Ius Gentium: Comparative Perspectives on Law and Justice 73

Pia Letto-Vanamo
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# Nordic Law in European Context

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# Nordic Law in European Context

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# Preface

Nordic law is often referred to as something different from other legal systems. At the same time, it is a common belief that the Nordic countries share more or less the same legal tradition and are very similar as to their approach to the law. This book engages with both of these points of view. It tells a story of how Nordic law and Nordic legal thinking differ from other legal systems. It also tells how many particularities exist in the law of each of the Nordic countries, making them different from each other. Thus, the idea of "Nordic" law also conceals national features.

The basic idea of this book is that even if there is no such thing as a Nordic common law, strictly speaking, it still makes sense to speak of "Nordic" law, and that achieving more than a basic knowledge of this law is interesting not only for comparative lawyers but also helpful for others who are working with Nordic lawyers and dealing with questions involving law in the Nordic countries.

Most of the following chapters, which together aim at providing an introduction to Nordic legal thinking, are written by more than one author in order to cover different national aspects of the law. The fact that only a few articles could be written by one author also demonstrates how a variety of legal solutions can be found in these countries, even if they may look very much alike from the outside. The editors have chosen legal topics in which a specific Nordic approach can be appreciated.

The volume starts with an introduction to Nordic cooperation within the law and the Nordic way of legal thinking. Chapter "Nordic Model of Welfare States" contains a more detailed description of one of the key elements of modern Nordic societies, namely the development of the welfare state. The following series of chapters starts with the Nordic constitutions and different constitutional approaches in each country (Chapter "Constitutional Mentality"), leading to questions regarding autonomies and minorities (Chapter "Respecting Autonomies and Minorities") and gender equality (Chapter "Promoting Gender Equality"). Marriage and family relations is the theme of Chapter "Marriage and Family Relations", followed by chapters on contracts (Chapter "Contracting with a Social Dimension"), property (Chapter "Property and Its Limits"), labour relations (Chapter "Labour Market and

Collective Agreements"), public administration (Chapter "Public Administration and Good Governance"), crime and punishment (Chapter "Crime and Punishment") and the courts (Chapter "Courts and Court Proceedings").

As a general rule, the authors have endeavoured to include a reasonable amount of necessary detail. However, the main aim is to present a more general outline of what is common among the different Nordic countries and what is peculiar to each of them within the legal fields listed above. Stress is also placed on what we see as specifically Nordic culture as compared to other legal cultures. A bibliography at the end of each chapter will enable the reader who seeks more details to find relevant material. References to the most important legislation can be found both in English and in national languages.

The editors wish to thank the publisher for engaging with the idea of a book on Nordic law and express the hope that it will provide a useful tool for both law students as well as comparative and other lawyers who may be interested in experiencing what—to quote from Shakespeare—may be found in a Nordic "lawyer's skull".

Helsinki, Finland — Pia Letto-Vanamo
Copenhagen, Denmark — Ditlev Tamm
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July 2018

# Contents

# Nordic Legal Mind


**Pia Letto-Vanamo and Ditlev Tamm**

**Abstract** In the following, peculiarities of the Nordic legal systems and legal thinking, are discussed. Common features of the legal systems are based both on history (on a certain historical delay in comparison to many other European countries) and legal cooperation. The active legal cooperation, started in the 1870s, not only has a long history. It has also achieved many concrete results, common legal norms as an example. Often, Nordic peculiarities of legal thinking are described by using such expressions as pragmatism, realism, absence of formality, transparency and equality. These values have also been cornerstones of the Nordic cooperation. They also explain a certain reluctance towards trends and policies within the EU. Even today, Nordic lawyers prioritise flexibility in law-making (with discrete acts) above creating a codified private law system (with a civil code).

## 1 Nordic Law

There is no such thing as Nordic law, but you may talk of a Nordic legal mind. The Nordic countries, Denmark, Finland, Iceland, Norway, and Sweden (including the autonomous regions of Greenland, and the Faroe and Åland islands) all have their own law and their own legal institutions. However, to speak of Nordic law may be useful as we need a concept that covers those peculiarities and similarities which, with certain reservations, can be considered as such characteristic and common features in dealing with the legal systems of these countries, which constitute the Nordic legal mind.

Comparative lawyers trying to grasp European legal systems have traditionally put the Nordic countries together as one legal "family" or group, or at least as a

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subfamily of the continental European so-called "civil law family".[1] This classification can at least partly be explained by reference to history. Still, the idea of "Nordic-ness" is more recent.

In a comparative analysis, the peculiarities of development seen in the Nordic legal system(s) are often explained by reference to a certain historical delay in accepting such ideas and institutions which are considered as belonging to the "European mainstream". We may also speak of the centre and the periphery, to which the Nordic countries belong due to their geographical position.

However, only in the 19th century did the idea of a specific "Nordic law" become a current notion to substitute the old division between Danish-Norwegian law on the one hand and Swedish law (including Finland) on the other, and then especially as a tool to promote cooperation in the field of law. Since then, Nordic unity, or the Nordic legal family, was formed by active cooperation through which former differences were bridged: "Nordic law" resulted from those efforts. It started in 1872, when several prominent Nordic lawyers were invited to the first meeting between lawyers from all the Nordic countries with the aim of discussing common answers to the challenges, which the Nordic countries and their laws were facing at a time of still early industrialisation. The inspiration for the meeting came from similar German and English institutions.[2]

One of the main arguments put forward in favour of Nordic cooperation by those invited to this first meeting of Nordic lawyers[3] referred to what was considered a common way of legal thinking. That was based on an ideology that stressed more similarities than differences by looking back on the historical origins of law in the Nordic countries. Understanding of the characteristics of Nordic legal thinking therefore requires taking into account both the idea of historical similarities between the legal systems of the Nordic countries along with advanced legal cooperation.

Nordic legislative cooperation has featured significantly in framing legal systems in the Nordic countries as they are today. Nordic cooperation as it developed and gradually covered many fields of law has also been seen as an ideal model for legal cooperation elsewhere because of its informal and voluntary nature and its success,[4] especially at a time when European legal cooperation was still in its very early stages.[5]

This fruitful cooperation started in the 1870s, and has perhaps been the most enduring result of the so-called Scandinavian movement of the early 19th century,

[1]Zweigert and Kötz (1998), Husa (2004) and Husa (2015); see also Husa et al. (2007).

[2]Tamm (1972) and Carsten (1973).

[3]Since the first meeting of Nordic lawyers in Copenhagen in 1872, these have been held every three years except for the periods between 1903–1918 and 1938–1947. The latest meeting (Helsinki 2017) was attended by around 900 lawyers—judges, civil servants, practising lawyers and legal scholars—from all the Nordic countries. To enhance their importance for general debate on law, since the first meetings conference papers, talks and partly also discussions among participants have been printed and published. See http://www.nordisktjuristmote.org/.

[4]Smits (2007) and Matteucci (1956).

[5]Matteucci (1956).

which after the experience of centuries of warfare between the Nordic countries pleaded for unity, collaboration and friendship among the nations of the North. Scandinavism, as this movement is called, however, failed completely as a political movement that might lead to unification of the Nordic countries, an idea that proved to be utopian.

All the Nordic countries were and are rather small, and many at that time topical questions were unknown to their scholars. Lawyers experienced in commercial matters did not abound, especially not such as could really be considered experts in new and complicated legal fields. Working together and using the potential from several states was the obvious solution, and became an immediate success. Not only Nordic lawyers' meetings but also harmonization of Nordic law experienced their beginnings in the 1870s. Since then, active legislative collaboration has been a decisive feature in classifying the Nordic countries as a legal family closer to civil-law countries (countries with statutory law) than to so-called common law countries (countries with case law), or even as a family of its own.

The purpose of Nordic legal cooperation was to find a Nordic way of jointly approaching questions posed by the rapid development of international commerce. Challenges were posed by new instruments of payment in commercial life, changes in methods of communication, and, in general, issues attached to industry on a greater scale and to questions of international trade.[6]

Since that time, the way the cooperation works is that common new legal solutions are discussed among representatives of the different countries, but at the same time it is left to the lawmakers of each country and thus to a political decision whether and to what degree any such new legislation will actually be drafted and adopted in their country. Nor does cooperation mean that common courts or other organs have been established to create what could be called a "Nordic common law"[7] based on Nordic legislation. At the same time, national lawyers, judges or law professors are free to make their own interpretations of the law.

Thus, in contrast to the European Union (EU) regime, there is neither such a thing as a common Nordic judiciary nor any other kind of common legal organs, nor any common legal thinking. Court decisions, legal rules or legal literature are national, while those of other Nordic countries may be and will regularly be cited, but basically they only serve an advisory function in the same way as any other foreign law or can be used as sources of inspiration when making decisions. Also quite rarely, law students will be familiar with legal literature from other Nordic countries than their own.

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[6]When the first Nordic lawyers' meeting was convened, the invitation stressed that because of a common understanding of law and of the common origin of many legal institutions, it was only natural that development of those institutions would need common action. The topics mentioned for cooperation were the law of commerce and issues of court procedure in civil and penal matters. During the first meeting in 1872, the question was raised of common Nordic legislation on commercial instruments of payment such as the bill of exchange, which was a means of getting short credit. This was successfully followed up by Nordic statutes; Carsten (1993).

[7]Common law here in the meaning of Glenn (2005).

Nonetheless, this "soft" method of harmonizing the law, which does not aim at unification but which respects local peculiarities and wishes, has led to an impressive series of important statutes within basic fields of law, such as commercial law especially with common statutes on the law of buying and selling and the law of contracts,[8] but also within fields often considered more national and culturally sensitive such as family law.[9] Based on some of these statutes, general principles of law have also been developed which in other continental legal systems are found in the general part of the civil code.

In the 1970s, Nordic legal cooperation suffered a crisis, as will be mentioned later, when the Swedish minister of justice declared at the 1972 Nordic lawyers' meeting that Sweden might decide to go its own way, especially in economic and family law matters, and not wait for the other Nordic countries.[10] Moreover, within the field of law of obligations problems have arisen in finding a common path to follow. Thus, the Nordic law of sale of goods that was discussed and drafted in the 1980s was not accepted in all the Nordic countries. Sweden and Finland preferred identical laws, and Norway had a very similar one. However, in Denmark the Nordic Sale of Goods Act was not accepted and the Danes preferred to amend the old Sale of Goods Act of 1906.[11]

For some decades now, great challenges to Nordic law and legal cooperation have been posed by the much wider cooperation taking part within the EU. Indeed, from time to time the issue whether Nordic cooperation has seen its heyday comes under discussion. In particular, the 1990s witnessed a boom of seminars and meetings on "Nordic legal identity" and its future. The main reason for this was the upcoming or recently achieved Finnish and Swedish membership in the European Union. The laws of the Nordic countries were compared with other European (EU) countries with the aim of determining what could be considered similarities between the Nordic legal systems on the one hand, and differences between them and other Western European countries on the other. In effect, this was an effort to foresee whether a kind of so-called "convergence" on a greater scale would happen through EU membership, and also what would be the impact on Nordic cooperation.[12]

Undeniably, Nordic cooperation within the field of law has been challenged by cooperation within the EU, based on institutions and the creation of obligations much more effective than the soft guidelines and voluntary arrangements that form the basis of Nordic cooperation. At that time, the EU and the development of EU law also seemed to many a more attractive field of study than the more limited Nordic cooperation. One might therefore say that since Swedish and Finnish

[8]See further Bärlund and Moegelvang-Hansen in this volume.

[9]See further Lund-Andersen and Kronborg in this volume.

[10]Lidbom (1973) and Modéer (1998).

[11]Se further Bärlund and Moegelvang-Hansen in this volume. On differences in regulation of registred partnership see further Lund-Andersen and Kronborg in this volume.

[12]See e.g. Letto-Vanamo (1998) and Bernitz (2000). See also Letto-Vanamo (2013).

accession to the EU in 1995 (Denmark has been a member since 1973), it was Europe, and not "Nordic-ness", that came into the focus of Nordic political and legal debates.

Today, the situation seems to have changed, at least partly. The economic-political crisis within the European Union has produced discussions on different ways of organizing societal life in the North and South of Europe, but also on the future of the so-called Nordic model with social welfare as a key element. Awareness of the Nordic countries as model societies has been strengthened and, at the same time, new openings for cooperation between the Nordic countries have been presented—even a modest relaunch of the proposal for a Nordic federal state.[13] It may also be maintained that there seems to be more external interest in "Nordic law" and ways to continue Nordic cooperation than some years ago, when the Nordic countries were considered more peripheral.[14] That said, however, it should be stressed that Nordic cooperation in the field of law is not as obvious a feature as it used to be. Revitalization is definitely needed.[15]

## 2 The Impact of "Old" Unions

The Nordic countries are in fact five countries with different histories, but also with different laws. Law is always national, even if national law itself needs not be of national origin: it can be a result of borrowing law or legal institutions from other countries or other legal systems. Indeed, the law of the Nordic countries—even if Roman law was never the law of the land—is firmly based on principles within private law that have their origin in a common European past in the field of law.

Ever since the Middle Ages, the Nordic countries have thus been exposed to influences from Canon law and Roman law. The law of the Church, Canon law, and scholars educated at universities in Southern Europe and Germany were important in forming legal thinking in the Nordic countries in the Middle Ages. They also played a significant role in the process of writing down local law, which mostly occurred in the 12th and 13th centuries. Thus, there is a long tradition of written law.

The early wave of Roman law influence (that of the *ius commune*), typical of many western European countries since at least the 16th century, did not have the

[13]See Wetterberg (2010) and Wenander (2014).

[14]The explorer spirit of Nordic cooperation, active in the 1870s–1930s and again when Nordic legislative cooperation was revitalized after World War II, is no longer present on the same scale. At the meeting of Nordic lawyers in 2005 the question whether Nordic legal cooperation had any further role to play actually came under discussion, with the conclusion that more fuel was necessary if this "Nordic dimension" was to maintain its position, Dahl (2005). Four years later a proposal was launched for more effective Nordic cooperation in implementing European (EU/EEA) legislation. Buskjær Christensen and Fenger (2009).

[15]The newest initiative Backer (2018).

same impact in the Nordic countries as elsewhere in Europe. Since end of the 15th century it was possible to study law also at a Nordic university, but students were few, and for a full study of law it was necessary to go abroad. A university-trained legal profession (with an exam) and legal science in the North are phenomena of the 18th or 19th centuries.[16] Since that time, the scholarly legal tradition has been that of continental Europe, with Nordic lawyers actively applying legal concepts and ideas from other countries. However, it was only rather late that so-called learned law and professional educated lawyers started to have an impact on law-making.

In the Middle Ages, important principles of local law were written down in all the Nordic countries, and even if many similarities can be found in the texts, significant differences also arose due to local peculiarities. In order to understand how law and legal contacts developed and functioned between the countries of the North, it is important to stress how the remains of earlier unions between the countries are still visible.

In fact, we may talk of a western Nordic group consisting of Denmark, Norway and Iceland, and of an eastern group consisting of Sweden and Finland. Denmark and Norway were united under the same King from 1380. Finland formed part of Sweden until 1809. The Danish-Norwegian monarchy (also including Iceland) and its law developed differently from the Kingdom of Sweden (of which Finland at that time formed part). In the late 17th century, Danish and Norwegian laws were unified on the basis of two major law books or codes (in principle containing basic rules in all fields of law), the Danish Code of 1683[17] and the Norwegian Code of 1687, the Norwegian Code being based on the Danish Code, leaving aside much of old Norwegian law.[18] Thus, Danish and Norwegian law were for centuries to a high degree virtually identical.

To a certain extent this idea of common Danish-Norwegian legal science also survived after 1814, the year Norway entered into a union with Sweden (until 1905) —but without adopting Swedish law. Sweden and Finland have always had a common legal basis, with its most material form in the shape of the Swedish Code of 1734.[19] Swedish law also remained the law of Finland and the Swedish language the official language[20] even after 1809, when Finland became an autonomous Grand Duchy (until 1917) within the Russian Empire. Still, the relation to Russia has had an impact on Finnish society as well as on societal and legal thinking, which may differ from that of the other Nordic countries. Especially, attitudes

[16]Tamm and Slottved (2009) and Björne (2002). See also Tamm et al. (2011).

[17]See Tamm (1984).

[18]Tamm (2011).

[19]See Wagner (1986).

[20]Today, Finland has two official languages, Finnish and Swedish; For instance, legislation is always published in both languages. Thus, in the following chapters references to the legislation in Finland can be found both in Finnish and Swedish.

towards law, have been more legalistic[21] in Finland than in the other Nordic countries. In addition, so-called Scandinavian Legal Realism played a less important role than in Sweden and Denmark. Furthermore, Finland became involved in Nordic cooperation later than the other Nordic countries, in fact only after becoming a sovereign state.

Nonetheless, strong links exist between Sweden and Finland, for example as to preparation of new legislation. In Swedish legal tradition, including judicial argumentation, preparatory works for new legislation (*travaux préparatoires*)[22] play an important role, as indeed they do in Denmark and Norway.[23] Reference to Swedish material has often been used when drafting new Finnish legislation. Indeed, the fact that legislation in Sweden and other Nordic countries is taken into consideration and referred to forms part of the preparatory procedure for new laws in Finland.

If such a development, which aimed at harmonizing the law, had not been counterbalanced by active legal collaboration since the 19th century, the Nordic countries might have continued as two or more clearly distinct legal groups within the civil law family. This cooperation, discussed later in more detail, was based not only on common histories and on the idea that the Nordic countries share a common idea of the law, but also on the conviction that the need for necessary legal reforms due to rapid developments, especially in international trade and commerce, could best be met by common efforts. Hence, Nordic legal collaboration not only has a long history. It has also achieved many concrete results, with common legal norms as examples, contributing to the feeling that such thing as a common Nordic "core" of the law does exist.[24]

Moreover, this active cooperation is a characteristic feature of what in a broader sense could be called "Nordic legal culture". A sense of coming from and having studied the law of a Nordic country is part of a Nordic lawyer's identity. The Nordic lawyers' meetings, which as we have seen started in 1872, have since then continued at different stages. Matters of common legal interest remain on the agenda. At the same time, these meetings, which are in principle only conducted in Nordic languages, have still contributed to the feeling among Nordic lawyers of having something more in common amongst themselves than with lawyers from other countries. At these meetings, participants are supposed to speak the language of their own country,[25] and to adapt their way of speaking to an audience which—not always without difficulty—is supposed to understand you. This means that the

[21]In the so-called Russification period during the decades before and after 1900, still during the autonomous period, legalism was a concept that referred to retaining Swedish legislation that was (still) in force in Finland as a symbol of "the rule of law".

[22]See further Husa in this volume.

[23]Wilhelmsson (1985).

[24]Carsten (1993).

[25]For participants from Finland, however, this means only the Swedish language. The Finnish language belongs among Indo-European languages and cannot be understood on the basis of knowledge of the other Nordic languages.

meetings also form part of a common Nordic legal identity across language borders.[26]

## 3 Common Ways of Legal Thinking

If we compare Nordic societies, many relatively well-known similarities clearly exist—indeed, some of these still play a role in the development of legal institutions and legal thinking. The countries are all rather small, and their societies quite homogenous and egalitarian.[27] For a long time, great majority of population was living on the countryside. Social and legal cultures have therefore been characterized as determined by a peasant or rural culture, as distinct from urban culture. At the time, you cannot neglect impacts of the strong Monarchy introduced in the waves of the Lutheran Reformation, which took place in the 16th century.

Both are rightly and often mentioned as important factors in understanding Nordic society and its legal institutions.[28] Here, so the argument goes, at least some reasons exist for the dominance of the Nordic idea of a "good" state and for implementing the idea of the social state, characterised not only by ways of organising conflict resolution[29] or institutions public law[30] but also by fundamental ideas of private law. A social dimension has been typical of Nordic legal thinking, for example with a focus on protecting the weaker party in contract law, especially in labour or consumer contract relationship.[31] One can also speak of one-norm societies with their interplay between state and church that could provide fruitful soil for modern, universal practices in Nordic welfare states.[32]

The Nordic countries were modernized relatively recently, generally speaking only during the 19th century, with the first wave of industrialization. In this process the state played an important role. At the same time, the Nordic countries are often characterized as countries in which the borders between civil society and the State are blurred. Indeed, the concepts of state and society do seem to be interchangeable in many ways. Hence, many societal and legal institutions have in a way been corporatist by nature in order to ensure representation of various social interests—for instance, boards with conflict-solving functions or committees for drafting

[26]Early results of this Nordic identity included the Nordic legal encyclopaedia (*Nordisk Retsencyklopedi* 1878–1899) and the Nordic journal *Tidskrift for Retsvidenskab* (today *Tidsskrift for Rettsvitenskap*, 1888–).

[27]See further Petersen and Niemi in this volume.

[28]Tamm (2010).

[29]See further Sunde and Nylund in this volume.

[30]See further Mäenpää and Fenger in this volume.

[31]Wilhelmsson (1994). See also further Bärlund and Moegelvang-Hansen in this volume.

[32]Stenius (2013).

new legislation.[33] At the same time, popular control and a common sense of justice have to varying degrees been brought into court proceedings through participation by laymen. Mention can also be made of state supervision of the legality of public administration by the (parliamentary) ombudsman—an institution with its origin in Sweden.

In all Nordic countries the public sector and public administration occupy a huge dimension and play an important role. The system of conflict resolution between public authorities and citizens varies to a high degree. Litigation between the administration and the citizen in Sweden and Finland is dealt with by specific administrative courts organized in a hierarchy which differs from that of ordinary courts. Other Nordic countries have no such organised administrative court system. For example, administrative cases in Denmark are dealt with by a plurality of different organs or boards. Most of these are set up for specific administrative complaints such as taxes, social legislation,[34] competition, environmental protection, energy providers, and consumer affairs, while the ordinary courts (with notable exceptions) normally have the last word in these matters.

## 4 Pragmatism and Realism

### *4.1 Against a Civil Code*

Often Nordic legal peculiarities are described by using expressions: pragmatism, realism, absence of formality, an uncomplicated and understandable legal style, transparency, equality, and avoidance of extremes. These peculiarities of legal thinking can be forceful when maintained not by the Nordic countries individually but in common. The Nordic countries still feel that in these respects they are closer to each other than to other countries. This also explains a certain reluctance towards what is seen as trends in over-administration and centralization within the European Union. These values were also cornerstones of the original Nordic project of legal cooperation.

"Nordic-ness" is in some ways a consequence of the late professionalization of legal culture in these countries. For a long time one could speak of non-professional or lay-dominated legal cultures. This again has defined court systems and legal procedures,[35] but could also explain at least partly why Nordic legal culture is even today characterized by the term "pragmatism".[36]

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[33]Letto-Vanamo (2014a, b).

[34]Tax law and social security complaints in Denmark and Norway are also decided by organs similar to ordinary courts. In these fields more similarities exist between the Nordic countries than in other parts of the complaints system.

[35]See further Sunde and Nylund in this volume.

[36]Zweigert and Kötz (1998).

In all the Nordic countries the most important source of law—and the key instrument for legal-societal changes—has been parliamentary legislation. Thus, the most important legal actor is the legislator. The countries do not have constitutional courts, and only seldomly the authority of the legislator is questioned by the judiciary.[37]

Ongoing European discussion of law addresses the question whether it is appropriate to collect rules in wide fields of law in written law books, so-called codifications or codes in the shape of systematic collections of law covering general principles and more detailed rules in several areas, and which are supposed to be the main source of law. In particular, the question has been raised whether codifications covering civil law, i.e. the law of obligations (in contract and tort), property law, family law, and law of succession, should be seen as a positive feature, or as one that complicates finding the law and causes stagnation in law-making.

Modern civil law codifications, including more or less detailed rules on general doctrines (principles) of civil law such as the French *code civil* (1804) or the German *Bürgerliches Gesetzbuch* BGB (1900), have been models for many countries covering all traditional fields of private law. After the fall of communism in 1991, work on codification was intensified in former Eastern-bloc countries. Indeed, the great majority of European countries today have a new or totally revised code on private law, considered as a national civil code which forms the basis of the law. Some countries even have a specific commercial code, which is also unknown in the Nordic countries even if some individual acts may have specific rules on commercial relations between professionals.

The Nordic countries, however, have been resistant to these large-scale law projects. They have chosen to enact the necessary legislation separately in discrete statutes, many of which were drafted on the basis of Nordic initiatives and discussions. Exceptions are found within penal[38] and procedural law. In Denmark, a code of procedure with more than a thousand articles came into force in 1919. The realistic, pragmatic approach, together with general democratization tendencies, led to reforms of legal procedure and the Swedish court system in 1948,[39] while similar reforms in Finland were realized only as late as the 1990s.

Within civil law, issues such as contracts, marriage or succession have been regulated by more or less independent acts, many of which are the result of common Nordic drafting and exchange of ideas. Indeed, the non-existence of broad, complex civil codes has enabled Nordic legislative cooperation. In Denmark, some important areas of law such as the general principles of tort law (on liability for non-contractual damages) are more or less exclusively based on the practice of the courts. At the same time, general doctrines (principles) of law have been developed, mainly by legal scholarship, while active cooperation with Nordic colleagues even today forms an important part of the daily work of many legal scholars.

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[37]Wind and Føllesdal (2009); see also further Husa in this volume.

[38]See further Lappi-Seppälä and Nuotio in this volume.

[39]See further Modéer (2005).

There are also Nordic associations and/or yearly meetings for scholars and other lawyers within different disciplines, e.g. administrative law, criminal law, contract law and family law.

The idea that Nordic law should be codified in a complete Nordic code gained currency in 1896, when this work was carried through in Germany in the shape of the BGB, which came into force in 1900. German legal thinking and the drafting of the BGB were well known in the Nordic countries, and revived the old discussion of codifying civil law. In 1899 one of the more outstanding Nordic lawyers of the time, the Danish professor Julius Lassen, took the opportunity to launch the idea of creating a modern Danish civil code.[40] He was much driven by his interest in German systematic legal thinking but was also critical of the way the German Code was drafted. In this connection he mentioned that a common Nordic civil code should be the final goal. In Norway especially, this idea was seen as driven by some sort of megalomania, but in Sweden it was taken as a chance to revive Nordic legal cooperation, which after a very active start had somehow come to a halt. Inspired by Lassen, a member of the Swedish parliament took the initiative and proposed that Nordic legal cooperation should be extended to new fields.

This did not lead, nor was it intended to lead, to the drafting of a Nordic code. The scope was narrower when so-called civil law committees were set up in Denmark and Sweden (1901) and later in Norway as well. The first Nordic legislative programme was accepted, and legal problems concerning contract, sales and securities were seen as suitable subjects for cooperation. In the 1909 programme even family law issues were mentioned, with planned cooperation in the fields of marriage and economic relations between spouses.[41] There have been two standing committees, a civil law committee and a family law committee, in each country.[42]

The idea of creating a new Nordic civil law book was never seriously seen as a realistic option. Indeed, drafts were drawn up but the endeavour was never accomplished and these drafts never led to a Nordic civil code.[43] Creating a code, and even more a Nordic code, is a big issue, and much harmonization would be needed before such a project could seriously be considered. Nordic lawyers did not see such a project useful, and prioritised flexibility in law-making above creation of a coherent codified private law system including both general principles and detailed rules of several fields of private law.

[40]Tamm (2011), pp. 135–139.

[41]In family law especial objects of cooperation were marriage and divorce, property relations between spouses, guardianship and the relationship between parents and children. See further Lund-Andersen and Kronborg in this volume.

[42]In the field of civil law the most important results of Nordic cooperation were nearly identical statutes on sale, agency, and on the conclusion and nullity (non-validity) of contracts. See further Bärlund and Moegelvang-Hansen in this volume.

[43]Still, in 1948 the Danish law professor, Frederik Vinding Kruse, also acting on his own initiative, presented to the Nordic lawyers' meeting a draft of a Nordic civil code, and in 1962 a second draft.

Later proposals for a common European civil code also met attitudes among Nordic legal professionals that were more sceptical than enthusiastic. Even today, Nordic lawyers prefer discrete acts, which are easier to formulate and more flexible to amend, and which do not govern the law and legal thinking too much but allow pragmatism and judicial and scholarly interpretations to meet practical ends.

## *4.2 Realism*

Nordic law and especially Nordic legal scholarship are heavily indebted to tremendous efforts, especially in Germany in the 19th century, to create a method of developing the law based on profound thinking on coherence in law and legal concepts. However, this thinking never became dominant and was gradually superseded by the idea of the law as serving social purposes, and thus having to be not only theoretically on a high level but also available as a tool for practical purposes. Great German lawyers such as F. C. von Savigny, Rudolf von Jhering and Bernhard Windscheid were familiar to leading Nordic lawyers, who might even have been among their students at some time.

Thus, it is important to stress that those lawyers who were instrumental within Nordic legal cooperation would have had a common background of legal knowledge based on German authorities, even if they represented different Nordic legal systems.[44] This was clearly the case in Finland and Denmark, whereas 19th century Norwegian lawyers were more critical towards the German approach. Still, when national legal scholarship[45] emerged in the Nordic countries during the late 18th and 19th centuries, this happened to a high degree based on German inspiration by adapting German legal ideas and relying heavily on textbooks by German legal authors. In this way, Nordic law became influenced by a Roman Law-based terminology and systematization, still visible today in the Nordic legal systems. At the same time, ideas of German legal scholarship and state theory played an important role in the development of public law in the Nordic countries.

However, it must be stressed that German legal thinking was not accepted uncritically. In particular, the work of the courts did not involve too much theoretical reasoning. We often talk of Nordic pragmatism in law. In other words, practical solutions have been preferred to those based on what in the Nordic countries is often seen as too much theoretical thinking or exaggerated abstraction. This tradition traces its roots back to the 19th century.

In Denmark one highly influential lawyer was Anders Sandøe Ørsted (1778–1860). In an impressive output of books and legal studies, to a high degree inspired

[44]Links do exist between Nordic law and the so-called "civil law family" represented e.g. by German law. But Nordic cooperation was still an important feature in creating and maintaining a way of legal thinking—and legal style—different from the highly abstract German approach.

[45]E.g. Montgomery (1889) and Lassen (1892).

by his reedling of contemporary German legal scholarship, Ørsted laid a basis in Danish and Norwegian law for a practical way of looking at the law.[46] From the 1920s, Nordic legal philosophy was influenced by the school of so-called Scandinavian Realism. This was mostly a Swedish and Danish phenomenon. In Sweden the main influence was the so-called Uppsala School, which made Scandinavian Realism as a philosophical school well known abroad, through such names as Axel Hägerström and Vilhelm Lundstedt. The Uppsala School had a significant impact on the thinking and argumentation of many Nordic lawyers, too. The Swedish lawyer Karl Olivecrona and the Danish lawyer Alf Ross are often seen as the most representative and internationally known legal scholar of the realistic movement. However, in Norway natural law thinking also came to play a role, while in Finland a more conceptual way of legal thinking truer to its German inspirations predominated.

Realism meant that legal theory was reluctant to recognize the importance of general legal concepts for argumentation and stressed that reflection on how the courts would actually reach their decisions was the proper object of the law. In this connection the concept of "*forholdets natur*" (the nature of the matter) or "*reella överväganden*" (real considerations) formed part of the basis of the Danish and Swedish doctrine of legal sources. At the same time, the idea of law as an instrument of "social engineering" formed a crucial element of Scandinavian realism.[47]

The dominance of German (conceptual) jurisprudence diminished in Finland, above all through influences from Analytical Philosophy and the so-called Analytical School of Law since the 1950s.[48] Analytical criticism focused mainly on "conclusions from concepts". But concepts were not neglected. They played a heuristic role—concepts were necessary for clarifying and classifying legal problems.[49] Today, legal principles have become important, but concepts are still in focus: they prepare the way for principles-based legal argumentation. Nevertheless, Finnish legal scholarship can be characterised as more theoretical than in the other Nordic countries.

At the same time, Finnish legal scholars share a view of three—almost equally powerful—legal actors (the legislator, the judiciary and legal scholarship), and the *ethos* of the active role of legal science as a means of changing the law and society.

[46]Tamm (1978).

[47]Pihlajamäki (2004) and Björne (2007).

[48]Influences in legal thinking were closely connected to Finnish philosophy of the 1960s and 1970s (e.g. von Wright and Hintikka), which was strongly influenced by Anglo-American analytical philosophy.

[49]The most important changes in Finnish society can be dated to as late as the 1970s. Since then it has become possible to speak of a welfare (social) state. The decade was characterised by various democratization and modernisation procedures: for instance, reforms to the school system, university education, and part of the court system. Approximation of legal science to other social sciences was required in terms of legal education at universities. Moreover, trends in legal research changed, visible e.g. in dissertations and other academic works pointing out the "social dimension" of law.