The History of Nordic Legal Culture and Court Culture: The Story of What Should not Have Been, but Still Came to Be

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Abstract The story of the making of a Nordic legal culture and court culture appears, at first glance, to be a story of what should not have been. Culture is about commonalities arising from common experiences. However, the similarities between the Nordic countries' political history are limited, with no common institutions before the late nineteenth century, large language similarities but no common legal language, and—most importantly—no common legal procedure. Still, the natural conditions in the very north of Europe came to shape the political and legal systems in similar ways, stimulating the desire to create a Nordic legal culture in the second half of the nineteenth century, with the Nordic Meeting for Lawyers playing a crucial role. Hence, law in the Nordic countries shares several characteristics today: a strong legislative tradition and strong courts with lay participation, accessible legal language in legislation and court decisions and orality in legal procedure, a small number of legal professionals and a small and pragmatic legal science. These characteristics can be viewed as building blocks in an overarching characteristic of Nordic legal culture and court culture: dialogue.

1 How to Approach Legal Culture

The Norwegian ambassador to Stockholm, former Prime mister Francis Hagerup, declared himself an advocate for a Nordic legal culture in 1916.[1] The Swedish Prime minister Carl Gustav Ekman spoke in 1928 on the necessity of a Nordic legal culture.[2] The Norwegian Minister of Justice Asbjørn Lindboe spoke of a Nordic legal culture at the Nordic meeting for heads of police in Oslo in 1932.[3] In Danish newspapers in

[1] *Stavanger Aftenblad* 8 November 1916.

[2] *Bergens Tidende* 20 July 1928.

[3] *Nordisk Politichef-konferanse,* 1932, p. 6.

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L. Ervo et al. (eds.), *Rethinking Nordic Courts*, Ius Gentium: Comparative Perspectives on Law and Justice 90, https://doi.org/10.1007/978-3-030-74851-7_4

1933, during the Greenland conflict between Norway and Denmark, it was claimed that Norway was a disgrace to the Nordic legal culture,[4] and at the meeting of the Nordic branches of the International Council on Social Welfare in 1934 a Nordic legal culture was again referred to as a fact.[5] The notion of a Nordic legal culture evolved quickly from something to be established to an established fact in the interwar period.

However, was this just a notion, or is there really a Nordic legal culture and even a Nordic court culture? If you ask a Nordic judge with international experience, he or she will confirm that the Nordic judges in international meetings often have the same viewpoints and take the same stands, as well as that they often socialise in the evening when the meeting is over. A Nordic prosecutor would confirm that this is also the case for Nordic lawyers, and for politicians the same would apply; in fact, people in all Nordic countries feel related and seek each other's company when staying outside their region in Europe. This very simple observation shows that there is a notion of Nordicness among Nordic lawyers and judges, as there is in general in the Nordic countries.[6] We are not only talking of a Nordic court culture, but a notion of a legal culture and Nordic culture in general.[7]

There are even empirical data that support this notion of Nordicness. If we apply the cultural model developed by Geert Hofstede for comparing national cultures, the Nordic countries display fairly high commonalities. The model measures power distance,[8] individualism versus collectivism,[9] masculinity versus femininity,[10] uncertainty avoidance,[11] long-term versus short-term orientation,[12] and indulgence versus

[4] *Morgenavisen* 9. February 1933.

[5] *Forhandlingene under Nordisk socialt møte 17–18 September* 1934, p. 56.

[6] On Nordicness, see Letto-Vanamo et al. (2019) for investigations of Nordicness and a Nordic legal culture.

[7] On a Nordic legal family and a Nordic legal culture, see Husa et al. (2007), Nylund (2010) and Letto-Vanamo et al. (2019).

[8] 'People in societies exhibiting a large degree of Power Distance accept a hierarchical order in which everybody has a place and which needs no further justification. In societies with low Power Distance, people strive to equalise the distribution of power and demand justification for inequalities of power'; https://hi.hofstede-insights.com/national-culture. Accessed 25 May 2020.

[9] 'The high side of this dimension, called Individualism, can be defined as a preference for a loosely-knit social framework in which individuals are expected to take care of only themselves and their immediate families. Its opposite, Collectivism, represents a preference for a tightly-knit framework in society in which individuals can expect their relatives or members of a particular ingroup to look after them in exchange for unquestioning loyalty'; https://hi.hofstede-insights.com/national-culture. Accessed 25 May 2020.

[10] 'The Masculinity side of this dimension represents a preference in society for achievement, heroism, assertiveness, and material rewards for success. Society at large is more competitive. Its opposite, Femininity, stands for a preference for cooperation, modesty, caring for the weak and quality of life. Society at large is more consensus-oriented'; https://hi.hofstede-insights.com/national-culture. Accessed 25 May 2020.

[11] 'The Uncertainty Avoidance dimension expresses the degree to which the members of a society feel uncomfortable with uncertainty and ambiguity. (…) Countries exhibiting strong UAI maintain rigid codes of belief and behaviour, and are intolerant of unorthodox behaviour and ideas. Weak UAI societies maintain a more relaxed attitude in which practice counts more than principles'; https://hi.hofstede-insights.com/national-culture. Accessed 25 May 2020.

[12] 'Every society has to maintain some links with its own past while dealing with the challenges of the present and the future. (…) Societies who score low on this dimension, for example, prefer to

restraint.[13] According to this model, the Nordic countries are generally characterised by a mentality of equality, collectivism, cooperation, stability, strong social norms, and a balance between past and future orientations.[14] If we compare with the Baltic states, Estonia, Latvia and Lithuania, we find that they score similarly to the Nordic countries, but they are more focused on the future and have much weaker social norms.[15] When comparing with the United Kingdom, France, Belgium, the Netherlands and Germany, we can see that in general especially the desire to cooperate, to seek stability and to focus on the future rather than the past is higher in the Nordic countries.[16] If we then compare with Portugal, Spain, Italy and Greece, we see that similarities are only coincidental.[17]

According to this model, then, there is a Nordic culture in general, both because the Nordic countries have common features and because they share more common features with each other than with other countries. However, can we also speak of a Nordic legal culture and a Nordic court culture more scientifically and not only as a notion? This question will be investigated in this chapter after we have defined and explained legal culture theoretically and have investigated how different kinds of interrelations are decisive for the making of legal culture. What we will see is that the history of Nordic legal culture and court culture is the story of what should not have been, but still came to be.

2 Legal Culture Defined and Explained

Legal culture has been defined in different ways. Lawrence M. Friedman, a pioneer within legal-cultural studies, defines legal culture in *The Legal System* (1975) as comprising the 'ideas, values, attitudes and beliefs of a specific group of people

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maintain time-honoured traditions and norms while viewing societal change with suspicion. Those with a culture which scores high, on the other hand, take a more pragmatic approach: they encourage thrift and efforts in modern education as a way to prepare for the future'; https://hi.hofstede-insights.com/national-culture. Accessed 25 May 2020.

[13] 'Indulgence stands for a society that allows relatively free gratification of basic and natural human drives related to enjoying life and having fun. Restraint stands for a society that suppresses gratification of needs and regulates it by means of strict social norms'; https://hi.hofstede-insights.com/national-culture. Accessed 25 May 2020.

[14] See https://www.hofstede-insights.com/country-comparison/denmark,finland,norway,sweden/ and https://www.hofstede-insights.com/country-comparison/iceland/. Accessed 25 May 2020. See Husa et al. (2007), p. 28.

[15] See https://www.hofstede-insights.com/country-comparison/estonia,latvia,lithuania/. Accessed 25 May 2020.

[16] See https://www.hofstede-insights.com/country-comparison/france,germany,the-netherlands,the-uk/ and https://www.hofstede-insights.com/country-comparison/belgium/. Accesed 25 May 2020.

[17] See https://www.hofstede-insights.com/country-comparison/greece,italy,portugal,spain/. Accessed 25 May 2020.

towards law'.[18] This definition can be taken as representative of a whole tradition within legal-cultural research, where the emphasis is on mentality and what we can call ideas and expectations of law.[19] Differing from this tradition, John Bell claims that '[T]he law is something more than simply a system of rules or legal standards. Those rules operate in a context of institutions, professions and values that form together a "legal culture".'[20] Legal culture is, according to Bell, not merely a question of ideas and expectations of law but also of the institutional practices that constitutes law. However, Bell overemphasises the latter when he claims that 'the institutional systems and practices precede the ideas'.[21] Hence, we will take a middle way and define legal culture as ideas and expectations of law made operational by institutional practices.[22]

Even when defined, legal culture can still seem to be more a notion than a fact. There is a long and rather varied tradition of splitting legal culture into elements to make it more manageable as an analytical tool. In a pioneer article on 'Foundations of European Legal Culture' published in 1985, Franz Wieacker investigates (1) personalism, (2) legalism, and (3) intellectualism with regard to the European legal culture.[23] Mark van Hoecke and Mark Warrington, in their article 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model of Comparative Law' from 1998, investigate legal cultures using the elements of (1) concept of law, (2) legal sources, (3) legal method, (4) argumentation, (5) legitimation, and (6) ideology.[24] John Bell, in his *Judiciaries of Europe* (2006) applies a personal, institutional and external perspective on the judiciary to reveal its character in France, Germany, Spain, Sweden and England. In practice, he investigates (1) the organisational setting and the judicial career, (2) history and values, (3) the judicial role, (4) professional judges and the legal community, (5) lay judges and (6) professional judges. We have chosen a different approach, as we split legal culture into institutional and intellectual structure and six elements, all together making up the legal cultural model. Under the institutional structure, we find there are two elements to be investigated when exploring legal cultures: (1) conflict resolution and (2) norm production. Under the intellectual structure, we find four more legal-cultural elements to be explored: (3) idea of justice, (4) legal method, (5) professionalisation, and (6) internationalisation.[25]

The institutional structure of a legal culture is, in short, that of institutions wherein law is shaped through different practices. Since the High Middle Ages, the main practices for shaping law in the Nordic countries have been court decisions and legislation. The intellectual structure consists of, in short, the ideas and expectations of law that influence the different practices shaping law. Court decisions and legislation are made

[18] Friedman (1975), p. 223.

[19] See the discussion in Cotterrell (2019), pp. 720–724.

[20] Bell (2006), p. 6, which is the definition he also uses in Bell (2001).

[21] Bell (2006), p. 7.

[22] Sunde (2010), p. 20, Sunde (2011), p. 51, Sunde (2014), p. 231 and Sunde (2020), p. 27.

[23] Wieacker (1990), p. 1.

[24] Hoecke and Warrington (1998), p. 495.

[25] Sunde (2020), pp. 33–34.

according to an idea of what is just and fair, and they come with a legal method that ensures that the applied law fulfils the ideas and expectations with regard to justice and fairness. What is considered just and fair might vary among professional lawyers and laypeople, and hence the level of professionalisation in the legal system is of importance with regard to what the ideas and expectations of the law will be. The international influence on the law also influences the ideas and expectations of the law, and hence it is among the legal-cultural elements under the intellectual structure.

We will investigate the Nordic legal culture and court culture by the above-presented definition of legal culture and the legal-cultural model. The investigation will include both legal culture and court culture, since they are highly intertwined in the Nordic countries. However, first we have to explain how we can speak of a Nordic legal culture and court culture as something more than a sense of Nordicness. After all, the Nordic countries have only limited commonalities in their political history, no common institutions before the late nineteenth century, large language similarities but no common legal language, and no common legal procedure.

3 The Interactions that Shape a Legal Culture

The are many definitions of culture. For our purpose, it is sufficient to state that culture is a product of human interaction; that is, it is through interaction in different social settings that shared ideas and expectations emerge. This is how a common understanding of words, sentence structure, and grammar is created, upheld, changed and finally lost. This is also what governs the life cycle of conflict resolution and norm production, ideas of justice, legal methods, level of professionalisation and internationalisation. In this context, interaction is to be understood more like communication, since it includes all kinds of information transfer and is not dependent on people actually being in the same place at the same time, observing and participating in the same events.[26]

The shared ideas and expectations of law are strongest between those who interact most often, whereas they weaken as the degree of interaction decreases until they are finally entirely lost. There are four modes of interaction that are interesting when studying legal culture and court culture. The first mode of interaction is between people sharing the space of the world with each other, the second is between people now and in the past, the third is between people and institutions, and the fourth is between people and nature. It is in the crossroads between these four modes of interaction that ideas and expectations of law are shaped through institutional practices.

It is fairly obvious that interactions between people sharing the world shape legal culture and court culture. Meetings between judges in court buildings, meetings of presidents of administrative courts or of the Consultative Council of European Judges, or the Nordic Lawyers Meeting are all events that at different levels contribute to

[26] See Kvam (2010), pp. 183–183.

creating common ideas and expectations of law. However, we must not get lost in the internal legal interactions. In addition to the internal legal culture, which is the legal culture shared by lawyers, there is also an external legal culture.[27] The external legal culture is not much investigated in legal literature, but it is the lay or popular legal culture[28] shared by the legal subjects. Especially the Nordic court culture, with its tradition of lay participation,[29] has been and partly is shaped by the interaction with the ideas and expectations of law in society more widely. However, we must also not forget that law is not a closed system in relation to the society it regulates,[30] and discussions on law in media, ordinary conversations, and so on also contribute to the interaction shaping the ideas and expectations of law.

It is obvious that history plays a role when shaping the ideas and expectations of law. No language speaker starts from scratch when making sense of and speaking a language, because we inherit the use of the language of previous users. This path dependency also applies to legal culture and court culture.[31] This does not mean that all Nordic lawyers at all times have shared the same ideas and expectations of courts. Rather, it only implies that there are always existing ideas and expectations with which new ideas and expectations must interact. While Sweden and Finland have a well-established system of administrative courts, Iceland, Norway and Denmark have no separate administrative court or chambers for administrative cases in general courts, and it is hard to see any other reason than history for this distinction.[32]

It is less obvious that the communication between different institutions and between institutions and people also must be taken into consideration as a separate kind of interaction. This is because institutions are not actors but rather consist of people who act on their behalf and in their name. However, institutions are different from groups of people in general. Social, ethnic and religious groups are often organised, but organisation is not their primary objective. An institution consists of a group of people with the primary objective of being sufficiently organises to be able to perform specific tasks with efficiency. Law-making and -applying institutions like Parliaments, Departments of Justice and the judiciary hence shape our ideas and expectations of the law to a much larger extent than the interactions of people. This said, we must not forget that the interactions of and with institutions have less effect when they do not correspond with the existing ideas and expectations. Hence, institutions are forceful but also are in a dialogue and have their ideas and expectations shaped through the interactions in which they take part.

The importance of the nature for legal culture has long been stressed. In the seventh century, Isidor of Seville, a bishop on the Iberian Peninsula, noted that good laws were those adjusted to local conditions and customs: ‘A law should be honourable,

[27] See briefly Friedman (1975), pp. 223–224, but also Gibson and Caldeira (1996), p. 58.

[28] See Cotterrell (2019), p. 718.

[29] On lay participation in Nordic courts, see Letto-Vanamo (2021).

[30] Eckhoff and Sundby (1991), p. 45.

[31] See Husa et al. (2007), pp. 10–13.

[32] See Difi-notat 2012:3 Forvaltningsdomstoler i Norge? Kort gjennomgang av begreper og synspunkter. Direktoratet for forvaltning og IKT, Oslo, pp. 15–16.

just, feasible, *in agreement with nature*, in agreement with the custom of the country, appropriate to the time and place'.[33] The same idea was later expressed in *De l'esprit des lois*, published by Charles Montesquieu in 1748, in which he, like Isidor, advised the lawmaker to make law in accordance with the local natural and cultural conditions:

> They [the laws] should be in relation to *the climate of each country, to the quality of its soil, to its situation and extent,* to the principal occupation of the natives (…) they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to the inclinations, riches, numbers, commerce, manners, and customs.[34]

Historically, the interaction with nature has been very important as a precondition for survival. This is less the case for many people today. However, as we have seen, historical interactions shape ideas and expectations of law just like contemporary interactions do. Hence, we still have to take into consideration the interaction with nature as a framework for all other interactions that shape ideas and expectations of law.

We have above considered the four different modes of interaction that shape legal culture and court culture. We will now apply them actively to identify and explore crucial factors in a Nordic legal culture and court culture.

4 A Nordic Legal Culture and Court Culture

4.1 The Interaction of Nature and History

We have seen that Charles Montesquieu was of the opinion that 'the climate of each country, to the quality of its soil, to its situation and extent' was important to take into consideration when making laws.[35] This climate theory was as important to Western legal development as the theory of the three branches of government, since it was decisive for the popularity of the idea of national law as good law. However, by the second half of the eighteenth century it was already controversial. Still, as explained above, there are good reasons for a modest use of this perspective.[36] When it comes to the Nordic countries, we should keep in mind that the relationship between geography on one hand and governance on the other is vital due to the Nordic states' vast territories with small populations.[37]

The Nordic countries' vast territories can be difficult to traverse. Historically, this was even more the case.[38] In the High Middle Ages, Norway ruled Orkney, Shetland, the Faeroe Islands, Greenland and Iceland in addition to mainland Norway. The

[33] *The Etymologies of Isidor of Sevilla* (2006), p. 121 no. xxi (italics mine).

[34] Montesquieu (2001), p. 23 (italics mine). See also p. 246.

[35] See Shackleton (1955), pp. 317–32.

[36] See Lando (2001), p. 6.

[37] With Denmark as an exception.

[38] For a short introduction to the Nordic realms in the Middle Ages, see Korpiola (2018), pp. 378–381.

Swedish realm included Finland, and Norway was ruled by the Swedish king from 1319 until 1397. From then until 1523, the Scandinavian kingdoms were joined under one queen or king. Later Denmark, Norway, Iceland and the Faeroe Island made up the Western Scandinavian realm,[39] and Sweden and Finland the Eastern Scandinavian realm. In the seventeenth century, Sweden would also rule the Baltic States and territories stretching far down into the European continent, while Denmark would acquire small colonies in India, Africa and the Caribbean. In 1811, Finland became a grand duchy under the rule of the Russian Czar. Three years later, the Swedish king possessed the Norwegian crown in a political union between the two countries. Norway gained its independence in 1905, Finland gained independence in 1917 and Iceland became an independent republic in 1944.[40]

A vast territory is difficult to control. However, control is essential to establish authority to tax and, in so doing, to establish the economic foundation for a state. How does one exert control when communication possibilities are limited and the territory one wants to control is vast? Very generally speaking, we can say that one instrument to strengthen central power in the Middle Ages, when the foundation of the modern state was made, was, paradoxically, to establish a decentralised feudal system of power. This system of power aimed at making sure that central power through vassals as agents reached out to every corner of the realm. Another instrument was—again very generally speaking, and paradoxically—to encourage the establishment of towns with a large degree of internal self-rule to attract trade and, hence, to be able to target taxation.[41]

In most of the Nordic countries, these two strategies were less suitable. Large parts of the Nordic countries were forested, were dominated by mountains or had a rugged coastline. Hence, it was hard for knights in castles with their soldiers to achieve military control. Moreover, it was in the hard-to-control areas that the natural resources[42] that were popular on the European market were found, like fish, walrus tusks, falcons, cairn cat (ermine) fur, and so on. At the same time, most Nordic towns stayed rather small until the nineteenth century. Hence, a model very different from feudalism and urbanisation had to be developed in the Nordic countries for control, enabling taxation, state formation and growth[43]—one of cooperation with the local peasantry and their popular assemblies.[44] This would prove most important for the development of a Nordic legal culture.[45]

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[39]The Orkney Islands and Shetland were mortgaged to Scotland in 1468 and 1469, and control of governance was lost step by step until 1611, when the islands definitely were included in the Scottish realm when Norwegian law was replaced with Scottish.

[40]For a short introduction to the Nordic countries in the Early Modern Period, see Pihlajamäki (2018), p. 807. It can also be noted that Denmark lost Schleswig and Holstein in 1850 and 1864 and that Finland lost its parts of Karelia in 1940.

[41]See the analysis of Sassen (2006), pp. 31–61.

[42]On the role of controlling access to natural resources and markets, see Iversen (2020), pp. 297–298.

[43]On feudal structures and urbanisation in the Nordic countries, see Pihlajamäki et al. (2018), pp. 808–811 and 821–822.

[44]Iversen (2016), pp. 124–135.

[45]See analysis in Bagge (2010), pp. 379–387.

In Nordic regions and localities there were popular assemblies. The origin of these assemblies is uncertain; the only major popular assembly whose origin we know with certainty is the annual Icelandic Alþingi meeting at Þingvellir that began in 930. It was established by the elite of Iceland as a popular assembly and instrument of governance. For the other Nordic countries, we can say that the king and the church—as the two parts of state power in the Middle Ages—took an interest in the assemblies and reorganised them to suit their purpose—that is, as an instrument for interaction and governance.

Popular assemblies were in no way unique to the Nordic countries. Rather, this was a rather universal instrument for governance. However, with state formation, popular assemblies easily lose power to the sovereign and the ruling elite.[46] This is also the case in the Nordic countries, but to a far lesser degree.[47] The popular assemblies, reshaped by royal power, were necessary as a place where royal and local authorities could interact for governance purposes in the absence of feudal lords and towns. The popular assemblies thus became a birthplace for a system of interaction making shared authority and governance possible.[48]

4.2 Interaction of People and History

Without going into detail, it became the prerogative of the king and church in the Nordic realms in the High Middle Ages to legislate, with the legislation being valid from the promulgation at the assembly. It is a common trait among all the Nordic realms that they used this technique of governance very soon after it was developed in the study of Roman and Canon law from the middle of the twelfth century. The code of law, Liber Augustalis, issued by King Fredric II of Sicily in 1231, can be seen as the first extensive and cohesive legislative effort in Europe in the High Middle Ages.[49] King Valdemar I of Denmark issued a code of law for Jutland in 1241; King Magnus VI of Norway issued a code of law for the realm in 1274, a code for the towns in 1276 and a code of law for Iceland in 1281; and King Magnus IV of Sweden did the same in his realm around 1350.[50] These were not singular events but established legislation as an instrument for governance.[51] Hence, singular statutes amending the codes of law were issued in all Nordic realms throughout the Middle Ages and into the Early Modern Period starting with the Reformation. In 1683 and 1687, the Danish King Christian V issued new codes of law for Denmark and Norway, respectively, while Iceland kept their medieval code from 1281 up to the present day. In 1734,

[46] Iversen (2013), pp. 5–17.

[47] See Husa et al. (2007), p. 15.

[48] See Bagge (2010), p. 226.

[49] Wolf (1996), pp. 47–48.

[50] On legislation in the Nordic realms in the Middle Ages, see Korpiola et al. (2018), pp. 385–388.

[51] See Husa et al. (2007), p. 15.

Fredric I of Sweden issued a code for his Swedish realm, including Finland.[52] Thus, the Nordic countries have a long tradition of governance through legislated law.[53] However, none of the Nordic countries has a code of law in the modern sense, which has given leeway for the legal pragmatism that we will deal with later.[54]

Making codes of law as an instrument of governance does not mean that one actually governs. Law in book and law in action do not have to correspond, and throughout most of legal history the correspondence between the two has in general been weak. The interaction between governing institutions and the governed has hence been equally weak. However, the number of preserved copies of the medieval codes for Jutland, Norway, Iceland and Sweden with Finland indicates that the codes were effectual instrument of interaction.[55] This was not due to the codes themselves but, rather, to their application, which to some extent took the interaction from command to dialogue. Lay participation in courts lasted longer in the Nordic countries than in most other European countries[56] (with the exception of the British Isles)—long enough to enjoy the revitalisation of lay judges with the French revolution. However, from the Early Modern Period, lay participation in Nordic courts was only found in the first-level courts. In the state hierarchy, these courts are subject to higher courts and hence are the courts with the least power to influence the shaping of law. At the same time, it was the first-level courts that decided the large majority of cases. Still, the continuous use of lay judges in Nordic courts is less important than the notion of lay judges being a Nordic legal feature to be restored in the nineteenth and early twentieth century, as the effect of actual and desired continuity is often much the same.

A long tradition of lay participation in courts, a long tradition of legislation, the use of the courts as a place for dialogue between sovereign and subjects, and the application of law as an act of dialogue would not have been possible without a tradition for using the vernacular language in a legal context.[57] With the exception of Denmark, Nordic legislation and legal documents have primarily been in the vernacular language.[58] Roman and Canon law, which was the learned law studied at universities from the middle of the twelfth century, was written and taught in Latin. Latin would also, to a large degree, become the legal language in Western Europe in the Middle Ages and onwards to the seventeenth and eighteenth centuries.[59] Hence, the legislation in the Nordic countries sprung from a learned law tradition totally dominated by Latin, in a cultural sphere where Latin in general was the primary

[52] Pihlajamäki et al. (2018), pp. 812–814.

[53] See Letto-Vanamo (2021) on the role of legislation in the Nordic countries.

[54] See Husa et al. (2007), pp. 18–20; see also p. 23.

[55] *Danmarks gamle landskapslove med kirkeloverne*, Jónsson (2004), p. 26, and *Samlig af Sweriges Gamla Lagar* Schlyter (1982), pp. I-LXI.

[56] Husa et al. (2007), pp. 15–17. For France and Germany, see Dawson (1960), pp. 69–83 and 109–112.

[57] On law and language, see Tamm (2021).

[58] Mattila (2006), p. 131.

[59] Mattila (2006), pp. 126–131.

legal language. However, the legislation enacted in the Nordic countries was in the vernacular language. This was not due to a lack of knowledge of learned law or Latin.[60] For instance, as early as 1163 or 1164 we find the first adaptation of Roman law in Norwegian law,[61] only decades after the study of Roman law emerged as a subject taught at universities. In general, Roman and Canon law's influence on Nordic law was quite substantial in Nordic legislation. From this perspective, abandoning Latin as a legal language was not an obvious choice and, hence, must have been done deliberately. However, taking into consideration the model of governance, with the public assembly as a place for dialogue, using the vernacular as legal language was a natural choice. Hence, this was a result of the governance model chosen in the Nordic countries. This also had an effect on the legal profession.

The universities of Uppsala and Copenhagen were established in 1477 and 1479 and offered lectures in law.[62] For members of the upper strata of society, it was not unusual to go abroad to study law before taking a seat in the higher courts or in chambers overseeing legislation.[63] However, a legal education was not a requirement for actors within the legal systems in the Nordic countries before 1736 for the Danish-Norwegian realm, nor before 1749 for the Swedish realm including Finland. Hence, it was not until the beginning of the nineteenth century that Nordic judges, prosecutors and judges all had a legal degree. This means that the Nordic legal and court culture was first fully professionalised at the time when lay participation in Western Europe was revitalised after the French revolution. The introduction of the jury system was a major instrument for making courts an arena for dialogue between legislators and legal subjects. During the nineteenth century, increased lay participation in courts would crash with the increase in the legal profession ultimately reversing and thus preserving this ancient dialogic feature of Nordic law.

Orality in court procedure is closely linked to lay participation.[64] As has been stressed above, lay participation in courts is a general feature in Nordic courts, and lay participation has favoured an oral procedure; listening to claims and the presentation of evidence are more effectual with lay judges than passing around written documents, and vice versa.[65] This is also why written documents play a more prominent role in the Nordic Supreme Courts, which have never had any lay participation, than in lower courts. The historical situation has slightly changed, since Iceland today has no lay participation in courts, and Finland has had few lay judges since a reform in 1993.[66] However, few European countries have more lay judges in relation to professional judges than Finland, with a ratio of 1.7 lay judges per 1 professional

[60] On excess of learned law in Nordic realms, see Korpiola et al. (2018), pp. 390–394; on application of learned law in the political sphere, see Korpiola et al. (2018), pp. 396–399.

[61] Sunde (2019), pp. 151–152.

[62] Pihlajamäki et al. (2018), p. 823.

[63] See Husa et al. (2007), p. 17, which briefly deals with this for Sweden and Finland.

[64] On orality and legal procedure, see Hjort (2021).

[65] The exception is Iceland, which has an oral procedure but no lay judges in the courts today.

[66] See p. 3 at https://finlex.fi/sv/esitykset/he/2014/20140004.pdf and at https://finlex.fi/sv/esitykset/he/2008/20080085.pdf. Accessed 25 May 2020.

judge.[67] This leaves Finland as number 12 of 20 European countries (out of the total of 48) that have lay judges at all. The top four countries in Europe with the largest number of lay judges compared to professional ones are Norway (78:1), Denmark (29:1), the UK (9.3:1) and Sweden (7.6:1).[68] The UK also has a long history of oral procedure, which strengthens the assumption that there is, in general, a relation between orality and lay participation.

The use of vernacular language and the orality of legal procedure must not only be seen in light of lay participation in courts but must also be related to the legislative tradition. Since the Middle Ages, the Nordic legislation has aimed at the general public and not at a class of learned lawyers (which, in any case, did not exist). Since the legislation was aimed at the general public and not trained lawyers, the legislative language was straightforward and close to the everyday language used in society. This is, of course, relative: the legislative language, like the language used in courts and court decisions, has been criticised both in the Nordic countries and in general for being overly complicated and dependent on alienating terminology. However, compared to the legal language in comparable countries in Western Europe, the Nordic legal language has been relatively accessible and the legislation possible to read and understand, albeit not at the level of detail that only legal interpretation can explore. When orality is a dominant legal characteristic in general,[69] the legislative language will be brought closer to everyday language. This has to been seen in light of the dialogue perspective that has already stressed several times: if the legislator and the courts with the lay judges are in a dialogue, the legislative language has to promote and not disrupt the dialogue. This will also pull the legislative language towards the everyday language.

When a legal profession with trained lawyers emerged and became a factor in the legal system, the legal language should have changed and become more professional as well. At least for the Danish-Norwegian realm, this was the case in the second half of the eighteenth century, with, for instance, a notable increase in the use of Latin legal terminology in legal practice. However, during the nineteenth century, legislative technique changed and preparatory work, often written by or with the participation of legal scholars, accompany the legislation. In the preparatory work, we find more detailed and sophisticated legal discussion, making it possible to keep the legal language rather straightforward and close to everyday language. This is one reason why preparatory work is a legal source in all Nordic countries.[70]

The late professionalisation of Nordic law and courts is linked to the late growth of legal science in this northern region of Europe. Without students attending lectures in

[67] These countries are Belgium (2.3:1), the Czech Republic (2:1), Estonia (2.1:1), France (3.7:1), Germany (4.7:1), Monaco (4:1), Slovenia (3.9:1) and the UK (9.3:1); European Commission for the Efficiency of Justice, 'European judicial systems—Efficiency and quality of justice', *CEPEJ Studies*, no. 26 2018, p. 103. Available at https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c. Accessed 22 May 2020.

[68] European Commission for the Efficiency of Justice 2018, p. 103. Available at https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c. Accessed 22 May 2020.

[69] Nylund (2010), pp. 177–178 and Nylund et al. (2019), pp. 208–209.

[70] Husa et al. (2007), p. 34 and Nylund (2010), p. 174.

law, there was no need for more than a handful of professors in the subject, for legal literature and legal journals. In all these aspects, Nordic law was not in sync with the rest of Western Europe.[71] It can be argued that a legal science to be reckoned with in the legal system first emerged in the nineteenth century. Legal science hence did not become a go-between between legislator and court before the American, French, and subsequent revolutions made the democratic idea popular and an effective force in society. On one hand, it took the entire nineteenth century to develop the Nordic democracies. The Norwegian constitution of 1814 introduced a radical democracy, but it was no longer up to date with Western European democratic development after 1848. Denmark and Iceland, Sweden and the grand duchy of Finland were still lurking behind and did not catch up with Norway before the First World War. On the other hand, the democratic idea, implying that the people constituted the legislator, still made it difficult for the legal science to become too much of a filter in the dialogue between legislator and courts.

The dominating legal theoretical tradition in the Nordic countries is one that we can label Scandinavian legal pragmatism. Lars Björne finds there is a long tradition of the present legal method in the Nordic countries that gives room for legal pragmatism in Nordic law.[72] This pragmatic tradition has dominated in the Nordic countries since the emergence of legal science in the eighteenth century, partly due to the weak position of legal science. In Norway, for instance, the number of ordinary professors in law was not greater than the 18 Supreme Court justices before in the 1980s. This meant that legal science was not in a position to push a legal theory or a legal method that would have a normative effect on the well-established and strong court and legislative traditions. Instead of becoming a go-between, legal science instead became a dialogue smoother, pushing a legal theory emphasising both law and legal practice and creating an instrument to harmonise the two. As Lars Björne has shown, the instrument to achieve this harmony was to operate with a wide range of legal sources that were less structured in a hierarchy than levelled. Not only did this approach make it possible to harmonise the apparent legal dichotomy of legislation and practice, but the harmonisation of a multitude of legal sources gave leeway for pragmatic considerations in legal practice as a glue holding the different pieces together. This fit well with lay participation, orality and the late emergence of professional lawyers and legal science. This can also be claimed to be the essence of Scandinavian legal realism,[73] but more generally it describes the core of the theory and method of law in the Nordic countries.

Thus far, we have seen how the natural conditions of the Nordic countries influence the model of governance chosen, as well as how this model is linked to several characteristics of Nordic legal culture and court culture that have been developed throughout history. These characteristics include a strong legislative tradition and strong courts with lay participation, accessible legal language in legislation and court decisions and orality in legal procedure, a small number of legal professionals and a

[71] See Husa et al. (2007), p. 17.

[72] Björne (1991), pp. 218–225.

[73] See Husa et al. (2007), pp. 32–33.

small and pragmatic legal science. These characteristics can be viewed as building blocks in an overarching characteristic of Nordic legal culture and court culture: dialogue.

Up till now, we have examined the interactions between nature and people and between history and people. These interactions prepare for the rather late interactions between people sharing the world together and between institutions and people that would be decisive for taking these characteristics and transforming them to a Nordic legal culture and court culture.

4.3 Interaction of People and Institutions

As we have seen, the Nordic countries were tied together in one political union from 1397 to 1523. More than 125 years of common political history is, on one hand, not insignificant. On the other hand, we are only referring to a personal union, with each country having their own political institutions, and a union that was superseded with a period of almost 300 years with a Danish-Norwegian Western Scandinavian realm including Iceland and a Swedish Eastern Nordic realm including Finland. These two realms were frequently at war with each other until the end of the Great Nordic War in 1720. However, in the second half of the nineteenth century, a pan-Scandinavian movement emerged. With it came a desire to identify, highlight and develop commonalities. As we have seen, such commonalities could also be found within law, and lawyers were not indifferent to these changes. This is the backdrop for the first Nordic Meeting for Lawyers in 1872.[74]

The common features of the legal cultures and court cultures developed through the interactions between nature and people and between history and people explain why the Nordic Meetings for Lawyers could become important. The meetings take place only every third year and last for a couple of days. Such short and periodic meetings might not be expected to contribute much to the shaping of a Nordic legal culture and court culture. However, the experience of shared common legal characteristics also had the effect that the Nordic Meeting for Lawyers de facto gave birth to a much more intensive and decisive interaction between institutions and people, as well as to institutional practices.

A series of common Nordic legislation has been produced since 1880. The legislative cooperation was very important until the 1960s[75] but was later made less relevant because of legislative cooperation within the EEA and EU.[76] However, the cooperation between legislative institutions is still important, even though it does not produce statutes enacted in all Nordic countries.

Firstly, meetings are still held between the Departments of Justice in the Nordic countries to mend existing legislation, to discuss new legislation, and to establish a

[74] See Boucht (1999), pp. 748–775.

[75] Nylund (2010), pp. 172–176.

[76] In Backer (2018), p. 18.

common front regarding EU legislation.[77] Secondly, some of the individuals engaged in these meetings are also engaged in the Nordisk Administrativt forbund (Nordic Administrative Association) established in 1918.[78] Most of their meetings are held nationally by each national branch, but they hold their own Nordic meetings.[79] Since 1920, they have published their own Nordic journal,[80] withholding the Nordic focus and strengthening the institutional cooperation by pulling together the individuals acting on behalf of the institutions.

The Nordic Lawyers' Meetings also came to be the first move towards other kinds of legal cooperation. Since 1888, *Tidsskrift for rettsvitenskap* (*Scandinavian Journal of Law*) has been published, targeting Nordic lawyers.[81] Even before the journal, there was already Nordic cooperation within legal science. However, the journal, with board members for the different Nordic countries, advanced this cooperation. At the university level, there are meetings and cooperation between Nordic legal scholars in the different fields of law, including criminal law, law of obligations, procedural law and legal history. This cooperation has also created a market for other Nordic law journals, like the journal *Nordisk tidsskrift for international ret* (*Nordic Journal for International Law*) from 1930[82] and *Retfærd,* published from 1976.[83]

At times, this kind of informal and individual cooperation has overlapped with the formal legislative cooperation. An example is the Nordic journal for criminal law (*Nordisk tidsskrift for Strafferet*) from 1912,[84] which must be seen as a backdrop for the meeting of criminal lawyers from 1948, which again is an important backdrop for the standing Nordic committee for criminal law (*Nordisk strafferetskomité*) from 1960,[85] and active for over 30 years. This blurred line between interactions between people and institutions is in general a characteristic of the interactions that have been important in shaping not only a Nordic legal culture but also a Nordic court culture.

The cooperation between courts and judges has been less intense and extensive than that related to legislation and legal science. The main meeting place for Nordic judges has continued to be the Nordic Meeting for Lawyers. However, since 1958, a Nordic collection of judgements (*Nordisk Domssamling*) has been published twice a year as an addition to *Tidsskrift for rettsvitenskap.*[86] From the early 1990s, the presidents of the Nordic Supreme Courts have met socially, and from the early 2000s they have instead met with some of their justices at a seminar.[87] The Nordic court

[77] Backer makes a vague reference to this practice (2018), pp. 19–20 and 26.

[78] See https://www.nafnet.no/. Accessed 22 May 2020.

[79] Björne (2007), p. 27.

[80] See https://www.djoef-forlag.dk/openaccess/nat/index.php. Accessed 22 May 2020.

[81] See https://www.idunn.no/tfr?languageId=2#/about. Accessed 22 May 2020.

[82] Björne (2007), p. 27.

[83] See https://www.jus.uio.no/forskning/publikasjoner/retferd/. Accessed 24 May 2020.

[84] Greve (2013), p. 1.

[85] See Waaben (1969), p. 102–103.

[86] See https://www.idunn.no/nd#/about. Accessed 22 May 2020.

[87] Sunde (2017), p. 56.

culture is hence less a product of the interaction between judges than a result of other kinds of Nordic legal interaction between institutions and people that have shaped a Nordic legal culture, which also have had consequences for a Nordic court culture.

5 The Essence of a Nordic Legal Culture and Court Culture

Above, we have used a theory of interaction to detect and systematise the communication processes that have shaped a Nordic legal culture and court culture. To do so, we have linked the processes to a series of factors. These factors are not randomly chosen but rather are the factors that make up the legal cultural model. The aim of the model is to make legal cultural analyses and comparison possible by identifying the factors that are influenced by the interaction and then shape legal culture. The model does not aim at identifying all relevant factors but only the factors that in general are the most important and that, hence, a legal-cultural analysis should start with. As mentioned previously, these factors are (1) conflict resolution, (2) norm production, (3) idea of justice, (4) legal method, (5) professionalisation and (6) internationalisation. However, the legal-cultural model is just a starting point for a legal-cultural analysis and has to be adjusted and supplemented in accordance with the subject analysed. Hence, we started the historical investigation by looking at the model of governance and the public assemblies (conflict resolution), legislation (norm production), Scandinavian legal pragmatism (idea of justice and legal method), professional lawyers and legal science (professionalisation). We treated idea of justice and legal method as one unit, and the same with professionalisation and internationalisation, and we spent quite some time on lay judges, orality, legal language and preparatory work as sub-categories under conflict resolution and norm production. We found that the crucial element is the model of governance and its dependency on interaction between legislation and courts, as well as the late professionalisation. Orality, legal language and pragmatic law are results of and also strengthen this interplay.

The commonalities and interaction strictly linked to judges are not decisive for shaping a Nordic court culture. Rather, the court culture must be seen in light of the general legal culture of the Nordic countries. This legal culture is based on commonalities that emerged from shared natural conditions and the political choices made from the state formation in the Nordic countries from the High Middle Ages. This again gave a reason for the decisive desire to strengthen the Nordic legal commonalities in the second half of the nineteenth century. Beginning in 1872, the Nordic Meeting for Lawyers served as a catalyst in the process of making a Nordic legal culture and court culture. However, this development was not purely legal but had political backing, as we have seen from the statements made by Francis Hagerup and Carl Gustav Ekman in the early twentieth century. The history of a Nordic court culture is hence rather complex, and it is the history of what should not have been, but still came to be.

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