (note 8 above), pp. 24-32.

[27] As a matter of positive law, the European Union has set certain conditions for enhanced cooperation. See *e.g.* Article 82(2) requiring at least nine Member States for certain form of enhanced cooperation in criminal matters.

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FESTSKRIFT TILL PER OLE TRÄSKMAN
UPPLAGA 1:1
ISBN 978-91-39-01554-3

FOTO: KENNET RUONA
TRYCK: ELANDERS SVERIGE AB, VÄLLINGBY 2011