ГОСУДАРСТВО И ПРАВО В СОВРЕМЕННОМ МИРЕ: ПРОБЛЕМЫ ТЕОРИИ И ИСТОРИИ

СЕВЕРНАЯ ПРАВОВАЯ СЕМЬЯ: ЗАРОЖДЕНИЕ, СТАНОВЛЕНИЕ, РАЗВИТИЕ

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В статье рассматриваются различные аспекты зарождения, становления и развития северной правовой семьи (северного права), которая является совокупностью правовых систем государств, расположенных на Скандинавском полуострове. Анализируются концептуальные основы, особенности и преимущества этой правовой семьи по сравнению с другими. Автор указывает на исторические условия и предпосылки появления северной правовой семьи и определяет периодизацию процесса ее укрепления, выделяя пять стадий. По мнению автора, северная правовая семья относится к правовым семьям традиционного типа и существенно отличается от романо-германской и англосаксонской (англо-американской) правовых семей, обладая уникальными правовыми характеристиками. В статье описывается законодательный процесс в скандинавских государствах, порядок принятия актов парламента, анализируются правоприменительная практика и использование правового обычая как источника права. Особое внимание уделяется роли судов и судей в нормотворческом процессе, их влиянию на формирование правовых систем и законодательства в североевропейских странах. В частности, отмечается наличие конфликта между судьями и парламентариями, заключающегося в том, что судьи не всегда удовлетворены качеством актов парламента, на основании которых иногда затруднительно справедливо разрешить дело в суде. Автор рассматривает функционирование публично-правовых и частноправовых институтов в системе регулирования общественных отношений, наряду с этим уделяя внимание вопросам регулирования общественных отношений в тех сферах общественной жизни, которые не охватываются актами парламента и где возможно договорное регулирование в межличностных отношениях и регулирование деятельности общественных организаций на основе саморегулирования. Рассматривается проблема правовой защиты индивидов.

Ключевые слова: северная правовая семья, право, закон, законодательный процесс, акты парламента, обычай, практика, судья, традиция.

NORDIC LEGAL SYSTEM: ROOTS, STRENGTH, TRENDS

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In this article different aspects of rooting, strengthening and trends of the Nordic Legal System (Nordic Law) are discussed. The Nordic Law is considered to be a sum of the legal systems of the countries, which are situated on the Scandinavian Peninsula. Apart from the concept principles, particularities and advantages of this legal system are analyzed in comparison with the others. The author points the historical background and conditions of this legal system's appearing and defines the periodization of this legal system strengthening process. He lights out five stages of the mentioned process. Besides this and according to the author's viewpoint the Nordic Legal System should be characterized as the one of the traditional type and it differs substantially if it is compared to the Roman-Germanic or to the Anglo-Saxon (Anglo-American) legal systems, having the unique legal dimensions. Further in the article the law — making process, the order of parliamentary acts adopting, the laws using practice and handling the custom as a source of law in the Scandinavian countries are described and analyzed. Special attention is paid to the role of courts and judges in the law-making process, their influence on the formation of legal systems and legislation in the Nordic countries. In particular, the article notes the existence of a conflict between judges and parliamentarians. It lies in the fact that judges are not always satisfied with the quality of acts of Parliament, on the basis of which it is not always possible to fairly resolve the case in court. In addition, the author considers the functioning of public and private law institutions in the system of regulation of public relations. At the same time, the author pays the necessary attention to the regulation of social relations in those areas of public life that are not covered by acts of Parliament and in which contractual regulation in interpersonal relations and regulation of the activities of public organizations on the basis of self-regulation are possible. The problem of legal protection of individuals is considered.

Keywords: Nordic Legal System, law, legal act, law-making process, parliamentary acts, custom, practice, judge, tradition.

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In 2017 I delivered a lecture here in Moscow on the Nordic law family. I compared it to other legal systems and I told about the unification efforts between the Nordic countries¹. This time I will dig a little deeper into the substance matter of Nordic law and how it functions (below part I). Additionally I will make some comment on the challenges facing us today (below part II).

Part I. Nordic Law²

Historical Development

Denmark, Norway and Sweden (including Finland) presumably emerged as unified kingdoms in the 7th to the 9th century. Before that the local areas were more or less independent administratively as well as legally — each of them is believed to have been controlled by “small” kings. In spite of that, social organization and legal developments within Scandinavia (defined not only as the Scandinavian peninsula but including also Denmark, Iceland, Greenland — colonized from approx 870 and onwards — and part of Finland) followed similar lines although with some discrepancies. On this basis a number of separate legal systems governing larger areas came into existence.

Such laws were originally not written down. They had presumably developed on the basis of custom and practice and were administered by the so-called things (“*ting*”). These things were regular meetings of all free men on a local, provincial, and, in Iceland, national basis. They were so to speak the basis-units not only of government (the things elected royal nominees) but also of law. Thus they legislated at all levels and settled legal disputes. They were presided over by the local chieftain or by a so-called law speaker (“*lovsigemand*”/“*løgmaður*”/“*laghmaþer*”/“*lagmann*”/“*laamanni*”) — a man who was extraordinarily learned in the unrecorded law and had the special task of reciting it to the thing. The things preserved this central role in society even up to the 13th and 14th centuries.

Between the 11th and 13th centuries the unwritten, customary law was recorded in writing in the form of private compilations or — occasionally — by instructions from the king. Examples are the Norwegian Gulathing’s Law (written in the 11th

century); the Danish Law of Jutland (1241); and the Swedish laws of Uppland (1296) and Götaland (early 13th century).

Subject Matter of the Compilations

The early laws or codes dealt with all matters relevant to society: matrimony, inheritance, property, contract, constitutional and administrative issues, crime and procedural law. However, ecclesiastical (church) law was treated separately.

In general the written codes did not constitute new law but were compilations of already valid, customary law. Basically influence from foreign law was negligible. However, in some respects a new approach was introduced in the codes. In particular blood feuds were not accepted any more — instead detailed tariffs for manslaughter and offenses against the body were set up. For instance King Magnus’ Swedish code (1350) abolished private vengeance, and prescribed that the king’s officials should initiate criminal proceedings and provide for the punishment of wrongdoers. Another new trend was that some provisions were introduced to assist paupers and helpless people.

Later Developments

Norway and Denmark were united under a common king (Olaf IV) in 1380, but this did not affect their legal systems. Instead, the two countries retained their separate laws. But until king Frederick III obtained sovereign power (in 1660) supplementary laws were issued by the changing kings in conjunction with an assembly of nobles.

However, a vital step was taken in the late 17th century as part of a reorganization of the Kingdom after the Swedish wars at that time. Thus king Christian V of Denmark and Norway organized two comprehensive codifications of laws: the Danish Law (1683) and the Norwegian Law (1687).

The two new codes left out prescriptions which had over the years become obsolete. But apart from the fact that even if the compilations on national level in some respects had to make choices between differing solutions in previous laws in their very core they were based on the existing laws of the two countries. Still influence of German, Roman, and Canon law was minimal. And as in the earlier codes, public as well as private law was included.

The new codifications were technically excellent — drafted in an easy, readable way. Moreover, by and large they were mirroring a wish also to respect individuals’ rights and equality before the law. The provisions of criminal law were also humane compared with legislation in other European countries.

In Sweden an original code, issued by King Christopher (1442), was revised in an edition which was confirmed by Charles IX (1608). Later on, under influence of the Danish-Norwegian example, a royal commission drafted a new, comprehensive code “the Law of 1734”, which was promulgated by the king.

¹ See: The Nordic Legal Family and Unification of Laws. *Journal of Foreign Legislation and Comparative Law*, 2017, no. 1, pp. 43—46. DOI: 10.12737/24287.

² For more details, see: Dahl, Melchior Rehof and Tamm. *Danish Law in a European Perspective*. GadJura 1996; Kimmo Nuotio, Sakari Melander, Merita Huomo-Kettunen (eds.). *Introduction to Finnish Law and Finnish Legal Culture*. Forum Juris, Helsinki, 2012. In general see: Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäki. *Nordic Law — Between Tradition and Dynamism*. Intersentia, 2007; Per Hagelien and Marie Vonen. *The Norwegian Legal System*. Advokatfirmaet Schjødt AS, 1994; Michael Bogdan (ed.). *Swedish Legal System*. Norstedts Juridik, 2010; Laura Carlson. *The Fundamentals of Swedish Law*, Studentlitteratur. 2nd ed. 2012. In general Kluwer Law International, *International Encyclopaedia of Laws* (Country by country and subject by subject reports).

Finland had been annexed by Sweden in the 13th century and therefore made subject to Swedish law. In consequence, Finland was also encompassed by the Swedish code of 1734 (known in Finland as “Law of the Realm of Finland”).

Modern Law

The old codes and supplementary unwritten custom and practice form basis of modern Scandinavian law. The Swedish law of 1734 was conserved as a formal framework. And in Denmark some provisions of Danish Law are still the formally valid basis of settling legal disputes even today. New, all-embracing codes have not been made, but important parts of public and private law have been codified in individual Acts of Parliament.

Moreover, since 1872 the Scandinavian countries have organized a formal legislative cooperation. So today to a considerable degree the Nordic states (including Iceland and Finland) have passed a uniform legislation in respect to i.a. contracts and commerce, family and the person.

The modern legal systems in the Scandinavian countries have preserved their national character, even if they have adopted some concepts of civil law from abroad (mainly German and French law). However, commercial law and the laws of shipping and of companies conform more or less to common European patterns. Also social welfare legislation has strong international connections. In addition, the Scandinavian legal systems are now heavily influenced by EU-law.

General Features

Law (or religion in its place) and organisation is the very core of any society. The Scandinavian countries have traditionally been well organised and they are based upon the rule of law. This concept was also the stepping stone for the Norman invasion in England and the reorganisation in that country after 1066. So it is no wonder that the Russians decided that a Viking (Rurik) should be their ruler.

As for law, it could be said that in general Scandinavian law of today is down to earth and close to life — much less dogmatic than other European legal systems. Rules and principles evolved in practice as confirmed by the courts as valid law play an important role. Thus much of the law is formulated by judges on the basis of 1) existing legislation (Acts of Parliaments) and 2) custom and practice which has been accepted as valid law by the Parliaments by their passivity to the existing order represented by customary law. Therefore Nordic law is traditionally well adapted to the practical needs.

The basis of law — whatever form it takes — is tradition and common thinking among citizens in the country in question. These elements are formed by history and physical conditions — such as natural assets, geographical location and imminent external or internal threats. It also plays a major role whether the society in question is small or big: for geographical reasons a big country cannot adapt to exactly the same model as a small one. I.a. a small population is more likely to form a

society based not upon formal legal rules but on trust and confidence — the reason being that it would be difficult to mistreat fellow citizens and expect it to go unnoticed. Therefore it is hazardous to try to transplant uncritically a model for society and its legislation from one country to another. In other words: don't take what I tell you now as a golden formula for the creation of a society as the ones in Scandinavia.

The Concept

The very core of Nordic law as it stands today is the fact that for long our countries have been based upon the democratic model. The modern Norwegian constitution “Eidsvoll-forfatningen”, even dates from 1814. Denmark has been a constitutional democracy since 1849. The first what might be called modern Swedish constitution dates back to 1809 (with supplements from 1810).

Today the concept of the constitutional basis as it has developed is based upon 5 pillars:

1) The principle of free speech — meaning allowing everybody to be heard and all facts and arguments to be presented to the people as well as to the immediate law-makers (the parliaments).

2) Law-making in accordance with the wishes of the people crystallized either by the individuals involved in the form of private agreements or by the parliaments by Acts of Parliament (legislation/statutes) based on free public debate on the subject matter of legislation.

3) An incorrupt Government and public administration and court system to administer the body of laws made on this basis.

4) A trustworthy and independent court system to apply to existing law in case of disputes.

5) Rights of the Individual.

The individual person/citizen plays a major role in legal thinking. Thus it is assumed that the individual can be entrusted with the role of participating in exercising governing of the State. He is regarded as fully capable of performing this role — and regarded as personally responsible enough not to abuse his power in a way which will seriously infringe on his fellow citizens. Therefore there is no need for laws as to what the individual should do and not do or which opinions, ideology or religion he should worship. Only a rudimentary framework of basic rules is assumed to be necessary in order to prevent conflicts between members of society, and within this framework citizens do as they please. In other words: the “private sphere” is wide and the integrity of the individual is a highly prized good.

Therefore the individual is granted privileges:

— He has the right to participate in the law-making process by electing representatives for Parliament (and the local community boards as well).

— He has the opportunity to interfere in Parliament's law-making process by launching arguments and information to his elected representatives as well as to the press and other medias (meetings, associations formed for the purpose etc.).

— He and his contractual partners have wide-ranging opportunities to set up rules for themselves not only on substance matters, but also on procedures for the settlement of disputes.

— He is protected by a core of inderogable law — the Constitution, Acts of Parliament and unwritten mandatory or non-mandatory legal principles.

— Accordingly, he has the right to have disputes of a legal nature (i.e. disputes on what is already valid law) solved by a judicial body in the form of a normal Court of Justice or a private arbitration court.

— He could not legally be deprived of his fundamental rights as an individual: his right to speak up, his right to earn a living, his right to fair and equal treatment by public authorities and a number of additional rights.

Accordingly, the feeding line of the Parliament and therefore also in law-making is public debate. It is regarded essential that any Scandinavian can rise a problem in this debate — or through a Member of Parliament — thereby putting on the political agenda issues which he finds apt for new legislation. This is a key point since it is essential that all aspects of a matter are taken into consideration before a final decision is taken in Parliament.

Thus, according to this concept of how society should work there is not — and should not be — a general, comprehensive and ever-lasting formula in the form of a religion or a political idea according to which human societies should abide. Instead consideration should always be taken as to what could be found by concrete investigation of the problems occurring. And then the final evaluation of what is brought forward by that investigation should be made by the citizens within the democratic system, which gives everyone the opportunity to be heard and to present his/her opinions and version of the facts. In other words empery (“fact-finding”) should be in the center of the law-making process and not speculation, the relevant facts should be established by the methods, which according to human experience, are best suited to produce verifiable knowledge, and the outcome should be subjected to open, public debate.

Law-making

Law-making in Scandinavia takes place in two ways:
Acts of Parliament

One way is to make an Act of Parliament.

Such Acts form the basis of administrative services or organs. But Acts of Parliament are also the usual way to create valid law between private and/or public parties. Such Acts could be mandatory (inderogable), meaning that an agreement in contradiction to the Act is null and void, or they might be non-mandatory (derogable), meaning that the Act only applies if the parties involved have not agreed otherwise.

Some Acts deal with the subject matter in details, others are rather lapidary. The reason could be that there is not time for discussions in Parliament on all issues involved, and some issues might also be of a purely

technical nature so that Parliamentarians are unable to make a reasoned decision. In such cases, the Act might open up for supplementary legislation (Orders) set up by the government within the mandate (general principles) given in the Act.

In Scandinavia the Parliament(s) are basically omnipotent, meaning that they are entitled to create new laws on any matter they find relevant. However, an important limit to this is the Constitution itself, which is based upon the idea that a Parliament should only be allowed to legislate on *general* issues. In other words, Parliaments are not permitted to solve concrete legal conflicts between two parties by way of an Act. Such legislation would be null and void. Moreover, Acts should be kept within the field apt for regulation by law. Resolutions on matters beyond what is necessary in order to make the parliamentary procedures work properly are not part of the parliamentary procedure — apart from so-called “dagsordener” (i.e. agendas), expressing that the majority is displeased with the Government so that the Prime Minister will have to step down. Examples: Penalisation of Holocaust denial or a resolution saying that the Turks committed genocide on the Armenians in the 1920s would be regarded as bad parliamentary habit, possibly even unconstitutional, since only historians could say what actually took place and the lawful purpose of an Act of Parliament cannot state what has happened in history.

Custom and practice

If no legislation exists regulating a disputed matter, the parties involved might have considered it beforehand and made an agreement between themselves, see below. However, a lot of issues occur, which are not solved by Acts of Parliament and not considered by the parties involved either. In such cases “sædvanen” (custom and practice) will reign. This means that valid law corresponds to what has traditionally been regarded as valid law. The constitutional basis is that if Parliament does not make a decision upon a matter in the form of an Act, the legal assumption will be that custom and practice has been rubberstamped by Parliament as valid law.

Such custom and practice might even be regarded mandatory. And it might also be binding upon public authorities and workplaces. For example mandatory customary law governed public administration long before Denmark had a formal Act on Public Administration. Another binding principle is the principle of fair and equal treatment of the citizens which form a core of unwritten public law. Other examples: private parties could not legally enter into any contract interfering in the one party's private life, political freedom or right to earn a living. Moreover, even if the majority of members in private associations in principle have in their power to decide what the association has to do, an unwritten minority protection applies, which makes it impossible for that majority to rule out any consideration for the minority.

Private Law-making

Another way to create law is the "leave-it-as-it-is"-solution (*laissez-faire*), meaning that Parliament leaves it to the parties involved to decide for themselves by agreement what should be valid law between them. Agreements between parties in need of a mutual regulation of their relationship are an important tool in the organisation of society.

Such agreements — which might be in writing, oral or even tacit (meaning unspoken), see below — are tools not only to settle actual or possible disputes between private and public parties. By agreement, parties might also decide to cooperate on a long-term basis according to agreed standing rules to play by.

A number of individuals may also agree on forming a private association in order to handle matters which are beyond an individual's capability to handle by himself. And associations organised according to a formal rule-book, a body to represent the organisation, fixed rules on how to run the economy etc. form "legal persons" which may take on rights and duties in relation to other legal or physical persons. One example is the unions and employers' organisations, others are the professional organisations which represent the different trades in business matters, the political parties and all sorts of sports and hobby associations.

In Denmark, Norway and Sweden — Finland has an Act of Parliament on this — it is entirely up to the parties themselves to decide the structure of such an collective body formed by their agreement. But it is also possible to cooperate within special models set up by legislation (such as the Acts on Private and Public Limited Companies)

However, not only formal agreements play a role. In Scandinavia "trust" is a dominant factor in human relations and it has been so at least since the Viking-Age. The reason might be that we are comparatively small countries, so no-one would go unobserved if he was untrustworthy. The consequence is that unless you live up to the customary rules of society or obligations you have expressly or by your behavior entered into, you will soon be marginalized by your fellow citizens and have the reputation of an unreliable person. This will give you a lot of problems.

The underlying trust between citizens forms the basis of another feature of Nordic law: an agreement need not be written down on paper in order to be binding upon the parties. Unless statutory law prescribes otherwise, agreements need not even fulfill any formal demands at all in order to be binding upon the parties.

So an agreement — or a clause of a written agreement — need not even be express meaning expressed in words or signs constituting a meaning. Even tacit agreements and clauses are valid. Thus, if one party behaves in a way which gives the other party a "justified impression" of what the legal position is between the two, that behavior constitutes a binding agreement between them.

This means that a legal obligation may also materialise itself solely in the behaviour of one party in relation to another. An example: if two parties (for example trading partners) for a long time have played by certain rules, courts may rule that there is a tacit agreement corresponding to those rules so that the one party may not suddenly deviate from the (customary) rule between them. And if a party tells the other party how he understands a suggested rule of the written agreement, the interpretation presented by the first party will be the one which courts find binding upon them if the other party does not protest immediately.

In accordance with this: the (proved) mutual intent of the parties to an agreement is more important to the interpretation of an agreement than the written text.

All this eases legal transactions since there is no need for extensive texts when you enter into an agreement. With a lack of words the assumption will simply be that the parties' intention was to resort to custom and practice as for the rest. Correspondingly a contract will be interpreted according to custom and practice if its wording is unclear.

It is difficult to explain this system of this "unspoken" law-making to foreigners who are used to the idea that parties must use written contracts. However, our system widely facilitates trade and makes human relations go more easily.

This idea might also be the reason why legislator — the Parliaments and before that the King and local things has traditionally not interfered in more than was urgently necessary.

The private law-making system even evolved in such a way so that parties could opt to have their legal disputes solved by private arbitration court put up by themselves instead of launching a lawsuit at the ordinary courts. Such arbitration courts substitute the normal court system — under the precondition that the final ruling will be in the hands of independent judges hired for the case and who act according to procedural rules which create legal security that the ruling is based upon fair and equal treatment of both parties.

Law-making by judges?

In many countries another legislator is involved too, namely the courts.

In principle the task of the Scandinavian Courts and their independent, highly skilled judges is to decide in their rulings how to apply existing, valid law in case of individual disputes. This means that Courts are not allowed to make a ruling beyond what has been decided in Parliament either by way of making an Act or by accepting custom and practice as valid law.

According to this principle the task of the Courts is only

1) to establish what should be regarded as the facts (what are the factual circumstances) of the individual case established by the proofs of the parties presented to the court, and

2) to apply already valid law (Acts of Parliament and subsidiary legislation, agreements of the parties and custom and practice) on this fact.

Naturally cases occur where an Act of Parliament is not formulated in a way which clearly solves the dispute. The agreements of the parties themselves might also be unclear or incomplete. And “custom and practice” is not easily and objectively readable. This leaves room for the judges to decide what should be the outcome of a lawsuit

and thereby what valid law is in the case. However, judges’ hands are tied by the intentions of the legislator (the Parliament) which can be read in parliamentary preparatory works and in previous Court-rulings showing what valid custom and practice which has been accepted by the Parliament actually is. In contrast a judge would not be allowed to make new law himself since this would be an illegal inference with the competence of the Parliament.

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