

# JURISPRUDENCE ON PROTECTION OF WEAKER PARTIES IN EUROPEAN CONTRACTS LAW FROM A SWEDISH AND NORDIC PERSPECTIVE

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## ABSTRACT

*With European integration, the European Union Member States are experiencing challenges to their national traditions; each Member State understands itself as particular and entertains the view that it has a different power dynamic than the average Member State. The creation of European contracts law is the source of one such challenge in that it is believed to decrease protection of weaker parties in contracts law in numerous Member States. Given the widespread assumption that contracts laws in the Nordic countries are characterized by welfare considerations and paternal motives, the Nordic countries are seen as the most prominent examples for which protection is believed to decrease. By considering Nordic contracts laws in the context of globalizations of law and legal thought, this article identifies the historical reasons and sources for this prevailing assumption and reconsiders the true impact of European contracts law in the Nordic countries. Specifically, this article shows that the Nordic countries have been able to postpone many legislative choices necessary for harmonization based on their concerns over a decrease in protection for weaker parties and the prevailing assumption about their welfare-laden laws; in doing so, the Nordic countries are acting to protect their national traditions from the reach of European integration. In the end, this article argues that there is ample room for the development of far-reaching consumer protective measures in European contracts law.*

## INTRODUCTION

From the outside, European integration appears to proceed without complications; the European Union (“EU”) recently joined ten new Member States, the European Community (“EC”) is progressing toward adoption of a directive on services in the common market, and the EC is soon to adopt a common reference framework on contracts law.<sup>1</sup> This article, however,

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<sup>1</sup> See European Commission, Enlargement, at <http://europa.eu.int/comm/enlargement/> (last visited Aug. 1, 2006); European Commission, Proposal for a Directive on Services in the Internal Market, at [http://europa.eu.int/comm/internal\\_market/services/services-dir/index\\_en.htm](http://europa.eu.int/comm/internal_market/services/services-dir/index_en.htm) (last visited Aug. 1, 2006); European Commission, Towards a European Contracts Law, 157, at [http://europa.eu.int/comm/employment\\_social/socio\\_economic\\_research/docs/FP6\\_synopsis\\_en.pdf](http://europa.eu.int/comm/employment_social/socio_economic_research/docs/FP6_synopsis_en.pdf) (last visited

probes the ongoing debate of harmonization of contracts law within the European Union, and finds that European integration causes numerous disturbances to Member States' legal systems including, of particular concern for this article, the Nordic legal systems.<sup>2</sup> Instead of assigning these disturbances to differences among the different Member States' legal systems and legal cultures, the analysis in this article looks at European integration through a framework of legal theory, specifically, the concept that there is an ongoing globalization of law and legal thought.<sup>3</sup> This article shows how European integration represents the reception of this ongoing globalization in the Nordic countries and, in doing so, traces the disturbances experienced in the Nordic countries to a misreading of and resistance to the globalization.

When the EC first began harmonizing national law in the 1950s, harmonization efforts concentrated predominantly on public law and thus left private law and public law distinct within the harmonization process.<sup>4</sup> It was not until 1985 that the EC took the first steps toward

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Oct. 20, 2006). With "EU," I refer to the European Union as a whole, whereas "EC"—the European Community—represents the area in which the EU has legislative powers.

<sup>2</sup> The Nordic legal systems refer to the legal systems in the Nordic countries. Denmark, Finland, and Sweden all are members of the EU. Although they are not members of the EU, Iceland and Norway also are included in this article because the EU closely affects these nations through their membership in the European Free Trade Association and the European Economic Area agreement. I should emphasize that my main source of knowledge is of Swedish origin. Most examples concerning national provisions, case law, and politics in this article are Swedish. However, I try to broaden my perspective to the group of Nordic countries as much as possible. Of course, in applying this model to other Nordic countries, one runs the risk of over-generalizing. My knowledge of political events in those countries is relatively limited and it is only as an outside spectator from which I draw my conclusions. Nevertheless, with this caveat in mind, I argue that there are strong similarities in the Nordic countries and that they all are facing similar challenges.

<sup>3</sup> See Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850-1968*, 36 SUFFOLK U. L. REV. 631, 638 (2003).

<sup>4</sup> Private law describes horizontal law, law concerning civil parties' interaction. For example, contracts, property, and torts laws are private law. Public law refers to cases concerning vertical relationships, when citizens interact legally with public institutions. In Sweden, the distinction between private law and public law dates back to 1789, when King Gustav III created the Supreme Court and granted it jurisdiction over private law cases. An administrative agency, "Rikets Allmänna Ärenders Beredning," was left with jurisdiction over public law cases. GÖRAN INGER, SVENSK RÄTTSHISTORIA, 155-56 (Malmö, Liber Ekonomi, 1997). The distinction later inspired the continued development of two independent court systems in Sweden and Finland: administrative courts and general courts. See ULF BERNITZ, EUROPEAN LAW IN SWEDEN: ITS IMPLEMENTATION AND ROLE IN MARKET AND CONSUMER LAW, 18 (Stockholm, Juridiska fakulteten vid Stockholms universitet, 2002). Today administrative courts handle cases concerning public law including, for example, tax law, social security law, and treatment of the mentally ill. General courts, on the other hand, handle cases concerning horizontal relationships—criminal cases and cases between private parties, *i.e.* private law. In contrast, Norway and Denmark each have a single court system. One

harmonizing private law, and still today the European Court of Justice (“ECJ”) remains reluctant to expand the doctrine of direct effect horizontally.<sup>5</sup>

In the 1990s, some scholars identified Member States’ ability to retain control over private law as one of the main reasons for the success of European integration.<sup>6</sup> The scholars pointed out that throughout the foundational phases of the integration project, which spanned almost three decades, Member States remained in control of private law. During this period, the true effects of European integration on the essence of domestic legal discourse were not apparent.<sup>7</sup> Governments’ powers seemed intact at the core.<sup>8</sup> The picture is radically different today.<sup>9</sup> The harmonization of private law is now openly on the agenda of EC institutions, and, to the interest of this article, a European contracts law is in the making.<sup>10</sup>

Throughout Europe, the pros and cons of a comprehensive European contracts law are subjects of contemporary discourse. One important issue in the ongoing discussion is what effects such a contracts law would have on Member States’ legal systems; so far, problems have

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can distinguish, however, between public and private law in all of the Nordic countries. Historically, the administrative courts have been more involved in applying EC law and referring cases to the ECJ. *See* Ulf Bernitz, *Sweden and the European Union: On Sweden’s Implementation and Application of European Law*, 38 COMMON MKT. L. REV. 903, 923 (2001).

<sup>5</sup> *See infra* note 291. The doctrine of “direct effect” gives unimplemented EC directives effect after the expiration of the implementation deadline. Article 94 of the Treaty Establishing the European Community (“TEC”) defines directives as legislative acts adopted by the Council for the approximation of laws, regulations, or administrative provisions. *See* Article 94, TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, 1997 O.J. (C 340) [hereinafter TEC]. A directive is a flexible regulatory instrument that binds Member States to a particular goal but leaves Member States to choose how to attain that goal. The direct effect doctrine only binds Member States as public entities—so-called vertical direct effect. Private parties are not required to comply with directive norms that the legislature has failed to implement—so-called horizontal direct effect. Horizontal direct effect has not been established as a matter of EC law. *See generally* Daniela Caruso, *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration*, 3 EUR. L. J. 6, 25ff (March 1997); *but cf.* Report from the Commission on the implementation of Council Directive 93/13/EEC (2000) 248, *infra* note 323, at 14 (In 1997, the Spanish Supreme Court applied an unimplemented Directive to a case concerning private parties, and thereby took the first steps introducing horizontal direct effect).

<sup>6</sup> *See* Caruso, *supra* note 5, at 4.

<sup>7</sup> *See* JOSEPH WEILER, *THE TRANSFORMATION OF EUROPE* (New Haven, Yale Law Journal Co. 1991).

<sup>8</sup> *See id.*

<sup>9</sup> *See* Daniela Caruso, *Private Law and Public Stakes in European Integration: The Case of Property*, 10 EUR. L. J. 751 (2004).

<sup>10</sup> *See infra* note 285.

primarily been identified in connection with the diverse regimes of domestic contracts law dealing with the protection of weaker parties.<sup>11</sup> Many scholars assign these problems to differences in Member States' legal systems and legal cultures. On the one hand, some Member States think contracts law is best left alone, and these nations avoid regulating protection of weaker parties. On the other hand, some Member States employ truly interventionist and paternalist systems to contract relations. The scholars believe that harmonizing contracts law decreases the protection of weaker parties provided for in the law—at least for those states that historically have allowed for intervention. The Nordic countries are held out as the most prominent example of countries for which protection is believed to decrease. Nordic contracts laws feature many social considerations and provides for court intervention to protect weaker parties—i.e., Nordic contracts laws contain numerous “welfarism” concerns, where welfarism represents “rules and principles protecting the weaker party to a contract.”<sup>12</sup>

However, there is reason to question whether harmonizing contracts law actually decreases protection of weaker parties. In 2002, the ECJ decided the case *Commission v. Sweden*.<sup>13</sup> The Commission brought the case before the Court because of Sweden's non-implementation—so the Commission argued—of the Unfair Contract Terms Directive.<sup>14</sup> Sweden had kept its regime providing for protection of weaker parties intact, making only minimal changes to the relevant contracts law provisions. There are two intrinsic points to be

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<sup>11</sup> See generally *id.*; Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 M. L. REV. 11 (1998); Thomas Wilhelmsson, *Varieties of Welfarism in European Contract Law*, 10 EUR. L. J. 712 (2004).

<sup>12</sup> Thomas Wilhelmsson, *The Philosophy of Welfarism and its Emergence in the Modern English Contract Law*, in BROWNSWORD, R., G. G. HOWELLS, WELFARISM IN CONTRACT LAW, 71 (Aldershot, Hants; Brookfield, Vt., Dartmouth et al. 1994) (In the first parts of the article, Wilhelmsson discusses different definitions of welfarism and their application); see also Wilhelmsson, *supra* note 11.

<sup>13</sup> Case C-478/99, *Commission v. Kingdom of Sweden*, 2002 E.C.R. I-04147 (1999).

<sup>14</sup> Council Directive 93/13, 1993 O.J. (L 095) 29 (EC) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML> [hereinafter Unfair Contract Terms Directive].

made here. First, the Swedish implementation of the Directive was part of a common Nordic effort.<sup>15</sup> Second, the Directive only provided for a minimum level of protection of weaker parties, leaving the Member States with the option of having stricter protection; one would expect, therefore, the Directive to cause no changes to the progressive Nordic legal systems.<sup>16</sup> Although Sweden—and the Nordic countries—prevailed in the case, there is nonetheless strong support for the Commission’s claim that the Nordic countries’ implementation did not meet the level required by the Directive. Indisputably, *Commission v. Sweden* challenges the claim that protection of weaker parties will decrease in the Nordic countries.

Consequently, differences between Member States’ legal systems and legal cultures are not likely the cause of the problems experienced in connection with contracts law regimes protecting weaker parties. An analysis of European integration through a framework of legal theory thus is useful. Building upon Duncan Kennedy’s work on globalizations of law and legal thought,<sup>17</sup> this article contrasts the historical development of Nordic contracts laws from the nineteenth century onwards, with the reception of law and legal thought from the centers of legal development. This description provides a national perspective where intervention in contracts law increased over time. The prevailing understanding is that Nordic contracts laws are full of paternalist motives, informalities, and social conceptualism. At the same time, the article offers a global perspective in which the Nordic countries receive globalizations of law and legal thought.<sup>18</sup> This analysis demonstrates how European integration represents part of the latest of these globalizations, which encompasses economic and political formalism.<sup>19</sup> Economic formalism embodies both an increased interest with freedom of contracts brought about by

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<sup>15</sup> See *infra* at note 343.

<sup>16</sup> See *infra* at note 346.

<sup>17</sup> Duncan Kennedy is a Professor at Harvard Law School, Cambridge, United States. See Kennedy, *supra* note 3.

<sup>18</sup> See *id.*

<sup>19</sup> See generally *id.*

European contracts law and the creation of protection of human and property rights resulting from the incorporation of the European Convention on Human Rights and Fundamental Freedoms (“European Convention”) into law.<sup>20</sup> Political formalism, on the other hand, embodies judicial supremacy and federalism introduced by means of the European Community Treaty and the *acquis communautaire*.<sup>21</sup>

It is against this background that this article proceeds to look at the consequences within the Nordic legal systems of the ongoing globalization of law and legal thought. The globalization causes numerous disturbances to the Nordic legal systems. With European contracts law, the Nordic legislatures are ceding formal legislative powers to the EC legislature and to federal and national courts, whereas Nordic courts must accept the ECJ as the supreme norm creator and interpreter. Additionally, both the legislatures and the courts fear for the uniqueness of the Nordic legal systems—its realist characteristics and discourses, its informalities, and its high level of social conceptualism.

Because of these disturbances, Nordic legal institutions strive to preserve the Nordic legal systems’ characteristics whenever they are incorporating EC law. Indeed, these disturbances are the reason why, within Nordic legal debate, all arguments and claims originate from presumptions that the Nordic legal systems represent informalities or intervention and that the EU represents formalism or economic liberalism. More specifically, Nordic legal debate perceives Nordic contracts laws to represent paternalistic intervention and European contracts law to represent economic liberalism. For instance, depending on political biases, scholars describe Nordic contracts laws in terms of, on the one hand, flexibility and redistribution and, on

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<sup>20</sup> See *id.*; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 (ETS No. 5), 213 U.N.T.S. 222, 1950 entered into force Sept. 3, 1953 [hereinafter European Convention].

<sup>21</sup> See Kennedy, *supra* note 3; TEC, *supra* note 5. The *acquis communautaire* is the product of the body of treaties and directives and their common interpretation by the ECJ.

the other hand, informality and excessive intervention; and European contracts law in terms of, on the one hand, legal certainty and efficiency and, on the other hand, stagnation and formalism.

This dichotomized set of presumptions about European contracts law, until now, has mitigated the true impact of harmonization of contracts law in the Nordic countries and has allowed postponement of the many legislative choices made necessary by the harmonization.

Part I of this article begins by presenting an analytic framework based on Kennedy's theory on globalization of law and legal thought, focusing on the three globalizations that have occurred since the nineteenth century, their characteristics, and their principal contents.<sup>22</sup> In Part II, this article gives a historical description of contracts law in the Nordic countries. The analytic framework developed in Part I provides a global perspective. The Nordic countries are in receipt of—and inspired by—the globalization movements at the core of legal development.

Part III analyzes the relevant EC legislation on contracts law—namely, the Unfair Contract Terms Directive.<sup>23</sup> As the contours of European contracts law form, Part III discusses its relation to Nordic contracts laws. The findings include differences in legislative techniques and in legislative policy. Part III shows how European contracts law includes more formalist clauses, grants more rights, and focuses policy more on information and individualism than Nordic contracts laws. Part IV compares the Nordic and European contracts laws and explains the effect of incorporating European contracts law into the Nordic legal systems. In particular, Part IV studies *Commission v. Sweden*, decided by the ECJ in 2002, which brings to light the conflicts between the Nordic legislatures and EC institutions, mainly the Commission and the ECJ.<sup>24</sup>

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<sup>22</sup> See Kennedy, *supra* note 3.

<sup>23</sup> See Unfair Contract Terms Directive, *supra* note 14.

<sup>24</sup> See *Commission v. Sweden*, *supra* note 13.

In Part V, this article presents an alternative explanation of the problems of harmonization of contracts law experienced in Nordic legal systems, connecting the historical description of Nordic contracts laws, European contracts law, and European integration with the theory of globalizations presented in Part I. In so doing, this article traces the disturbances experienced in the Member States to the ongoing globalization. Furthermore, Part V shows how Nordic legal debate works to mitigate the true impact and resist the implications of European contracts law, and, finally, Part VI presents a conclusion based upon the findings in this article.

### I. GLOBALIZATIONS OF LEGAL THOUGHT

In his more recent works, Kennedy presents a theory about the globalization of law and legal thought.<sup>25</sup> Kennedy identifies and tracks the developments of legal theory in the core, analyzes how these developments globalize and, ultimately, describes the reception of these developments in the periphery. Of importance to this article are the globalizations of *Classical Legal Thought*, *The Social*, and *the Third Globalization*.<sup>26</sup>

Classical Legal Thought is what Kennedy identifies as the first globalization, comprising a combination of individualism and deduction.<sup>27</sup> More specifically, what globalized with Classical Legal Thought was the idea that the legal system has a strongly coherent internal structure—based on Friedrich Carl von Savigny’s (1779-1861) theories on legal systems—and the *will theory*.<sup>28</sup>

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<sup>25</sup> See Kennedy, *supra* note 3, at 637; see also Duncan Kennedy, *The Rise & Fall of Classical Legal Thought* (AFAR, Cambridge, 1998) (unpublished manuscript, on file with the author) [hereinafter *The Rise & Fall of Classical Legal Thought*].

<sup>26</sup> See *id.*

<sup>27</sup> The globalization of Classical Legal Thought stretched from the mid-nineteenth century until the end of the First World War. See Kennedy, *supra* note 3, at 637; see also Kennedy, *The Rise & Fall of Classical Legal Thought*, *supra* note 25.

<sup>28</sup> See Kennedy, *supra* note 3, at 637.



Savigny believed that normative orders are coherent systems, building upon the spirit and history of a specific people.<sup>29</sup> According to him, positive legal rules can be created and derived from a system's internal coherence.<sup>30</sup> This produced a strong sense of tradition, authority, and patriarchy.<sup>31</sup> Legal scientists and law professors were the main actors in the process of constructing coherent systems.<sup>32</sup> In Germany, for example, followers of Savigny—the Historical School—inspired the adoption of the German Civil Code of 1900.<sup>33</sup>

The other notion of Classical Legal Thought, the will theory, tried to identify and derive rules from the idea of individual self-realization.<sup>34</sup> Accordingly, governments should be concerned with the rights of legal entities, allowing them freedom to realize their individual will and intervening only to assure that others can do the same.<sup>35</sup>

Kennedy identifies the emergence of a critique toward the inherent logic and deduction of Classical Legal Thought to avoid a social crisis stemming from a few dominating the many.<sup>36</sup> Whereas the logic was “inherently individualist in legal substance,” it had limited reach—it could not safeguard social concerns.<sup>37</sup> In the latter part of the nineteenth century, social reality was at focus and the new socio-economic maxim of interdependence became predominant.<sup>38</sup> Everywhere in society, there were reminders of the countless examples of extreme outcomes and inequalities stemming from Classical Legal Thought's inability to regard the changing factors of

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<sup>29</sup> See Kennedy, *supra* note 3, at 638; see also INGER, *supra* note 4, at 165.

<sup>30</sup> See *id.*

<sup>31</sup> See INGER, *supra* note 4, at 165.

<sup>32</sup> See Kennedy, *supra* note 3, at 638

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See Kennedy, *supra* note 3, at 648. Rudolf von Jhering (1818-1892) played a major role in formulating this critique, which globalized between 1900 and 1968. See *id.*; RUDOLPH VON JHERING, *THE STRUGGLE FOR LAW* (1879).

<sup>37</sup> Kennedy, *supra* note 3, at 648 (quotations omitted).

<sup>38</sup> See *id.* (interdependence represented a social transformation, comprising industrialization, globalization, and urbanization).

society. Industrial accidents, failing factories, and emerging urban slums all were attributed to the will theory's inability to respond to social needs.<sup>39</sup>

The critique of Classical Legal Thought took the form of The Social.<sup>40</sup> This does not mean that the critique was necessarily Socialist; instead, The Social connotes a way of thinking concerned with how to use law to achieve social objectives.<sup>41</sup> From describing the problem of Classical Legal Thought and of what “is,” The Social continued and developed what “ought” to exist.<sup>42</sup> Everything, from unfair contract practices, labor legislation, rent and housing laws, and zoning to intervention in financial markets, was considered a legitimate purpose.<sup>43</sup> Within general contracts law, The Social shifted the focus from the subjective intention, i.e. the free will of the parties, to predefined objective functions in an effort to avoid unfair results.<sup>44</sup>

Politically, The Social could take the form of Socialism, Nationalism, Authoritarianism, or Fascism.<sup>45</sup> The Social was, however, always both anti-Marxist and anti-laissez-faire.<sup>46</sup> Whatever its political shape, The Social advocated the same language of “organicism, purpose, function, reproduction, welfare, [and] instrumentalism.”<sup>47</sup>

Most recently, and all around us, the Third Globalization exists.<sup>48</sup> What is globalizing is not an all-new comprehensive legal theory, nor is it a synthesis from what was before.<sup>49</sup> Rather, the Third Globalization is the “un-synthesized coexistence” of The Social and Classical Legal

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<sup>39</sup> See *id.* at 649.

<sup>40</sup> See *id.* at 648. The Social is the term used by Kennedy in his scholarship to describe this era.

<sup>41</sup> See *id.* at 633.

<sup>42</sup> *Id.* at 650. Different organized interests as well as the public interest worked in harmony to maximize social welfare, and the result was legal rules derived from “social needs or functions or purposes.” Kennedy, *supra* note 3, at 653, 672.

<sup>43</sup> See *id.* at 650.

<sup>44</sup> See Fernanda Nicola, *Asymmetry and Distribution in European Contract Law*, 35 (S.J.D. Candidate, Harvard Law School, 2004) (on file with the author).

<sup>45</sup> See Kennedy, *supra* note 3, at 650.

<sup>46</sup> See *id.* at 649.

<sup>47</sup> *Id.* at 650.

<sup>48</sup> See *id.* at 674.

<sup>49</sup> See *id.*

Thought.<sup>50</sup> Elements from those theories transformed or survived and now surround us.<sup>51</sup>

Neither Classical Legal Thought nor The Social thus has ceased to exist.

In the way The Social stemmed from a critique of Classical Legal Thought, the Third Globalization grew out of a critique of The Social. From the 1930s on, with a peak in 1968, the critique has visualized the many problems of The Social.<sup>52</sup> Four main critiques exist.

First, The Social bases its is-to-ought constructions of legal rules on meta-physical concepts.<sup>53</sup> One cannot derive rules from social needs, functions, or purposes, without denying the invasive conflict between different functions.<sup>54</sup> Second, critics gave much attention to the link between The Social and extreme political systems; Fascism is a prime example.<sup>55</sup> Third, the critique that had the most impact addressed the lack of formalism in The Social as informalities of The Social opened the way for governments to tangle with individual rights.<sup>56</sup> Arbitrariness and authoritarian elements permeated government institutions and administration.<sup>57</sup> Finally, there were many claims concerning social institutions' tendency to damage the interests they aimed to protect.<sup>58</sup> For instance, one claim was that redistribution of wealth from the middle classes to the lower classes stagnated economic growth.<sup>59</sup> Another example was that people received social protection that was worth less than the price increase the protective measures

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<sup>50</sup> Kennedy, *supra* note 3, at 674. Modeer draws a similar conclusion in his book, *Historiska Rättskällor*. He recognizes the reemergence in Swedish jurisprudence of what he calls natural law as a consequence of European influence in Sweden. KJELL A MODEER, *HISTORISKA RÄTTSKÄLLOR: EN INTRODUKTION I RÄTTSHISTORIA*, 236 (Stockholm, Nerenius & Santerus Förlag, 1997); Håkan Strömberg, *Tankar om naturrettens renässans*, I: *Svensk Juristtidning* 1996, s. 635 ff.

<sup>51</sup> See Kennedy, *supra* note 3, at 674.

<sup>52</sup> See *id.* at 671.

<sup>53</sup> See *id.* at 672.

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *id.* at 672-73.

<sup>57</sup> See Kennedy, *supra* note 3, at 672-73.

<sup>58</sup> See *id.* at 674.

<sup>59</sup> See *id.*

caused in the market.<sup>60</sup> This critique found that weaker parties would be better off without The Social, social engineering, and state services.

As the critiques against The Social gained strength, the Third Globalization embraced The Social, which had now transformed into policy analysis—also described as conflicting considerations or balancing.<sup>61</sup> Policy analysis enabled courts to strike a balance between different “interests,” “values,” and “utilities” that had a stake in the outcome.<sup>62</sup> In contrast to the earlier mode, when rules had been created with a particular purpose in a coherent legal system, policy analysis allowed creation of rules from ad hoc compromises.<sup>63</sup>

Similarly, Classical Legal Thought formalism transformed into a new shape and re-emerged as neo-formalism,<sup>64</sup> introducing human rights, contracts and property rights, federalism, and judicial supremacy.<sup>65</sup> Rule of law limited the executive and legislative branches of government through judicial supremacy, and courts grew to be the arbitrators.<sup>66</sup> Once again, it was possible to deduce rights and rules from an imaginary coherent system of positive law,<sup>67</sup> the best example of which was the emergence of the extensive and widely used regime of human rights.<sup>68</sup>

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<sup>60</sup> *See id.*

<sup>61</sup> *See id.* at 671, 676. *See also* Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L. J. 1031 (2004) (for more on policy analysis).

<sup>62</sup> Kennedy, *The Rise & Fall of Classical Legal Thought*, *supra* note 25, at 251 (the point is that none of the different criteria may be used to construct a principle; they are all choices between “natural rights/morality and social welfare maximization.”).

<sup>63</sup> *See* Kennedy, *supra* note 3, at 675.

<sup>64</sup> *See id.* at 671, 676.

<sup>65</sup> *See id.* at 634, 674.

<sup>66</sup> *See id.* at 634. Both policy analysis and neo-formalism perceived the judge as the central figure. It is he or she who makes the ad hoc compromises in each case and at the same time protects rights and formalities. *See id.* at 677.

<sup>67</sup> *See id.* at 674.

<sup>68</sup> *See* Kennedy, *supra* note 3, at 674-75.

## II. PROTECTION OF WEAKER PARTIES IN NORDIC CONTRACTS LAWS

Nordic legal unity stems from the Nordic countries' common legal theory and methodology, because all Nordic countries share basic legal concepts, have alike legal sources, and incorporate the doctrine of precedent.<sup>69</sup> Other notable characteristics are the many sociological and political correspondences between the Nordic countries; they all share similar “intentions, language and welfare.”<sup>70</sup>

Most comparative studies perceive the Nordic legal systems as distinguishable from both Civil and Common Law legal systems.<sup>71</sup> Zweigert and Kötz observe in their book, *An Introduction to Comparative Law*, that Nordic law is “not completely civil – not common law.”<sup>72</sup> Although historically the Nordic legal systems have had close ties to the Civil Law tradition, one can find general Common Law features in, for example, securities and property law, which developed almost entirely by case law, analogies, and scholarship.<sup>73</sup>

From a contracts law perspective, what characterize the Nordic legal systems are “the lack in Nordic law of large, systematically constructed private law codifications” and the frequent use of analogies when no applicable statutory law exists.<sup>74</sup>

### A. Emerging Welfarism and Classical Legal Thought

The Nordic countries traditionally work together to find common legal solutions. Cooperation takes place both on a formal and on an informal level, from private phone calls

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<sup>69</sup> See BERNITZ, *supra* note 4, at 97.

<sup>70</sup> K. ZWIGERT & H. KÖTZ, *INTRODUCTION TO COMPARATIVE LAW*, 294-95 (Oxford New York, Clarendon Press, Oxford University Press, 3d ed., 1998).

<sup>71</sup> Recent comparative studies describe the Nordic legal systems as a sub group to the continental Civil Law legal system. See BERNITZ, *supra* note 4, at 20 (*citing* MICHAEL BOGDAN, *KOMPARATIV RÄTTSKUNSKAP*, 91 (Stockholm, Norstedts juridik, 1993)).

<sup>72</sup> ZWIGERT & KÖTZ, *supra* note 70, at 287.

<sup>73</sup> See BERNITZ, *supra* note 4, at 17.

<sup>74</sup> Ulf Bernitz, *Nordic Legislature Cooperation in the New Europe*, 39 *Sc. St. L.* 29, 32 (2000).

between officials to public meetings.<sup>75</sup> Nordic cooperation dates back to 1872 when Nordic lawyers and scholars gathered in a formal meeting to exchange ideas on legal issues.<sup>76</sup> Other meetings followed and, in time, the meetings became institutionalized.<sup>77</sup>

At first, efforts were concentrated on areas concerning trade law.<sup>78</sup> However, cooperation has since expanded to areas such as family law, intellectual property law, and laws of inheritance.<sup>79</sup> This has produced a number of essentially identical laws throughout the Nordic countries; similarities exist both on a material level and in how the Nordic countries apply these laws. Currently, the Nordic countries arrange “Meetings of Nordic Jurists” once every three years.<sup>80</sup>

In the context of contracts law, one can trace common Nordic features back to the early twentieth century. Between 1905 and 1907, Sweden, Norway, and Denmark adopted common acts on Sale of Goods.<sup>81</sup> At the time of enactment, the controlling law in Sweden was the Trade Code from 1734,<sup>82</sup> which most critics held as outdated and insufficient.<sup>83</sup> In terms of regulating contracts law, the Purchase and Exchange of Goods Acts changed little, and a significant addendum to and improvement of the Purchase and Exchange of Goods Acts and of contracts

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<sup>75</sup> See generally INGER, *supra* note 4, at 171, 180, 253; MODEER, *supra* note 50, at 225-26.

<sup>76</sup> See MODEER, *supra* note 50, at 200.

<sup>77</sup> See *id.* at 200-01, 224-26. Note that Finland was not part of the Nordic cooperation until 1918, when it received independence from Russia. See INGER, *supra* note 4, at 181.

<sup>78</sup> See INGER, *supra* note 4, at 180.

<sup>79</sup> See *id.* at 180-181.

<sup>80</sup> See *id.*; see also Meetings of Nordic Jurists, Reykjavik, Iceland, at <http://www.congress.is/njm2005/> (last visited Oct. 20, 2006); Meetings of Nordic Jurists, Helsinki, Finland, at <http://www.congrex.fi/njm2002/indexs.htm> (last visited Oct. 20, 2006). In 1962, Nordic legislative cooperation formalized as the Nordic countries came together to reinforce their commitment to cooperate. The Helsinki Agreement was entered into that same year. It expressed a clear ambition to continue Nordic legislative cooperation in order “to attain the greatest uniformity possible in private law.” See The Helsinki Agreement, Article 4, available at <http://www.norden.org/avtal/helsingfors/sk/3-2-2-hfors.asp> (translated by the author) (last visited Oct. 20, 2006).

<sup>81</sup> See *Köp och byte av varor* [Purchase and Exchange of Goods], see generally INGER, *supra* note 4, at 180.

<sup>82</sup> Handelsbalk [Trade Code], SFS 1736:0123 2 (Sweden).

<sup>83</sup> See INGER, *supra* note 4, at 220-21.

law came with the new Contracts Acts.<sup>84</sup> Between 1915 and 1936, all Nordic countries adopted the new Contracts Acts.<sup>85</sup> The Acts mostly were an effort to put into statute what already was governing case law, but new aspects included honesty and fair dealing in contract relationships.<sup>86</sup>

From a global perspective, Classical Legal Thought strongly influenced Nordic contracts laws and the adoption of the Contract Acts. The Act represented the success of the will theory in Nordic contracts laws, emphasizing the rights of legal entities and scientifically construed after the positivist German model of “normative formalism.”<sup>87</sup> The Contracts Acts also were in step with the general *laissez-faire* tendencies of society.<sup>88</sup>

Central to the Contracts Acts was the principle of *freedom of contract*. For instance, section 1, paragraph 1, of the Swedish version of the Contracts Act made offers to contract binding.<sup>89</sup> The contracting parties decided the extent of their contractual relationship through offer and acceptance, and the Government upheld their will to contract as long as it could identify a formal offer to contract—the promise made by the offeror was one that the Government thought should be enforceable.<sup>90</sup>

Moreover, section 1, paragraph 2, of the Contracts Act established that when commercial practices or a practice between the involved parties entail a custom that the parties and the courts regard as binding on the parties, that custom should have precedence over formal requirements in

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<sup>84</sup> See *id.* In a case from 1901, the Swedish Supreme Court expressed its desire for an all-purpose Contracts Act. NJA 1901:1, at 6-9, 20ff (Sweden).

<sup>85</sup> Sweden 1915, Denmark 1917, Norway 1918, Finland 1919, and Iceland 1936. See Wilhelmsson, *supra* note 12, at 70-71.

<sup>86</sup> See INGER, *supra* note 4, at 221.

<sup>87</sup> Kennedy, *supra* note 3, at 631, 638; see also INGER, *supra* note 4, at 181; BERNITZ, *supra* note 4, at 19; Wilhelmsson, *supra* note 12, at 70-71.

<sup>88</sup> Liberals believed that free competition stimulated societies' economic development. State intervention was dangerous and should be limited to the greatest extent. See generally INGER, *supra* note 4, at 164-65.

<sup>89</sup> See Lag om Avtal och andra rättshandlingar på förmögenhetsrättens område [Contracts Act], SFS 1915:218, section 1 (Sweden) [hereinafter Contracts Act].

<sup>90</sup> Exceptions to the general rule that offers to contract are enforceable promises were found in other laws. See *id.* at section 1, para. 3. In comparison, American contracts law from this time required consideration for a contract to be binding. Consideration represented the Government's opinion on which promises should be enforceable. See Kennedy, *The Rise & Fall of Human Thought*, *supra* note 25, at 215.

the Act.<sup>91</sup> Of course, an explicit agreement between the parties also would have precedence.<sup>92</sup> Freedom of contract thus was negatively legislated; it was the underlying presumption.<sup>93</sup> The law allowed parties to develop their own norms through trade practice, and courts upheld those norms.<sup>94</sup>

Another example of the importance of the will theory in Nordic law can be found outside the Contract Acts. Sweden has strongly relied on the *principle of extinction*. According to that principle, restated in among others the Promissory Notes Act (1936), a buyer who purchases stolen property in good faith prevails over the original owner by extinguishing the original owner's right to the property.<sup>95</sup> The idea is that good faith buyers should be able to rely on the enforceability of a contract to buy property, thereby increasing willingness to contract. Only in July 2003 did the Swedish legislature change this rule toward the prevailing principle elsewhere in the EU, which holds that the original owner's right prevails over a good faith buyer's right.<sup>96</sup> In sum, the Nordic legislatures sought different ways to retain a very high degree of contractual freedom and to avoid interfering in market transactions.

Classical Legal Thought also had an impact on how to provide for protection of weaker parties; the Contract Acts limited intervention in contract relationships to the securing of each entity's individual will through regulating the form and procedure, rather than the substance, of contract formation.<sup>97</sup> When the Acts allowed for intervention in substance, specifically section 33 of the Act, it limited intervention to invalidating contracts "contrary to good faith and

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<sup>91</sup> See Contracts Act, *supra* note 89, sec. 1.

<sup>92</sup> See *id.*

<sup>93</sup> See LARS ERIK TAXELL, AVTALSRÄTT: BAKGRUND, SAMMANFATTNING, UTBLICK, 36 (Stockholm, Juristförl., 1997).

<sup>94</sup> For a comprehensive discussion, see BERNITZ, *supra* note 4, at 285ff.

<sup>95</sup> See Lag om Skuldebrev [Promissory Notes Act], SFS 1936:81 (Sweden) [hereinafter Promissory Notes Act].

<sup>96</sup> See Lag om Godtrosförvärv av Lösöre [Good Faith Acquisition of Goods Act], SFS 1986:796 (Sweden).

<sup>97</sup> See Claes Sandgren, *En social avtalsrätt? Del I*, 4 JT 456, 461 (1992-1993) (Sweden); see also Kennedy, *supra* note 3, at 637.



honesty.”<sup>98</sup> Accordingly, a contracting party had no obligation to take into consideration the other party’s will. This image assumed that all contracting parties had equal social and economic power and, therefore, that parties could look after their own interests.<sup>99</sup> The widespread use of the *caveat emptor* principle strengthened the presumption that contracting parties were informed and rational actors.<sup>100</sup>

In sum, contracts law from this period was shaped by the perception that the market was best left alone. Consequently, the Contract Acts contained no specific welfarist goals, only a mutually recognized respect of each party’s will and a limited call for morality in the market.<sup>101</sup> Thomas Wilhelmsson, Professor at Helsinki University in Finland, categorizes the welfarist provisions in the Contract Acts as representing an “emerging welfarism.”<sup>102</sup>

## **B. The Civil Code Discussion**

Both the French and German civil codes greatly inspired Nordic countries throughout the nineteenth century, and Sweden entertained the option of adopting a civil code in the early nineteenth century, when the French adopted their *Code Civil*.<sup>103</sup> In fact, the Government’s working committee presented a draft, *Civillagsförslaget*, in 1826.<sup>104</sup> Critics, mainly conservatives, opined that a civil code would be “unduly radical.”<sup>105</sup> Following Savigny, they argued that codification would upset the history and tradition of the people.<sup>106</sup> The Supreme

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<sup>98</sup> Wilhelmsson, *supra* note 12, at 73 (discussing the Contracts Act, *supra* note 89, sec. 33).

<sup>99</sup> E.g. Prop. [Legislative note] 1994/95:17, 16 (Sweden).

<sup>100</sup> See generally Wilhelmsson, *supra* note 12, at 72. *Caveat emptor* is Latin for “let the buyer beware.” The buyer takes responsibility for the condition of the goods involved in the transaction. The opposite doctrine is *caveat vendor*, meaning “let the seller beware.” Marriam-Webster Online, at [www.m-w.com](http://www.m-w.com) (last visited Aug. 2006).

<sup>101</sup> The call for morality in contract relations, though limited in its reach, was a development from existing case law and the Trade Code [Handelsbalken 1734]. This supports Wilhelmsson’s categorization of this historical period as emerging welfarism. See Wilhelmsson, *supra* note 12, at 86. For a similar claim, see INGER, *supra* note 4, at 221.

<sup>102</sup> Wilhelmsson, *supra* note 12, at 86.

<sup>103</sup> See BERNITZ, *supra* note 4, at 17. France adopted its *Code Civil* in 1804. See Wikipedia, at [http://en.wikipedia.org/wiki/Napoleonic\\_Code](http://en.wikipedia.org/wiki/Napoleonic_Code) (last visited Oct. 21, 2006).

<sup>104</sup> See INGER, *supra* note 4, at 176.

<sup>105</sup> BERNITZ, *supra* note 4, at 17; see also INGER, *supra* note 4, at 176.

<sup>106</sup> E.g. Kennedy, *supra* note 3, at 638.

Court, at the time charged with the responsibility of reviewing proposed laws, dismissed the code in 1833<sup>107</sup> and, hence, the code was never presented to the Parliament for voting.<sup>108</sup> No Nordic country adopted a civil code, choosing instead to focus legislative efforts on particular legal sectors and the use of analogy when no applicable rule exists.<sup>109</sup> The Nordic Contract Acts only consisted of around thirty sections.<sup>110</sup>

### C. Reactive Welfarism and The Social

At the end of the nineteenth century and in the early twentieth century, governments all over the world experienced increasing numbers of market failures and, like in many other places, governments in the Nordic countries looked to activist state action in the form of reconstruction programs as a counter measure. Otto von Bismarck's German welfare model especially influenced the establishment of Nordic welfare states.<sup>111</sup>

Inspired by its German counterpart, social democracy grew as a political force; it was a movement to reform society through democratic rather than revolutionary means.<sup>112</sup> Large parts of the growing working class were excluded, however, from democratic influence, because of restrictions that based voting rights on gender and property.<sup>113</sup> As a result, in Sweden, the period

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<sup>107</sup> See MODEER, *supra* note 50, at 176-78. The Supreme Court performed judicial preview to establish whether a proposed law was constitutional. See *id.* at 177; *infra* note 259.

<sup>108</sup> The Parliament did vote, however, on one part of the proposed code, the Criminal Act, which eventually was adopted. See INGER, *supra* note 4, at 177.

<sup>109</sup> See BERNITZ, *supra* note 4, at 17, 99; see also Wilhelmsson, *supra* note 12, at 85 n.15 (the Nordic countries denied the idea of a "sacrosanct" general code).

<sup>110</sup> See Bernitz, *supra* note 4, at 99-100.

<sup>111</sup> See Gregory S. Alexander, *Comparing the Two Realisms – American and Scandinavian*, 50 AM. J. COMP. L. 131, 174 (Winter 2002); INGER, *supra* note 4, at 224; see also Kennedy, *supra* at note 3, at 665-66. Between the years 1883 to 1889, Germany introduced a social insurance program for workers—providing for a mandatory health insurance, accident insurance and a disability- and retirement insurance. The Swedish parliament entertained the same possibility in 1884, but in the end, decided that it was too radical a measure. Later on, however, Sweden did introduce a similar program. See INGER, *supra* note 4, at 224.

<sup>112</sup> See INGER, *supra* note 4, at 165. Social democracy first was introduced as a concept in Germany. In the Nordic countries, social democratic parties progressively formed—1871 in Denmark, 1887 in Norway, 1889 in Sweden, and 1899 in Finland. See *id.*; Socialdemokraterna, at [http://www.socialdemokraterna.se/Templates/Page\\_\\_\\_6591.aspx](http://www.socialdemokraterna.se/Templates/Page___6591.aspx) (last visited Oct. 20, 2006).

<sup>113</sup> In fact, less than twenty-five percent of male voters actually could vote—and no women—as a direct effect of the qualifications in the Swedish Constitution. See INGER, *supra* note 4, at 186. Even though the political development

between 1880 and 1909 can be described in terms of class conflict, characterized by demands for increased democracy against the conservative regime.<sup>114</sup> Only in the 1910s did Sweden see change and social democrats were able to establish themselves in the parliamentary system. All the Nordic countries experienced the emergence of welfare states.

The Swedish welfare state was characterized by the introduction of “Folkhemmet” or the “Common people’s home.”<sup>115</sup> This concept was of German origin and stood for the idea that the state should look after and take care of its citizens.<sup>116</sup> In the words of former Swedish Prime Minister Per Albin Hansson (1885-1946):

A good home knows of no privileged or suppressed, and of no favorites or stepchildren. No one looks down on others, and no one tries to gain advantages from others’ weaknesses, the strong do not repress or loot the weak. In a good society, there is equality, care, co-operation, and willingness to help.<sup>117</sup>

Tax revenue allowed the government to fund increased pensions, health insurance, accident insurance, disability and retirement insurances, unemployment insurance, unemployment boards, and favorable loans for housing.<sup>118</sup> Social democrats also enacted new Family Codes, regulating everything from marriage to the parameters for government intervention in a family to take custody of children.<sup>119</sup> It was an attempt to reach harmony on all

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during the nineteenth century thus shifted power from the King to the Parliament and the Cabinet, conservative forces could still control most of parliament. *See id.* at 170-71. By 1921, Sweden had established the right to vote for both men and women. *See id.* at 188-89.

<sup>114</sup> *See* Sven Eliaeson & Sidonia Jędrzejewska, *Neo-Liberalism and Civil Society. Swedish Exceptionalism and Polish Pluralism.*, European Civil Society Network CiSoNet, Presented at Conference on Markets and Civil Society in Europe, Madrid, (Sep. 23-25, 2004), at [http://www.asp-research.com/Papers%20CiSoNet/MADRIDSEPT%20\(1\).pdf](http://www.asp-research.com/Papers%20CiSoNet/MADRIDSEPT%20(1).pdf), 16 (work in progress) (last visited Oct. 20, 2006) [hereinafter *Neo-Liberalism and Civil Society*]. Workers, for example, fought for the right to organize themselves and the introduction of union agreements. The tension reached its peak in 1909 when, because of the ongoing class conflict, a national strike involving over 300,000 workers was called. *See* INGER, *supra* note 4, at 227.

<sup>115</sup> *See* Eliaeson & Jędrzejewska, *supra* note 114, at 7.

<sup>116</sup> *See id.*

<sup>117</sup> Socialdemokraterna, *supra* note 112 (translated by the author).

<sup>118</sup> *See* INGER, *supra* note 4, at 224, 285; *see also* Socialdemokraterna, *supra* note 112; Lag om Arbetslöshetsnämnd [Unemployment Boards Act], SFS 1944:475 (Sweden).

<sup>119</sup> Föräldrabalken [Family Code], SFS 1949:381 (Sweden).

levels in the labor market, in the family, and between state and civil society.<sup>120</sup> In this process, all Nordic countries centralized state power and applied large-scale solutions.<sup>121</sup> With time, the distinction between state and civil society eroded.<sup>122</sup>

As a parallel to—and tied to—the social democratic parties' increased political influence, the Nordic countries experienced the globalization of The Social. One original and expounding example of The Social's impact on Nordic legal theory is the development of labor law, which contains many corporatist features and which historically has been heavily regulated and more or less completely isolated from general contracts law.<sup>123</sup>

Labor law was among the first areas in which the legislature intervened to preempt inequalities.<sup>124</sup> This occurred, for example, in the early twentieth century, when legislation forced employers to include social insurance for industrial accidents in wage bargaining.<sup>125</sup> In addition, the legislature enacted statutes addressing labor accidents and protection against evictions during labor conflicts.<sup>126</sup> Nevertheless, workers, employers, and the government still divided the labor market. A process of cooperation started when the forces of the labor market settled. In Sweden, this happened in 1938, when unions entered into a collective bargain with employers, the so-called “Saltsjöbadsavtalet.”<sup>127</sup> Both sides understood that in order to avoid a

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<sup>120</sup> See, e.g., ALVA MYRDAL & GUNNAR MYRDAL, *KRIS I BEFOLKNINGSFRÅGAN* (Stockholm, Bonnier, 1934) (in which they suggested that citizens together should take part in carrying the costs of, for example, raising a child).

<sup>121</sup> See Eliaeson & Jedrzejewska, *Neo-Liberalism and Civil Society*, *supra* note 114, at 7.

<sup>122</sup> For a general critique, see GUNNAR MYRDAL, *HUR STYRS LANDET?* (Stockholm, Rabén & Sjögren, 1982); see also Eliaeson & Jedrzejewska, *Neo-Liberalism and Civil Society*, *supra* note 114, at 7; Åke Daun, *Välfärd inte bara offentlig service – Europa som negativ kontrast till folkhemsbygget*, 19; Kennedy, *supra* note 3, at 657 (describing how The Social did not see that they were “eroding the distinction between law and politics.”).

<sup>123</sup> See Wilhelmsson, *supra* note 12, at 77.

<sup>124</sup> See *id.* (describing how several protective elements developed much earlier in labor law than in other areas of law).

<sup>125</sup> See *id.* at 76; Kennedy, *supra* note 3, at 653. Sweden enacted a Workers Compensation Act in 1901, compensating work related injuries, and a voluntary Social Insurance Act in 1910. See INGER, *supra* note 4, at 224.

<sup>126</sup> See, for example, Lag med särskilda bestämmelser om försäkring för olycksfall i arbete av vissa tjänstepliktiga m.m. [Insurance Regulations of Workrelated Accidents for certain Employee Groups], SFS 1943:182 (Sweden); Lag om skydd mot vräkning vid arbetskonflikter [Protection Against Evictions in Strikes], SFS 1936:320 (Sweden).

<sup>127</sup> See INGER, *supra* note 4, at 287; see also Socialdemokraterna, *supra* note 112.

collapse of production, they had to work together. Strife and class war were outdated because they ignored the inherent interdependence between labor and capital; in other words, society needed to find harmony.<sup>128</sup> Together, unions and employers entered into collective agreements, disregarding individual and formal criteria of contract making by binding non-union members and, thus, marginalizing the will theory.<sup>129</sup> Moreover, labor and management councils were vested with the power to make legally binding regulations.<sup>130</sup>

This marked the start of a lasting period of consensus and détente in the Swedish labor market. The Swedish legislature allowed the parties in the labor market to develop their own solutions, as long as those solutions produced results. A comprehensive regime of corporatism grew out of this close cooperation between unions and employers. It was not until the 1970s that the unions started demanding legislative intervention in order to force development.<sup>131</sup> Sweden has not, to date, enacted any legislation providing for minimum wage, leaving it to the unions and the employers to agree. Employer duties, contained in labor contracts growing out of this period, included retirement benefits, paternity leave, and employment insurances.<sup>132</sup>

Whereas labor law was heavily regulated and developed progressive solutions to socio-economic problems, mainstream contracts law was left untouched. Intervention was limited to specific cases where abuse of weaker parties occurred. One can identify two dominant trends from a welfarism perspective. Case law expanded the reach of court intervention and the legislatures took action *in casu* against specific market malfunctions.

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<sup>128</sup> See Kennedy, *supra* note 3, at 653-54.

<sup>129</sup> See *id.*

<sup>130</sup> See *id.* at 653.

<sup>131</sup> See Eliaeson & Jedrzejewska, *Neo-Liberalism and Civil Society*, *supra* note 114, at 18; INGER, *supra* note 4, at 286-87 (describing this development and the history of the Lagen om Anställningsskydd [Employment Protection Act], SFS 1982:80 (Sweden)).

<sup>132</sup> See Landsorganisationen, *at*

<http://www.lo.se/home/lo/home.nsf/unidView/3FAC3BF28773FD47C1256E3C00534DDC> (last visited Oct. 22, 2006).

Through case law, the courts broadened welfarism and increased intervention in contract relations. As a first step, courts came to use section 33 of the Contract Acts to establish a general “duty of disclosure.”<sup>133</sup> In Finland, the leading Supreme Court case came in 1949, concerning information about the condition of a machine for sale.<sup>134</sup> The same year the Swedish Supreme Court ruled that a duty exists to inform contracting parties about surprising and onerous conditions in contracts.<sup>135</sup> That case concerned an arbitration clause that was integrated into a contract through reference to a standard contract.<sup>136</sup>

Courts also developed a general right and power to adjust unfair contract terms.<sup>137</sup> Several cases established this right to modify or set aside obviously unfair terms.<sup>138</sup> After a long discussion in Finland that persisted well into the 1950s, scholars started to agree that by analogizing to the unfairness clause in section 8 of the Promissory Notes Act,<sup>139</sup> one could recognize a general principle of adjustment of “manifestly unfair contracts.”<sup>140</sup> In Sweden, the Supreme Court decided the leading case, *Köksmåla*,<sup>141</sup> in 1948, where a lease made by the Swedish Forest Council was found to contain unfair terms.<sup>142</sup>

For their part, the Nordic legislatures introduced several mandatory laws as reactions to the existing conditions of the relevant markets. To help develop urban areas, renting of dwellings and leasing were regulated; for example, Finland passed a Land Lease Act in 1902 and a Rent Act in 1925.<sup>143</sup> The legislatures adopted Insurance Contracts Acts in response to the

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<sup>133</sup> Wilhelmsson, *supra* note 12, at 73.

<sup>134</sup> *See id.* at 73 n.8 (citing NJA 1949 II 258 (Sweden)).

<sup>135</sup> *See* BERNITZ, *supra* note 4, at 247.

<sup>136</sup> *See id.* (citing NJA 1949 p. 690 (Sweden)).

<sup>137</sup> *See* BERNITZ, *supra* note 4, at 241.

<sup>138</sup> *See id.*

<sup>139</sup> For the Swedish version, see Promissory Notes Act, *supra* note 95.

<sup>140</sup> Wilhelmsson, *supra* note 12, at 81.

<sup>141</sup> NJA 1948 p. 138 (Sweden).

<sup>142</sup> *See* BERNITZ, *supra* note 4, at 241 n.2.

<sup>143</sup> *See* Wilhelmsson, *supra* note 12, at 76-77.

unhealthy insurance practices that were widespread in the 1920s.<sup>144</sup> Additionally, regulations addressed disclosure practices, double insurances, and time limitations.<sup>145</sup> A Promissory Note Act also was adopted in Sweden in 1936 and in Finland in 1947.<sup>146</sup>

Because the core of contracts law was left untouched and because attempts to limit freedom of contract were seen as reactions to problems, Wilhelmsson describes these mandatory rules as “reactive welfarism.”<sup>147</sup>

#### **D. Particulars of The Social in the Nordic Countries**

The unique characteristics that led the Social to develop a bias for social democracy and mixed market economies in the Nordic countries are hard to identify. Where continental European countries saw the emergence of Fascist regimes, the Nordic countries prospered in social welfare democracy. This may well have been largely accidental; at least Sven Eliaeson observes that no real reason exists for why Sweden only got the good out of what could have been so bad.<sup>148</sup> His analysis is, to some extent, also true for the other Nordic countries.

First, Eliaeson identifies that the Swedish system is a system of class compromise: “Socialized consumption and monopoly capitalism . . . [exist in] consensual cooperation, with a high degree of involvement of organized interests . . . .”<sup>149</sup> There are many examples of successful corporatist solutions and egalitarian ambitions.<sup>150</sup> Second, no real checks and balances exist in the Swedish Constitution. Sweden has no tradition of judicial review and, hence, no Constitutional Court.<sup>151</sup> In fact, the distinction between constitutional order and

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<sup>144</sup> See *id.* at 77; see also Lag om Försäkringsavtal [Insurance Contracts Act], SFS 1927:77 (Sweden).

<sup>145</sup> See Wilhelmsson, *supra* note 12, at 77.

<sup>146</sup> See Promissory Note Act, *supra* note 95; Wilhelmsson, *supra* note 12, at 81.

<sup>147</sup> Wilhelmsson, *supra* note 12, at 86.

<sup>148</sup> See Eliaeson & Jedrzejewska, *Neo-Liberalism and Civil Society*, *supra* note 114.

<sup>149</sup> *Id.* at 14-15.

<sup>150</sup> See *id.* at 15.

<sup>151</sup> See *id.* at 18.

democracy is relatively absent.<sup>152</sup> The Swedish democracy is extremely monistic and unfit for countries like Belgium, Germany, or Bosnia, Eliaeson believes.<sup>153</sup> Finally, Sweden's authoritarian and top-down system is built from comprehensive social engineering.<sup>154</sup> Swedes are ignorant of the dangers of "Rousseauan populism."<sup>155</sup> Rousseau understood democracy to have totalitarian elements and, at least to some extent, to conflict with the notion of liberty.<sup>156</sup>

The early twentieth century also saw the emergence of Scandinavian Realism. At the time American Realism was evolving in the United States, Scandinavian scholars undertook a similar project.<sup>157</sup> Scandinavian Realism was a reaction to legal science and its undemocratic effects.<sup>158</sup> Throughout history, the Nordic countries have been autocratic and conservative, with weak liberal traditions.<sup>159</sup> Society was very hierarchical and the aristocracy exercised great power.<sup>160</sup> Even in the latter part of the nineteenth century, and for a long time thereafter, strong conservative biases existed.<sup>161</sup> The Nordic countries had a democratic deficit.

Both Classical Legal Thought and The Social maintained that existing legal norms were real and unchangeable.<sup>162</sup> Deduction from history, and reconstruction through deduction of what

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<sup>152</sup> *See id.*

<sup>153</sup> *See id.*

<sup>154</sup> *See* Eliaeson & Jedrzejewska, *Neo-Liberalism and Civil Society*, *supra* note 114, at 13.

<sup>155</sup> *Id.* (quotations omitted).

<sup>156</sup> *See id.* In his opinion in the *Loan Association* case, Justice Miller explains the danger of democracy:

A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority if you choose to call it so, but it is none the less a despotism.

Kennedy, *The Rise & Fall of Classical Legal Thought*, *supra* note 25, at 59 (*citing Loan Assoc. v. Topeka*, 87 U.S. 655 (1874)).

<sup>157</sup> Axel Hägerström (1868-1939), Professor at Uppsala University in Sweden, laid the foundation of Scandinavian Realism. Among others, Villhelm Lundstedt (1882-1955), Karl Olivecrona (1897-1980), and Alf Ross (1899-1979) followed his lead.

<sup>158</sup> *See* Alexander, *supra* note 111, at 171.

<sup>159</sup> *See id.* at 167.

<sup>160</sup> *See id.*; *see also* INGER, *supra* note 4, at 170ff.

<sup>161</sup> *See* Alexander, *supra* note 111, at 171.

<sup>162</sup> *See id.*



ought to be, worked as justificatory concepts.<sup>163</sup> From their emergence in the first part of the twentieth century, Scandinavian Realists showed how this approach to law actually gave legal science a conservative purpose and effect.<sup>164</sup> The Realists established that Classical Legal Thought and The Social both involved elements of abuse of deduction.<sup>165</sup> Legal concepts such as Right and Force were impossible to define in specific cases and the result was powerful; legal concepts were not scientific, but they were under human control.<sup>166</sup> The method used by Scandinavian Realists to achieve democratization was legal positivism. By removing the unscientific parts of legal science, scholars and judges' sphere of power over legal science decreased.<sup>167</sup> This shifted legal decision-making powers from legal scientists and judges to the popularly elected legislatures.<sup>168</sup> As a result, elected politicians could gain power and take control of legal politics.<sup>169</sup>

#### **E. Maturing Welfarism and The Third Globalization**

The Third Globalization can be used to explain current legal developments in the Nordic countries. While the reception of the Third Globalization at the periphery, which includes the Nordic countries, is still underway, the Third Globalization links legal, political, and economic events to a historical process. In so doing, it provides for important insights about the changes and conflicts of Nordic legal theory.

A first observation concerning the reception of the Third Globalization in the Nordic countries is that it has been asymmetrical. Whereas policy analysis has received much attention and caused a progressive development, neo-formalism has met strong resistance.

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<sup>163</sup> See Kennedy, *supra* note 3, at 648, 672.

<sup>164</sup> See Alexander, *supra* note 111, at 171.

<sup>165</sup> See Kennedy, *supra* note 3, at 648, 672.

<sup>166</sup> See Alexander, *supra* note 111, at 173.

<sup>167</sup> See *id.* at 174.

<sup>168</sup> See *id.* at 166, 174.

<sup>169</sup> See *id.* at 161.

Policy analysis made its entry in the early 1970s, and had wide impact. Rules had allowed for court intervention “in an all-or-nothing fashion.”<sup>170</sup> Rules conferred on courts either the power to intervene or no power to intervene. As legislation through principles became more frequent, courts’ powers expanded. Yet, in case law, courts continued to show reluctance toward making active use of principles. This was true in the case of principles or general clauses in contracts law. It was not until the 1970s, when legislation introduced general clauses that were more powerful, that there was a major shift and courts’ power to intervene became real.<sup>171</sup> Principles providing for balancing appeared throughout the legal systems; in Sweden and Finland, legislation through principles appears under the name *framework laws* or *elastic norms*.<sup>172</sup> This development cleared the way for decisions of ad hoc compromises, which give relevance to circumstances *in casu*.<sup>173</sup>

From the perspective of contracts law, the most significant development in policy analysis perhaps came in 1975. After a common Nordic effort to renew legislation, there were three important developments: a principle of general consumer protection, a principle on adjustment of unfair contracts, and a clear goal to “secur[e] the real functioning of protective measures.”<sup>174</sup> Legislation provided for an assessment procedure of what is most fair in each individual case and, consequently, delegated power to intervene to change the contract in line with that assessment. This was the next major step in welfarist contracts law: “maturing welfarism.”<sup>175</sup> Wilhelmsson characterizes maturing welfarism as a utilitarian consideration, a system providing for a maximum amount of protection in each individual case.<sup>176</sup> The general

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<sup>170</sup> Wilhelmsson, *supra* note 12, at 82 n.14.

<sup>171</sup> *See id.* at 87; *c.f.* TAXELL, *supra* note 93, at 60.

<sup>172</sup> *See, e.g.*, TAXELL, *supra* note 93, at 60-61 (translated by the author).

<sup>173</sup> *See id.* at 60.

<sup>174</sup> Wilhelmsson, *supra* note 12, at 87.

<sup>175</sup> *Id.*

<sup>176</sup> *See id.*

clause of the Contract Acts, common section 36 (“Section 36”), combines all these features.<sup>177</sup>

All Nordic countries adopted Section 36 with some variances. The Swedish version reads:

A contract term may be adjusted or held unenforceable if the term is unreasonable with respect to the contract’s content, circumstances at the formation of the contract, subsequent events, or other circumstances. If the term is of such significance that it shall otherwise be unenforceable in accordance with its original terms, the contract may also be adjusted in other respects or held unenforceable in its entirety.

With respect to the application of the first paragraph, special consideration shall be given to the need for the protection of consumers and others who assume an inferior position in the contract relationship.

The first and second paragraphs shall be given similar application to terms in other legal relationships than that of contract.<sup>178</sup>

With the introduction of Section 36, courts increasingly used their powers to intervene in contracts cases.<sup>179</sup> This intervention had been the legislatures’ intent; the Finnish legislature, for instance, articulated the goal to “increase the willingness of the courts to adjust unfair contracts . . .” in the preparatory works to Section 36.<sup>180</sup> In addition, the Swedish version of Section 36 necessitated consideration of “the need for protection of consumers and others who assume an inferior position . . . .”<sup>181</sup> The increased intervention led to the establishment of a supplementary judge-made body of interpretative rules, a development best embodied in today’s strong legal principle in Nordic contracts laws of allowing for court interference in contractual relations.<sup>182</sup>

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<sup>177</sup> See *infra* note 178.

<sup>178</sup> Ulf Bernitz, *Swedish Standard Contracts Law and the EC Directive on Contract Terms*, 39 SC. ST. L. 2000 13, 19 (2000); see BERNITZ, *supra* note 4, at 243; Contracts Act, *supra* note 89, sec. 36. Denmark enacted its general clause, Section 36, in 1975. According to the Danish clause, a court can intervene in contracts if they are unreasonable or contrary to fair course of action. In Iceland, a clause almost fully coherent with the Danish clause was adopted in 1986. Finland has adopted two general clauses: first, Section 36 allowing for intervention in unfair terms adopted in 1982, and, second, a clause in the Finish Consumer Protection Act, solely concerning consumer protection. Since 1983, Norway has had a general clause, Section 36, providing for intervention if it would be unreasonable or contrary to fair business practice to uphold a contract in part or whole. See Prop. 1994/95:13, *supra* note 99, at 24-25 (translated by the author).

<sup>179</sup> See Wilhelmsson, *supra* note 12, at 79.

<sup>180</sup> *Id.* at 82; see Prop. [Legislative Note] 1975/76:81, 33 (Sweden).

<sup>181</sup> Bernitz, *supra* note 178, at 19.

<sup>182</sup> See Bernitz, *supra* note 178, at 23-24; Joseph Lookofsky, *The Harmonization of Private and Commercial Law: Towards a European Civil Code*, 39 SC. ST. L. 111, 119 (2000).

More specifically, Section 36 expanded the criteria to consider when establishing whether a contract was valid. Courts were no longer limited to considering only the formalities of contract formation. Preparatory works, case law, and market practice laid out the idea that a contract's validity was dependent on substantive considerations.<sup>183</sup> To determine validity, courts were required to examine what a contract materially incorporated.<sup>184</sup> A contracting party's personal relationships and social status could affect the outcome of a case.<sup>185</sup> In practice, Nordic courts increasingly chose to intervene, and consumers and small businesses were more likely to receive relief.<sup>186</sup> In Ulf Bernitz's words: "The courts have been given considerable freedom of action in handling this sanction, and in case law, the courts have often used adjustment to alter unfair features of contract terms so as to be able to assess them as fair."<sup>187</sup>

Recent contributions to the evolution of policy analysis and contracts law include some degree of "person related need-rational welfarism."<sup>188</sup> The focus of review has shifted and is now set on the material substance of the contract, making the judging principle each party's economic and social position and need.<sup>189</sup> The rules establish, for example, "social force majeure" of a party as a cause for paternalistic intervention.<sup>190</sup> There are several examples of such tendencies in Swedish statutory law, including section 8 of the Interest Act, section 2 in chapter 6 of the Torts Act, section 32 of the Consumer Credit Act, and section 25 of the

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<sup>183</sup> See Prop. 1975/76:81, *supra* note 180, at 118-19, 147-54 (giving several examples of when and how courts can apply Section 36); see also Sandgren, *supra* note 97, at 461 (for a general discussion).

<sup>184</sup> See Sandgren, *supra* note 97, at 461.

<sup>185</sup> See *id.* at 462.

<sup>186</sup> See *id.* at 473.

<sup>187</sup> BERNITZ, *supra* note 4, at 234.

<sup>188</sup> Wilhelmsson, *supra* note 12, at 88.

<sup>189</sup> *Contra* Sandgren, *supra* note 97, at 462. In his article, Sandgren criticizes Wilhelmsson and the existence of a social contracts law. Nevertheless, the article gives a useful description of existing tendencies of social contracts law. For a critique of Sandgren's article, see Thomas Wilhelmsson, *En Social Avtalsrätt? – Några Kommentarer*, 5 JT 499, 502-504 (1993-1994) (Sweden).

<sup>190</sup> Sandgren, *supra* note 97, at 462.

Consumer Insurance Act.<sup>191</sup> Moreover, preparatory works contain many guidelines for courts on what policy concerns and what social problems to consider when applying relevant legislation. Case law has further established that social problems may sometimes be cause to limit liability for a weaker party.<sup>192</sup> Even some *standard contracts* contain clauses accepting severe illness or other similar circumstances as a reason to escape contract liability.<sup>193</sup>

There were many other progressive developments in Nordic contracts laws in addition to policy analysis. Sweden adopted a Consumer Services Act in 1985,<sup>194</sup> providing far-reaching protection for purchasers of services.<sup>195</sup> In Finland, the government has created a Legal Committee with representatives from both industry and commerce.<sup>196</sup> When asked, the Committee gives reasoned opinions on unfairness of contract terms.<sup>197</sup>

Additionally, policy analysis reception through EC law and the incorporation of European Convention included a widening of national courts' ability to adjudicate on general principles of law.<sup>198</sup> For example, Sweden has recognized the proportionality principle and the Supreme Court established its universal reach in 1995.<sup>199</sup> The Supreme Administrative Court also has applied the principle of proportionality in a number of cases<sup>200</sup> concerning restrictions on owners' use of real property.<sup>201</sup>

Distinct from the enthusiastic reception of policy analysis, the Nordic countries have demonstrated great reluctance toward neo-formalism, the second part of the Third Globalization.

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<sup>191</sup> See *id.* at 464-66.

<sup>192</sup> See *id.* at 468-69; MD [Market Court], 1979:3 (Sweden).

<sup>193</sup> See Sandgren, *supra* note 97, at 469 (citing J. Bärlund, Sociala Prestationshinder i Konsumentavtal, NAK-rapport 1990:6, Nordiskt Ministerråd, Nord 1990:49, Köpenhamn: Nordiskt Ministerråd 1990, 44-77).

<sup>194</sup> Konsumenttjänstlag [Consumer Services Act], SFS 1985:716 (Sweden).

<sup>195</sup> See BERNITZ, *supra* note 4, at 8.

<sup>196</sup> See *id.* at 272.

<sup>197</sup> See *id.*

<sup>198</sup> See BERNITZ, *supra* note 4, at 5; see also European Convention, *supra* note 20.

<sup>199</sup> See BERNITZ, *supra* note 4, at 45.

<sup>200</sup> See *id.*

<sup>201</sup> See *id.*

Only with the help of political neo-liberalism and globalization, and only when framed in terms of economic necessity, was neo-formalism able to gain influence in the Nordic legal systems: European integration allowed judicial supremacy and human rights to establish themselves. However, as the later parts of this article will show, the reception of neo-formalism to this day is incomplete and contested.

Like other welfare states, the Nordic countries depend on free trade and the abolishment of trade barriers for their survival. Their wealth is directly proportional to their trade, and they all rely on a competitive and strong industry to pay for welfare expenses and to keep their economies vital. Acting on this presumption, in 1960, Sweden, Norway, and Denmark were among the founding fathers of the European Free Trade Association (“EFTA”).<sup>202</sup> Finland joined the EFTA as an associate member in 1961 and Iceland joined in 1970.<sup>203</sup> Whereas EFTA provided the Nordic countries with the benefit of free trade areas, it did not come without stipulations. In particular, the EFTA required deregulatory measures and privatizations in the market. This started a trend in the 1970s, in the aftermath of the Oil Crisis, which led to increased dismantling and privatizing of welfare services in the Nordic countries.<sup>204</sup>

At about the same time, political neo-liberalism evolved as a legitimizing factor to the deregulatory movement. Neo-liberals promoted market independence in relation to the state.<sup>205</sup> They claimed that the model of increasing governmental expenditures, as proposed by John Maynard Keynes (1883-1946), was incapable of addressing economic recessions.<sup>206</sup> One

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<sup>202</sup> See European Free Trade Association, at <http://secretariat.efta.int/Web/EFTAAtAGlance/history/> (last visited Oct. 21, 2006).

<sup>203</sup> See *id.*

<sup>204</sup> The Oil Crisis showed the weakness of a small, controlled economy and laid the foundation for the economic necessity argument in Nordic debate. *E.g.* Junko Kato and Bo Rothstein, Government Partisanship and Managing the Economy: Japan and Sweden in Comparative Perspective, 19 *Governance: An International Journal of Policy, Administration, and Institutions* 1, 81 (2006).

<sup>205</sup> See Wikipedia, at <http://en.wikipedia.org/wiki/Neoliberal> (last visited Oct. 21, 2006).

<sup>206</sup> See Wikipedia, at <http://en.wikipedia.org/wiki/Keynes> (last visited Oct. 21, 2006).

example put forward by neo-liberals was the failure of national economies to handle the Oil Crisis.

In Sweden, the single most significant event influenced by the neo-liberal movement may have been the deregulation of the credit market, sometimes referred to as the “November Revolution.”<sup>207</sup> On November 21, 1985, the National Bank deregulated the Swedish credit market.<sup>208</sup> The Government stated that this measure was a natural part of the ongoing modernization of economic politics.<sup>209</sup> Previously, the Government had actively directed and controlled banks’ profits and risk taking.<sup>210</sup> Swedish National Economist Lars Jonung describes the event as the most far-reaching reorganization of the National Bank’s currency policy in post-World War II Sweden,<sup>211</sup> and Kjell Olof Feldt, the Swedish Treasurer at the time, believes that with this decision Sweden gave up one of the most symbolic means for sheltering the economy from undesirable market forces.<sup>212</sup> From a social democratic perspective, this deregulation was a great defeat to neo-liberal ideology.<sup>213</sup>

Another area affected by neo-liberalism and global free trade was the currency market. The Nordic countries could no longer defend the value of their currency and, at the same time, retain and develop a competitive industry. Eventually, all the Nordic countries had to switch to floating exchange rates.<sup>214</sup>

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<sup>207</sup> INGVAR CARLSSON, *SÅ TÄNKTE JAG: POLITIK & DRAMATIK*, 212 (Stockholm, Hjalmsarson & Högberg, 2d ed. 2004).

<sup>208</sup> *See id.* at 211. The National Bank in Sweden has similar functions to the United States Federal Reserve Bank.

<sup>209</sup> *See id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See id.* at 212.

<sup>212</sup> *See id.* at 216.

<sup>213</sup> *See* CARLSSON, *supra* note 207, at 216.

<sup>214</sup> Sweden in November 1992 and Finland in September 1992. *See* Bengt Dennis, Bankrättsföreningen Debatt, at <http://www.bankrattsforeningen.org.se/Debatt2/debatt56.html> (last visited Oct. 20, 2006).

Neo-liberalism also provided for a way to privatize social welfare.<sup>215</sup> For instance, until the 1980s, Sweden provided for health care as part of social services. One could describe the system in terms of doctors supplying a state service from which patients needing care and help benefited. With neo-liberalism, the perspectives shifted. Patients became consumers who were now buying a service; through elected representatives in parliament, the patients ordered the health care.<sup>216</sup> This implied certain rights for the patient-consumer and certain duties for health care providers. In addition, efficiency became an important concept in health care services.<sup>217</sup> Another example of privatized welfare includes the trend to contract out public services. Where the Government earlier had owned the companies that provided services, now, through public bidding, private companies bid to provide the service for a given price. Public transportation, health care, and day care all were contracted out.

Ultimately, during the 1980s, joining forces with the EU, either as member states or through closer cooperation, became necessary for all the Nordic countries.<sup>218</sup> The EU had become a solution to economic difficulties. In its EU application in July 1991, Sweden named economic reasons as the decisive factor in its decision to join the EU.<sup>219</sup> “It is determinative for Sweden’s economic strength and welfare that Sweden can continue to take part of Western European integration,” the Government explained to the Parliament in its proposition concerning the EU application.<sup>220</sup> At the time, after years of changing economic conditions, Sweden was in the midst of its worst economic crisis in modern history. Today, Denmark, Sweden, and Finland

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<sup>215</sup> E.g. Wilhelmsson, *supra* note 189, at 507.

<sup>216</sup> See generally Eliaeson & Jedrzejewska, *Neo-Liberalism and Civil Society*, *supra* note 114, at 8.

<sup>217</sup> Conversation with Ingela Heimann, Medical Doctor at Kungälv's Sjukhus, Sweden (October 22, 2005).

<sup>218</sup> Denmark joined the EU in 1973.

<sup>219</sup> See CARLSSON, *supra* note 207, at 380 (translated by the author).

<sup>220</sup> *Id.*



are members of the EU, and both Iceland and Norway work closely with the EU through the EFTA and the European Economic Area (“EEA”) agreement.<sup>221</sup>

With the EU, neo-formalism made its entry into the Nordic legal systems. For Denmark, this process came about much earlier than in the other Nordic countries because Denmark had been a member of the EU since 1973.<sup>222</sup>

The most obvious neo-formalist development resulting from the EU membership was the reception of judicial supremacy. As part of becoming members of the EU, Member States are subject to the quasi-federal judiciary, in the form of the ECJ.<sup>223</sup> For the EEA states, Norway and Iceland, the EFTA Court has a similar role.<sup>224</sup>

The ECJ has jurisdiction to interpret EU treaties and EC legislation.<sup>225</sup> The ECJ handles cases in two primary areas. One, the ECJ continuously checks Member State compliance to EC law.<sup>226</sup> Two, the ECJ ensures that all Member States apply EC law in a uniform manner.<sup>227</sup> Cases decided by the ECJ thus take precedence over decisions by Member State courts.<sup>228</sup> The ECJ may hear cases with EC institutions, Member States, companies, and individuals as parties.

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<sup>221</sup> See Agreement on the European Economic Area, at <http://secretariat.efta.int/Web/EuropeanEconomicArea/EEAAgreement/EEAAgreement/EEA%20Agreement.pdf> (last visited Oct. 21, 2006). The EEA treaty creates an internal market between the European Union and the EFTA. When Sweden and Finland joined the European Union in 1995, they left the EFTA; Iceland, Lichtenstein, Norway, and Switzerland are still members of the EFTA. Today the EEA agreement continues to be of relevance to the remaining EFTA countries, and through it, these states closely follow and adapt to relevant European Union legislation. In this context, there is reason to point out that there still exist a viable reason and arena to cooperate for the Nordic countries.

<sup>222</sup> See Jucka Pekkarinen, *Den nordiska välfärdsmodellens finansiella hållbarhet*, in ÅRSBOK 2004, HUR MÅR DEN NORDISKA VÄLFÄRDEN, ANP 2004:761, at 82 (2004).

<sup>223</sup> See Fernanda Nicola, *Asymmetry and Distribution in European Contract Law*, 10 (S.J.D. Candidate, Harvard Law School, 2004) (on file with the author) (citing F. SCHARPF, GOVERNING IN EUROPE, EFFECTIVE AND DEMOCRATIC? (1998) and J.H. WEILER, THE CONSTITUTION OF EUROPE (1999)).

<sup>224</sup> The following discussion is limited to the ECJ. For more information about the EFTA Court, available at <http://www.eftacourt.lu/> (last visited Oct. 20, 2006).

<sup>225</sup> See The European Court of Justice, available at [http://www.curia.eu.int/en/instit/presentationfr/index\\_cje.htm](http://www.curia.eu.int/en/instit/presentationfr/index_cje.htm) (last visited Oct. 20, 2006).

<sup>226</sup> See *id.*

<sup>227</sup> See *id.*

<sup>228</sup> See *id.*

Member States also must accept and incorporate the *acquis communautaire*, the body of legal rules developed with the EU. The EU treaties and the accessions treaties regulate how to apply the *acquis communautaire*.<sup>229</sup> There exists, however, a general obligation to apply and implement EC law effectively and a duty for courts to interpret and apply national law in compliance with EC law.<sup>230</sup> The *principle of interpretation* in EC law should guide, and be the basis for, Member State court decisions.<sup>231</sup>

With the incorporation of the *acquis communautaire*, judicial review increased in the Nordic countries. Courts must give EC law precedence over a conflicting national provision; it follows logically since the national “provision is decided by an instance[, the Member State legislature] no longer has the competence to decide the norm.”<sup>232</sup> This is a clear development from the earlier prevailing model that included limited judicial review. Under the Swedish Constitution, courts have the power to disregard unconstitutional provisions enacted by the Parliament or the Cabinet only if that provision is manifestly in conflict with the Constitution.<sup>233</sup> Swedish courts, therefore, have greater powers of judicial review when applying EC law; where EC law is silent and national law governs, however, limited judicial review remains.<sup>234</sup>

Two leading Swedish cases recognizing EC law supremacy have been decided by the Supreme Administrative Court. In the 1997 case *Lassagård*, the Court established that where Swedish law conflicts with EC law, Swedish law should be set aside.<sup>235</sup> The next case, *Upplands Lokaltrafik*, found that national provisions inconsistent with an EC Directive are

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<sup>229</sup> See BERNITZ, *supra* note 4, at 39.

<sup>230</sup> See *id.* at 39, 41; TEC, *supra* note 5, art. 10.

<sup>231</sup> See BERNITZ, *supra* note 4, at 41.

<sup>232</sup> *Id.* (citing SFS 1993/94:114, 27 (Sweden)).

<sup>233</sup> See REGERINGSFORMEN [Swedish Constitution], SFS 1974:152, ch. 11, sec. 14 (Sweden); see also BERNITZ, *supra* note 4, at 41, 69.

<sup>234</sup> See BERNITZ, *supra* note 4, at 41.

<sup>235</sup> See *id.* at 44 (Decision of 25 Nov. 1997, Case 219-1997. (Sweden)).

void.<sup>236</sup> The Court directly referred to ECJ case law,<sup>237</sup> such as *Van Gend en Loos*<sup>238</sup> and *Simmenthal*.<sup>239</sup>

Another development in the Nordic legal systems stemming from European integration involves human rights. Sweden incorporated the European Convention on Human Rights and Fundamental Freedoms (“European Convention”) in January 1995.<sup>240</sup> Finland incorporated the European Convention in 1990, Denmark in 1992, and Norway in 1999.<sup>241</sup> The Convention enumerates several fundamental rights and freedoms. Parties to the treaty bind themselves to secure the enjoyment of these rights and freedoms within their jurisdiction. Moreover, the European Convention establishes a European Court of Human Rights (“ECtHR”).<sup>242</sup> The Court has jurisdiction over cases concerning the interpretation and application of the Convention, and the Court has developed an extensive case law over the years.<sup>243</sup>

Bernitz suggests that, together, these developments have increased judicial protection for individuals in Sweden.<sup>244</sup> In this sense, Constitutional Law has become more vital. As Bernitz states, “the accession to the EU can be said to have upgraded the role of the law in Sweden and the importance of the judiciary.”<sup>245</sup>

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<sup>236</sup> See *id.* at 46 (Regeringsrättens Årsbok 1996 No. 50. (Sweden)).

<sup>237</sup> See *id.*

<sup>238</sup> Case C-26/62, *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 13.

<sup>239</sup> Case C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E.C.R. 629.

<sup>240</sup> European Convention, *supra* note 20, at art. 38; Lag om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna [Act incorporating the European Convention], SFS 1994:1219 (Sweden) [hereinafter Act incorporating the European Convention]; see also BERNITZ, *supra* note 4, at 48.

<sup>241</sup> See BERNITZ, *supra* note 4, at 82.

<sup>242</sup> See European Convention, *supra* note 20, art. 38.

<sup>243</sup> See *id.* at art. 45.

<sup>244</sup> See BERNITZ, *supra* note 4, at 45.

<sup>245</sup> *Id.* at 42. It is ironic that Sweden’s Constitutional provision relating to the EU states that Sweden’s membership to the EU is conditioned on the EU continuing to provide for a level of Human Rights protection equal to that of the Swedish Constitution. The Swedish view of Constitutional delegation to the EU is inspired by the famous German Constitutional Court case, *Kompetenz-Kompetenz*. Sweden negotiated its EU membership at the time of that decision. See BERNITZ, *supra* note 4, at 30.

## F. Two Notes on the Third Globalization

Two aspects about the Nordic reception of the Third Globalization are striking. Both have to do with the legislatures and, thus, the social welfare policies of all the Nordic countries. First, one can attribute the legislatures' thorough incorporation of policy analysis to the special legal status of preparatory works in the Nordic legal systems. Second, the Nordic legislatures have actively resisted the increased importance of rights in the Nordic legal systems.

As described above, policy analysis was the first part of the Third Globalization in the Nordic countries.<sup>246</sup> Policy analysis was what transformed from The Social receiving swift and straightforward implementation. The legislatures saw many advantages to policy analysis—general clauses in the context of contracts law. Earlier attempts to intervene in the market had been both over- and under-inclusive and sometimes produced awkward results.<sup>247</sup> With policy analysis, intervention could be more pragmatic and on a case-to-case basis.<sup>248</sup> Policy analysis became progressive law-making to the Nordic countries.

Perhaps the main reason why the reception of policy analysis came so easily to the Nordic countries was that the legislatures believed they could control the outcome of policy analysis in case deliberation through preparatory works. For instance, through general clauses the legislature delegated broad powers. Section 36 of the Contract Acts was no exception. Under Section 36, courts had the power to intervene if a party to a case showed a weakness leading to an unbalanced contract.<sup>249</sup> For the Nordic legislatures, an important concern about delegating power to the courts was how to safeguard effective protection of weaker parties and how thus to attain a social welfare outcome. Put differently, there were no guarantees for what

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<sup>246</sup> *See supra* at 208ff.

<sup>247</sup> *See supra* note 170.

<sup>248</sup> *See supra* note 173.

<sup>249</sup> *See supra* note 178.

courts would do with their broad powers. Legislative delegation had to be conditioned, and preparatory works played an important role.

Preparatory works are a primary legal source in the Nordic legal systems. They include guidelines and explanations for laws as well as concrete and specific examples of adjudicative outcomes. In his book, *Avtalsrätt*,<sup>250</sup> Lars Erik Taxell describes the use of preparatory works in the Nordic legal systems:

Even a very specified and detailed legal norm will be applied to practical situations that differ greatly from each other—this is a consequence of the increased complexity of economic life. Therefore, when applying or interpreting legal norms, a judge needs support of principles and the norms' underlying goals. Preparatory works and, therein, reiterated legislative comments consequently integrate with a norm's binding effect. Preparatory works highlight, materialize and explain legal norms and thus provide tools to help their legal application. The clearer and more detailed the legislative comments are, the stronger the legislatures' influence over legal application.<sup>251</sup>

The Swedish preparatory works to Section 36 of the Contract Acts contain numerous examples of how and when to apply the general clause.<sup>252</sup> They illustrate various market situations and contract terms, analyzed and evaluated from the standpoint of unfairness.<sup>253</sup> For instance, the works include example contract terms that give a stronger contracting party discretion to act, examples demonstrating where a party is discriminated against, and examples where a party reserves the right to decide on a particular issue.<sup>254</sup>

The *Bergman & Beving* case illustrates how the courts relate to the preparatory works to Section 36.<sup>255</sup> In that case, concerning a contract between a small business and a larger corporation, the Swedish Supreme Court stated:

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<sup>250</sup> TAXELL, *supra* note 93.

<sup>251</sup> *Id.* at 110 (translated by the author).

<sup>252</sup> See generally Prop. 1975/76:81, *supra* note 180.

<sup>253</sup> See BERNITZ, *supra* note 4, at 242.

<sup>254</sup> See *id.* at 256 (citing Prop. 1975/76:81, *supra* note 180, at 118-21).

<sup>255</sup> NJA 1979 p. 483 (Sweden).

Whether . . . [in a case, a small business is in an inferior position,] depend[s] . . . on the overall judgment of the contract situation which according to various statements in the travaux préparatoires [(preparatory works)] to . . . [Section 36] of the Contract Acts ought to be the basis for determining whether or not a contract term is to be regarded as unfair.<sup>256</sup>

In sum, the special status of preparatory works in Nordic legal systems proved to be a useful tool for the legislatures when legislating with general clauses. Indirectly, social policies expressed in the preparatory works supplemented general clauses and, thus, allowed the legislatures to set up frameworks for court balancing. Contracts law deliberation could thereby entertain balancing between conflicting policies such as *freedom of contract* and *intervention*<sup>257</sup> and give consideration to social inequalities and social problems.<sup>258</sup>

Both Taxell and the Draft Legislation Advisory Committee (“Law Council”) have criticized legislation through preparatory works.<sup>259</sup> One critique is that particular examples and political preferences expressed in the preparatory works aim to give the courts a limiting framework.<sup>260</sup> This limiting framework, however, does not bind courts; they can go any way in deliberations.<sup>261</sup> The framework is only illusory and general clauses vest strong powers with courts.<sup>262</sup>

When the Swedish Government drafted the new Contract Acts, the issue of legislation through preparatory works was brought to the fore; an open conflict of interest arose concerning the application of Section 36. Carl Lidbom, the Swedish Attorney General at the time,

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<sup>256</sup> BERNITZ, *supra* note 4, at 259 (*citing* Prop. 1975/76:81, *supra* note 180, at 106) (emphasis added).

<sup>257</sup> Intervention here means a strategy of intervention in the market to correct market failures.

<sup>258</sup> *C.f.* Wilhelmsson, *supra* note 189, at 507.

<sup>259</sup> The Law Council is a body of highly distinguished and recognized judges with experience from the Supreme Court and the Administrative Supreme Court of Sweden. The Law Council reviews, for example, whether a proposed law fulfills its given purpose and whether problematic future applications of a law might arise. The opinion hence represents the courts’ views and gives a strong indication of how a future law will be applied in the courts. *See, generally*, REGERINGSFORMEN, *supra* note 233, ch. 8, sec. 18, paras. 1, 3.

<sup>260</sup> *See* TAXELL, *supra* note 93, at 61.

<sup>261</sup> *See id.*

<sup>262</sup> *See id.*

demanded a “modification threshold for terms of contract.”<sup>263</sup> Conversely, the Law Council made clear that “the principal rule must remain that a contract must be adhered to.”<sup>264</sup> According to the Law Council, the “numerous statements in the *travaux préparatoires* [(preparatory works)] involving judgments from the point of view of unfairness were only to be regarded as examples providing guidance.”<sup>265</sup> With time, these statements would lose their relevance as public policy changed.<sup>266</sup> Carl Lidbom had the last word, wanting the courts to change their views: “this clause is designed to encourage the courts to take a different view of the matters involved here.”<sup>267</sup>

On the issue of rights protection, Bernitz has been a strong critic of the protection of human rights provided for in the Nordic countries.<sup>268</sup> All of the Nordic countries were among the founding fathers of the European Convention and, formally, their conviction to promote human rights always has been unquestionable.<sup>269</sup> Nevertheless, the Nordic countries have been reluctant to implement and incorporate the Convention into national law. Behind this inaction lies a broad political resistance, especially among social democrats.<sup>270</sup> In Sweden, the ECtHR was not allowed jurisdiction until 1966, and for many years the European Convention remained unimplemented.<sup>271</sup> Only in 1995 did Sweden incorporate the Convention into law, although still with several conditions.<sup>272</sup>

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<sup>263</sup> BERNITZ, *supra* note 4, at 242 (*citing* Prop. 1975/76:81, *supra* note 180, at 164ff, *esp.* 166).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *See id.*

<sup>267</sup> *Id.* (*citing* Prop. 1975/76:81, *supra* note 180, at 173, 177).

<sup>268</sup> *E.g.* Ulf Bernitz, *The Incorporation of the European Human Rights Convention into Swedish Law – A Half Measure*, 38 GERMAN Y. I. L. 178 (1995); Bernitz, *supra* note 4.

<sup>269</sup> *See* European Council, Chart of signatures and ratifications, at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> (last visited Oct. 22, 2006).

<sup>270</sup> *See* BERNITZ, *supra* note 4, at 82.

<sup>271</sup> *See id.* at 47-48.

<sup>272</sup> *See* Act incorporating the European Convention, *supra* note 240; *see also* BERNITZ, *supra* note 4, at 48.

One such condition was that the Social Democrats agreed to incorporate the European Convention in so far it did not strengthen courts' power of judicial review.<sup>273</sup> The liberal and conservative parties agreed to this concession to secure the Social Democrats' approval to incorporate the Convention.<sup>274</sup>

In addition, the European Convention does not have constitutional status in Sweden because the Parliament enacted the Convention as a law. Some statements in the preparatory works to the implementing law of the European Convention establish an interpretation priority for the Convention and the Swedish Constitution contains a reference to "Sweden's undertakings under" the Convention.<sup>275</sup> In principle, however, any subsequently enacted law can take precedence.<sup>276</sup> The Swedish Parliament and Cabinet retain the power to legislate away the protection of the European Convention.<sup>277</sup>

Not surprisingly, Nordic courts are generally positive toward rights. It was the courts, especially the Supreme Court, which led the process of strengthening the European Convention and ECtHR case law in Sweden.<sup>278</sup> In the 1980s, the Supreme Court actively began to interpret Swedish legislation in accordance with the Convention and ECtHR case law.<sup>279</sup> The Court based its decisions on "the principle of treaty conform interpretation."<sup>280</sup> In a case from 1992, the Supreme Court indicated that the interpretation principle should apply even when the outcome would be contrary to prior Swedish case law or legislative history.<sup>281</sup>

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<sup>273</sup> See BERNITZ, *supra* note 4, at 83.

<sup>274</sup> See *id.* at 84.

<sup>275</sup> *Id.* at 90ff; BERNITZ, *supra* note 4, at 930; REGERINGSFORMEN, *supra* note 233, ch. 2, sec. 23.

<sup>276</sup> See BERNITZ, *supra* note 4, at 6, 82.

<sup>277</sup> See *id.* at 93.

<sup>278</sup> See *id.* at 83.

<sup>279</sup> See *id.* at 47-48 n.84.

<sup>280</sup> *Id.* at 47.

<sup>281</sup> See *id.* at 83.



### III. CONTRACTS LAW IN THE EUROPEAN UNION

The European Union expressed its intention to harmonize contracts law in 1989. In a resolution from June 1989, the European Parliament (“Parliament”) requested the European Council, the European Commission (“Commission”), and the Member States to initiate work on a common European code of private law.<sup>282</sup> No comprehensive measures were actually taken until July 2001.<sup>283</sup> At that time, the Commission adopted an Action Plan entitled “Communication from the Commission to the Council and the European Parliament on European Contract Law.”<sup>284</sup> The Action Plan aimed to initiate “a process of consultation and discussion about the way in which problems resulting from divergences between national contract laws in the EU should be dealt with at the European level.”<sup>285</sup> Specifically, the Communication intended “to allow the Commission to gather information on the need for more far reaching EU action in the area of contracts law.”<sup>286</sup> It emphasized several issues: whether cross-border contracts caused problems to the internal market; whether diverse national contract laws hindered cross-border transactions; and whether sector-specific harmonization of contracts law caused inconsistencies.<sup>287</sup>

After receiving and considering responses to the first action plan, the Commission adopted a new action plan in 2003: A More Coherent European Contract Law Action Plan.<sup>288</sup> The new action plan has three aims: “to increase the coherence of the EC *acquis* in the area of contract law, to promote the elaboration of EU-wide general contract terms and to examine

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<sup>282</sup> See Lookofsky, *supra* note 182, at 112; see EUR. PAR. RES. A2-157/89, 1989 O.J. (C 158), 400.

<sup>283</sup> See *id.*

<sup>284</sup> Communication from the Commission to the Council and the European Parliament on European Contract law, COM(2001)398 final, 2001 O.J. (C 255) [hereinafter Action Plan 2001].

<sup>285</sup> A more coherent European Contract Law, An Action Plan, Brussels, COM(2003)68 final, 2003 O.J. (C 063) [hereinafter Action Plan 2003].

<sup>286</sup> *Id.* at 4.

<sup>287</sup> See *id.*

<sup>288</sup> *Id.*

whether to adopt non-sector specific measures such as an optional instrument.”<sup>289</sup> Though the new action plan dropped the goal of developing a European Contracts Code, there is an expressed strategy by the Commission to increase harmonization activity in contracts law.

On a practical level, the EU started adopting directives concerning specific areas of contracts law in 1985.<sup>290</sup> The EC has adopted several directives since 1985. The most relevant to this article are the Product Liability Directive (85/374/EEC),<sup>291</sup> the Directive on Contracts Negotiated Away from Business Premises (85/577/EEC),<sup>292</sup> the Directive on Consumer Credits (87/102/EEC),<sup>293</sup> the Package Tours Directive (90/314/EEC),<sup>294</sup> the Unfair Contracts Term Directive (93/13/EC),<sup>295</sup> the Distance Contracts Directive (97/7/EC),<sup>296</sup> the Sale of Consumer Goods Directive (99/44/EC),<sup>297</sup> and the Directive on Electronic Commerce (2000/31/EC).<sup>298</sup> All these directives concern particular situations—specific contracts or marketing techniques—that have been identified as requiring harmonization.<sup>299</sup>

These directives aim at leveling out existing disparities between Member States within a certain area of contracts law. The legal bases used by the EU Legislature to adopt directives are Article 94 and Article 95 of the Treaty of the European Community (“TEC”).<sup>300</sup> Together these articles provide the EC Legislature with power to harmonize contracts law in response to

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<sup>289</sup> *Id.* at 4.

<sup>290</sup> For more on directives, *see supra* note 5. The Council adopted some of these directives before Sweden and Finland joined the European Union. Sweden and Finland, however, adopted those directives as a part of the EEA that came into force on January 1, 1994. *See Bernitz, supra* note 4, at 909.

<sup>291</sup> 1985 O.J. (L 210).

<sup>292</sup> 1985 O.J. (L 372).

<sup>293</sup> 1987 O.J. (L 042).

<sup>294</sup> 1990 O.J. (L 158).

<sup>295</sup> Unfair Contract Terms Directive, *supra* note 14.

<sup>296</sup> 1997 O.J. (L 144).

<sup>297</sup> 1999 O.J. (L 171).

<sup>298</sup> 2000 O.J. (L 178).

<sup>299</sup> *See* Action Plan 2001, *supra* note 284, at 6-7, 9.

<sup>300</sup> *See* TEC, *supra* note 5, art. 94, 95.

problems in a market sector relating to trade between Member States; disparate contracts laws are trade barriers and cause for intervention, the argument goes.<sup>301</sup>

The best explanation of the function and limits of Article 95 harmonization is the *Tobacco I* decision.<sup>302</sup> Measures based on Article 95 must have as their objective to “improve the conditions for the establishment and functioning of the internal market.”<sup>303</sup> There also must be a “finding of disparities between national rules and of the abstract risk of obstacles” to the fundamental freedoms or the possibility of distortions of competition.<sup>304</sup> Such future obstacles to trade must be likely to occur and the measure “must be designed to prevent them.”<sup>305</sup>

Separate from the above-discussed processes of legislative activity within the realm of the EU are many private initiatives. The most noteworthy of these initiatives are the Lando Commission, the Common Core Project, the Social Justice Group, and the Study Group for a European Civil Code.<sup>306</sup> These initiatives aim to research and promote the understanding of contemporary contracts law in the different Member States. Some of the initiatives draft proposals for a European Contracts Code; others try to identify and articulate the general principles of a future European Contracts Code, lobby their particular agendas to the

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<sup>301</sup> It is uncertain, however, whether Article 94 and 95 of the TEC provides a sufficient legal basis for the enactment of a European Contracts Code. Walter van Gerven has commented that “no legislature at the European level . . . is empowered to enact comprehensive legislation covering all areas of private patrimonial law.” He continued, quoting *Tobacco I*, Case C-376/98, *Germany v. Parliament and Council* (2000): “a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental (economic) freedoms or of distortions of competition liable to result therefrom, [is not] sufficient to justify the choice of Article [95] as a legal basis . . . .” Walter van Gerven, *Codifying European Private Law*, Communication on European Contract Law, at 13, available at [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/comments/5.5.pdf](http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/5.5.pdf) (last visited Oct. 20, 2006).

<sup>302</sup> Case C-376/98, *supra* note 301; see also Action Plan 2001, *supra* note 284, at 3-4.

<sup>303</sup> Case C-376/98, *supra* note 301, at para. 83.

<sup>304</sup> *Id.* at para. 84.

<sup>305</sup> *Id.* at para. 86.

<sup>306</sup> See generally the Study Group for a European Civil Code, at <http://www.sgecc.net> (last visited Oct. 20, 2006); The Principles of European Contract Law, at [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/](http://frontpage.cbs.dk/law/commission_on_european_contract_law/) (last visited Oct. 20, 2006).

Commission, or work to promote public awareness.<sup>307</sup> The Lando Commission is responsible for the Principles of European Contract Law (“PECL”).<sup>308</sup> Even though the PECL have no legal force in and of themselves, they represent an account of European contracts law. Practitioners and courts often use the PECL as a reference and a source of inspiration. Their authority is similar to that of the American Restatement in Contract Law.<sup>309</sup>

#### **A. A European Contracts Code**

Against this background, the EU is working toward a unified European contracts law. What concerns this article is the protection of weaker parties in such a future law. There exists no final law to examine, but by examining various contracts law directives adopted by the Council, it is possible to predict general principles of a European contracts law. The directive on unfair contracts terms is the most relevant act to this prediction. Whereas all other contracts law directives are limited to certain sectors, the Unfair Contract Terms Directive applies to all contracts between a professional and a consumer.<sup>310</sup> Additionally, the Directive also shares a similar view of protection of weaker parties with the PECL.<sup>311</sup> From studying the Unfair Contract Terms Directive, one therefore gets an indication of what legislative techniques and principles the EU will use to provide for protection of weaker parties in a code. Article 3 is the article most relevant to the protection of weaker parties in the Directive:

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence

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<sup>307</sup> See *supra* note 306.

<sup>308</sup> See The Principles of European Contract Law, *supra* note 306.

<sup>309</sup> See RESTATEMENT (SECOND) OF CONTRACTS (1981) (United States).

<sup>310</sup> See Unfair Contract Terms Directive, *supra* note 14

<sup>311</sup> See The Principles of European Contract Law, *supra* note 306. For a thorough discussion of PECL and the Unfair Contract Terms Directive, see Thomas Wilhelmsson, *Private Law in the EU: Harmonised or Fragmented Europeanisation*, 10 EUR. R. P. L. 77, 87 (2002).

the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.<sup>312</sup>

There are two ways to establish a contractual term as being unfair by the use of the Directive. Paragraph 1 contains a general clause containing criteria of when and how a court shall deem a contract term unfair.<sup>313</sup> To supplement the general clause, paragraph 3 refers to a list of unfair terms, found in the annex to the Directive.<sup>314</sup>

The general clause, at first glance, seems to provide for a great deal of intervention. This is, however, deceiving, as its reach is limited to *not individually negotiated* terms that cause a *significant imbalance*, contrary to *good faith*.<sup>315</sup> First, paragraph 2 defines an individually negotiated term as a term that one party drafts ahead of time, and which substance the other party cannot control.<sup>316</sup> By only allowing courts to interfere when a contract is *not* individually negotiated,<sup>317</sup> “contracting parties [are free] to conclude the contract which most suits their particular needs.”<sup>318</sup> The emphasis of this rule is on the principle of *freedom of contract* and the virtue of *private autonomy* in a *laissez-faire society*.<sup>319</sup> The belief is that “control of individually negotiated contracts ... [is] in conflict with private autonomy and the functioning of a market

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<sup>312</sup> Unfair Contract Terms Directive, *supra* note 14, art. 3.

<sup>313</sup> *See id.* art. 3, sec. 1

<sup>314</sup> *See id.*

<sup>315</sup> *See id.*

<sup>316</sup> *See id.* art. 3, sec. 2.

<sup>317</sup> *See id.* art. 3, secs. 1, 2.

<sup>318</sup> Action Plan 2003, *supra* note 285, at 21.

<sup>319</sup> *See* Thomas Wilhelmsson, *The implementation of the EC directive on unfair contract terms in Finland*, 2 EUR. R. P. L. 151, 155 (1997); *see also* Wilhelmsson, *supra* note 311, at 14-15.

economy.”<sup>320</sup> Courts and other authorities, consequently, only have the power to intervene with predefined—not individually negotiated—contract terms in standard contracts.<sup>321</sup> Wilhelmsson observes, “[p]rivate autonomy and freedom of contract... [will] be left untouched as soon as they have been made use of in some form of negotiation, irrespective of the balance of power of those taking part in the negotiation.”<sup>322</sup> In sum, the aim of the general clause found in Article 3, and in a future code, is only to protect the *free will* of weaker parties, leaving weaker parties on their own when they have negotiated because those parties have made use of their free will.<sup>323</sup>

For a term to be unfair, it must cause a “significant imbalance” between the parties’ rights and obligations.<sup>324</sup> A similar requirement existed in earlier general clauses in Nordic contracts laws. For example, before Section 36 of the Swedish Contracts Law Act was adopted, a term had to be “obviously unfair” before a court could intervene.<sup>325</sup> With the introduction of Section 36, the Swedish legislature deleted the word “obviously.”<sup>326</sup> Since then, a term may be unfair if it merely causes, to use the words of the Directive, imbalance between the parties’ rights and obligations. Where in this case the EC Directive requires a significant imbalance, it represents a retreat in attitude concerning intervention. The message given is that courts should abstain from intervening in contract relations.

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<sup>320</sup> Wilhelmsson, *supra* note 311, at 88 n.41.

<sup>321</sup> *See id.*

<sup>322</sup> *Id.*

<sup>323</sup> *See id.* When implementing Article 3, none of the Nordic countries transposed this limitation to individually negotiated contract terms. *See* Commission of the European Communities, Report from the Commission on the implementation of Council Directive 93/13/EEC of April 5 1993 on Unfair Terms in Consumer Contracts, COM(2000)248 final,14; EFTA Surveillance Authority, Report on the Application of Council Directive 93/13/EEC of April 5 1993 on Unfair Terms in Consumer contracts, 01-9395-D, 4.

<sup>324</sup> Unfair Contract Terms Directive, *supra* note 14, art. 3, sec. 1.

<sup>325</sup> Prop. 1975/76:81, *supra* note 180, at 33.

<sup>326</sup> *Id.*

Moreover, the Unfair Contract Terms Directive introduces good faith as a limitation by requiring any significant imbalance to be “contrary to the requirement of *good faith*.”<sup>327</sup> Consequently, even though the facts of a case may establish a significant imbalance between the parties’ rights and obligations, courts’ authority to intervene is constrained by the good faith principle.<sup>328</sup> One can conclude that intervention in a future code does not aim to promote equality between the parties.

As a supplement to the general clause, courts can also find a term unfair if it is included in the list provided for in paragraph 3. It should be noted initially that the language in paragraph 3 is remarkably ambiguous: a self-described “indicative,” “non-exhaustive” list of terms that “may” be unfair.<sup>329</sup> Yet it is the legislative technique and the origin of this paragraph, and not poor legislative quality in its drafting, that should draw our attention.

The list is a so-called “gray list.” In Advocate General Geelhoed’s words, a gray list contains “terms which are presumed to be unfair, but for which the burden of proof is in fact reversed.”<sup>330</sup> Not every use of a term on the list will cause an imbalance in a contract relationship.<sup>331</sup> A “black list,” by comparison, includes terms “which are regarded as unfair and in relation to which courts or competent administrative authorities do not have any discretionary power.”<sup>332</sup> The EC legislature found inspiration for using such a list from the German Standard Contracts Act of 1976.<sup>333</sup>

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<sup>327</sup> Unfair Contract Terms Directive, *supra* note 14, art. 3, sec. 1 (emphasis added).

<sup>328</sup> *See generally* Teubner, *supra* note 11, at 20-21 (discussing the good faith principle).

<sup>329</sup> Unfair Contract Terms Directive, *supra* note 14, art. 3.

<sup>330</sup> Case C-478/99, *Opinion of Mr Advocate General Geelhoed delivered on 31 January 2002*, *Commission of the European Communities v Kingdom of Sweden* 2002 E.C.R. I-04147, para. 26 [hereinafter *Opinion of Mr Advocate General Geelhoed*].

<sup>331</sup> *See id.* at para 28.

<sup>332</sup> *Id.* at para 26.

<sup>333</sup> *See* Bernitz, *supra* note 178, at 14.

The list has a twofold objective. On one hand, the list aims both to direct and to limit courts by giving examples of unfair terms. “The list thus offers the courts and other competent bodies . . . a criterion for interpreting the expression unfair terms.”<sup>334</sup> One fear, expressed by the Danish legislature among others, is that a list containing specific examples might narrow the scope of court intervention to such listed terms and decrease the protection already provided for in general clauses.<sup>335</sup>

On the other hand, the list signals to the market what may be acceptable, that is, what is not categorically prohibited. Because a gray list allows for certain exceptions, market actors will find ways to use gray-listed terms and courts will be limited in their review of such terms.<sup>336</sup> Effects of such an approach will manifest themselves over time, and despite the amount of criticism the gray list has received, a future European contracts law likely will include gray lists. Some Member States, such as Germany, have implemented the list as a binding black list,<sup>337</sup> others as an indicative gray list, and some only included the list in the preparatory works of their law.<sup>338</sup> Furthermore, some Member States use even more restrictive techniques than lists; they “only allow specific [enumerated] contract clauses to be struck down . . . .”<sup>339</sup>

#### IV. COMMISSION V. SWEDEN

The historical description of contracts law in the Nordic countries in Part II shows that there has been a continuous development toward increased protection of weaker parties closely related to the political and social changes of Nordic society. This development is comprised of four different periods, to use Wilhelmsson’s terminology: *emerging welfarism*, *reactive*

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<sup>334</sup> Opinion of Mr Advocate General Geelhoed, *supra* note 330, at para. 28.

<sup>335</sup> See Lookofsky, *supra* note 182, at 117 (citing GOMARD, ALMINDELIG KONTRAKTSRET, 177 (2d ed. Copenhagen 1996)).

<sup>336</sup> See Opinion of Mr Advocate General Geelhoed, *supra* note 330, at para. 28; see also Wilhelmsson, *supra* note 319, at 154-56.

<sup>337</sup> See Bernitz, *supra* note 178, at 14.

<sup>338</sup> See Action Plan 2003, *supra* note 285, at 9.

<sup>339</sup> *Id.* at 11.



*welfarism, maturing welfarism, and person related need-rational welfarism.*<sup>340</sup> All four periods of welfarism coexist and supplement each other today. *Person related need-rational welfarism* represents, however, the most recent tendencies within the legal regime of protection of weaker parties.<sup>341</sup> In addition, Nordic contracts laws deem anyone who is in an inferior position to the other party as a weaker party; for instance, a consumer or a small business dealer could be a weaker party.

A future European contracts law, described through this article and through other scholars' analyses of the Unfair Contract Terms Directive, provides protection of weaker parties similar on its face to that afforded in the Nordic countries during the period of *emerging welfarism*—early twentieth century legislation.<sup>342</sup> Moreover, European contracts law shifts the standard of who to consider as a weaker party. In the EU, a weaker party is a well-informed and educated individual. He or she must understand the risks involved in entering a contract, have the ability to collect information, and be articulate enough to make his or her claims heard. A weaker party in the EU is thus a market actor

On the surface, the Nordic countries appear to have a much broader system providing for protection of weaker parties, and therefore, rightfully, they need to make no, or almost no, changes to existing contracts law in response to EC harmonization efforts. Contracts law regulations in place provide for similar or better results. This is the reason why many scholars have connected problems experienced within the Nordic legal systems to the retreat to *emerging welfarism* that European contracts law brings about. Thus, these scholars believe that the

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<sup>340</sup> See Wilhelmsson, *supra* note 12.

<sup>341</sup> See *id.* at 88.

<sup>342</sup> Wilhelmsson draws a similar conclusion in his article *Varieties of Welfarism in European Contract Law*, *supra* note 11 (Wilhelmsson describes the different ways of providing for welfarism. He finds that EU law is so far primarily limited to market rational and market correcting welfarism and calls for a broader welfarist agenda and increased intervention).

problems within the Nordic legal systems are caused by the decreased protection of weaker parties. The implementation of the Unfair Contract Terms Directive and the subsequent case, *Commission v. Sweden*, however, challenge this perception.

Building on the well-developed tradition of Nordic legal cooperation, the implementation of the Unfair Contract Terms Directive was a common Nordic effort. The Swedish preparatory works state:

The effort to transpose the Directive has taken place on a Nordic level. The goal has been to have a common interpretation of the Directive and establish universal principles for transposing the Directive domestically. Because regulations on unfair contract terms are very similar in the Nordic countries, it has been a natural goal to synchronize transposing measures so that no unnecessary differences occur. All Nordic countries have been involved, including Iceland.<sup>343</sup>

There were three components to the Swedish implementation of the Directive. First, a revised Consumer Contract Terms Act was enacted.<sup>344</sup> The revised Act conserved significant portions of the old act but introduced, for instance, an expanded scope of application.<sup>345</sup> Second, the only change made to Section 36 of the Contracts Act was the introduction of a reference to the adjustment clause, section 11 of the revised Consumer Contract Terms Act.<sup>346</sup> Finally, Sweden implemented the list in the annex to the Directive in the preparatory works to the implementing law.<sup>347</sup>

In 1999, the Commission brought Sweden to court for failure to implement the Unfair Contract Terms Directive.<sup>348</sup> The Commission also, under authority granted to it by Article 226 of the TEC, issued “reasoned opinions . . . against Denmark and Finland for the same reason.”<sup>349</sup>

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<sup>343</sup> Prop. 1994:95/17, *supra* note 99, at 14 (Sweden) (translated by the author).

<sup>344</sup> Lag (1994:1512) om avtalsvillkor i konsumentförhållanden [Consumer Contract Terms Act].

<sup>345</sup> See Prop. 1994:95/17, *supra* note 99, at 1.

<sup>346</sup> See *id.* at 2, 107.

<sup>347</sup> All the Nordic countries including Iceland and Norway chose this model of implementation. See EFTA Surveillance Authority, *supra* note 323, at 7.

<sup>348</sup> See Case C-478/99, *supra* note 13.

<sup>349</sup> *Id.* at n.16.

The EFTA Surveillance Authority expressed that it would take action against Norway if the Commission prevailed in the case against Sweden.<sup>350</sup> Both Denmark and Finland chose to intervene in support of Sweden in the proceedings.<sup>351</sup>

The Commission argued in its brief to the Court that Sweden must reproduce the list in the annex in section 3 of Article 3 in the laws implementing the Directive.<sup>352</sup> Specifically, the Commission said that the Directive has two goals: first, to approximate Member States' consumer provisions on unfair terms in contracts; and, second, to improve information on applicable law to consumers.<sup>353</sup> For the Commission, it is necessary to publish the list in law, in order to achieve the two goals as well as satisfy the requirement of legal certainty.<sup>354</sup> Advocate General Geelhoed described legal certainty in his opinion to the case: "individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights."<sup>355</sup> The Commission thus argues that to fulfill these obligations, a "mere mention in the preparatory work for a law cannot suffice."<sup>356</sup> It is doubtful whether preparatory works are as easily accessible as laws are and whether the public is made aware of the existence and importance of the list through preparatory works.<sup>357</sup>

Sweden defended its implementation method, relying in its argument on Article 249 of the TEC, which grants Member States discretion to choose the form and method of implementing directives.<sup>358</sup> In making its case, Sweden expressed four reasons why it was a more "suitable solution" to incorporate the annex into the preparatory works of the implementing

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<sup>350</sup> [0] *See id.*

<sup>351</sup> *See* Case C-478/99, *supra* note 13, at 9.

<sup>352</sup> *See id.* at 7.

<sup>353</sup> *See id.* at 10.

<sup>354</sup> *See id.* at 12.

<sup>355</sup> Opinion of Mr Advocate General Geelhoed, *supra* note 330, at para. 13.

<sup>356</sup> Case C-478/99, *supra* note 13, at 12.

<sup>357</sup> *See id.*

<sup>358</sup> *See id.* at 13.

law.<sup>359</sup> First, “the annex to the Directive ... is not in itself intended to create rights and obligations for individuals.”<sup>360</sup> Advocate General Geelhoed purported this view in his opinion to the Court; he described the Directive as containing one normative part and one indicative part.<sup>361</sup> Whereas the list is of indicative value and Member States only have to transpose normative provisions into their legislation, Sweden’s implementation was sufficient.<sup>362</sup>

Second, in the Nordic countries, preparatory works are one of the main legal sources.<sup>363</sup> By incorporating the list into the preparatory works, the list can be of help when applying and interpreting the relevant law.<sup>364</sup> Sweden argued to the court:

When the Directive was being implemented, the question of the list in the Annex was the subject of extensive discussion. According to a legal tradition well established in Sweden and common to the Nordic countries, the preparatory work is an important aid to interpreting legislation. The incorporation of the Annex to the Directive in the preparatory work thus seemed the most suitable solution.<sup>365</sup>

Moreover, Swedish legislative texts rarely contain lists of examples.<sup>366</sup> Reiterated in the preparatory works, the list will be an interpretative source to the adjustment clause.

Third, Swedish courts already had declared fourteen out of the seventeen terms in the annex unfair at the time the ECJ heard the case.<sup>367</sup> Case law was, therefore, already in harmony with the Directive. Furthermore, throughout the court proceedings, the Commission could not give a single example where Sweden had failed to designate a term unfair.<sup>368</sup>

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<sup>359</sup> *Id.* at 14.

<sup>360</sup> *Id.* at 13.

<sup>361</sup> *See* Opinion of Mr Advocate General Geelhoed, *supra* note 330, at para. 36ff.

<sup>362</sup> *See id.* at para. 36.

<sup>363</sup> *See supra* at 219ff.

<sup>364</sup> *See* Opinion of Mr Advocate General Geelhoed, *supra* note 330, at paras. 49, 51.

<sup>365</sup> Case C-478/99, *supra* note 13, at para. 14.

<sup>366</sup> *See* Opinion of Mr Advocate General Geelhoed, *supra* note 330, at para. 49.

<sup>367</sup> *See id.* at para. 51.

<sup>368</sup> *See id.* at para. 56.

Fourth and finally, “members of the concerned public are informed of ... [the list’s] existence in various ways.”<sup>369</sup> In sum, Sweden argued that whereas Member States only are obliged to implement directives in a way compatible with their own legal framework, Sweden had sufficiently implemented the Directive.<sup>370</sup>

In its holding, the Court stated that “it is essential that the legal situation resulting from national implementing measures be sufficiently precise and clear and that individuals be made fully aware of their rights so that, where appropriate, they may rely on them before the national courts.”<sup>371</sup> The list in the annex “does not limit the discretion of the national authorities to determine the unfairness of a term . . .” and “[i]t in no way alters the result sought by the Directive . . . . It follows that . . . the full effect of the Directive can be ensured in a sufficiently precise and clear legal framework without” incorporating the list into the implementing provisions.<sup>372</sup>

The court also quoted Advocate General Geelhoed’s opinion:

Inasmuch as the list contained in the Annex to the Directive is of indicative and illustrative value, it constitutes a source of information both for the national authorities responsible for applying the implementing measures and for individuals affected by those measures.... Member States must therefore, in order to achieve the result sought by the Directive, choose a form and method of implementation that offer a sufficient guarantee that the public can obtain knowledge of it.<sup>373</sup>

The Swedish Government has claimed that preparatory works are an important interpretative tool and that they are easily accessible.<sup>374</sup> In relation to implementing the Directive, the Government asserted that it made the list available to the public in various ways.<sup>375</sup> The Commission failed

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<sup>369</sup> Case C-478/99, *supra* note 13, at para. 14.

<sup>370</sup> *See id.* at para. 15.

<sup>371</sup> *Id.* at para. 18.

<sup>372</sup> *Id.* at para. 21.

<sup>373</sup> *Id.* at para. 22.

<sup>374</sup> *See id.* at paras. 23-24.

<sup>375</sup> *See* Case C-478/99, *supra* note 13, at paras. 23-24.

to establish the contrary, and instead, “confined itself to maintaining that those factors cannot compensate for the fact that . . .” Sweden did not integrate the list in the implementing laws.<sup>376</sup>

The Court ruled that the Swedish model of implementation makes individuals sufficiently aware of their rights, and consequently, Sweden cannot be required to implement the list into law.<sup>377</sup>

#### **A. The Discussion within Sweden**

In the preparatory works to the law implementing the Directive, the Swedish Government discussed different possibilities of implementation. First, the Government identified two positive effects of incorporating the list in the annex directly into law; such an incorporation would make the list more easily accessible and would facilitate interpretations of the law in many cases.<sup>378</sup> Nevertheless, where the Directive provides that contract terms in the list “may” be unfair, the Government concluded that it would be pointless to prescribe the list of contract terms in law if the terms were not always binding.<sup>379</sup>

Second, the Government looked at alternative solutions in implementing the list. One solution was to change the terms in the list into mandatory terms through prohibiting exceptions.<sup>380</sup> Such a solution, however, would have made individual review of a contract term in an individual case impossible.<sup>381</sup> An alternative solution would have been to incorporate the list into law, but conditioning it. The list would be binding “if no particular circumstances to the contrary exist.”<sup>382</sup> In that alternative, the list would not give any guidance in complicated cases.<sup>383</sup> Moreover, such an implementation would have caused misunderstandings. For

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<sup>376</sup> *Id.* at para. 23.

<sup>377</sup> *See id.* at para. 24.

<sup>378</sup> *See* Prop. 1994:95/17, *supra* note 99, at 48.

<sup>379</sup> *See id.*

<sup>380</sup> *See id.*

<sup>381</sup> *See id.*

<sup>382</sup> *Id.* (translated by the author).

<sup>383</sup> *See id.*

instance, courts might believe that they should avoid considering as unfair contract terms not included on the list.<sup>384</sup>

With these aspects in mind, the Government found that the best solution for implementing the list into Swedish law was by incorporating the list into the preparatory works of the implementing law. The Law Faculty Board at the University of Stockholm wrote an opinion to the proposed draft preparatory works, expressing concern over the risk of courts overlooking the list if not incorporated into law.<sup>385</sup> Because the Government considered the reasons against incorporating the list into law predominant, this risk was worth taking.<sup>386</sup> Additionally, the Government noted that the implementing law would be equipped with a direct reference to the Directive and, as a result, court adjudication would take the Directive into consideration.<sup>387</sup> In the end, all Nordic countries chose this method of implementation.<sup>388</sup>

## **B. The Law Council's Comments**

During the implementation process of the Directive, the Swedish Government requested the Law Council to comment on the draft for the new law.<sup>389</sup> In its comment, the Law Council recognized the special legal character of the list and pointed to several features.

First, Swedish tradition dictates that the Government should enact into law lists containing recommendations that purport to bring about a uniform application or assist in forming future case law—like the list of the annex.<sup>390</sup> In this case, the Government, therefore, could not rightfully claim that the list has been “incorporated into Swedish Law.”<sup>391</sup>

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<sup>384</sup> See Prop. 1994:95/17, *supra* note 99, at 48.

<sup>385</sup> See *id.* at 49.

<sup>386</sup> See *id.*

<sup>387</sup> See *id.*

<sup>388</sup> See EFTA Surveillance Authority, *supra* note 323, at 7.

<sup>389</sup> See *supra* note 259.

<sup>390</sup> See Prop. 1994:95/17, *supra* note 99, at 140.

<sup>391</sup> *Id.* at 141.

Second, where the preparatory works to the implementing law incorporates the list, a court cannot use the list as an interpreting factor when applying the relevant section concerning unfair contract terms; in Swedish legislation, the clause relating to unfair terms is Section 36 of the Contracts Act.<sup>392</sup> When assessing possibly unfair terms under Section 36, therefore courts only will consider the preparatory works to Section 36 itself. When implementing the Directive, however, the only change made to Section 36 of the Contracts Act was the incorporation of a reference to the assessment provisions of the implementing law.<sup>393</sup>

In *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, the ECJ decided that courts must interpret national law in accordance with EC law.<sup>394</sup> This means that Swedish courts are obligated to include the Directive as an interpreting factor when applying Section 36.<sup>395</sup> The result is that the list will have sufficient impact, though not because of its incorporation into the preparatory works of the implementing law.

Third, the Law Council agreed with the Government that the terms in the list are vague and for many reasons are not suitable for legislating.<sup>396</sup> Finally, it is most likely that Courts would already hold the terms included on the list unfair by application of Section 36.<sup>397</sup>

### **C. Remarks on the Discussion of *Commission v. Sweden***

From the Nordic legislatures' perspective, there is no question that Nordic contracts laws materially fulfilled the implementation requirements of the Unfair Contract Terms Directive.<sup>398</sup> After all, the Directive caused little disturbance in Nordic contracts laws—largely because the

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<sup>392</sup> See *id.* at 140.

<sup>393</sup> See *id.* at 2; see also *supra* note 346.

<sup>394</sup> Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, 1990 E.C.R. I-04135.

<sup>395</sup> See Prop. 1994:95/17, *supra* note 99, at 94.

<sup>396</sup> See *id.* at 140.

<sup>397</sup> See *id.*

<sup>398</sup> Norway, for example, stated that the Directive only “brought minor amendments to the existing . . .” legislation. EFTA Surveillance Authority, *supra* note 323, at 10. For a similar statement, see Wilhelmsson, *supra* note 319, at 151 (“By and large the Finnish system was considered to be in line with the Directive”).



laws in place already contained well-developed legislation and case law that provided for equivalent results. The legislatures' argument was that the Directive was redundant. The concepts of *individually negotiated terms*, *significant imbalance*, and *good faith* already were well established in the Nordic countries. In fact, the Nordic countries considered themselves leaders in providing for protection in line with these concepts.

The list was different by virtue of the legislative technique used; Sweden had to transpose it into Swedish law in one way or another. Transposing the list into the preparatory works allowed the legislature to retain its control while also implementing the list. The legislature was well aware that its implementation model was borderline insufficient; not only did it comment on this possible insufficiency in its internal discussion, but also the critique from the Law Council recognized it. Moreover, Sweden had notice from precedent; when Denmark tried to implement a directive into a preparatory works in 1985, the Commission brought Denmark to the ECJ for failure to implement the directive and the ECJ found against Denmark.<sup>399</sup> In *Commission v. Sweden*, the ECJ distinguished its reasoning from the Danish case on the grounds that the list of presumptively unfair terms only provided information to private citizens and did not create any rights or duties by itself.<sup>400</sup>

The analysis of the Nordic implementation of the Unfair Contract Terms Directive suggests that the Commission was right. Although Nordic contracts laws many times provide for outcomes similar to that required by the Directive, it is only through the interpretative obligation, as reaffirmed by the ECJ in *Marleasing*, that a party can rely on, or the courts can give full effect

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<sup>399</sup> See Case 143/83, *Commission of the European Communities v. Kingdom of Denmark*, 1985 E.C.R. 00427.

<sup>400</sup> See Case C-478/99, *supra* note 13, at para. 12.

to the Directive in adjudication.<sup>401</sup> *Commission v. Sweden* thus visualized a dilemma between the Nordic countries and the EU institutions.

## V. ANALYSIS AND NORDIC LEGAL DEBATE

Part I of this article laid out Kennedy's theory of globalizations of law and legal thought, comprised of Classical Legal Thought, The Social, and the Third Globalization. Kennedy's theory gave a global perspective that this article used to analyze the historical and current Nordic legal debate.

The Nordic countries received Classical Legal Thought at the end of the nineteenth century and during the early years of the twentieth century. Nordic contracts laws from this period were filled with freedom of contract features, and protection of weaker parties was limited to secure each party's will.

Next, until the 1970s, The Social heavily influenced legal forces in the Nordic countries, allowing parliamentary supremacy, social conceptualism, and corporatism to prosper. Contracts law during this period shaped a wide-ranging regime of welfarism; this period saw the emergence of informalities, strong biases for welfare considerations, and contracts rules laden with paternalist motives. Another important element from this period for the current Nordic legal debate was the emergence of Scandinavian realism, which first played an important role in democratizing law-making in the Nordic countries and later was a dominant factor in the enthusiastic reception of The Social in the Nordic countries.

When the Third Globalization, comprised of policy analysis and neo-formalism, evolved, the Nordic legal systems, heavily inspired by The Social, had no trouble in receiving policy analysis. Part II of this article laid out how case law had established the proportionality principle, and how Section 36 of the Contract Acts made a prima facie case of policy analysis

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<sup>401</sup> See *Marleasing S.A.*, *supra* note 394.

legislation. However, neo-formalism met strong resistance in the Nordic countries and gained strength only through European integration, primarily through the Nordic countries' accession to the EU. For example, Sweden partly introduced federalism and judicial supremacy through the EC Treaty and the *acquis communautaire* when joining the EU in 1995; Sweden's implementation of the different directives on contracts law reintroduced freedom of contracts and formalism; and Sweden incorporated the ECtHR—property rights and human rights—into law in 1995.

Although parts of neo-formalism have been introduced to the Nordic legal systems, incorporation of those parts is at best incomplete and is generally insufficient. The reason for this is that the Nordic countries claim redundant the legal influences coming with neo-formalism and, specifically, European contracts law. In Part III and Part IV, the article outlined the present Nordic mind-set toward European contracts law. Where Part III explored the contents of a European contracts law and highlighted differences in relation to Nordic contracts laws, Part IV illustrated how the Nordic countries implemented the Unfair Contract Terms Directive, how they argued, in *Commission v. Sweden* that the Directive was redundant to Nordic contracts laws, and how they insufficiently implemented the Directive. My discussion in Part IV, however, shows that neither the Unfair Contract Terms Directive nor neo-formalism is redundant.

Neo-formalism causes many disturbances to the Nordic legal systems. First, neo-formalism re-establishes coherence within the legal system, from which one can deduce rights, and grants courts the power to protect rights—in this case, freedom of contracts, but also property rights and human rights—in contrast to the earlier prevailing order of an informal parliamentary-made regime of collective welfare. Second, neo-formalism introduces a federal level of governance with powers to decide policy, specifically, the Commission and the ECJ, and

removes policy-making powers from the former sovereign Member States. Third, with neo-formalism the judiciary is supreme and, thus, takes the place of parliaments. Because European contracts law represents part of the reception of neo-formalism in the Nordic countries, it requires Nordic legal institutions to subject themselves to a new balance of formal powers.

Arguably, the claim that harmonization of contracts law decreases protection of weaker parties stems from the assumption in the Nordic countries that their contracts law is more social in the law of the market and this claim is employed by the Nordic countries to resist, and to justify resistance of, European contracts law. Resistance takes place as Nordic legal institutions strive to preserve the Nordic legal systems' informal and arbitrary characteristics whenever they are incorporating EC legislation or ECJ case law. Indeed, this mind-set is prevalent everywhere in Nordic legal debate. All arguments and claims originate from the presumption that the Nordic legal systems embody social welfare, intervention, and informality ("social"); whereas the EU stands for economic liberalism, deregulation, and formalism ("liberalism"). Political biases determine the positions and arguments made at each side of the social versus liberalism dichotomy.

Here follows a summary of the dichotomy within Nordic debate, though it is not an attempt to be comprehensive.

#### **A. Social**

At the social side of the dichotomy, one can summarize the arguments as a strong preference for informal and wide-ranging Nordic legislation over formal and stagnated EC legislation. First, looking at how legal debate views the Nordic legal systems, the Swedish Government argued in *Commission v. Sweden* that the Unfair Contracts Term Directive was redundant. The Government claimed that Swedish law already held the terms in the list in the

annex to the Directive unfair. Advocate General Geelhoed supported that claim by stating that Swedish case law already had declared fourteen out of the seventeen terms in the annex unfair and, more interestingly, the Commission could not give a single example where Sweden had failed to designate a term unfair.<sup>402</sup> All these arguments presume that the Nordic legal systems, which are flexible and dynamic and which give judges broad powers to balance and intervene in cases, already provide for every possible adjudicative outcome. Whether it is rights, principles, or judicial supremacy, the system in place can secure the same outcome as a formal system and, at the same time, be flexible. If this should prove insufficient, the argument goes, the legislature can always intervene to supplement or correct legislation.

Second, what is most striking about the image of the EU at the social side of the dichotomy is the great fear of neo-liberal ideology. The Nordic countries have a long tradition of intervention and social purposes. Scholars are concerned that once the EU has harmonized contracts law, initiatives could only come through the cumbersome democratic process of the EU.<sup>403</sup> Harmonization of contracts law means that any area covered by EC laws “would be removed from the powers of the national states,” because EC law is supreme over Member State law.<sup>404</sup> Member State legislatures thus will no longer have policymaking powers or power to respond to socio-economic changes.<sup>405</sup> Whereas European contracts law is enacted to promote ideas such as trade, market economy, and efficiency, there will be no room for social welfare concerns.

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<sup>402</sup> See Opinion of Mr Advocate General Geelhoed, *supra* note 330, at para 51.

<sup>403</sup> See Wilhelmsson, *supra* note 311, at 86.

<sup>404</sup> *Id.*

<sup>405</sup> See *id.*

A third concern is the conflict between a uniform European contracts law and the idea of welfarism, because welfarism is not a single idea around which one can construct a code<sup>406</sup> and is not reducible to a single coherent formula.<sup>407</sup> Rather, welfarism requires a combination of various welfarist regulations.<sup>408</sup> Wilhelmsson explains: “one needs to take a stand on various questions on an issue-by-issue and case-by-case basis. The variety . . . implies that the solutions[, or rules,] are necessarily too political, too decisionistic, to be carved out in stone once and for all.”<sup>409</sup> Welfarism requires a “continuous experimental development and improvement . . . where new ideas not only flow via EC legislation, but also directly between the Member States.”<sup>410</sup> Logically, this is impossible if a uniform European contracts law controls contracts in the EU; hence, legal development would stagnate under European contracts law.<sup>411</sup> Any measures taken on a European level of government must therefore leave “sufficient room for continuous development at a national level.”<sup>412</sup>

Fourth, another common perception about European contracts law is that because all Member States within the EU, to some extent, have different legal cultures, one will have to search for common values on which to base a contracts law.<sup>413</sup> The regime of protection of weaker parties in Nordic contracts laws has been “connected with the relatively homogeneous [welfarist] values of those able to influence them.”<sup>414</sup> Among the different Member States in the EU, however, there are no homogeneous social values to build upon, but rather, a multitude of

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<sup>406</sup> See generally *id.* at 85; Wilhelmsson, *supra* note 11, at 732-33. This argument is similar to the common argument that one has to be informal to be social. See Kennedy, *The Rise & Fall of Classical Legal Thought*, *supra* note 25, at 105.

<sup>407</sup> See Wilhelmsson, *supra* note 311, at 86ff; Wilhelmsson, *supra* note 11, at 732-33.

<sup>408</sup> See Wilhelmsson, *supra* note 11, at 732-33.

<sup>409</sup> *Id.* at 733.

<sup>410</sup> Wilhelmsson, *supra* note 311, at 93.

<sup>411</sup> See *id.*

<sup>412</sup> Wilhelmsson, *supra* note 11, at 733. According to Wilhelmsson, a better alternative than the creation of a European Contracts Code would be “a process of europeanization through a free movement of legal ideas and doctrines.” *Id.*; see Wilhelmsson, *supra* note 311.

<sup>413</sup> See Lookofsky, *supra* note 182, at 118.

<sup>414</sup> Wilhelmsson, *supra* note 311, at 85.

different social groups and conflicting interests.<sup>415</sup> A European contracts law therefore will be a race to find common traditional values.<sup>416</sup> An aggravating factor is the “natural tendency ... [among] governmental experts to defend the positions of their own legal systems and the consequent need to search for compromise solutions.”<sup>417</sup> In sum, Nordic legal debate perceives European contracts law to be very abstract, construed out of concepts, and containing no homogenous welfarist idea.<sup>418</sup>

Finally, whereas the legal basis for EC legislation is trade barriers caused by disparities in Member States’ legislation, EC legislation necessarily will disrupt the flexible and interventionist system in place and will cause great insecurity. In the case of European contracts law, it will replace over 100 years of case law.<sup>419</sup> EC law codification hence implies a shift from “judge-made law to black-letter statutes.”<sup>420</sup> It “took [Nordic] judges and legal theorists decades to build up the progressive, flexible and pragmatic system of today,”<sup>421</sup> all of which will be exchanged for European contracts law. Although, most importantly, given the need for uniform application, it is unavoidable that the ECJ bears the sole responsibility for ensuring legal development.<sup>422</sup> Harmonization thus strips Member State courts of their powers. Swedish Supreme Court Judge Torgny Håstad explains that if national courts are left in charge of developing case law, there is a great risk that disparities in application will once again develop.<sup>423</sup> Bigger countries also would likely influence case law more than smaller countries

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<sup>415</sup> *E.g. id.* at 90-91.

<sup>416</sup> *C.f. id.* at 86.

<sup>417</sup> Lookofsky, *supra* note 182, at n.54.

<sup>418</sup> See Torgny Håstad, *En europeisk civillag och den nordiska kontraktsträtten*, at <http://www.congrex.fi/njm2002/referat/339histad.pdf>, 360 (2002).

<sup>419</sup> See Lookofsky, *supra* note 182, at 117; see also Håstad, *supra* note 418, at 365.

<sup>420</sup> Lookofsky, *supra* note 182, at 117.

<sup>421</sup> *Id.*

<sup>422</sup> See Håstad, *supra* note 418, at 363.

<sup>423</sup> See *id.* at 363-64.

because they have more cases.<sup>424</sup> The only solution for a free market is to leave it to the ECJ to take on the role of norm creator and supreme judiciary.

## **B. Liberalism**

On the liberalism side of the dichotomy, Nordic debate focuses on how European “formal” legislation can increase the wealth and growth of the market, in combination with a strong critique of the existing “informal” Nordic legal systems.

First, to achieve an efficient and working market, one needs a European contracts law with uniform rules.<sup>425</sup> Member States’ contracts law is too interventionist and too disparate for businesses. Only with a uniform law can market actors adopt business routines applicable indiscriminately throughout the EU.<sup>426</sup> In the words of Ole Lando:

The Union is an economic community. Its purpose is the free flow of goods, persons, services and capital. The idea is that the more freely and more abundantly these can move across the frontiers, the wealthier and happier we will become. All of these move by way of contracts. It should, therefore, be made easier to conclude and perform contracts and calculate contract risks.<sup>427</sup>

Second, the EU allows for highly technical and efficient solutions in comparison to local Nordic legislation. With European contracts law, there exist increased possibilities to entertain the demands of trade and economy.<sup>428</sup> Lando explains: “[c]ontract law is not folklore. It is a question of ethics, economics and technique.”<sup>429</sup> As a conclusion, it must follow that one could draft a contracts law with “common principles favorable for the economy and technically

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<sup>424</sup> *See id.*

<sup>425</sup> *See id.*; *see* TAXELL, *supra* note 93, at 109.

<sup>426</sup> *See id.*

<sup>427</sup> Ole Lando, *Optional or Mandatory Europeanisation of Contract Law*, 1 EUR. R. P. L. 59, 61 (2000).

<sup>428</sup> *See id.* at 65.

<sup>429</sup> *Id.*



expedient.”<sup>430</sup> To sum up, European contracts law is a project of democracy, market economy, and Christian ethics and, therefore, a plausible and desirable goal.<sup>431</sup>

Third, Nordic legal debate often refers to EC law as strengthening legal certainty. Under a system of rule of law, individuals must know and must be able to rely on the legal consequences that will result from their actions. A harmonized system of rules such as a European contracts law will increase legal certainty because market actors will no longer run the risk of having different Member States’ rules apply to similar contracts. Stig Strömholm gives an illustrative description: “People living inside the EU shall be able to rely on the legal framework surrounding the Union, foresee the legal effects of their actions, and have the freedom of choice to enter into dispositions.”<sup>432</sup> The enactment of a European contracts law will improve legal certainty for consumers and businesses as these parties increasingly take part in cross-border trade.<sup>433</sup>

Fourth, the EU minimizes state intervention in the market to predefined exceptions. In short, neo-liberals believe that intervention causes more disturbance than good for the market and, hence, the state shall avoid intervening. Not only does the market have to be protected from intervention, but so do individuals; protection is necessary to secure the free enjoyment of individual rights. Rights like freedom of contract and the right to property are sacred. Implicit in this claim, European contracts law embodies the principle of freedom of contract and allows only for clear and foreseeable exceptions. In his article, *Swedish Standard Contracts Law and the EC Directive on Contract Terms*, Bernitz emphasizes the importance of limiting paternalistic

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<sup>430</sup> *Id.* Christina Ramberg has also expressed support for the opinion that it is possible to draft a high quality Code. See Christina Ramberg, *Mot en gemensam europeisk civilagstiftning*, 5/6 SvJT, 460 (2004) (explaining the PECL and its future application in Sweden).

<sup>431</sup> See BERNITZ, *supra* note 4, at 42.

<sup>432</sup> Stig Strömholm, *En gemenskapsrättslig internationell privaträtt? Konsekvenser för nordiskt samarbete, lagstiftning och juristutbildning?*, 5/6 SvJT 524 (2003) (translated by the author).

<sup>433</sup> See generally Lando, *supra* note 427, at 69.

court intervention.<sup>434</sup> Any social concerns or protective measures should be contained to specific problem areas.<sup>435</sup> The best way to achieve this is with mandatory rules regulating such problem areas.<sup>436</sup> Whereas the principal consumer protection goal is information to consumers in EC contracts law,<sup>437</sup> the EU reproduces the image of minimized court intervention.

Fifth, because EC law will use standardized models for finding solutions to conflicts, court deliberation on a case-by-case basis will decrease.<sup>438</sup> In his book, *Avtalsrätt*, Lars Erik Taxell foresees that formalism will increase with a European Contracts Code.<sup>439</sup> EC Directives might very well already have initiated this process. Concerning the “gray list” in the Unfair Contract Terms Directive, Bernitz identifies a possible shift in court deliberation from an individualized assessment to a more “clause-oriented” assessment of contracts.<sup>440</sup> The focus of assessment thus will be on specific contract clauses, not the individual circumstances of the case.<sup>441</sup> With time, Bernitz believes this will increase the efficacy of the system.<sup>442</sup>

## VI. CONCLUSION

Because of the social versus liberalism dichotomy and its presumptions about the EU and the Nordic legal systems, Nordic legal institutions have resisted European contracts law and have mitigated the disturbances caused by it. Formal issues of institutional competences have been blurred into substantive issues of policy and, thus, allowed the Nordic countries to avoid the legal choices coming with European contracts law.

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<sup>434</sup> See BERNITZ, *supra* note 4, at 237.

<sup>435</sup> *See id.*

<sup>436</sup> *See id.* The neo-liberal influence on existing EC law is also evident. For instance, Wilhelmsson identifies in his recent article that EC law mainly concerns market rational welfarism, concerned with contracting parties’ autonomy and market functioning mechanisms. *See* Wilhelmsson, *supra* note 11, at 732. This finding is in line with the concern for minimized state intervention described here.

<sup>437</sup> *See* Case 362/88, *GB-INNO-BM v Confédération du commerce luxembourgeois*, 1990 E.C.R. I-00667, 689, para. 18.

<sup>438</sup> See BERNITZ, *supra* note 4, at 237.

<sup>439</sup> See TAXELL, *supra* note 93, at 110.

<sup>440</sup> BERNITZ, *supra* note 4, at 237-38.

<sup>441</sup> *See id.*

<sup>442</sup> *See id.*

For instance, in the case of protection of weaker parties, Nordic legal institutions mitigate the consequences of European contracts law by claiming that harmonization decreases protection. In making this claim, legal institutions transform the issue of which institution has the formal power to legislate and decide contracts law policy—the EC legislature or the Member States’ legislatures—to one of substance. Specifically, the issue becomes who has the best policy and what is the substantive outcome of such a shift to European contracts law.

The claim presumes that Nordic contracts laws are better as informal and paternalistic. The true concern of Nordic legal institutions is resistance to giving up legislative powers to the EU and, in contrast to what one might believe, Nordic legal institutions are not concerned with what will happen with protection of weaker parties.

Through a perspective of globalization of law and legal thought, this article lays out how harmonization of contracts law represents part of the reception of the ongoing globalization in the Nordic countries. The perspective helps to identify and trace disturbances coming with European integration, in this case, to the Nordic legal systems.

Moreover, this perspective allows for a brief prediction of what is to come. On the one hand, the Nordic countries are likely to experience an increased amount of cases and reasoned opinions against themselves. This will arise from their non-implementation of EC Directives, the fact they do not recognize principles and rights established by ECJ case law, and the perception that their continued use of informal criteria creates barriers to the free movement of goods, services, people, and capital. On the other hand, this analysis suggests that European contracts law will not cause protection of weaker parties to decrease. Rather, European contracts law leaves ample space for the development of far-reaching consumer protective measures.