Analyze This! Some Swedish Reflections on the Europeanization of Tort Law

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‘We are right to continue to worry away at the unnecessary divergences which continue to divide us. But the things which unite us, are greater than the things which divide us. The dawning of the new millennium should, no doubt, act as a spur to further endeavour; but it is also an opportunity to reflect on the extraordinary progress already made during what, historically speaking, is like an evening gone.’1

I. General Introduction

The project of harmonizing European private law, or the Europeanization of private law as for instance Ole Lando put it,2 through the proposition of a common European code is in many ways as much a novelty for the Scandinavians as for the common law lawyers. The main reason for this is that none of the Scandinavian countries – even though they traditionally have been, in the previously favored division between legal families, considered to belong to the continental civil law family – have a civil code in the proper sense of the word. But if the more far-reaching aspirations of some proponents of the Europeanization process are fulfilled, this may be about to change.

The background for this article is the current work on developing a common European law of torts as one part of a civil code for Europe. Torts is one of the areas where the most comprehensive Europeanization project, The Study Group on a European Civil Code (The Study Group) has made considerable progress.3 And

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2 See O Lando ‘Optional or Mandatory Europeanisation of Contract Law’ European Review of Private Law 2000, p 59 ff, at 59 f: “The term to ‘Europeanise’ the law, as used here, means to unify or harmonise European law, ie, the law of the countries which are, or will, become [sic!] members of the European Union”. In this article, the expression ‘Europeanization’ will be used in the same way Lando does (although I will out of habit use an American spelling).

3 Hereinafter the Study Group. This project should be well known by now, at least by academics. See generally Towards a European Civil Code edited by Hartkamp et al (2nd edn The Hague 1998); C
the Study Group is not the only project that investigates the possibilities of finding a common ground for a harmonization of the different European national tort legislations: among these efforts one should at least mention also the so-called European Group on Tort Law (or the Tilburg Group). In addition to these two large-scale comprehensive projects there are also other examples of comparative research projects, working in a smaller scale.

More specifically, the purpose of this article is to address some concerns a Swedish jurist may feel towards the Europeanization process on a methodological or deeper level, albeit only with regards to tort law. It seems to me that concerns on this level have not been articulated sufficiently enough before, with the exception of those critical towards the Europeanization process. But these are not questions that should be left only to the skeptics. These considerations – indeed these are sometimes problems – must also be accounted for by us – and I include myself here – that on the whole are sympathetic towards the idea of a European tort law. The critics have been countered on some accounts on a theoretical or methodological level but a lingering impression (that underpins this article) is that the criticism is not sufficiently refuted if the methodological and cultural differences are not dealt with also in a, so to say, substantial way. Another reflection is that the criticism occasionally seems to be based in a rather black-and-white comparative law view, which leaves out jurisdictions that are more difficult to place in this simplistic scheme.

It is thus some of the more abstract features of legal culture that will be the subject of this article and focus is on the relationship between the cultural context of a Swedish tort lawyer and the Europeanization process. It should be stressed that the aim is nothing more than to try to throw some light on issues that seldom receive much attention in the European discussion, again with the exception of the project’s

von Bar ‘The Study Group on a European Civil Code’ [2000] Tidskrift utgiven av Juridiska Föreningen i Finland 323 ff; and C von Bar ‘A Civil Code for Europe’ [2001-2002] JT 1 ff. Compared to the vivid discussion on legal harmonization in general and the project of the Study Group in particular in continental Europe, the Scandinavians have up until recently seemed rather indifferent to these efforts. However, the discussion seems now to be on the increase also in the Scandinavian countries, see for instance U Bernitz ‘Mot en europeisk civillag?’ [Towards a European Civil Law] [2001] Europarättslig tidsskrift 469 ff. A rather critical approach to the codification project is taken by T Wilhelmsson ‘Europeiseringen av privaträtten’ [The Europeanization of Private Law] [2001] Tidsskrift for rettsvitenskap 1 ff and in ‘The Legal, the Cultural, and the Political – Conclusions from Different Perspectives on Harmonisation of European Contract Law’ (2002) 13 European Business Law Review 541 ff. In Sweden I previously tried to open up a policy discussion on these efforts through some more popular articles, see for instance M Schultz ‘En europeisk civilkod’ [A European Civil Code] 7/2000 Advokaten 22 ff.

4 See for the current work http://civil.udg.es/TORT/, and in its association with the Vienna-based European Centre of Tort and Insurance Law http://www.ectil.org/.
5 In the following when I generically speak of ‘the projects’ I include all European research that have in common the aim of investigation the possibilities of further harmonizing the tort law systems of Europe, whether in a code or otherwise. However, the emphasis of this article will lie on the Study Group’s research on tort law. When I hereinafter speak on the Europeanization process, I refer to the conscious effort to harmonize national rules and principles on tort law.
critics, and none of the subjects dealt with will be as thoroughly penetrated as they deserve. There are many problems of comparative law theory that could and perhaps should be dealt with along the way that I will only discuss briefly in passing. Since the aim of the account of Swedish tort theory in this article is not so much to compare it to a particular view in some other legal culture, but rather to present some methodological issues that have been discussed mostly internally in Swedish law, the comparative legal method questions might perhaps be of less interest here. In other words: This article is not foremost a comparative inquiry but rather an account of some aspects of a national legal culture, against the background of a comparative project. There are nevertheless some issues that always arise when one tries to juxtapose phenomena from a particular legal culture with phenomena outside this realm, for instance when one tries to present some methodological hang-ups from Swedish tort law with the international environment of the civil code project in mind. One such classic and unanswerable problem of comparative legal theory that will not be discussed sufficiently is how to meaningfully compare legal entities outside of their context. The problem might have been exaggerated, but it can still be said to be a starting point for this article: For a meaningful comparison of legal phenomena we need, or at least would benefit from, attempts at providing a picture also from the deeper levels of legal culture. I realize that these introductory remarks may sound obscure and fuzzy, but the approach will hopefully be made clearer as we proceed.

II. The Europeanization Projects and Their Critics

Even if the Europeanization process has been extensively discussed in law journals and conferences in the last couple of years, some misconceptions concerning the actual work within the academic groups seemingly still thrive. In this section we shall therefore take a look at how the Study Group actually works and what the stated aims of the Study Group actually are. The point we need to make here, that might seem obvious but which is often difficult to discern in the normative debate

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6 A seminal article on the issue in Swedish literature is S Strömholm’s ‘Har den komparativa rätten en metod’ [Does comparative law have a method?], reprinted in Ideer och tillämpningar (Stockholm 1978) 332 ff.

7 Is this not only a variation on the problem that all observations and interpretations are influenced by the context in which we live? We cannot fully understand the meaning of, for instance, the English institute ‘trusts’ if we have a Swedish perspective since it will be impossible to translate it into a Swedish context, so to say, salva veritate. But this insight cannot really be an argument against us trying, since the same problem arises, although perhaps not with the same force, every time we observe or interpret legal phenomena – also domestic rules and institutes. If we should refrain from interpreting and analyzing legal phenomena every time there is a risk that our judgments might be influenced by factors unrelated to the investigated object – such as our legal context or our subjective beliefs or values – we would be unable to ever make legal judgments.
for or against a code, is that one might very well be a firm believer in the Study Group’s work without therefore committing oneself to the view that the introduction of a civil code is desirable in a foreseeable future. There is a complex of intertwined policy questions lurking in this discussion.8 To mention but two one must distinguish between: (1) Should a European Civil Code be introduced? (2) Should academics carry out investigations on how a European Civil Code could and should be formulated? My personal answer to the first question would be, ‘it depends’9 while my answer to the second question is an unequivocal ‘yes’.

A. The Aims and Method of the Study Group

Whether a European civil code should or should not be introduced is a political question that must be dealt with mainly within the democratic framework (which of course does not preclude a pro et contra-discussion in the academic community). This is also recognized by the proponents of a common code. The purpose of the work of The Study Group and other research projects is and should foremost be to provide a feasible and comparatively well-founded proposal when (if) the respective decision-making bodies (on a European and on a national level) decide to take the next step. Nevertheless, one should not disregard the fact that any proposal will also be permeated by normative considerations,10 but this is also something that is primarily for the legislator to evaluate. The important issue here is how the research is actually carried out and what the stated aims are. On the web page of the Study Group the following mission statement is given: ‘The aim of the Study Group is to produce a set of codified principles for the core areas of European private law (patrimonial law). Although the foundation for our work is detailed comparative law research, the principles which we are fashioning will represent more than a mere restatement of the existing law in the various EU jurisdictions from the standpoint of the predominant trends among the diverse legal regimes. Instead the Study Group seeks to formulate principles which constitute the most suitable private law rules for Europe-wide application.’11 We see thus that the method is that of extensive comparative law research and the aim is to provide a convincing set of principles for a future civil code. The input from the national legal orders is secured through the participation and cooperation of legal scholars from all over Europe. As for the

8 Concerning the different questions that arise in this discussion, see for instance the enumeration of T Koopmans ‘Towards a European Civil Code?’ [1997] European Review of Private Law 541 ff.
10 These objections are particularly raised by T Wilhelmsson ‘Europeiseringen av privaträtten’ [The Europeanization of Private Law] [2001] Tidsskrift for rettsvitenskap 1 ff, who argues that there is a risk that a civil code will promote liberal or perhaps rather libertarian (Wilhelmsson uses the word ‘liberalistic’) values at the expense of welfare state concerns. When it comes to tort law particularly, these risks seem lower than for instance when it comes to consumer protection law, but this is probably an assessment that would not be shared by a code skeptic.
possibilities of such a proposal eventually becoming law, this is left for the political bodies to decide. That this is the ambition should always be kept in mind when one reads criticism against the project.

B. The Criticism Against the Europeanization Process

1. Different Levels of Comparative Analysis
Karlo Tuori has usefully distinguished between three different levels in the analysis of law.\(^\text{12}\) The first, superficial level consists of the particular legal rules and court decisions and the like. The second level is inhabited by legal culture, a notion which covers legal concepts and principles, as well as the legal method. Lastly, on the third level one finds the deep structure of the law. A general observation is that the concrete work of the projects that investigate the possibilities of a harmonized private law – at least as far as the Study Group is concerned – mainly have devoted their efforts to work on the first level, in the way that the comparative research have focused on particular rules and solutions, rather than on a comparative analysis of more diffuse ideas belonging to legal culture.\(^\text{13}\) This is of course a deliberate choice of method; the idea is that only through comparative research of different national solutions to concrete legal problems, and how these solutions are supported in the sources of law (legislation, adjudication and so on), will the end result – a restatement or a proposal for a code – have a possibility of being considered as legitimate. Not only is the actual work within the Europeanization projects primarily focused on the first level, also the policy arguments that are invoked to support the enterprise are down-to-earth and often not very philosophical in character.\(^\text{14}\)

The criticism against the Europeanization process, on the other hand, is often based at a deeper level of the analysis. As we shall see, some critics have argued that the European legal systems are diverging. However, it seems that not even the critics dispute that the laws of Europe converge on the surface level. It is simply a fact that more and more legislation, also in private law, is a result of different kinds of European initiatives, most importantly from the EU. That the bulk of identical or at least similar legislation within Europe is increasing is thus a truism. The divergence is instead supposed to lie on the deeper levels. It is the legal cultures, the new pet subject of comparative legal research, that are supposed to drift further apart. How does this, then, affect the Europeanization projects?


\(^\text{13}\) Here I have the benefit of drawing on my own experience. I earlier (2000-2001) participated as a co-worker in the Osnabrück team within The Study Group on a European Civil Code, and after this I have had the privilege of being able to participate in the continuous work on torts within the project.

\(^\text{14}\) Compare for instance O Lando ‘Optional or Mandatory Europeanisation of Contract Law’ [2000] European Review of Private Law 59 ff, at 61: “The arguments in favour of a Europeanisation of contract law are down-to-earth. […] Contract law is not folklore. It is a question of ethics, economics and technique.”
2. Deep Level Criticism Against the Europeanization Process: Pierre Legrand

Perhaps the most persistent and vocal critic of the Europeanization projects is Pierre Legrand. Legrand’s criticism is sometimes difficult to understand without considerable knowledge of contemporary philosophy, which in itself makes it difficult to counter on a surface level of the analysis. In several essays,\(^{15}\) Legrand has attacked the idea of a European civil code, which he sees as a manifestation of civil law imperialism with the common law jurisdictions on the losing end. In the idea of a civil code, Legrand (and indeed many others) sees the (antiquated) modernistic ideal of the great book, the all-embracing meta-narrative.\(^ {16}\) Legrand is sceptical about the modernist ideal encompassed in the codification idea and he sees in this ideal a threat to cultural pluralism and diversity. The aspirations for a European civil code are, according to Legrand, a reflection of the civilian tradition’s arrogance towards and fear of the common law. This is not the place for an attempt at a general rebuttal of Legrand’s arguments\(^ {17}\), but it could be useful to provide some examples of why the criticism seems completely misguided from a Swedish perspective.

For someone with a pronounced post-modernistic approach, Legrand puts a lot of stock in a very traditional, bipolar comparative law worldview. The framework for Legrand’s criticism presupposes the traditional division between a common law tradition and a civil law tradition. In this division Legrand reads in a myriad of differences. Not only are there differences in the view on legal institutions and methods, but jurists in a common law legal culture actually live in another world than us (supposedly) living in a civil law jurisdiction. ‘[T]here have developed, and there exist, both a civil law and a common law mentalité – two different ways of thinking about the law, about what it is to have knowledge of law and about the role of law in society. […] An important feature of the civilian’s contemporary epistemological construct (although not a necessary one as Denmark, Finland and Sweden continue to remind us) is the civil code.’\(^ {18}\) This is a bold empirical claim.\(^ {19}\) In support of the claim one does not find much empirical data from Legrand. Instead the criticism is of a more philosophical nature: Legrand seems to hold that the different mentalités


\(^{16}\) A lucid and accessible account of the modernist programme in Swedish is S-E Liedman I skuggan av framtiden (Stockholm 1997).

\(^{17}\) Any such attempts of mine would undoubtedly fail miserably anyway. For some other general comments on Legrand’s views, see V Zeno-Zencovich ‘The ‘European Civil Code’, European legal traditions and neo-positivism’ (1998) 4 European Review of Private Law 349 ff.


\(^{19}\) In some parts the arguments seem almost patronizing towards the common lawyer Legrand sets out to protect. “It is not an exaggeration to state that in England a solicitor or barrister is regarded as being more akin to a plumber or carpenter than to a philosopher or humanist. English lawyers remain
he sees in the two traditions actually entail that an English lawyer and a German lawyer live in incommensurable worlds. This is an issue that certainly warrants an essay of its own (from someone better suited than me), but one immediate reflection is how this in reality could pose a problem for the civil code project. If the common law actually does make up an autonomous epistemological sphere where jurists speak another language than us in the civil law world, it is difficult to see how a civil code could do much damage. If a code really were alien to the common law tradition, would it not rather be transformed into something less civilian when it enters into the common law sphere, would it not be absorbed into the system, so to say? As Legrand points out, ‘the power of a culture inheres in its capacity to assimilate data through a didactic of conflict resolution operating in its favour so that a new appearance experiences conform to existing structures of thought and belief’. In this Legrand makes an important point. As Teubner says, in his comment on the introduction of good faith in English law: ‘Thus the question is not so much if British contract doctrine will reject or integrate good faith. Rather, it is what kind of transformations of meaning will the term undergo, how will its role differ, once it is reconstructed anew under British law?’

Maybe Legrand tries to tell us something more alarming, however. Perhaps the real danger, that he wants to warn us of, is that the introduction of a civil code is such a major blow to the core of the common law tradition that it could actually disrupt the very foundations of the culture. Would a civil code be the end of the common law world? Such a view apparently entails that the existence of a civil code is something that indeed does go to the very core of what makes up a legal culture. But is this really the case?

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20 This is not the terminology favored by Legrand, but it seems to be this that comments such as the following aim at, Pierre Legrand ‘European Legal Systems Are Not Converging’ (1996) 45 ICLQ 52 ff at 76: “the common law and civil law worlds cannot […] engage in an exchange that would lead one to an understanding of the other.” Personally I disagree with this for much the same reasons as mentioned by T Wilhelmsson, see ‘Europeiseringen av privaträtten’ [The Europeanization of Private Law] (2001) Tidsskrift for rettsvitenskap 1 ff, at 13. See also T Wilhelmsson ‘Private Law in the EU: Harmonised or Fragmented Europeanisation?’ [2002] European Review of Private Law 77 ff, at 81. Generally on the incommensurability thesis of theories, see WH Newton Smith The Rationality of Science (London 1994) 9 ff and passim, with detailed references to Kuhn and Feyerabend.


3. The Code as the Core of Culture: Legrand’s Critique from a Swedish Perspective

Perhaps Legrand is right in arguing that the European civil code idea and its proponents do not sufficiently recognize the differences between the two traditions, and that the common law is on the losing end of the stick (even if the many British academics that have shown support for the European endeavour apparently think the advantages outweigh the disadvantages).23 But when we shift focus from the epicenters of the respective tradition, England on the one hand and the Continental jurisdictions on the other, one cannot help but feeling puzzled. That the broad generalization of the two ‘major traditions’ fits less well on the classic mixed-systems is well known. But for a Scandinavian reader, Legrand’s worldview seems downright peculiar. Even though Legrand explicitly notes the absence of a civil code in the Scandinavian countries, he nevertheless categorically refers also these to the civil tradition.24 Thus Scandinavian jurists work within the ‘epistemological cluster’ of civil law, according to Legrand. But how does this cohere with categorical statements such as ‘[T]he civilian proceeds to reason from the social and legal perspective embodied in the code’.25 One cannot help but to wonder how we Scandinavian lawyers have come to possess this ephemeral civil law mentalité in the absence of a civil code, when it is the introduction of such a code that allegedly would contaminate the common lawyers with civil law ideas to the very extent of the end of the common law culture. And as a Swedish lawyer one feels even more estranged from Legrand’s generalization of the civil lawyer after reading this longer characterization of the legal process in civil law traditions: ‘The civil law is, thus, best understood as a law of the system, where the emerging contingencies of life readily find themselves being subsumed under one or the other of the available categorical umbrellas with all the confidence that comes from the attribution of significance to the act of categorisation and to the criteria allowing for a separation of the categories.’26

4. A Concrete Example: Unjust Enrichment

Because of the basis in these simplistic and sweeping generalizations, it seems clear that Legrand’s criticism misses its mark in some of the cases it purports to cover. If one replaces the vague references to the civil law jurisdictions in the quotes above with for instance Sweden, a jurisdiction that Legrand explicitly refers to the civil law

23 Others, also those skeptical towards the idea of a code, have been less convinced of the need for protecting the common law tradition. See T Wilhelmsson ‘Europeiseringen av privaträtten’ [The Europeanization of Private Law] [2001] Tidskrift för rettswetenskap 1 ff, particularly at 15. See also T Wilhelmsson ‘Private Law in the EU: Harmonised or Fragmented Europeanisation?’ [2002] European Review of Private Law 77 ff.

24 This is a question on which much has been written, but it should nevertheless be stressed one more time that the question at least is by no means as clear-cut as Legrand suggests.


family, one ends up with results that for a Swedish lawyer seem in some instances manifestly incorrect and in other instances bizarre. One illustrative example of why this generalization seems strange from a Swedish perspective is the contrast between the Swedish attitude on unjust enrichment law and how these issues are dealt with for instance in German law. Modern Swedish lawyers would often not even know what kind of cases to put in the category of enrichment law and it is certainly not well known as a systematic set of principles and rules. Rather, the situations that would be considered to belong to unjust enrichment law in Germany would systematically be dealt with within, for instance, family law, tort law, the law of sales or the general law of obligations (even if this might also be seen as an obscure category in Swedish law). Some situations that might in other jurisdictions be seen as paradigm cases of unjust enrichment law, such as mistaken payments, are dealt with pragmatically on a case-by-case basis, without being subsumed under more general principles or rules.

As a separate subject, unjust enrichment is given little attention at all. It seems that the characteristic unjust enrichment cases pragmatically are referred to different areas of the law, partly decided on how the parties to a dispute formulate their cases, and the systematic aspects have been considered less interesting than achieving what are considered materially acceptable results in individual cases. (In this regard it looks like even English law is more favorable towards the idea of unjust enrichment law, at least judging from the growing English literature on unjust enrichment and restitution.)

With this background Legrand’s general characteristic of the methods of a civil law system seems incoherent with a Swedish perception of the law. In many areas of the law Swedish jurists would certainly not argue from a systematic perspective

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27 One might find some guidelines from legal scholars, for instance in H Karlgren Obehörig vinst och värdeersättning (Stockholm 1982) and J Hellner Om obehörig vinst (Stockholm 1950). But, as Tiberg writes, “[t]he concept of unjust enrichment is in Swedish law considered far too unclear for it to be referred to for any claim.” H Tiberg Fordringsrätt (5th edn Stockholm 1986) at 17. It seems that Swedish law does not recognize a general rule on unjust enrichment, see for instance T Hästad Tjänster utan uppdrag (Stockholm 1973) at 36: “[t]he main rule in Swedish law must be that an enrichment someone has made on someone else’s expense may be kept”.

28 The latest published survey of this is H Karlgren Obehörig vinst och värdeersättning (Stockholm 1982).

29 See J Hellner ‘Betalning av misstag’ [1999-2000] Juridisk Tidskrift 409 ff, at 413: “The rule [mistaken payments or condictio indebiti] does not need support from either the doctrine of unjust enrichment or the doctrine of tacit assumptions, the causa doctrine, ‘quasi-contract’, implied conditions in the payment or any other of the constructions that exist. Such explanations have been presented but generally been dismissed as unnecessary or misleading.”

30 Concerning this claim, see P Schlechtriem, C Coen and R Hornung ‘Restitution and Unjust Enrichment in Europe’ [2001] European Review of Private Law 377 ff, at 378. For a general comparative account on unjust enrichment (and the law of restitution) in Europe, see ibid. The article is according to its authors a summary of P Schlechtriem Restitution und Bereicherungsausgleich in Europa vol I (Tübingen 2000); vol 2 (Tübingen 2001).
the way Legrand holds is characteristic for civil law. In these cases the arguments are more of an inductive nature, seemingly closer to a common law tradition. The thing is that this is by no means the only example. Similar observations can be made in tort law, the general law of obligations, negotiorum gestio etc. Still, Swedish law is apparently to be considered as a civil law system even in the absence of what is seen as characteristic for civil law systems. Why? Could it perhaps be the other way around? That this example illustrates a deeper problem with building a critique on these very broad generalizations?

5. Lessons to be Learned from the Critique
From a perspective outside the mainstreams of the two major European legal traditions, some points in Legrand’s forceful criticism against the idea of a civil code seem to have a questionable basis. But even if one may find cracks in the critical arguments, there are still lessons to be learned. One is that the research being devoted to investigating the possibilities of a Europeanized private law in general must not only address questions on what Tuori called the surface-level of law, where the convergence, at least superficially, of European law seems uncontested. We must also meet the critics on their own playing field, and address concerns that arise on the deeper levels of legal analysis. In practice this entails that the Europeanization projects must also try to compare and analyze differences that lie on a deeper level than that of concrete rules, principles and apparent systematics, such as deeper methodological beliefs and hang-ups. Only with such a background will we be able to provide a tenable basis for a real harmonization and have a secure position from which to counter criticism on the deeper level of legal analysis. These tasks should not overshadow the concrete research on the surface level – which is where the emphasis of the research should always lie – but this surface level research deserves to be supplemented and backed up by comparisons on a deeper level of analysis. ‘Deeper’ does not mean that this line of analysis needs be particularly more complicated or philosophical than the traditional comparative investigations. On the contrary, the aim should be to perform also these comparisons as concretely as possible. With these pretentious ambitions, I shall in the rest of this article try to give a brief account on some concerns on this deeper level that a Swedish jurist might hold when it comes to the Europeanization of the law of torts.

III. Broad Outlines on Swedish Tort Theory
A. A Short Background Story

In the enterprise of providing a picture of Swedish tort theory for a comparative purpose, a suitable point of departure is the theoretical heritage of the Uppsala-school and its founder Axel Hägerström. The infusion from the so-called Uppsala-school of legal theory, and the following development into the school of Scandinavian
realism has had an incomparable influence on Scandinavian legal culture, most significantly in Sweden.\(^{31}\) The present article will deal with one important outflow of Hägerström’s legacy, in the area of tort law, where Hägerström’s influence is particularly evident through the ‘energetic preaching’\(^{32}\) of Hägerström’s philosophy by his disciple Vilhelm Lundstedt (d. 1955). Lundstedt was one of the great tort scholars in Scandinavia in the twentieth century and a fierce, not to say aggressive, critic of Scandinavian tort theory.\(^{33}\) Lundstedt will serve as a focal point for the following discussion on Swedish tort theory. One could (rightly) object that with this approach one single author is given too much attention, but we will on the other hand have the advantage of a fixed frame of reference for the following discussion.

B. The Heritage of the Uppsala-school and some Tenets of Scandinavian Realism

The founder of the Uppsala-school is generally held to be Axel Hägerström (d. 1932), who was professor in philosophy in Uppsala. A popular joke among (empirically inclined) Swedish students in philosophy is that Sweden’s only lasting contribution to the history of philosophy is that we managed to kill Descartes,\(^{34}\) but Axel Hägerström is at least one exception to this saying. Hägerström has had a lasting influence on legal thinking and has even been dubbed ‘a genius’ by a leading Swedish professor in civil law.\(^{35}\) Hägerström initiated a new mode of analytical legal

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\(^{31}\) For general introductions to these ideas in other languages than the Scandinavian, see J Bjarup, Scandinavian Realism. Hägerström – Lundstedt – Olivercrona – Ross (Freiburg 1978); S Ströhmholm and H-H Vogel Le réalisme scandinave dans la philosophie du droit (Paris 1975); K Olivercrona ‘The Legal Theories of Axel Hägerström and Vilhelm Lundstedt’ Scandinavian Studies in Law 3 125 ff; and H McCoubrey and ND White Textbook on Jurisprudence (2nd edn London 1996) ch 9. Further references will be given below.


\(^{33}\) Apparent for instance in the frontal assault on Scandinavian tort theory, ‘Kritik av nordiska skadeståndsläror’ [Criticism of Nordic Doctrines of Tort Law] [1923] Tidskrift for Rettsvitenskap 55 ff.

\(^{34}\) René Descartes died while holding service at the royal Swedish court under Queen Christina’s reign in 1650. There is actually some substance behind the joke. Descartes came to Sweden under the auspices of serving as a philosophical teacher for the Queen. But it appears that the Swedes treated Descartes rather dismissively when he arrived in Stockholm in 1649. Descartes was given assignments quite unrelated to philosophy, such as writing verses for a ballet, and he complained about the Queen’s many different preoccupations. In January 1650 the Queen finally decided to take up her philosophy lessons. Descartes was commanded to attend her at five o’clock in the morning. Descartes, who had always been very careful about his health, was a late sleeper and it is said that the shock of having to get up so early proved too much for the great philosopher, who caught pneumonia and thereafter died. See J Cottingham The Rationalists (Oxford 1988) 17.

thinking in Scandinavia, which has had – and still has – important implications, not only for legal theory but also for more ‘concrete’ legal science (in a broad sense of the term).

Hägerström’s work is notoriously difficult to read, as a result of his predilection for mixing philosophical, psychological and sociological elements into the same text. Hägerström’s theories comprise many different subjects, including ethics, epistemology and the philosophy of religion. From a contemporary perspective it seems that Hägerström’s most lasting influence has been on legal theory, and that this influence has been most apparent in Sweden. One reason for this is that several legal academics took inspiration from Hägerström and tried to transfer his ideas to the discipline of law. Hägerström’s most vigorous disciple was Lundstedt, professor in private law and Roman law in Uppsala, but Lundstedt was not the only one. Karl Olivecrona, first assistant professor in private law in Uppsala and thereafter professor in procedural law in Lund, is another illustrious example. The term ‘Scandinavian realists’ includes not only the proponents of the Uppsala-school but also scholars outside of Sweden. In Denmark, for instance, Alf Ross took up some ideas of Hägerström, although Ross’ theories are quite independent from Hägerström in other regards.

A common denominator in the four above-mentioned authors’ approach is a distinct repudiation of metaphysics, especially in legal contexts. The credo was ‘preterea censeo metaphysicam esse delendam’. However, Hägerström had a quite extensive interpretation of the word ‘metaphysics’. Natural law was as a whole rejected as metaphysics, and many traditional legal concepts were included in the metaphysical field, such as all notions and concepts that cannot, in some way, be perceived in the physical world. With this basis, Hägerström held that the legal and moral fields are permeated with metaphysical content. For instance, Hägerström went to great lengths to show how traditional legal concepts, such as ‘rights’ and ‘duties’ were metaphysical or, as he alternatively called them, mystical or ‘supersticious’. This line of criticism was partly built on a thorough analysis of the concept of obligation in Roman law – Hägerström devoted great efforts to the historical background of the legal conceptions and ideas. Some other main points in Hägerström’s theories

Hägerström’s writings have been translated into English by CD Broad, published in Inquiries into the Nature of Law and Morals (Stockholm 1953).


37 Ross’ main inspirations probably came from the Vienna-school and other logical positivists; see J Bjarup and J Dahlberg-Larsen Retsbegreb, retsanvendelse og retsvidenskab (Århus 1994) 31 ff. This holds at least for Ross’ magnum opus Om ret og retfærdighed (København 1953).


39 Hägerström wrote two major works on the subject, Der römische Obligationsbegriff im lichte der allgemeinen römischen Rechtsanschauung vol 1 (Uppsala 1927) and vol 2 (Uppsala 1941). Cf con-
should also be held in mind in this discussion. In modern philosophical terminology, Hägerström was a non-cognitivist or emotivist.\textsuperscript{40} Thus Hägerström held that moral judgments do not possess truth-value: ‘[I]t is nonsense to consider the idea of ought as true’.\textsuperscript{41} Truth was by Hägerström understood in accordance with the common correspondence theory. In the Swedish discussion this thesis of Hägerström and his followers has for a long time been labeled ‘value nihilism’, which initially was used as a pejorative term but which has since won wide acceptance. As for ontology, Hägerström was a realist in so far as he believed in the existence of a physical world, but he was certainly a determined anti-realist concerning the question of an ‘objective’ existence of norms or values.

Except for these basic points, we do not have to consider the details of Hägerström’s ethics or other specific parts of his philosophy here. The interesting thing in this context is the general implications it brought about for legal methodology and especially for the view on tort law. Hägerström’s theories were of concrete importance first for the academics, but much of his ideas have since floated into a more general common perception of law in Sweden.\textsuperscript{42} From the perspective of legal science, Hägerström’s revolutionary paradigm brought about a new aspiration for purity and logical validity. Hägerström himself was quite clear in his view of the purposes of science in general, and legal science in particular: ‘As science only has to describe what is true, and it is nonsense to view an idea of an ought as true, no science can have as its purpose to describe how we should act’.\textsuperscript{43} Taken together, Hägerström’s ideas had profound implications for legal science. As Olivecrona put it: ‘There can be no science of legal rights and duties; it cannot be scientifically determined what rights and duties exists under such and such circumstances.’\textsuperscript{44} If concepts such as rights and duties are, not only metaphysical or magical, but indeed nothing but nonsense (in the true meaning of the expression), the language of legal science needed a thorough overhaul. Hägerström’s pupil Lundstedt was up for the task.

\textsuperscript{40} This was clearly laid down by Hägerström in his inaugural lecture 1911, which was published under the title Om moraliska föreställningars sanning [On the Truth of Moral Ideas]. See J Bjarup ‘Ought and Reality’ 40 Scandinavian Studies in Law 12.
\textsuperscript{42} This is an empirical statement, but I think many legal sociologists would agree.
\textsuperscript{43} A Hägerström ‘Om moraliska föreställningars sanning’ in: Moralfilosofins Grundläggning (Uppsala 1987) 48, my translation.
\textsuperscript{44} K Olivecrona ‘The Legal Theories of Axel Hägerström and Vilhelm Lundstedt’ (1959) 3 Scandinavian Studies in Law 136.
C. Vilhelm Lundstedt – The Anti-Metaphysical Jurist

Vilhelm Lundstedt was probably Hägerström’s most devoted disciple and certainly one of the most important advocates for Hägerström’s philosophy in more traditional legal science. A general account of Lundstedt’s ideas was published in English after his death under the title Legal Thinking Revised.45 The title speaks for itself. Lundstedt had a high regard of the importance of his work: ‘I hold these views of mine – as do many scholars throughout the world – to be nothing short of a basic reshaping of legal thinking’.46 Under Hägerström’s anti-metaphysical credo Lundstedt penetrated the traditional cornerstones of jurisprudence and he vigorously continued Hägerström’s attacks on legal concepts such as ‘rights’, ‘obligations’ and ‘duty’ as being reminiscences of the metaphysical heritage from natural law. Lundstedt went so far as to condemn legal science as such as unscientific.47 The basis was his adherence to Hägerström’s non-cognitivistic philosophy. ‘As instances of the false notions in question the following may be mentioned: legal rights and duties, obligations, legal claims and demands, legal relationships (Rechtsverhältnisse), fault, guilt, liability, rules of law, (natural) justice etc.’48 These concepts, Lundstedt argued, are based on value judgments and as these can not be true or false, they are by definition unscientific.49 (Lundstedt did not discuss the issue that truth and the requirement of truth is an extremely complicated question for all science: What does it mean to say that a scientific proposition is ‘true’? Do we talk about the same kind of truth in legal science as in natural science? Lundstedt seemingly considered truth as a necessary basis for the legitimacy of legal science and science as a whole, but he never defined the basis for and meaning of this requirement.)

However it is not so easy to dispose of a legal terminology that goes back to ancient times. In his works on matters of private law, Lundstedt used the traditional terminology much the same way others had done long before him. Nevertheless he maintained that there was a difference between the way he made use of the concepts and the way they previously had been used.50 For instance, ‘liability’ was used merely ‘as a short term or label instead of more or less tiresome periphrases’.51 The same goes for concepts such as ‘ownership’ and ‘rights’. Other concepts should be banned from science altogether, for instance ‘wrongful’, ‘fault’ and ‘guilt’. Already these examples – taken from different levels in the legal argumentation52 – show

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45 V Lundstedt Legal Thinking Revised (Uppsala 1956).
46 Ibid, at 5.
47 One of Lundstedt’s works was characteristically named Die Unwissenschaftlichkeit der Rechtswissenschaft (vol 1, Uppsala 1932 and vol 2, Leipzig 1936).
48 V Lundstedt Legal Thinking Revised at 16.
49 Ibid, ch 1.
50 See Lundstedt Obligationsbegreppet II. (Uppsala 1930) at 3, with references. In English, see Legal Thinking Revised (Uppsala 1956) at 16.
51 V Lundstedt Legal Thinking Revised at 16.
52 Concepts such as wrongfulness might be considered to be mostly of interest on a justificatory
that some of Lundstedt’s targets belong to the basic apparatus of tort law. It may thus be interesting to take a closer look at Lundstedt’s criticism in some of these cases, before proceeding to the importance Lundstedt’s arguments have today. As indicated, these are disparate topics but what they have in common is that they deal with issues on a higher plane than written law; their meaning must be sought on a deeper level of legal analysis.

**D. Lundstedt on Vicious Circles, Justice, Wrongfulness and Causation**

1. **Fault and other ‘Vicious Circles’**

One basic concept in tort law that fell under Lundstedt’s critical argument was ‘fault’, a term which he equated with negligence.\(^53\) Fault, defined in different ways, is a basis for allowing damages in most legal systems. In Sweden the general rule in negligence law is the ‘culpa-rule’, and the first part of Lundstedt’s series of books on tort law was thus called *The Culpa-Rule*.\(^54\) (The Latin word culpa is in Swedish law considered as a collecting term for the two subjective requisites negligence and intent.\(^55\))

The main point in Lundstedt’s criticism is that negligence (fault, culpa) is based on the notion of *guilt*. In this regard, Lundstedt’s criticism is based on the more general discussion of wrongfulness (in Swedish: *rättstridighet*), which will be discussed below. But another line of argument reveals a basic methodological outlook of Lundstedt’s.\(^56\) If there would be no liability for persons acting negligent, there would be no reason to call the acts in question negligent. On the contrary, that kind of behavior would in the absence of negligence rules be normal. To justify the rules of liability for negligence on negligence is tautological. This is one example of a basic methodological principle: to reveal and pin down vicious circles through legal analysis.

2. **Justice**

The criticism of fault is an example of the critical analysis of different legal concepts, but more fundamental was the criticism against the *foundations* for the legal rules. One line of criticism is aimed against what Lundstedt called the method of justice, by which he referred to different ideas and methods that have little in common.\(^57\) It seems, at least to me, reasonable to strive towards a tort system that

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\(^{53}\) V Lundstedt *Legal Thinking Revised* 252 ff.

\(^{54}\) V Lundstedt *Grundlinjer i skadeståndsrätten. Förra delen: Culpa-regeln* (Uppsala 1935).


\(^{57}\) Cf J Hellner ‘Legal Philosophy in the Analysis of Tort Problems’ (1958) 2 Scandinavian Studies in Law 164.
is just. The problem is that justice is one of these esoteric notions that will have very different content depending on who you ask. There have been many different attempts to qualify justice in tort law,\textsuperscript{58} under such terms as ‘distributive justice’ and, more importantly, ‘corrective justice’.\textsuperscript{59} But Lundstedt rejected the concept of justice from legal science altogether, not only because justice is a metaphysical concept without factual content\textsuperscript{60} and for this reason should be avoided, but Lundstedt even argued that tort law is actually \textit{unjust}, rather than just. ‘In reality nothing could be more cynical than the talk that the obligation to [pay] damages according to the culpa-rule is just’.\textsuperscript{61} Justice is according to Lundstedt something that can only be perceived through emotions and he tried to show the injustice of the tort system through examples of how the rules in some cases lead to consequences that must emotionally be thought of as unjust.\textsuperscript{62} The examples are not too convincing.\textsuperscript{63} One example that occurs in many of his books concerns how differently burdensome the obligation to pay damages can be for different tort feasors. In Lundstedt’s favourite example a rich bachelor who caused harm to a destitute victim is compared with a poor father with many dependents who caused damages to a very wealthy person. Under most legal systems the poor man would be obliged to pay damages to the millionaire, and vice versa.\textsuperscript{64} To award the same amount of damages is in Lundstedt’s eyes apparently unjust and to talk of a justice of damages is therefore discarded as pure nonsense.\textsuperscript{65}

In the place of justice Lundstedt wanted to put a theory of \textit{social welfare}. Legislators, legal writers and judges should adapt their activities to the theory of social welfare, and this adaptation will have different implications for different professions. The difference — according to Lundstedt — is that according to the theory of social welfare, legal rules are judged by the effects their application has on society while according to the theory of justice, legal rules are judged by the justice of the par-

\textsuperscript{58} Cf J Hellner \textit{Metodproblem i rättssvetskapen} (Stockholm 2001) 51 ff. The division between corrective and distributive justice is generally thought to originate from Aristotle. From the many accounts on this subject in recent time one may mention, for instance, George Fletcher’s in \textit{Basic Concepts of Legal Thought} (New York 1996) ch 5.


\textsuperscript{61} V Lundstedt \textit{Grundlinjer i skadeståndsrätten. Förra delen: Culpa-regeln} (Uppsala 1935) at 44. (In Swedish: “I verkligheten kan intet vara mera cyniskt än talet om att skadeståndsväget enligt culpa-regeln vore rättvis”).

\textsuperscript{62} Lundstedt’s approach is very clearly laid down in \textit{Legal Thinking Revised} 53 ff (in a chapter labeled ‘The absurdity of the method of justice’).

\textsuperscript{63} Cf J Hellner ‘Legal Philosophy in the Analysis of Tort Problems’ (1958) 2 Scandinavian Studies in Law 164.

\textsuperscript{64} Even if there now are rules on adjustment in many systems, under which the situation for the tortfeasor can also be regarded

\textsuperscript{65} V Lundstedt \textit{Grundlinjer i skadeståndsrätten. Förra delen: Culpa-regeln} (Uppsala 1935) 44 f.
It is thus a shift in focus, from the individual to the collective. With this premise Lundstedt puts the question: what would the consequences be if persons could negligently cause damages to others without being obliged to compensate them? In Lundstedt’s vision society would in this case be one of chaos, demolition of property and lack of protection for personal safety. But through the rules of tort law, people are discouraged from causing damages because of the following obligation to compensate. Accordingly, the basic function of the rules of tort law is deterrence or prevention. And in accordance with this function, Lundstedt finds that the rules of tort law supports the social welfare of a society and that this basis is the only factual foundation for the rules one can give.

3. Wrongfulness

The debate concerning wrongfulness was a dominating issue in Scandinavian tort theory in the early 20th Century. Wrongfulness had had (and still has) a significant influence in Danish and Norwegian law while the Swedish attitude had always been more skeptical. With Lundstedt the attitude shifted from skeptical to aggressive. Wrongfulness is a concept with many dimensions. It can be viewed as a general term covering phenomena the legal order disapproves of, but it can also be viewed as a method for establishing fault. It is perhaps foremost in the latter sense the doctrine of wrongfulness has been used in the Nordic discussion, albeit less so in Sweden. But wrongfulness has also been closely associated with the general problem of liability for pure economic loss not caused through criminal behavior. And it

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67 It is quite a vivid picture Lundstedt paints when he argues what the consequence would be if the negligence rule were abolished: “The civilized society would be unthinkable. From hunger and lack of basic vital necessities the majority of the earth’s civilized population would eventually disappear. The remaining would – to complete the intellectual experiment – in the end wander about as barbarians and savages” V Lundstedt Grundlinjer i skadeståndsrätten. Förra delen: Culpa-regeln (Uppsala 1935) 106.

68 Lundstedt stresses the importance of prevention frequently in his works; see for instance V Lundstedt Legal Thinking Revised (Uppsala 1956) 255.

69 The positivistic hardliner Alf Ross was not impressed with Lundstedt’s arguments, and held that Lundstedt through the introduction of the notion of social welfare fell into the same metaphysical trap as those he criticized, see A Ross ‘Realismen i retsvidenskaben og samfundsnyttekimæren’ [1932] Svensk juristtidning 324 ff at 349.

70 The English term ‘wrongfulness’ does not carry with it the same connotations as the expressions in civil law countries. In Swedish, the term is ‘rättsstridig’. More on the contemporary discussion on wrongfulness from the perspective of a possible harmonization will follow below.

71 See J Kleineman Ren förmögenhetsskada (Stockholm 1987) 96.


73 The Swedish tort liability Act of 1972 stipulates that pure economic loss is compensatable if criminally caused. However, the provision does not say that pure economic loss is not compensatable if it is caused through non-criminal behavior, which leads to the problem of differentiating between the cases where causing pure economic loss result in liability and those that do not. See generally J Kleine man Ren förmögenhetsskada (Stockholm 1987) passim.
may even be seen simply as a generic term for circumstances that exclude liability, self-defense, necessity, etc. Lundstedt’s method of criticism is characteristic and we recognize the approach from his critique against the notion of fault.\(^{74}\) The doctrine of wrongfulness is based on a vicious circle, since it is a requisite for liability that the act was wrongful. But what does it mean to say that an act is wrongful, if not only that it may result in liability? The circular structure, Lundstedt argues, is therefore evident and the notion of wrongfulness is discarded as unscientific nonsense.

4. Causation

Another topic on which Lundstedt was very critical against the prevalent perceptions was causation or, more specifically, causation in fact. At the time the dominating view in Sweden was influenced by the philosophy of Stuart Mill, as well as the writings of von Kries. In his broadside against Scandinavian tort theory Kritik av nordiska skadeståndsläror\(^{75}\) Lundstedt argued that any kind of knowledge about these ‘causal doctrines’, with which he seemingly understood philosophically oriented approaches, is superfluous for the jurist and that the topic should be altogether avoided in legal literature. A characteristic quote is this: ‘One may on the whole say that an account of the causal doctrines in a legal work is less motivated than an account of, for instance, anatomy, surgery, medicine, chemistry, the economical rules on the determination of prices, the botanical on the germination of a seed, [...] and so on.’\(^{76}\) Lundstedt later iterated this line of critique in several of his works. The edge of his argument was always pointed against the attempts to formulate theories around the concept of causation, which in fact, according to Lundstedt, did not need any theoretical support. Instead the judge, or whoever had to perform a causation in fact-assessment, should rely on his common sense. To put it another way, with another example of Lundstedt’s polemic style: ‘The lawyer is surely in no need of any other knowledge about the concept of causation than any sensible farm-hand whoever possesses’.\(^{77}\)

\(^{74}\) See 'Kritik av nordiska skadeståndsläror' [Criticism of Nordic Doctrines of Tort Law] [1923] Tidskrift for Rettsvitenskap 60.

\(^{75}\) [1923] Tidskrift for Rettsvitenskap 55 ff [the criticism against the theories of causation on p 150 ff].

\(^{76}\) [1923] Tidskrift for Rettsvitenskap 153 (my translation). See also Lundstedt’s ‘Några anmärkningar om skadeståndsrättens systematisering och om kausalitetsfrågan i juridiken’ Festskrift til professor, dr. juris Henry Ussing 5. maj 1951 (København 1950) 328 ff.

\(^{77}\) Taken from V Lundstedt’s Grundlinjer i skadeståndsrätten. Förra delen: Culpa-regeln (Uppsala 1935) 200. In Swedish: “[J]uristen [har] sannerligen icke behov av andra kunskaper angående orsaksbegreppet, än vilken förnuftig bonndräng som helst är i besättning av”.

IV. The Methodological Heritage and Europeanization Process

A. What is it with Swedish Jurists and Method?

In the current work on a European codification of private law Sweden and foremost Swedish academics are among those that have shown support for the academic activities.\(^78\) Being only one jurisdiction among many, there is no possibility for the Swedish representatives to demand any special treatment in the different working groups. Any international legal project involves giving and taking; you win some and you lose some. But sometimes it may be difficult to understand why some consider they lost something, when a proposal seems completely innocuous to others. Why do Swedish academics complain so vividly about vicious circles, superfluous paragraphs and ‘metaphysical’ concepts, perhaps even when the material outcome seems pragmatically acceptable? The answer lies in tradition and legal culture, in Tuori’s deeper levels of legal analysis.

It seems to be necessary to base the work on harmonization in concrete legal questions, which is also the way the work is carried out today. The focus is on finding a common ground for the development based on extensive comparative investigations of the material law in the European legislation. With this approach, however, there is always a risk that one misses more esoteric phenomena in the legal cultures, abstract notions and principles that may often be different to pin down in detail. From a Swedish perspective the lasting influence of the Uppsala-school (as it has blended with other influences) in many ways goes to the core of a Swedish jurist’s basic understanding of the law. It sets the limits for what is considered as rational arguments in the law and for what is not. This may need to be more explicitly emphasized.

B. The Uppsala-School Today

The Uppsala-school of legal theory has now been the target of criticism for more than half a century. Especially important was the criticism from another Uppsala-professor in philosophy, Ingmar Hedenius, who talked about the Hägerström-Lundstedtian mistake,\(^79\) which lead to a fierce counter-attack from Lundstedt.\(^80\) However, Hedenius is also sometimes considered to belong to the Uppsala-school, which illus-

\(^78\) A meeting of the coordinating committee of The Study Group on a European Code was held in Stockholm in June 2001, hosted by Professor Jan Kleineman and Stockholm University.

\(^79\) See I Hedenius *Om rätt och moral* (Stockholm 1941) ch 2.

\(^80\) V Lundstedt *Det Hägerström-Lundstedtska misstaget* (Uppsala 1942). See also the introduction to *Legal Thinking Revised* (Uppsala 1956) 7 where an indignant Lundstedt strikes back against the “the two brash youngsters [one of which was Hedenius as a grad student in philosophy]” who he thought had “impudently attacked” him. Even though Lundstedt did not think that the attack of the “two cocky boys rated an answer”, he nevertheless devoted substantial effort to counter Hedenius’ arguments in several works.
brates one important fact: In one way or another much of Swedish legal theory since Hägerström has been busy with positioning itself to the Uppsala-school.

The most important influence of the Uppsala-school is to be found on a general level. The theories of the Uppsala-school has in a way blended with the general neo-positivistic trend in recent legal theory, and in a broad sense of the term, Hägerström and Lundstedt were both positivists. Thus when criticism today is directed against the ‘extreme positivism’ in Swedish legal culture, Hägerström is often taken as the starting point. This particular version of positivism must be described as the hegemonic methodological program in Swedish private law.

From a methodological point of view the most interesting aspect of the ideas of the Uppsala-school is the focus on what is to be considered as acceptable arguments. Perfectly in line with the teachings of by Lundstedt and others, Swedish jurists have been actively hostile towards circular arguments, value judgments in legal contexts as well as anything that might resemble natural law in even the slightest way. These ideas have been of major importance for legal science but also for how the legislator, judges and lawyers formulate legal arguments. In a way the theories of the Uppsala-school laid down the borderlines of acceptable argument and these borderlines are in many regards still intact.

On the level of specific issues it seems obvious that many of the basic tenets of the Uppsala-school have now been deserted. Authors have no problem with the use of the rights-terminology in material legal writing. The terms ‘obligation’, ‘duty’ and ‘fault (culpa)’ are frequently used in works on civil law. But in the case of some other targets (such as unjust enrichment) the influence has been more lasting. In this article our subject is not legal theory or methodology in general, but only the influence the discussion on these issues has had on tort theory. We have already devoted substantial space to Lundstedt, and the reason for this – as will hopefully become apparent – is the lasting importance his teaching has had on many basic matters of tort theory. Before we address some more concrete examples of this we will need a basic understanding also of some fundamental methodological tenets in Swedish legal theory, as of interest from a tort perspective.

C. Some Methodological Cornerstones of Swedish Legal Culture with Regard to the Harmonization Project on Torts

1. Value Judgments and the Law

Hägerström’s and Lundstedt’s lasting influence can mostly be found in the area of methodology and what can be called legal philosophy of science. The total refusal to accept any position of values in legal science still has dogmatic followers, mainly in academic writing. From the development of general theory of science we have learned that the distinction between value judgments and empirical or rational judgments by no means is as clear-cut as the Uppsala-school or the logical positivists

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81 Even if they both were very critical towards the traditional Benthamite school of positivism.
liked to think. But even if it is well known that the distinction does not hold absolutely, there is still an aspiration of many Swedish legal writers to clearly separate between the personal value judgments of a legal question and the objective status of the legal sources. Value judgments must play a role in legal science, it is argued, but they should be kept separate from the legal judgments. Others argue that value judgments have a more important role to play. Generally it may be said that the subject is still sensitive in the Swedish discussion, especially in the academic discussion. A lasting influence of the value theory of the Uppsala-school is that Swedish jurists often seem reluctant to address questions that might seem political or normative. If this picture is true, this attitude might perhaps be a hindrance for the Swedish jurist in the European discussion on a legal policy level.

2. Natural Law
While natural law theory internationally seems to be on the increase in general legal theory, it is still used as an invective in the Swedish discussion. The criticism against natural law was directed not only against, say, references to God or the Natural Good, but also against references to basic principles in the law of obligations, such as the *pacta sunt servanda*-principle. One can note that when Swedish authors criticize what they believe are natural law arguments, they seem not to take into account the development in recent natural legal theory. Take for instance the positivist’s thesis of a separation between law and moral, an aspect related to Hume’s and Hägerström’s thesis that one can never derive an ‘ought’ from an is. This thesis can no longer be seen as distinguishing between a natural view of law and a positivistic view; a modern natural lawyer would not necessarily consider an immoral law as a ‘non-law’. Also, in modern legal theory, it seems that the firm demarcation between natural law and legal positivism has become blurred.

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83 A concrete example of the skepticism towards values and value judgments in the legal discussion concerns the correlation between legal science and the courts. This was brought to the fore in a vivid debate concerning case reports in the legal journal *Juridisk Tidskrift* a couple of years ago. The subject of the debate was whether there actually is any sense in criticizing decisions from the Supreme Court. In one article a Justice of the Supreme Court even argued that there never is any sense in arguing that the Supreme Court came to the wrong solution (see J Lind ‘Rättsfallsanalyser – recension eller analys?’ [1995-6] *Juridisk tidskrift* 232 ff). Thus some hold that there is no place for normative evaluation of the court decisions: it is nonsense, in the true sense of the word.
84 Natural law has always played an important role within the Catholic Church, but the starting point of a renaissance for natural law also outside this domain is probably J Finnis *Natural Law and Natural Rights*.
85 A modern example of this line of criticism can be found in J Hellner *Metodproblem i rättsvetenskapen* (Stockholm 2001) 132 ff.
87 It is always extremely difficult to say something substantial that is not at the same time extremely controversial on the subject of natural law and its relation to positivism. This depends partly on the fact...
the negative attitude against everything that can be seen as natural law seems still to be significant in contemporary Swedish methodology and it should perhaps be particularly mentioned that a favored target of this criticism has been Roman law. This importance of this issue is perhaps nothing that is apparent in the actual work within the harmonization projects but one might find elements of these lines of thought in criticism against the projects.

3. The Discussion on Justice

Another track of criticism mentioned above in the presentation of Lundstedt’s ideas concerned the role of justice in legal science in general and tort law in particular. Since this criticism a major shift has occurred in justice theory as a result of Rawls’ groundbreaking work *A Theory of Justice*.88 After Rawls many attempts have been made to rationally analyze justice, and the role of justice in tort law, and this general tendency is reflected in many sophisticated works on theory of tort law.89 One may perhaps distinguish between corrective and distributive justice as the two main approaches, even if arguments based on ideas of commutative justice90 and even retributive justice also occur in the debate. Thus the debate on justice in tort law seems to be on the increase, perhaps foremost in North America, but with repercussions also in Sweden. Lundstedt’s vision of putting social welfare in the role of justice in the legal discussion has thus failed, even if the material arguments falling under the heading ‘social welfare’ seemingly could be dealt with within a discussion that these labels are given different meaning by different authors. As Stephen Perry, one of the most influential writers on legal positivism puts it, “[i]t is not easy to come up with a characterization of legal positivism that is not vacuous and yet at the same time is sufficiently general to capture the myriad theories of law to which, over the years, the positivist label has been attached” S Perry ‘The Varieties of Legal Positivism’ (1996) 9 Canadian Journal of Law and Jurisprudence 361. Still many have tried, and the next question is then which formulation of positivism one should rely on. Bix has put the dilemma nicely: “Legal positivism, like breakfast cereal, seems to come in a wide variety of brands with modest variations in the ingredients. Each brand offers slightly different promises as to the benefits of choosing it over its competitors. The question for the tired morning consumer is whether anything important is at stake in the choice.” B Bix ‘Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate’ (1999) 12 Canadian Journal of Law and Jurisprudence, 17. Perhaps one should refrain from talking about over arching schools, such as “positivism” or “natural law” altogether and instead focus on singular accounts, since one otherwise always risk arguing against straw men, see, for instance, J Raz ‘Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment’ (1998) 4 Legal Theory 1.

88 J Rawls *A Theory of Justice* (revised edition Oxford 1999). It is interesting to note that Rawls was actually one of a few moral philosophers in the English-speaking world who actually read and commented on Lundstedt’s work. In his review of Lundstedt’s *Legal Thinking Revised*, Rawls was less than impressed by Lundstedt’s pretensions, see J Rawls ‘Review of Legal Thinking Revised’ (1959) 44 Cornell Law Review 169 ff.

89 A Swedish contribution is J Hellner’s *Justice in the Distribution of Benefits* [1990] Ratio Juris 162 ff.

on justice, primarily as an aspect of distributive justice. Lundstedt would probably not have found this terminology sufficiently scientific. 91

An outcome of Lundstedt’s and others criticism is that the notion of ‘justice’ is rarely heard in Swedish tort theory, not even in policy oriented discussions where it is more common to stick to arguments on a more superficial level. 92 In the discussion on the underlying policy principles and functions of tort law one often make use of notions such as deterrence, reparation or cost allocation but without asking why these goals could be seen as worth striving towards. 93 Instead of addressing the core normative issues, the ultimate goals of tort law – which in reality often turn out to be a choice between different kinds of either utilitarian or individualistic approaches (or perhaps a pluralistic view as some Swedish authors have favoured) 94 – Swedish authors tend to stay on the more superficial normative plane, on the analysis of the primary goals of tort law, goals which in fact are only comprehensible if stated from the background of deeper normative goals. 95 This is significant in several ways: It illustrates the Swedish reluctance to head-on deal with normative issues in relation to tort law and it also points to a problem in dealing with the deeper policy questions that undoubtedly arise in any attempt to restate tort principles in a codified form.

4. Vicious Circles and Other ‘Logical’ Errors

Another general methodological issue that should be mentioned in this context is the Swedish hang-up with vicious circles, as was above illustrated with Lundstedt’s refutation of the notion of fault. Swedish legal academia previously spent much effort and time searching for vicious circles or circular arguments in the law. Circu-
lar arguments have lately been categorized as a ‘logical fault’ in the methodological debate, albeit not in the formal logical sense. The previous predilection in Swedish academic writing to accuse others of logical mistakes seems to be on the decrease, but circular arguments are still a target for methodological criticism. Circular arguments may occur in different shapes and in different legal sources. The criticism is directed against a kind of argument in general, not against arguments in a particular legal source. Lundstedt found circularity inherent in basic concepts of the law, such as the concept of fault, as well as in different legal doctrines, such as the doctrine of reliance. Vicious circles may also occur in the reasoning in academic legal writing, as well as in positive statutory rules.

A general impression from my own participation in the meetings of the Study Group is that Swedish academics seem more sensitive towards circular arguments than perhaps jurists from other legal cultures. An example (which I hope is fictitious) could be a rule that holds that negligence is a prerequisite for liability, but where the black-letter rule demands not simply negligence but ‘legally recognized negligence’ or something similar. A typical Swedish response might then be that not only is the addition of the expression ‘legally recognized’ superfluous, but misleading, since negligence in the context of tort law can never be anything but ‘legally recognized negligence’. The disapproval of circular arguments is a methodological principle which has left a lasting mark on the Swedish legal profession. From a policy point of view it is not always clear that all kinds of circular arguments should be avoided, however. A reason for retaining a circular argument might be that such an argument in particular contexts may have pedagogic advantages, or that it conveys a deeper cognitive content. Nevertheless vicious circles and circular arguments seem to be like a red rag to many Swedish jurists.

D. Methodological Hang Ups Concretized: Wrongfulness and Causation

The purpose of the discussion above was to point to some basic methodological cornerstones in Swedish law, mainly as they have had an impact on tort theory, from the perspective on the European harmonization projects. To complete the task set out for us by the discussion on Lundstedt above we need also take a look at some more concrete issues where Swedish jurists might have a different outlook than other European jurists. We will partly follow the previously outlined discussion on Lundstedt, albeit with particular emphasis on some different points of interest.

96 See J Hellner Metodproblem i rättsvetenskapen (Stockholm 2001) ch 3 (especially at 57).
97 J Hellner Metodproblem i rättsvetenskapen (Stockholm 2001) 57 ff.
98 V Lundstedt Legal Thinking Revised (Uppsala 1956), passim.
1. The Discussion on Wrongfulness Today

Kleineman notices that: ‘Through Lundstedt’s attack the very concept [wrongfulness] became taboo, at least for those who wanted to appear scientifically acceptable’.99 This attitude is apparent also in court practice, where the courts seemingly refrained from using the wrongfulness terminology after Lundstedt’s showdown with the doctrine.100 Wrongfulness has thus become an unwelcome figure in Swedish tort law and not only in the sense that it has been banished as an argument of justification in legal science. The same goes for legislation. In the Tort Liability Act from 1972, there is no mention of wrongfulness and this applies also for other legislation on damages, such as legislation on strict liability (which perhaps is less surprising). This issue is of particular importance from the perspective of the harmonization process.

Bill Dufwa recently recognized these problems in an interesting article, unfortunately only available in Swedish.101 From the outlook of the Tilburg Group’s102 attempt to work out European principles of tort law, Dufwa specifically singled out the problems concerning wrongfulness, problems that might only be recognized as such by Swedes.103 Dufwa surveyed many of the European codifications and found that wrongfulness (in different costumes) played an important part in the ABGB, the BGB, the Greek Code, the Codice civile, and in the new Burgerlijk Wetboek. The older codifications, however, lack the wrongfulness concept in the chapter on damages (with the exception of the ABGB). Wrongfulness is thus not taken up in the Code Napoleon or in the Código civil. As have already been indicated wrongfulness in the Continental sense is rather unknown to the English system, even if it may be argued that the elements contained in the wrongfulness notion are reflected in the concept of duty of care in English law. Still, Dufwa held that it is more or less meaningless to talk of wrongfulness in relation to liability for damages in English law.104

On the basis of this survey Dufwa established that the general tendency in European tort law is that the importance of wrongfulness is on the increase.105 He also found that once the notion of wrongfulness has been introduced in a codification it was difficult to get rid of. From the perspective of Swedish law, Dufwa found

99 J Kleineman Ren förmögenhetsskada (Stockholm 1987) at 99.
100 Compare J Kleineman Ren förmögenhetsskada (Stockholm 1987) at 218.
102 The group is also known as the European Tort Law Group.
103 In the latest presented proposal of the Study Group, there is no explicit reference to the notion of wrongfulness. http://www.sgecc.net/media/download/tort_law.pdf.
105 Ibid, no 22.
this European development to be an obstacle for the harmonization process: ‘It is difficult to imagine that Swedish lawyers would want to return to the wrongfulness concept’. A pragmatic approach is preferable for instance concerning the pure economic loss cases, Dufwa argues. Instead of focusing on whether the tort feasor acted wrongful when he caused the victim’s pure economic loss, one should refrain from using speculative doctrines and stick to the decisions in casu. We again see how the methodological heritage of Lundstedt and others has had a noteworthy affect on the conception of tort law on a very concrete and important level.

2. Causation

Another lasting influence of Lundstedt’s, albeit less obvious, is in the discussion on causation. As presented above, Lundstedt was very critical against all philosophically oriented attempts to analyze factual or empirical causation in the law, and he especially refuted the dominant conditio sine qua non-theory with its basis in Mill’s teachings. In this regard Lundstedt was not altogether successful. The analysis of causation with a basis in Mill’s apparatus of necessary and sufficient conditions is still widely accepted. However, it seems that Lundstedt was successful in his refutation of the legal methods that had been developed on the philosophy of Mill, such as the but-for test. Even if the Swedish attitude on the issue of cause-in-fact is ambiguous and difficult to interpret, it is absolutely clear that the but-for test does not have the dominant position it has in many other countries. It seems clear that a twofold causal inquiry is taken for granted also in Swedish law, and that the distinction between necessary and sufficient conditions is seen as a tool that in some way could be used when carrying out the first, factual inquiry. There are some that still argue that this inquiry is, or should be, more or less to be carried out in accordance with

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107 But Dufwa also recognizes that in any international project concerning proposals for the future of tort law, compromises need to be made. The wrongfulness notion is but one part of the bigger picture and in any project the end standpoint needs to be based on a comprehensive view. See BW Dufwa, as above no 31.
108 I deliberately choose the term ‘conditio sine qua non-theory’ here to avoid the often confusing theoretical baggage that many of the other labels – the condition theory, the equivalence theory et al – entail. (What I have in mind is particularly the circumstance that both of these labels have occasion-
110 That is, a dichotomy between the cause-in-fact inquiry and the legal process of evaluation is taken for granted. See for instance the preparatory works for the Tort Liability Act (skadeståndslagen), proposition 1972:5, at 21 f.
the but-for test, but other writers are more cautious and do not take a firm position on any specific method.\textsuperscript{111} The general impression is that it is difficult to clearly state how the core view on causation in Swedish law actually is to be understood. An illustrative example of this skepticism towards causal theory is Jan Hellner’s review of Hart and Honoré’s seminal \textit{Causation in the Law}, which was criticized under the argument that the approach to analyze causation from a common sense perspective could even lead to the in Sweden so detested \textit{begriffsjurisprudenz}.\textsuperscript{112} This attitude towards theoretical treatment of causation might turn out to pose a problem in the European harmonization process since it makes it difficult to evaluate what impact a particular codified causation rule might have on the law, and how it differs from how causation have previously been considered in Swedish law. It may perhaps also be a reason for a Swedish defense of a pragmatic view on causation – a view which favors a less casuistic causation rule that would leave the door open for different considerations depending on the particular inquiry in question. A more far-reaching position with this background is to oppose a rule on causation altogether.

\section*{V. Concluding Remarks: Analyze This!}

In the projects involved in the analysis of the Europeanization of tort law, Sweden, and indeed all the Scandinavian countries, are in many ways in a special situation. In some aspects the Scandinavian legal cultures might be said to take an intermediary position in the previously favored distinction between common law systems and civil law systems, even if some authors have placed Sweden in the civil law tradition. Sweden lacks for instance the tradition of a civil code in the proper since of the word, but is nevertheless very statutory law-oriented, albeit not in all areas of the law. Another factor that is of interest in the Europeanization process is that even though the three Nordic countries make up a significant part of the European Union it seems that the distinct characteristics of the Nordic legal traditions are much less known that those of the common law and civil systems, which has become apparent in the critique against the civil code project.

The purpose of this article was to discuss the harmonization process and its relation to some focal points of Swedish tort theory on a more methodological and

\begin{itemize}
\item \textsuperscript{111} Cf J Hellner ‘Causality and Causation in Law in Justice’, in: \textit{Morality and Society. A Tribute to Aleksander Peczenik} (Lund 1997) 159 ff, at 184: “[M]ost writers do not seem to take any clear position on this point, or may be that they frame the problems in other terminology”.
\end{itemize}
theoretical level. A presumption is that these issues will also affect the Swedish reception on any proposal of a unified tort law, albeit these concerns may be more difficult to formulate than, to take a concrete example, the difference in the rules on recourse for an employer against her employee in a case of vicarious liability. In addition to a brief glance at some of the tenets of the Uppsala-school of legal philosophy, the great Swedish writer on torts, Vilhelm Lundstedt, was taken as a starting point for a discussion on what might be considered some methodological cornerstones of Swedish legal theory in general and tort theory in particular. These lines of thought were then juxtaposed to some questions that may arise in the comparative work that is carried out within the projects that investigate the possibility of a unified, European tort law.

The doyen of modern Swedish tort law, Jan Hellner, once wrote an article called ‘To think like an English jurist’, which dealt with the difficulties of achieving a deeper understanding of a foreign legal tradition. Heller mused on whether it was ever possible for a Swedish jurist to put herself in a position where she actually started to ‘think’ like an English jurist. Hellner’s conclusion was that you cannot think like an English jurist, unless you are an English jurist. If we aspire towards a unified tort law but also if we only strive towards a deeper understanding of our neighbors in the European Union, however, we must try. And the good thing is that there are reasons to assume that in the future the chances of a deeper understanding will be better than before. It seems undisputed also among the critics of the civil code project that European legal traditions are converging on the surface level. The bulk of enacted EU-legislation increases continuously and more and more lawyers become accustomed to other European legal traditions than their own, for instance through cross-border affairs, studies and exchange programs. An important role in this convergence process is the comparative research projects such as The Study Group that will provide unprecedented sources of information on the similarities and differences of the European legal orders. The jurists of tomorrow will have a unique possibility to study the common grounds of European law, which will affect how law develops. The divergence process on the other hand is supposed to lie on the deeper level and on this level the critics may be right in one regard: In the comparative research, we might have to try harder than now, also on the deeper levels of legal analysis. Perhaps the real differences will turn out on these levels, but we might also find out that also here, there are more that unite us than separate us.

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114 The starting point of Hellner’s article was the famous English case of Lipkin Gorman (a firm) v Karpnale Ltd and another, [1991] 2 AC 548, [1992] 4 All ER 512.
117 As LM Friedman put it, “[t]o measure such differences [between different countries which could only be fully understood if the cultural determinants were taken into regard] and explain them is completely beyond the technical equipment of standard comparative law. On the other side, differences
In our attempts to find the common elements of European private law on which a further harmonization can be built, we cannot confine the comparative investigations to positive rules, well-entrenched principles and systematics. Only when we try to account for all levels of legal analysis will the dream, if it is a dream, have a real chance of reaching its goal.

in style and outcome among western legal systems may conceal fundamental similarities”, see LM Friedman ‘Some Thoughts on Comparative Legal Culture’ Comparative and Private International Law (Berlin 1990) 49 ff, at 56.