The Past, Present and Future of Nordic Courts

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Abstract Based on the insights from the previous chapters in this volume, this concluding chapter discusses key traits of Nordic courts: colloquial legal language, generalist judges, ‘unrefined’ and fragmentary laws, high trust in the state and judges, and corporatism. The development of these traits over time is explored as well as the emergence of new traits that could be labelled ‘Nordic’. It also discusses how two current trends—Europeanisation and privatisation of dispute resolution processes—influence Nordic courts. The question whether a unified Nordic procedural culture still exists is raised. Finally, the future of Nordic courts is discussed.

1 Introduction

This study of the Nordic legal mind and its historical, societal and linguistic contingencies, as well as its current manifestations in the structure, processes and practises of the justice system demonstrates a vibrant, regional procedural culture. The ‘Nordic’ traits identified in the contributions in this book demonstrate pragmatism expressed in, among other things, a belief in the benefits of amicable solutions; keeping the law and justice system ‘accessible’ (which translates into a colloquial legal language and lay participation); a belief in the ‘good’ state that manifests in high trust in judges and discretionary rules; corporatism;¹ and a legislative tradition consisting of single acts rather than codes, in which preparatory works, case law and legal scholarship are important supplements. The Nordic Supreme Courts have taken up the challenge of being guardians of human rights and EU law and they have transformed into courts of precedent that contribute actively and openly to the development of the law. Additionally, we have seen how courts are used to actively

¹See Nylund (2021a), Sect. 4.2.

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enforcing government policies, particularly those regarding protection of weaker parties (e.g., consumers and employees).

Based on the insights from the previous chapters in this volume, this concluding chapter discusses key traits of Nordic courts and how these traits have developed over time, and how new hallmarks of Nordic courts and court proceedings have emerged. It also discusses how two current trends—Europeanisation and privatisation of dispute resolution processes—influence Nordic courts. The question whether a unified Nordic procedural culture still exists is raised. Finally, the future of Nordic courts is discussed.

2 Nordic Legal Language as a ‘Colloquial’ Language

Pragmatism and lay culture characterise Nordic courts and court proceedings, as opposed to a ‘learned’, highly professionalised procedural culture and ‘rigid’, formalistic court proceedings. According to Pia Letto-Vanamo,² a strong peasant culture and late urbanisation and industrialisation characterise the Nordic countries. Until the 1800s and even later, disputes were resolved by panels consisting either entirely of lay persons or of a mixture of judges with at least some formal legal training and lay judges. The judge was not a stranger from a completely different social stratum who imposed almost incomprehensible rules; rather, one was judged (at least in the case of peasants, craftsmen and traders) by one’s equals, who would attempt to find an equitable, practicable solution. In this setting, developing advanced legal concepts and coherent codes easily amenable to deductive reasoning is futile, if not plainly impossible. As Ditlev Tamm explains, the first written laws were vernacular and were only to a very limited degree and indirectly influenced by Roman law and Canon law.³ Although the persons who redacted the laws might have studied law at a university or encountered learned law in other ways, the laws were written with the reality of very low professionalisation of judges in mind. The codes enacted in the seventeenth and eighteenth centuries were also compilations of earlier law rather than products of direct transplantation of ‘learned’ law or manifestations of legal innovations. Continental European ‘learned’ legal thinking had a very modest impact on them, which is hardly surprising considering that the academic community was almost non-existent and could not have undertaken the tremendous work to craft codes that adhered to the ideals of the Enlightenment. As mentioned, low professionalisation would have made the effort futile, since the use of general concepts and deductive reasoning necessitates formal legal training.⁴

The language and terminology used in contemporary Nordic procedural law still reflect the ‘lay’ elements. For instance, the committee that drafted the Norwegian Dispute Act discussed whether and how the language used should and could be

²Letto-Vanamo (2021).

³Tamm (2021).

⁴Sunde (2021).

accessible for citizens.⁵ The committee found that the language should be accessible for everyone. As a result, it abolished *inter alia* the term *kjæremål* to refer to interlocutory appeals; instead, appeal (*anke*) now refers to both appeals of judgments (i.e., rulings on the merits) and interlocutory appeals, despite the fact that the procedural rules governing the two are different.⁶ Of course, one can question whether the terminological changes have increased the accessibility of the Dispute Act, considering that understanding the concept of interlocutory appeals requires prior knowledge of procedural law. Nevertheless, the example illustrates how simple language is still a foundational value of Nordic legal culture.

The language used in court rulings also reflects the pragmatic, ‘lay’ approach: the language is, relatively speaking, fairly accessible and not very technical. It does not reflect the ideal of a distant judge who mechanically applies technical rules.⁷ Likewise, the language is sober and the style of matter-of-fact argumentation lacks the persuasiveness and eloquence that is associated with rulings in common law jurisdictions.⁸ Ideally, the average citizens who are willing to make an effort to comprehend the ruling should be able to understand the reasoning of the court.⁹ Despite the ideal of accessible language, the use of complex sentence structures, such as the passive voice, and of difficult words is common in legal language, and even in mediated agreements, although these are supposed to reflect the wishes of the parties.¹⁰

Linguistic unity has been pivotal for Nordic law: lawyers can understand texts written in Danish, Norwegian and Swedish without having to resort to a dictionary, and the legal terminology is mostly shared, despite some differences. Nevertheless, Finnish and Icelandic law are, as a rule, not available to speakers of the other languages. Instead, communication between Finland and Iceland and the other Nordic countries is mainly one-way: Finnish and Icelandic lawyers generally read at least one of the other languages, but the same is not true in reverse. Since Swedish is an official language of Finland, some legal texts, such as statutes and government bills, are available in Swedish.¹¹

⁵NOU 2001: 32 Rett på sak, p. 150.

⁶The terminological choice can be ascribed at least partly to the fact that the rules concerning appeals of rulings on the merit and appeals of procedural rulings were formally merged. Still, different rules and principles apply for the two categories of appeals; the rules are simply interwoven.

⁷Mattila (2016), pp. 111–112, 218–222, 241 and 258–260.

⁸Mattila (2016), pp. 11–112, 318–331 and 339.

⁹Bogason and Örlygsson (2019).

¹⁰E.g., Dahlberg-Larsen (2015), Kjær (2015), Adrian and Mykland (2018).

¹¹Tamm (2021).

3 ‘Generalist’ Judges and ‘Unrefined’, Broad Laws

Nordic procedural law remained archaic well into the twentieth century. The repeated failure of attempts at modernising court proceedings in the Nordic countries during the nineteenth century and early twentieth century could be attributed partly to the lay character of Nordic law at that time. The reforms were direly needed to expedite court proceedings and to improve the factual and legal basis of the ruling by moving from piecemeal, written proceedings to oral proceedings with witness testimony and legal arguments presented orally, as well as to modernise concepts, ideas, beliefs and practices. Still, the laborious and costly process of turning a system founded on medieval law into a state-of-the-art process of the time caused significant delays, except in Denmark.¹² In Finland, the rules were modernised as late as the 1990s, partly due to the fact that profound legislative reforms regarding courts were impossible during the Russian period, and the turbulent period before, during and after the Second World War brought reforms to a halt.¹³ Since German and Austrian procedural law and legal thinking formed the backbone of the Nordic reforms, despite the fact that they were adapted to Nordic legal culture, contemporary procedural law still has a strong kinship with these systems.¹⁴

Contemporary Nordic societies are far from peasant, rural or under-developed societies. Nevertheless, the historical characteristics are still palpable in Nordic legal culture. One example of this can be found in the Nordic court structure and aversion towards judicial specialisation, which in turn has resulted in the same procedural rules being applied in practically all civil cases and a second set of rules governing criminal cases.¹⁵ The Nordic countries, except Norway, still have only a single act governing both civil and criminal proceedings.¹⁶ In Finland, supplementary rules for criminal proceedings are provided in a separate act, although the Code of Judicial Procedure forms the backbone of both civil and criminal court proceedings.¹⁷ Regulating court proceedings in a single act contributes to maintaining coherence across civil and criminal procedure and having general rules that fit a wide range of different cases and that do not require specialist knowledge. Family law cases are, in contrast, regulated in a fragmented manner, with procedural rules amending or supplementing the general procedural rules scattered across different acts or even left partially unregulated.

Since the Nordic countries have a ‘piecemeal’ legislative technique (i.e., a multitude of legal sources, including statutory law, case law, preparatory works, legal scholarship, etc.), courts have a pivotal role in amalgamating the sources to create a

¹²Hjort (2021), Sect. 2.

¹³Ervo (2021a).

¹⁴Hjort (2021).

¹⁵Hjort (2021), Letto-Vanamo (2021) and Tamm (2021).

¹⁶Retsplejeloven in Denmark and Rättegångsbalken in Sweden.

¹⁷Oikedenkäymiskaari and Laki oikeudenkäynnistä rikosasioissa. The government considered including the rules in the Code of Judicial Procedure but found that the result would be complicated and confusing (HE 82/1995, p. 19). This argument is not very convincing, however, considering that Denmark and Sweden have all the relevant rules in the same act.

coherent system. This requires high trust in courts to loyally enforce the policies that the legislature and executive branch have adopted, while also promoting equal access to justice by searching for a pragmatic and equitable solution.¹⁸ Courts are expected to pursue the same policy goals as the legislator, the goals that the Parliament has identified as pivotal. The design of the small claims programs in Nordic courts is a manifestation of the idea of enforcement of policies, in that the judge has an active role in managing the case to reduce costs and enabling self-represented parties to argue their cases to render their legal rights effective.¹⁹ Laura Ervo explains that, in Finland, the fact that legislation has often been outdated has resulted in the courts having to step in to modernise the law through interpretation.²⁰

Anna Nylund posits that a streamlined court system consisting of general (and ‘general’ administrative) courts with broad jurisdiction and judges that adjudicate all types of cases is pivotal for attaining legal coherence.²¹ However, the ideal of general courts does not preclude the use of special courts and dispute resolution boards, since all cases have the capacity of eventually reaching general (or ‘general’ administrative) courts, either a lower court or the Supreme Court or Supreme Administrative Court. These specialised dispute resolution bodies also enable corporate decision-making.

4 High Trust in the Good State Underpins Nordic Procedural Culture

Trust among citizens and trust in the government permeate Nordic culture and legal culture. Flexible, general procedural rules represent an embodiment of trust. Judges can adapt the proceedings according to the needs of the case at hand and their individual preferences, since the public and the government trust that judges obey the law and that they will use their discretion wisely and to the benefit of the parties and the legal system, as Christina Jensen demonstrates.²² The proliferation of mediation could be interpreted as an expression of high trust in courts and the good state, as well as in pragmatism and thus the rejection of excessive formalism and legalism. The potential tension between protecting and enforcing legal rights and private ordering through settlement has been overlooked, at least so far.²³ Facilitating settlement is considered a duty of judges and a natural function of courts. In the Nordic legal mind, dispute resolution outside courts does not jeopardise the access to justice or undermine the law as a tool of governance; rather, it is believed to enhance justice

¹⁸Sunde (2021).

¹⁹Jensen (2021).

²⁰Ervo (2021a).

²¹Nylund (2021b).

²²Jensen (2021).

²³Ervo (2021b) and Petersen (2020).

by amplifying access to high-quality processes.²⁴ The use of lay judges is crucial in building and maintaining trust.²⁵

Martin Sunnqvist identifies ‘Nordic-ness’ in the role of supreme courts in performing judicial review.²⁶ The Nordic countries do not have constitutional courts like many countries in continental Europe. Nordic supreme courts have been hesitant to exercise judicial review overtly, apart from the Norwegian Supreme Court. However, even the Norwegian Supreme Court exercised self-restraint in the post-war years until it re-embraced judicial review in the late 1970s and 1980s. The decrease in self-restraint coincided with a discussion of the protection of human rights in Danish and Norwegian law. The shift in Finnish and Swedish courts occurred more gradually, with the first cases where the court set aside were passed only at the turn of the millennium and, moreover, partly as the result of Europeanisation.

The turn towards human rights and the Europeanisation of law has resulted in Nordic supreme courts no longer being willing to blindly obey the Parliament: they have become the guardians of human rights, with procedural rights and equal access to justice forming the epitome of the new role of courts. However, they still defer to the Parliament. Often, they resolve the discrepancy between national legislation and the constitution, ECHR or EU law by defining the problem as one that arises in a specific context, rather than a possibly profound mismatch between the underlying legal ‘regimes’. In this process, assessing the decision-making processes and procedures as well as the quality and transparency of the underlying reasoning (i.e., whether the decision-maker has taken into account and balanced different viewpoints and arguments in an appropriate manner) enables courts to circumvent some of the problems regarding the relationship between national and supranational law, notes Sunnqvist.²⁷ Focusing on processes and transparency is congruent with the requirements of ECHR and largely also EU law: Court must assess whether proceedings abide by the criteria of due process, and not necessarily the outcome as such.²⁸

A power shift has also ensued from supreme courts becoming primarily courts of precedent; that is, the supreme court had the right to select a limited number of cases based on whether the case raises issues of interest for other cases or matters of principle. The Swedish Supreme Court was the first to evolve into a court of precedent in the 1970s.²⁹ The other Nordic courts have followed suit, and the final step was taken when Iceland introduced a court of second instance, *Landsrettur*, placed between the Supreme Court and the district courts. Except on Iceland, this development thus preceded Europeanisation, despite the fact that the influx of EU law and international human rights from the 1990s onwards has further propelled the transition in the role of Nordic supreme courts. As a result of the increased weight of case law as a source of law, court rulings must be longer, more detailed and the

²⁴Linnanmäki (2021) and Nylund (2021b).

²⁵Letto-Vanamo (2021) Sect. 4.

²⁶Sunnqvist (2021) Sects. 2 and 3.

²⁷Sunnqvist (2021).

²⁸Pedersen (2016)

²⁹Sunnqvist (2021).

legal profession must advance of techniques for determination of the *ratio decidendi* and for distinguishing cases.³⁰

5 Europeanisation and Nordic Courts

The European law, primarily the ECHR and EU law, have had a tangible impact on Nordic courts and court proceedings, as many of the contributions in this volume demonstrate. Despite the variation in the formal relations to EU, in particular the Area of Freedom, Justice and Security,³¹ differences in the underlying mechanisms of influence and the extent of the influence among the countries are relatively minor. The EEA and Schengen Agreements have been instrumental in this respect since they necessitate close cooperation in the justice sector as well.³²

The Nordic conventions on judicial cooperation have served as a model for the foundational concept of mutual trust in EU judicial cooperation, as Dan Helenius explains.³³ The difference is that ‘blind’ mutual trust exists among the Nordic countries (i.e., they consider the systems of the other Nordic countries to be of an equal standard as the domestic system), and consequently they do not question the background of a request for cooperation. For instance, Helenius notes that since the rules governing criminal liability, the criminalised acts and the criminal sanctions are sufficiently similar, requiring double criminality is redundant. Thus, Nordic countries comply with requests without hesitation. The European rules do not preclude intra-Nordic conventions on judicial cooperation, and thus Europeanisation adds a layer on the pre-existing Nordic cooperation scheme.³⁴

The influx of EU law and ECtHR case law has manifestly shifted the balance of power among the three state powers in favour of courts: courts are required—not just allowed—to interpret and apply statutory law in a manner that renders them compatible with the ECHR (and EU law) and, when necessary, to give primacy to the ECHR and EU law. The increasing role of the ECHR through the growing weight and density of ECtHR case law coincided with a national turn toward human rights and courts as the guardians of those rights. In their combined effect, the burgeoning of human rights has driven courts to perform judicial review actively and openly, which has challenged and altered the idea of courts serving the people by yielding to the will of the Parliament. Even when the ECHR does not formally take precedence over acts of Parliament, it has in practice become intertwined with interpretation of

³⁰Sunnqvist (2021).

³¹For a more detailed discussion on how international agreements can be—and are—used to tie the Nordic countries closer to the EU, see Nylund (2019a).

³²For a more detailed discussion on the impact of EU law on the civil procedure law of EEA countries, see Nylund (2020a) and Nylund and Strandberg (2019).

³³Helenius (2021).

³⁴Helenius (2021).

the national constitution, except in Denmark.³⁵ As Sunnqvist notes, courts are even required to monitor whether courts and court proceedings of other EU Member States fulfil fundamental fair trial rights.³⁶ However, as Thorsteinsdóttir illustrates, Nordic courts have taken on their new role gradually and reluctantly.³⁷ As explained above, courts still tend to frame discrepancies as related to the specific case or specific issues and are hesitant to discuss the underlying, general differences.

Courts are, in essence, required to monitor the rule of law by protecting human rights derived from the ECHR, national law and other human rights instruments, such as the United Nations Covenant on the Rights of the Child,³⁸ the EU Fundamental Rights Charter³⁹ and the United Nations Convention on the Rights of Persons with Disabilities.⁴⁰ In contrast with the earlier approach, where courts were expected to respect the will of the majority, courts are now expected to protect the rule of law—the fundamental values of a liberal, democratic society and the rights of minorities—from infringements by the government.

In interpreting case law from European courts, Nordic courts must assess whether and which aspects of the case are applicable in the national context. Navigating the complex multi-layered European system is not an easy task: sometimes Nordic courts are accused of being overly cautious and minimising the room to manoeuvre nationally, while at other times they have been criticised for being overly confident and reluctant to engage in dialogue. The former applies especially to the ECHR and the latter to the issue of requesting preliminary rulings from the CJEU (or advisory opinions from the EFTA Court).⁴¹ The ECHR and the EU system rely on national courts explaining how they have interpreted relevant laws and how they have balanced different arguments and values. Procedural aspects, access to court and open argumentation are paramount, and courts scrutinising above all procedural aspects of constitutionality is a logical consequence of this approach. The implementation of EU law has thus propelled congruous shifts in all Nordic countries.

The impact of EU and ECHR law on Nordic law is partly contingent on judges and lawyers having sufficient knowledge and understanding of EU and ECHR law—substantive law, legal principles and methods. Unless lawyers and judges recognise the relevance of EU law and have the skills to detect and analyse complex problems pertaining to EU law, they are likely to overlook it or refrain from invoking it. Anna Nylund argues that Nordic lawyers and judges tend to have insufficient skills in EU law and that weaknesses in the implementation of EU law generate additional hurdles for effective application of EU law.⁴² Moreover, since requests for preliminary rulings (and advisory opinions in the EEA context) drive the development and refinement of

³⁵Sunnqvist (2021) and Thorsteinsdóttir (2021).

³⁶Sunnqvist (2021).

³⁷Thorsteinsdóttir (2021).

³⁸For a comparison of the Nordic countries in this regard, see Haugli and Nylund (2019).

³⁹See, e.g., Nylund (2020a) for a discussion of its impact on civil procedure in EEA countries.

⁴⁰Brennan et al. (2018) and Helgadóttir (2009).

⁴¹Nylund (2021c), Sunnqvist (2021) and Thorsteinsdóttir (2021).

⁴²Nylund (2021c).

EU law, the relative passivity of Nordic courts in this respect reduces the footprint of Nordic law, legal principles, values and patterns of argumentation on EU law.

Furthermore, policymakers, and to some extent academics, in Nordic countries influence whether the response to Europeanisation is proactive or reactive. A proactive approach entails participation in the processes by which European procedural rules are forged and in making deliberate choices when implementing European procedural law in national law, not just treating European procedural rules as 'technical' rules that can be implemented mechanically.

6 Changing Role of Courts: Privatisation and Enforcement of Policies

The expectations courts face are increasingly bifurcated: on the one hand, settlement in all its forms is promoted, resulting in individualised, privatised dispute resolution; on the other hand, courts are required to enforce selected government policies (i.e., provide for the public good).

Court-connected mediation, in which either a judge or a registered mediator serves as the mediator, was introduced as a parallel process to litigation in Norway in 1997 and has since spread to Denmark, Finland and Iceland.⁴³ Sweden differs in this regard, since courts do not have mediation programs themselves; they only encourage the parties to attempt mediation. Court-connected mediation fits Nordic courts and court culture in several ways, not least due to the innate pragmatism of these cultures and the ubiquity of dispute resolution processes available outside courts. In addition to court-connected mediation, judges have had the right to promote settlement as part of regular civil proceedings, and in recent reforms this right has transformed into a duty to promote settlement when appropriate. Cross-fertilisation seems to take place between court-connected mediation and litigation practices, particularly in the techniques that judges apply to promote settlement.⁴⁴ Court-connected mediation could also influence whether and how parties negotiate before they file a court case and thus also whether they decide to litigate. However, the findings related to the reciprocal impact between litigation and mediation are preliminary and indicate a need for more research on the underlying mechanisms and outcomes.

Despite court-connected mediation being relatively prevalent in the Nordic countries, which suggests that it could be characterised as a success, the quality of the mediation process has been questioned. Mediation theory promises a facilitative process and interest-based outcomes, where the parties jointly decide whether they wish to enter the process, the design of the process and the outcome.⁴⁵ Litigation, in contrast, offers an adversarial process resulting in an outcome defined by the rules of law, where one party can force the other to participate in the process and the

⁴³Nylund (2021b) and Lög um meðferð einkamála (Civil Procedure Act Sect. 106 ff.).

⁴⁴Nylund (2021b) and Ervo (2016).

⁴⁵Linnanmäki (2021).

rules of civil procedure determine the procedure. As Kirsikka Linnanmäki observes, the legislation and case law on mediation does not fully support the vision of party self-determination by protecting the parties from direct or indirect coercion and by sustaining informed, deliberate decision-making.⁴⁶ She identifies several problematic aspects. The process of mediation, its structure and the intended outcomes are unclear; the mediator and the parties do not have a joint understanding of mediation, the role of the mediator and what defines a quality settlement. The role of the mediator is unclear in that the mediator should formally be an expert on the mediation process and not direct the outcome or provide any opinion of the outcome, yet the mediator often acts in a way that is contrary to these ideas. Hence, the self-determination of the parties and the confidential nature of the mediation process are not sufficiently protected, as Linnanmäki observes.

Plea bargaining is related to mediation in that it represents a form of ‘negotiated’, informal justice where the parties to a dispute are given more control of the process and the outcome than in regular court proceedings. The process is often cheaper and faster than regular proceedings, since the police does not have to investigate the crime in detail if the accused person confesses the crime. As Laura Ervo notes, plea bargaining constitutes a shift from the power of the state to the power of the individuals involved in the dispute and their communities.⁴⁷ Perhaps one could also argue that plea bargaining represents a ‘postmodern’ turn: truth is no longer considered to be absolute, rather it is relative and contextual. However, one could also argue that various forms of plea bargaining and related phenomena are introduced for pragmatic reasons. Spending less time on criminal offences that the defendant has agreed to plead guilty enables the police and courts to focus on cases in which the defendant has not done so.

Clement Salung Petersen discusses the intricate relationship between party autonomy and private ordering on the one hand and using law as a tool to promote and enforce policy goals on the other hand. He notes that while parties still determine the ambit of the dispute and are responsible for providing evidence, recent reforms have stressed case management⁴⁸ and the duty of the judge to provide guidance, primarily to self-represented parties.⁴⁹ The CJEU demands that national courts enforce parts of EU consumer and competition law on their own motion. As a result, courts must be more active during the court proceedings, and the duties of the judge vary depending on the subject matter of the case. Although active judges contribute to more equal access to justice and efficient enforcement of rules protecting public policy and weaker parties, relying on active judges as the primary mechanism for enforcing public policies is also controversial and even potentially counter-productive.⁵⁰ Furthermore, the variation in the degree to which judges are

⁴⁶Linnanmäki (2021).

⁴⁷Ervo (2021b).

⁴⁸Nylund (2019b).

⁴⁹Petersen (2021).

⁵⁰Petersen (2021), Wallerman Ghavanini (2020), Andersson (2019), Fredriksen and Strandberg (2019) and Eldjarn (2016).

active could result in significant fragmentation of procedural rules, which is contrary to the Nordic tradition of operating with a single set of procedural rules.

Settlement and processes facilitating (early) settlement have long been a part of Nordic dispute resolution culture and are an essential part of the Nordic justice systems. Recent decades have witnessed a proliferation of processes facilitating settlement within the domain of court proceedings by mandating judges to actively promote settlement whenever appropriate, by introducing court-connected mediation, by directing cases to restorative justice processes and through various forms of plea bargaining and simplified proceedings when the accused person pleads guilty. The question arises whether it is possible to pursue two diametrically different aims simultaneously. The question of whether or not judges should review settlement agreements, and, if so, when and to what extent they should interfere, remains unanswered, as does the question of what exactly lies in the duty to promote settlement, what type of process court-connected mediation is and should be and which cases are appropriate for each process.⁵¹ Furthermore, one could question whether current procedural rules regarding settlement in fact undermine the rule of law and ‘neutralise’ the constitutional dimensions of the growing role of courts.

Requiring courts to enforce certain rules on their own motion or catering to the needs of self-represented or weaker parties is as such not problematic; on the contrary, one could argue that it is part of the Nordic legal-cultural DNA. Instead, the problem is the variation in how courts and judges perceive the obligation to act, and the way considered most appropriate to exercise the obligation or power to interfere also differs. Moreover, the extent to and intensity with which the court reviews an arbitral award or a settlement agreement, and to which courts enforce selected rules on their own motion through guidance and other measures, also varies, as Petersen notes.⁵² The consequences of a very strict approach or a too-lenient approach could be draconian. For instance, employers could circumvent obligations arising from employment contracts by characterising the contract as purchase of services and thus avoid both procedural and substantive rules protecting employees. The question is whether the court should intervene and declare the contract void or interpret it as if it were an employment contract. Significant variation in the approach courts and individual judges use will result in different outcomes and will contradict the epitome of the rule of law—that is, equal and predictable application of law. Fragmentation of procedural rules could also amount to a breach of intrinsic principles of the rule of law: Why does a consumer deserve far better protection than a tenant or employee who is in an equally weak position, and where the case at hand is likely to be crucial for the tenant or employee in question? Is a split justice system desirable, where some parts are permeated by a *laissez-faire* attitude toward justice and enforcement of legal rules in the name of privatisation, while other parts of the system depart from traditional ‘adversarial’ maxims of the parties defining the ambit of the dispute in favour of forceful promotion of selected policies? Petersen argues that a new path for

⁵¹Linnanmäki (2021), Nylund (2021b), Petersen (2021) and Adrian et al. (2015).

⁵²Petersen (2021). See also Wallerman Ghavanini (2020), Andersson (2019), Fredriksen and Strandberg (2019) and Eldjarn (2016).

civil procedure law is needed to find a proper balance between the two approaches and to regulate when and how courts should intervene in private agreements and settlements and in implementing mandatory rules.⁵³

Digitisation is an omnipresent trend, yet only Maria Astrup Hjort discusses it in detail.⁵⁴ One reason for this is that digitisation is not specific to courts and has so far not been disruptive. Whether a document is filed on paper or electronically has few implications, except that a party (in practice, legal counsel) or judge preparing for a court hearing does not have to carry binders full of documents in order to have access to all relevant documents.⁵⁵ Similarly, judges are likely to perceive examining an expert or a witness remotely via video as an improvement vis-à-vis conducting examination via telephone, because they can both see and hear the person who is examined. Until now, digitisation has been an incremental process. One can question whether the potential of new technology has been so far largely overlooked among Nordic courts.

The novel coronavirus pandemic illustrates the pragmatic Nordic approach: Problems are related to courts lacking the hardware and software to allow judges to conduct hearings remotely, even from their home office. Makeshift solutions were put in place during the first weeks of the pandemic, and these are gradually being replaced by more permanent and functional solutions. In civil cases, the main problem seems to be the transformation of work processes, not a resistance to technology as such.⁵⁶ In criminal cases, the problems are more profound, since the right to appear in person in front of the judge is a quintessential element of the rights of the accused. Additionally, the use of lay judges and multiple accused persons in the same case entail problems regarding sufficient social distancing.⁵⁷ Some courts have established a video link between two courtrooms to enlarge the rooms virtually, and many utilise only the larger courtrooms. Despite these measures, practically all courts have a significant backlog of cases that will take a few years to dispose of.⁵⁸ Although

⁵³Petersen (2021) .

⁵⁴Hjort (2021).

⁵⁵See Ervo (2020), Krans and Nylund (2020), Nylund (2020b) and Petersen (2020).

⁵⁶Ervo (2021b), Nylund (2020b) and Petersen (2020).

⁵⁷E.g., Ervo (2020) and Justis- og beredskapsdepartementet, Utkast til høringsnotat om forslag til midlertidig lov om endringer i rettens sammensetning mv. for å avhjelpe konsekvenser av utbrudd av Covid-19, <https://www.regjeringen.no/contentassets/9189a551f3cc4cdcb30dce395e114478/horingsnotat---forslag-til-midlertidige-endringer-i-prosesserelverket.pdf> (accessed 24 June 2020).

⁵⁸As of 24 May 2020, 6068 criminal cases, 1,485 civil cases and 311 administrative cases had been postponed in Finnish courts (https://tuomioistuinvirasto.fi/fi/index/loader.html.stx?path=/channels/public/www/tuomioistuinvirasto.fi/structured_nav/ajankohtaista/QwIqgYmkm accessed 2 June 2020) (accessed 24 June 2020). Dealing with the backlog is expected to take at least two years, https://tuomioistuinvirasto.fi/fi/index/loader.html.stx?path=/channels/public/www/tuomioistuinvirasto.fi/structured_nav/ajankohtaista/2020/OSXN0egSy (accessed 2 June 2020). In Norway, more than 1,200 cases were postponed. <https://www.dn.no/jus/bergen-tingrett/rettsak/domstolene/over-1100-rettssaker-utsatt-pa-grunn-av-virusutbruddet/2-1-803400> (accessed 2 June 2020), and dealing with these is expected to take two years <https://www.domstol.no/nyheter/domstolene-far-penger-fra-krisepakke/> (accessed 2 June 2020). In Sweden, the ratio of cancelled or postponed hearings has increased from 20.3% to 27.9% during the pandemic compared to the three

one can hardly expect courts to seize the opportunity to rethink the justice system by implementing new technologies amidst an unprecedented crisis, one can hope that policymakers, judges, lawyers and academics will do so in due time.

7 Nordic Procedural Culture: Unity and Division

At the onset of the early modern period, there were only two Nordic countries, Denmark-Norway, which included Iceland, and Sweden, which included modern Finland. The laws, legal terminology and court structure of these countries were dissimilar, yet founded on congruous roots, and law in both blocks was influenced by the same sources.⁵⁹ Norway and Iceland retained their ties to Denmark, and Finland preserved its strong connection to Sweden even after the political detachment from the ‘mother’ country.⁶⁰ The divide between East-Nordic and West-Nordic is still visible in the structure of the court system, where the East-Nordic countries have administrative courts and in legal terminology.⁶¹ However, if we zoom in on each individual country, differences in judges’ self-perception become perceptible.⁶²

The size and significance of the East–West divide should not be exaggerated, however. Several factors offset the divergences between the East and the West. One of these factors can be seen in the purposeful and persistent—though not always entirely successful—efforts to nurture and sustain Nordic legal cooperation in all areas of law, including procedural law among legislators, policymakers, scholars and (Supreme Court) judges. In relatively small countries like the Nordic countries, strong bonds to neighbouring countries ensure the continuous input of ideas and an opportunity for discussing ideas.⁶³ Ervo analyses the persistently strong ties between Finland and Sweden by showing how Finnish lawyers still turn to Swedish law for innovations and inspiration.⁶⁴ In drafting new laws, the Nordic countries serve as a benchmark for identifying the need for reforms and societal trends, as Hjort notes.⁶⁵ Thus, the need for and content of reforms is put in a broader context, and arguments for the specific approach chosen for the reform can be extracted. Often, the resume of Nordic law is nevertheless simply an ornament, a ritual in both drafting of legislation and in academic treaties.

previous years <https://www.domstol.se/globalassets/filer/gemensamt-innehall/styrning-och-riktlinjer/statistik/2020/installda-forhandlingar-tom-v.22-2020.pdf> (accessed 2 June 2020). The number of remote hearings has doubled, <https://www.domstol.se/globalassets/filer/gemensamt-innehall/styrning-och-riktlinjer/statistik/2020/diagram-veckovis-videokonferenssamtal-salar-vecka-1-22.pdf> (accessed 2 June 2020).

⁵⁹Letto-Vanamo (2021), Sunde (2021) and Tamm (2021).

⁶⁰Hjort (2021) and Sunde (2021).

⁶¹Nylund (2021b).

⁶²Ervo (2021a).

⁶³Ervo (2021a), Letto-Vanamo (2021), Sunde (2021) and Tamm (2021).

⁶⁴Ervo (2021a).

⁶⁵Hjort (2021).

In seeking inspiration from the same countries and in being influenced by the same ideas, the Nordic countries maintain alignment. Often, the process of transplanting legal concepts and institutions entails adaptation to the Nordic legal and societal context. Sometimes coordination among the Nordic countries is organic: during the 1800s and the early decades of the 1900s, German (and Austrian) law was the main source of influence, whereas today, ideas originating from common law jurisdictions are in vogue.⁶⁶ The potential transplants are often discussed in informal settings and among scholars, but efforts to propel formal cooperation in procedural law have remained futile. Class action (collective redress) serves as an example. Instead of each country drafting its own set of rules, albeit using enacted or draft legislation from other Nordic countries as a blueprint, Nordic model rules could have been drafted in a joint effort when the Nordic countries decided to enact rules on class action. Nordic model rules could then be adapted to the needs and wishes of each country. Alternatively, the countries could have enacted temporary rules on class actions to test how the modalities chosen influence the number of class actions and the court proceedings. A joint trial period would have enabled the Nordic countries to function as a natural laboratory. One reason why Nordic model rules were not drafted is that each of the Nordic countries decided to introduce class actions at different times. Small claims proceedings illustrate how the Danish, Norwegian and Swedish rules are slightly different yet based on the same tenets, such as flexible rules leaving ample room for the judge to exercise discretion and active involvement of the judge in giving judicial guidance.⁶⁷

There are also some notable, even foundational, differences among the Nordic countries in some respects. Traditionally, the demarcation has been located between the East and West Nordic countries, such as the differences in the attitude towards administrative courts. In this regard, the gap has widened due to the increased independence of administrative courts in the East Nordic countries concurring with the persistent legal-cultural resistance towards administrative courts. In the domains of court-connected mediation and victim-offender mediation, a new divide has emerged, as Finland and Norway have embraced mediation, while Swedish legal culture has been more reluctant to mediation.⁶⁸ A similar divide seems to apply to plea bargaining as well.⁶⁹ Perhaps some of the differences can be attributed to the ideal of 'legalism' among Swedish judges, in contrast to the more pragmatic attitude of Finnish (and Norwegian) judges.⁷⁰ Differences in the attitudes towards mediation has devitalised the East–West divide and created new divides.

⁶⁶Hjort (2021).

⁶⁷Jensen (2021).

⁶⁸Nylund (2021b).

⁶⁹Ervo (2021b).

⁷⁰Ervo (2021a).

8 The Future of Nordic Courts

What are the prospects of a distinct Nordic procedural culture amid Europeanisation, globalisation and privatisation of dispute resolution?

Being Nordic has never entailed a uniform court structure or uniform procedural legislation: instead, the similarity of the underlying ideas, values and concepts, as well as shared cultural, economic, and societal structures, have constituted the basis of the Nordic legal culture. Consequently, upholding ‘Nordic-ness’ does not require identical legislative changes in the Nordic countries; it is sufficient that processes such as privatisation and Europeanisation prompt similar changes in the underlying ideas and concepts. The increasing tendency of Supreme Courts to perform judicial review, courts’ hesitation to engaging in dialogue with the Court of Justice of the European Union and the EFTA Court and the increased focus on courts facilitating settlement have resulted in the metamorphosis of the role of Nordic courts; however, since the changes are largely congruous, it is primarily the content of ‘Nordic-ness’ that has changed, while the degree to which courts and court proceedings can be labelled as ‘Nordic’ has remained largely unaltered. The EEA and Schengen Agreements have been pivotal in this respect, since they enable Iceland and Norway to participate in many of the processes, either formally or *de facto*.⁷¹ Nevertheless, differences in the views on the functions and form of administrative courts maintain a divide among the Nordic countries, and the manner in which and degree to which mediation processes are integrated in the civil and criminal justice systems could also be a source of increasing differences.

The ideological mainstays of Nordic court proceedings appear to be almost immutable: the generalist judge is still the ideal; pragmatism and high trust in judges have resulted in general, flexible procedural rules; language is fairly simple and judges strive to write comprehensible rulings; and judges must seek to balance and forge information derived from various sources and sometimes unite various interests.

The networks, shared culture and (with the exception of Finland and partly Iceland) shared language preserve legal unity and a shared legal culture. Seeking assistance is easy when communication is less formal, or even informal, such as when sending an email or telephoning a colleague one knows by name, instead of having to proceed formally through a long chain of intermediaries such as the Prosecutor General or the Central Authority.⁷² Often, both parties involved can use their first language. Nonetheless, Nordic lawyers have not fully tapped into the potential of cooperation, particularly regarding pre-emptive attempts to shape EU hard law

⁷¹The Maintenance Regulation, Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, O.J. L7/1 (2009), is intertwined with the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, in a manner that enables third countries, such as Iceland and Norway, to align their system with the internal EU system, see Lipp (2019) and Nylund (2019a).

⁷²Helenius (2021).

with procedural implications and in ensuring quality implementation.⁷³ The future of Nordic procedural law thus depends to a large extent on whether Nordic lawyers attempt to maintain strong ties and find new methods of fruitful cooperation.

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⁷³Nylund (2021c).

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