LEGAL PRAGMATISM: A COMPARISON WITH THE NORDIC LEGAL METHOD

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The article explores the evolution of Nordic legal pragmatism through a comparison with other European legal traditions, particularly that of Italy. The authors analyze the defining characteristics and historical development of a pragmatic approach in Nordic law, particularly in Sweden, one that prioritizes problem-solving over theoretical abstraction. Tracing Nordic legal pragmatism back to medieval statutes, which were casuistic and practical rather than conceptually systematic, and the relatively minimal influence of Roman law, the authors highlight the unique trajectory of Nordic law in contrast to the rest of Europe. Over time, this approach fostered an emphasis on social utility and democratic processes, notably expressed in Scandinavian legal realism, which rejected metaphysical legal concepts. The article further examines how pragmatism continues to permeate Swedish law today, evident in legal education, legal scholarship and judicial practices, where court judgments emphasize concise, context-sensitive reasoning over conceptual and argumentative diversity. Comparative analyses underscore that this pragmatic approach is a hallmark of the Nordic legal tradition, setting it apart from the more theory-driven continental European legal systems.

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I. TWO FLORENTINES IN SWEDEN

We are two jurists who started their academic careers as doctoral students in the same cozy place: the former *Dipartimento di diritto comparato e penale* at the University of Florence, Italy. Although our academic interests took us to different subjects – comparative constitutional law in the case of Katalin Kelemen, and comparative legal history in the case of Filippo Valguarnera - the strange maelstrom that is life has led us both of us to continue our intellectual journey in Sweden. We feel therefore that we are uniquely well-placed to understand the differences - sometimes subtle but always significant – between continental European (especially Italian) and Nordic legal culture.[1] This article is dedicated to exploring such differences from one point of view: that of so-called legal pragmatism. This is a trait commonly attributed by comparative scholars to Nordic legal systems but rarely explored with any degree of depth. We will discuss the topic both historically and in the present.[2]

II. THE GENESIS OF A PRAGMATIC LEGAL TRADITION

1. What is Meant by 'Pragmatism'

The notion of a 'Nordic pragmatism' in the field of law has over the years raised to the status of a trope in comparative legal studies. Rarely, however, has legal scholars tried to clarify what exactly pragmatism means, how it differs from opposite attitudes and how it relates to other phenomena, such as legal realism and functionalism. This lack of clarity tends to become a major hurdle in the communication between Nordic and continental European jurists, especially in fields such as property law and contract law.

A laudable exception from this tendency can be found in the work of Norwegian scholar Sverre Blandhol who dedicated his doctoral dissertation to the subject.[3] One of the major contributions of this study is that it views Nordic legal pragmatism within the broader frame of Western philosophical pragmatism. This allows us to understand the building blocks, so to speak, of pragmatism as

[1] We will not spend time arguing for the existence of a Nordic legal culture or, indeed, a Nordic legal family, as we believe that such a notion is already sufficiently well established. We will only point out that of the five members of the family (usually grouped into two sub-traditions, the Western Nordic composed of Denmark, Iceland and Norway, as well as the Eastern Nordic, composed of Sweden and Finland), we are mainly going to focus on Denmark and Sweden, as they have been historically the most influential.

[2] While we take joint responsibility for the whole article, we should point out that the historical part has been drafted by Filippo Valguarnera, while the contemporary analysis is by Katalin Kelemen.

[3] S. Blandhol, *Nordisk Rettspragmatisme - Savigny, Ørsted Og Schweigaard Om Vitenskap Og Metode* (Copenhagen: DJØF, 2005).

an approach to law and to try to identify how they emerged historically.

Blandhol identifies the following ten elements as defining pragmatism:

1. Anti-fundamentalism: a rejection of the quest for absolute certainty of knowledge derived from general first principles. Pragmatism does not offer an alternative answer to the quarrel between rationalists and empiricists but rather concludes that the endeavour is a waste of time. Knowledge can guide sensible decisions even if it is not certain.

2. Anti-formalism: pragmatism does not deny the utility of formal logic but refuses to let it limit the scope of the analysis. While formal logic works by studying the connection between legal concepts and ideas, and thus promotes the idea of legal scholarship as isolated from other intellectual domains, it is of little use to understand the relationship between legal ideas and the social phenomena they intend to regulate.

3. Rhetorical understanding of language: pragmatism rejects the possibility of achieving the degree of linguistic coherence and precision necessary to build a formal logical system. This also means that a legal scholar should avoid the tendency of a perfect correspondence between legal concepts and reality.

4. Problem orientation: pragmatism embraces the fundamental idea - which also lays at the origin of classical roman legal culture - that the vocation of legal scholars is the solution of practical problems rather than the elaboration of abstract conceptual systems. This does not mean that pragmatists cannot take advantage of systematic legal thinking. It means, however, that they reject the idea of law as a closed and complete system, considering it rather as a continuous process aimed at addressing social problems.

5. Experience orientation: law is developed by trial and error rather than by the construction of closed conceptual systems. Pragmatism is interested in concrete facts and experience and is thus empirical. It should be noted, however, that it differs - as seen above - from empiricist philosophy in the sense that pragmatism is unconcerned with the problem of absolute certainty of knowledge.

6. Consequence orientation: legal pragmatism evaluates the quality of legal norms regarding their concrete social effects.

7. Moderate scepticism: while pragmatism is anti-fundamentalist, it also rejects radical scepticism, ie the philosophical position that all is uncertain. It rather concerns itself with what is likely to be true.

8. Pluralism: pragmatists are open to a multitude of arguments and do not exclude some of them a priori just because they are not perfectly coherent with some general principle or some absolute formula.

9. Contextualism: pragmatists reject the idea of a 'pure' legal science capable of dissociating itself from the social, cultural and historical context in which law exists.

10. Style: pragmatism promotes a type of communication which tends to be rich in metaphors and other linguistic devices that might be criticized by those who prefer a more literal use of language. This is not a mere aesthetic choice as it

stems from the idea that legal analysis is not a mere logical process circumscribed by fixed argumentative rules.

These ten elements are obviously closely connected to one another and there is a certain measure of overlap between many of them. Of course, one should not imagine the ingredients to the pragmatist recipe to be a rigid set of requisites. It would indeed be ironic if the elements of pragmatism were interpreted in such a dogmatic way. This also means that pragmatism - as well as its opposite tendencies - can exist on a spectrum. For instance, it is conceivable that an individual legal scholar could strongly favour logical formalism in almost all scenarios but would concede that a more pragmatic approach might be warranted in particularly hard cases. The same is of course true for legal cultures as a whole and one can easily imagine a slow movement of the historical pendulum between periods where formalism and dogmatism carried the day and periods in which pragmatism became stronger. Thus, the emergence of one tendency or the other takes the shape of a gradually emerging set of stylistic choices and argumentative devices.

In this section, we will argue that, while a full-blown legal pragmatism in the Nordic legal systems is a product of the 20th century, its foundations and prerequisites were developed over a much larger swath of time.

2. Natural Born Pragmatists? The Development of Legislation in the Nordic Countries

One of the most glaring features of the Nordic legal tradition concerns the role and style of statutes. Legislation can be considered a historical red thread that gives the Nordic legal family a remarkable sense of continuity, stretching from the provincial laws of the 13th century to our days. It goes without saying that this claim should not be interpreted as to mean that there are no significant differences between the medieval statutes and modern legislation. The differences are obvious, but they have developed following a soft evolutionary slope rather than the steep revolutionary cliff that is so typical of continental Europe, where codifications are commonly thought of as a historical breaking point.

Given this remarkable fact, one could wonder whether there is a connection between the very pronounced pragmatist tendencies of the Nordic legal family and its peculiar statutory tradition. Any inquiry in this direction needs to at least touch upon the complex historiographical debate surrounding the origin of the Nordic statutory tradition. Luckily, our understanding of the Nordic medieval statutes, while still unsatisfactory, has much improved over the last fifty years. Two major trends in scholarly works can be identified. Early legal historical works underscored the originality of Nordic medieval statutes and looked at them as bearers of autochthone legal ideas. This notion was determined by ideological preferences in two ways. Firstly, Nordic scholars themselves were strongly influenced by national romantic ideas and embraced the uniqueness of Nordic culture. Indeed, early expressions of this tendency went to extremes that from a

modern perspective may appear quite ridiculous. The Swedish scholar Carl Lundius, for instance, published in 1687 the work *Zamolxis primus Getarum legislator* in which he tried to prove, with questionable methods, that the mythical Thracian figure Zamolxis had been the driving force behind Sweden's earliest laws.[4] Secondly, German scholars - especially those of the Germanist branch of the historical school of jurisprudence, such as Konrad von Maurer and Karl von Amira - saw the medieval Nordic laws as a close derivation of a supposed Germanic 'Urrecht'.[5]

The last decades have witnessed a deep revision of the assumptions made in earlier scholarship. More recent studies have preferred exploring the links between the Nordic medieval laws and continental European law, such as canon law, rather than insisting on their uniqueness. This has been the case of the studies of Sten Gagnér and Elsa Sjöholm.[6] The latter has tried to prove the quite radical proposition that Swedish medieval laws are derivative of church law and are thus not autochthon Nordic products at all.

If the observations made by the more recent scholarship are true, one could conclude that the medieval statutes cannot be construed to be an early spark of Nordic pragmatism. Such a conclusion would, however, be premature. Regardless of how derivative the Nordic medieval statutes may be, it is undeniable that their provisions were drafted in a markedly casuistic style, describing a very concrete scenario and prescribing a legal rule attached to it. One could obviously reply that the Nordic provisions were not more casuistic than those of the German *Sachsenspiegel*. The important difference, however, is that the various *iura propria* in continental Europe, after the 11th century, interacted with and were complemented by the rapid rise of a scholarly approach to law centred on the rediscovered Corpus Juris Civilis. The Nordic countries' relationship with the continental universities were considerably weaker.

While there were Nordic students from wealthy families eager to study law at the continental universities (Paris became the most popular choice during the 13th century), most of these aimed at an ecclesiastical career. This is not to say that these students did not have an important impact on Nordic law. Indeed, some of them played a major role in shaping Nordic medieval legislation and aligning it with canon law. This is, for instance, the case of 12th century archbishops Anders Sunesen of Lund and Øystein Erlendsson of Nidaros.[7] The

[4] C. Lundius, *Zamolxis Primus Getarum Legislator, Academica Dissertatione Luci Publicæ Restitutus. Qua Simul Occasione Pluscula Ad Antiquitates Sveonum Gothorumq´;, Atq´; Aliarum Etiam Gentium Spectantia; … Proferuntur* (Uppsala: excudit Henricus Keyser, S. R. M. & Acad., 1687).

[5] D. Tamm, 'How Nordic Are the Old Nordic Laws?', in P. Andersen et al eds, *How Nordic Are the Nordic Medieval Laws?* (Copenhagen: DJØF, 2nd ed., 2011), 7-8.

[6] S. Gagnér, *Studien Zur Ideengeschichte Der Gesetzgebung* (Stockholm: Almqvist & Wiksell, 1960); E. Sjöholm, *Sveriges Medeltidslagar: Europeisk Rättstradition i Politisk Omvandling* (Stockholm: Institutet för rättshistorisk forskning, 1988).

[7] S. Bagge, 'Nordic Students at Foreign Universities until 1660' 1 *Scandinavian Journal of History*, 2-3 (1984).

Nordic countries lacked, however, a significant penetration of legal scholarship among laymen and within the king's administration. There are, to be fair, a few examples in the historical record of laymen with considerable power who had studied law in continental universities - this is for instance the case of the Norwegian Bjarne Lodinsson - but these must be considered the exception confirming the rule.[8] Thus, except for the ecclesiastical jurisdiction, Justinian law played a very modest role in the practical life of the law.

A brief comparison with the Italian legal culture during the high medieval period will illustrate the point. Knowledge and practical application of Justinian law is attested in Italy since at least the end of the 11th century. The oldest and best-known example is the placitum of Marturi, a judgement rendered in a litigation between a monastery and the possessor of a plot of land, in the year 1076, concerning acquisitive prescription. The document shows that Justinian law was invoked and given importance as a practical legal argument.[9] This is also confirmed by the two commentaries to the *Liber papiensis*, a collection of Langobardic statutes drafted in the city of Pavia: the so-called *Walcausina* (named after its author Walcausus) and the *Expositio ad librum papiensem*. Both texts, written in the second half of the 11th century, show the authors' remarkable knowledge of Justinian law and a willingness to use it to organize the legal material offered by the Langobardic statutes as well as to fill the gaps.[10] It is of course in this same period that Irnerius started teaching Roman law in Bologna. This opened the gates to the renaissance of legal studies and to centuries of highly sophisticated legal scholarship that hardly needs to be summarized in this article.

The contrast with the Nordic legal culture could not be starker. It is in fact even a stretch to speak of a Nordic legal culture until the 17th century. The first Nordic university (Uppsala) was founded in 1477 by a papal bull but its (already modest) activities were not long thereafter strongly limited by virtue of the Lutheran reformation and the teaching of law was, for all practical purposes, suspended until the 1620s.[11] Moreover, until 1614 there were no centralized courts nor a technically refined judicial profession.[12] What Nordic judges were left with was therefore an extremely casuistic legislation not underpinned by an intellectually sophisticated scholarly tradition that could be used to fill the gaps. Legal practice must have been centered around concrete problem-solving with reference to

[8] ibid

[9] C.M. Radding and A. Ciaralli, *The Corpus Juris Civilis in the Middle Ages: Manuscripts and Transmission from the Sixth Century to the Juristic Revival* (Leiden: Brill, 2007), CXLVII, 183-184.

[10] ibid 90-99; M. Ascheri, *I diritti del Medioevo italiano: secoli XI-XV* (Roma: Carocci, 2022), 64.

[11] C. Annerstedt, *Upsala Universitets Historia - D. 1, 1477-1654* (Uppsala: Uppsala universitet, 1877), 24; L. Björne, *Den Nordiska Rättsvetenskapens Historia. D. 1: Patrioter Och Institutionalister: Tiden Före År 1815* (Stockholm: Nerenius & Santérus, 1995).

[12] In this year, Sweden got its first centralized court, *Svea hovrätt*, the Court of Appeal of Stockholm.

custom and equity rather than around the conceptual thinking typical of the jus commune.

The scarcity of adequate primary sources makes it difficult to assess with any kind of precision what long-term effects the absence of a strong academic legal culture had on the Nordic legal tradition. There are two main possibilities with an almost infinite number of intermediate solutions. Firstly, one might hypothesize that the Nordic legal tradition, once it started developing a strong academic culture during the 17th century, underwent a full-blown 'normalization'. In such scenario, the differences with the continental legal systems largely receded and the High Middle Ages play no role in explaining today's pragmatic tendencies. Secondly, one might instead think that the rift between the refined Roman law and the Nordic legal practice, while clearly diminishing, still was strong enough to leave a mark on the Nordic legal style.

There are, in my opinion, strong arguments to support the second hypothesis. It is true that the (re)foundation of the universities and the establishment of centralized courts favored a professionalization of the legal profession and created a legal elite that was well-versed in Roman law, with extensive contacts with the continental intellectual environment. It is also true, however, that the idea of a national legal order with deep roots in a peculiarly Nordic culture was never erased, nor was the relationship between jus commune and jus proprium, typical of the continent, properly established.

This circumstance can once again be illustrated with reference to Uppsala university, which after being re-established in 1620 had a law faculty composed by two professors: one in Swedish law and one in Roman law. The cultural importance of Roman law is thus unquestionable. What is truly interesting, however, is that Swedish law became a major part of the curriculum.[13] The re-establishment of the law faculty had, as a matter of fact, the very practical purpose of training and developing the public administration of a country whose military and political weight were rapidly growing.[14] The university was therefore called to teach the law that was relevant for the Crown. Roman law became an important tool to fill the gaps in Swedish law, but it was the latter which was the law of the land.

Things are even more interesting if we turn our attention to Denmark, where the University of Copenhagen was founded in 1479 and turned into a Lutheran university after the reformation of 1536. The law faculty did not teach Danish law until the 18th century and remained primarily focused on training priests.[15] The

[13] The royal decree by Gustaf II Adolf of 7 July 1621 can be found in C. Annerstedt ed, *Upsala Universitets Historia: Bihang. 1, Handlingar 1477-1654* (Uppsala: W. Schultz, 1877), 172-176.

[14] King Gustaf II Adolf's anxiety over the bad state of the Swedish administration was made clear in the remarks given to the clerical estate on 11 March 1620, where he lamented that most of the functionaries were not even able to spell their own name. Annerstedt, 146.

[15] D. Tamm, 'Why Roman Law? Danish Arguments for the Study of Roman Law', in R. van den Bergh et al eds, *Libellus Ad Thomasium, Essays in Roman Law: Roman-Dutch Law and Legal History. In Honour of Philip J Thomas* (Pretoria: Unisa Press, 2010), 428-430.

university charter of 1539 gives us nonetheless a clear picture about how Roman law was perceived:

> 'One lawyer shall give a lecture on the *Institutiones*. (…) We hope that some of his students will thereby become men whose judgements may be of service in state business. For although here in our realm we do not follow Roman laws and customs in everything, because we have our own, yet that venerable empire acknowledges that its laws have proceeded from the law of Nature and are not to be regarded as being kept against her laws; it is therefore right that the laws of other kingdoms should agree with the law of Nature, yet sometimes in a different manner from the way Roman law operates. Moreover these consorts with the highest truth, the word of Christ. As for all the ways in which you wish men to behave towards you, you must behave to them likewise. Thus their intellects will be sharpened by knowledge of others' laws, so that they may also comfortably make judgements about our own laws and customs.'[16]

While Roman law was not considered part of the Danish laws and customs, it could still find a point of entry through the assumption - typical of classical natural law - that Roman law, among the various positive legal orders, was the one closest to ideals of universality and perfection of the law of nature and that it could be used to judge Danish law.

It seems clear that, from an early stage, the Nordic legal tradition claimed its autonomy from the jus commune, while still recognizing the value of teaching Roman law as a complement to municipal law. Regardless of the debate concerning the origin of the Nordic medieval laws, it seems clear that they contributed to establish the image of an autochthonous legal tradition that under a considerable swath of time had to rely on a legal practice that was not underpinned by the intellectual sophistication of the continent.

The 17th and 18th centuries witnessed a revision of the medieval legislation in both Denmark and Sweden. The political situation in the two countries was different. In Denmark, in the wake of a humiliating military defeat against Sweden, Fredrik III established an absolute monarchy in 1660. The new legislation, the Danske Lov of 1683, was part of the Crown's strategy of centralization and affirmation of royal power. The Swedes followed fifty years later, with the Sveriges Rikes Lag of 1734, drafted in a period usually called the age of liberty in Swedish historiography, a moment of parliamentary strength wedged in between the preceding Carolingian absolutism, which had ended with the defeat in the Great Northern War and the death of Charles XII, and the following Gustavian absolutism. Despite these differences, both legislations had similar features: they

[16] M. Fink-Jensen and F. Gredal Jensen eds, *Fundats og ordinans for Københavns Universitet 1539: The Foundation and Regulations of the University of Copenhagen 1539*, trans. P. Fisher (København: Gads forlag, 2020), 123.

aspired to a revision of the medieval legislation, covering all areas of the law, but without truncating the bonds with the past.

In Denmark, the adherence to the past was almost forced, as the country was still to develop a sophisticated legal scholarship.[17] A class of university educated jurists started to appear as late as in 1736.[18] In Sweden, on the other hand, it was the product of a political choice. In fact, a conservative attitude towards legislation had been apparent in many quarters since the mid-17th century. The courts of appeal themselves had displayed resistance against any attempt at revising the law. The Court of Appeal of Åbo maintained, for instance, that the old legislation was 'a strong and immovable foundation'.[19] As already mentioned, the rising national pride among the intellectual elite was a formidable force moving in the same direction. Both the Danske Lov and the Sveriges Rikes Lag thus maintained the style and many features of the medieval laws while adding some of the solutions (sometimes derived from Roman law) developed by the courts.

These observations are relevant as they describe a legal tradition that, while engaging in cultural exchanges with the European continent, was proudly defining its own trajectory. In essence, while it is hard to prove beyond all doubts that the legislative style was a key factor steering the Nordic legal tradition towards pragmatism, one can at the very least argue that, for a considerable amount of time, legislation was the main factor shaping Nordic legal practice with very little competition (or support) from the intellectually sophisticated and conceptually abstract law studied in the universities.

3. The Nordic Legal Scholarship Between the 18th and 19th Century

To study the Nordic legal culture between the 18th and 19th century is akin to observe Janus, the Roman two-faced deity. On the one hand, the contacts between the Nordic jurists and the continent – especially Germany – were frequent and meaningful. Nordic scholars often spent years in German universities to deepen their knowledge and such contacts left obvious marks in Nordic legal literature. On the other hand, however, the tendency of the Nordic culture to defend its own specificities became even more pronounced during these centuries.

A good example of both tendencies can be found in Sweden's greatest legal scholar of the 18th century, David Nehrman (ennobled as Ehrenstråhle), professor at Lund University. Nehrman had spent considerable time studying in Germany and

[17] D. Tamm, 'The Danish Code of 1683: An Early European Code in an International Context' 28 *Scandinavian Studies in Law*, 163, 165-166 (1984).

[18] This is the year when a compulsory legal exam was introduced. Incidentally, this reform pushed the development of the Danish legal academia and induced the University of Copenhagen to start teaching Danish law (as it was now educating practicing jurists). See D. Tamm, 'Why Roman Law?' n 15 above, 430.

[19] H. Forssell ed, *Valda Skrifter Af Hans Järta* (Stockholm: P.A. Norstedts & söner, 1882), 330, fn 1.

had obviously been influenced by German scholars. His most famous work - *Inledning til den swenska jurisprudentiam civilem af naturens lagh och Sweriges rikes äldre och nyare stadgar uthdragen och upsatt* (1729)[20] - was a clear attempt at stressing the national dimension of legal studies. The reference in the title to the law of nature should not mislead the reader to think of it as a work with the ambition to explore some universal legal dimension. In fact, Nehrman's cultural program is made evident by the unusual choice to publish the book in Swedish rather than in Latin, which also in the Nordic academia was considered the proper language for academic writing.

In the foreword Nehrman states that the goal of the book was to 'clearly show what Swedish law can achieve without involvement of foreign provision and opinions.' The foreign law was clearly Roman law. In the first chapter of the book, when talking about the *jurisprudentia legislatoria* (the type of legal expertise that assists the legislature), the author states that 'each people has its peculiar inclinations and each kingdom its own advantage' and that it was therefore unwise to 'borrow other kingdoms' statutes and, without consideration of such circumstances, adapt them to another kingdom. For the law, for its goal to be reached, must be created for and suited to the people that it regulates'.[21]

Nehrman then proceeded with a frontal assault against Roman law. When recalling the various types of knowledge that are useful to a jurist - such as knowledge about philosophy, theology, history, medicine and mathematics - the professor from Lund finished with a sarcastic remark:

> 'I was almost forgetting the study of Roman law that by many is considered the first and most important (…) despite the fact that these Roman and Constantinopolitan laws are not in force in our Kingdom.'[22]

In fact, Nehrman stated that Swedish and Roman law were as distant from one another as Latin and Hebrew. This also meant that it was a pedagogic mistake to teach Roman law early in Swedish students' curriculum. Nehrman stated that it was as if Lutheran theologians began their studies by reading catholic authors. Roman law would lead Swedish students astray by 'reinforcing many erroneous notions'.[23] Nehrman was more positively inclined towards Roman law regarding more experienced students. These could learn important legal terminology and deepen their knowledge by comparing Swedish and Roman law.[24] The most serious assault against Roman law – especially considering the natural law theory

[20] The title translates: 'Introduction to Swedish private law as derived from the law of nature as well as from old and new statutes of the Kingdom of Sweden' D. Nehrman Ehrenstråle, *Inledning til then swenska iurisprudentiam civilem, af naturens lagh och Sweriges Rikes äldre och nyare stadgar uthdragen och upsatt* (Lund: Decreaux, 1729).

[21] ibid

[22] ibid 9-14.

[23] ibid 14-15.

[24] ibid 15.

that dominated European legal scholarship at the time – was Nehrman's criticism of Giovanni Vincenzo Gravina's opinion that Roman law was *recta ratio*.[25] He was not unique in supporting this notion. In fact, it is likely that Nehrman got the idea from Nicolaus Hieronymus Gundling during his years in Germany, although he does not mention him. Indeed, the distancing of the national legal culture from Roman law was a trend involving much of Europe during the 18th century.[26]

In Denmark, Andreas Hoier expressed opinions similar to Nehrman's. In his work *Forestilling paa en Dansk Jurist* (1737), Hoier claimed that Roman law was as distant from Danish law 'as the times of Justinian and Theodosius are from the ones in which we live.' Hoier also claimed that, while Roman law could be useful to an experienced jurist, it would make it difficult to learn Danish law. He reasoned that 'the sophistications and fictions of Roman law have been distant from the truthfulness and simplicity of our Nordic customs.'[27]

Another Dane, Peder Kofod Ancher, who is generally regarded as Denmark's most influential legal scholar of the 18th century, shared Nehrman's and Hoier's opinion that law students should learn Danish law before being taught Roman law.[28] Ancher, however, underscored the great importance of the latter. He reasoned that Danish law, because of its brevity left many cases unregulated and Danish jurists had therefore to fill those gaps with *jus universale*, general principles taken from Roman law.[29]

How should these ideas be assessed regarding our quest to understand the historical origin of Nordic legal pragmatism? It is obvious that these scholars cannot be considered pragmatic in the sense illustrated at the beginning. They were still writing within the rationalist natural law paradigm. They believed, in other words, that absolute knowledge could be achieved through reason. Moreover, they clearly did not interpret the law in the contextual way typical of pragmatism. They did nonetheless anticipate some of the features of Nordic law that would fully emerge later. I have already mentioned the tendency to focus on the national legal tradition. Nordic positive law was not simply a vehicle to understand natural law by means of inductive logic. It was rather the cornerstone of a legal tradition that fulfilled practical purposes. This problem-oriented attitude shines through the works of the Nordic scholars. Ancher's stance regarding Roman law is telling. He held Justinian law in high esteem for reasons that were eminently practical, as he claimed that

[25] 'Quid enim est aliud jus romanum, nisi ratio imperans et armata sapientia sententiaeque philosophorum in publica jussa conversae?' See G.V. Gravina, *Orationes* (Napoli: Felice Mosca, 1723), 103.

[26] S. Jägerskiöld, *Studier rörande receptionen av främmande rätt i Sverige under den yngre landslagens tid* (Lund: Almqvist & Wiksell, 1963), 122.

[27] A. Hoier et al, *Forestilling Paa En Dansk Jurist, Den 1. Part* (Copenhagen: Kongl. Majests. privilegerede bogtrykkerie, 1737), 43-44.

[28] P.K. Ancher, *En Kort Anviisning i Sær for En Dansk Jurist Angaaende Lovkyndigheds Og Staats-Konstens Adskillige Deele, Nytte Og Hielpe-Midler* (Copenhagen: Ludolph Henrich Lillie, 1755), 70.

[29] ibid 25.

references to 'equity' or 'natural law' as sources to fill the gaps left the problem unsolved: the few principles that strictly speaking could be found in natural law were *prima & generalissima principia juris*, and thus too abstract to fill most of the gaps that appeared in legal practice. Ancher preferred to rely on two-thousand years of scholarly tradition applied on Roman law.[30] Ancher's problem-oriented approach is clearly displayed in his 1755 work *En kort Anviisning i sær for en Dansk Jurist angaaende Lovkyndigheds og Staats-Konstens adskillige Deele, Nytte og Hielpe-midler*.[31] While discussing the importance of case law, the Danish scholar declared legal expertise to be

> 'a practical science that requires proficiency in applying the laws to emerging situations, a proficiency that theory alone - regardless of how broad it is - cannot develop.'[32]

This eminently problem-oriented perspective became even clearer in the generation of Nordic jurists that followed in the wake of the Kantian revolution, which undermined the theoretical foundations of classical natural law and would eventually usher in the new paradigm of legal positivism. The most representative and influential among these scholars was the Dane Anders Sandøe Ørsted. As pointed out by Blandhol, a crucial milestone of Ørsted's intellectual journey might have been the failure to pass a selection for a job at Copenhagen's law faculty in 1799. Ørsted himself attributed this unexpected fiasco to a nervous breakdown that had manifested itself in the days leading up to the selection and that he attributed to the energies spent on studying philosophy (Ørsted had both a philosophical and a law degree). One should of course be cautious in drawing far-reaching conclusions from a single biographical event - especially as it is reported by Ørsted himself - but this professional hiccup had at least two consequences. Firstly, it meant that the most impactful Nordic legal scholar of the first half of the 19th century did not enter the university milieu, nor would he later in life. His activity as a scholar was rather undertaken in parallel with a career as judge and civil servant. Secondly, Ørsted diverted his interests - which previously had been strongly focused on Kantian and post-Kantian philosophical speculation - to historical, political and empirical subjects.[33]

Regardless of the causes of Ørsted's intellectual development, it is clear that he started espousing the idea that it was impossible to deduce a norm that could be applied in a particular case from a system of abstract principles. This was, as Blandhol calls it, a 'rethorical turn' in Ørsted's scholarship predicated on the realisation that the concepts that mediate human knowledge only can capture a

[30] ibid 24-25.

[31] 'A brief instruction, particularly for a Danish jurist, about the various parts, usefulness and auxiliary tools concerning legal expertise and the art of statehood.'

[32] P.K. Ancher, n 28 above, 65.

[33] S. Blandhol, n 3 above, 154-155.

limited portion of reality.[34] The impact of these ideas on Ørsted's view of the law becomes clear in his 1822 *Haandbog* (handbook) in six parts over Danish and Norwegian law. In the foreword, Ørsted aimed some sharp barbs at the condition in which Danish law found itself. He claimed that the general part of the legal system was in a particularly bad shape and that it was in fact a good thing that the special parts of the system, concerning the various substantive subject matters, seemed to ignore it. To follow the general rules of interpretation would have 'turned statutes and law upside down'.[35] Ørsted's main criticism against the general part was that its categories had been concocted with very little understanding of the actual legal problems that they would impact. They had therefore resulted in 'the most hasty and one-sided abstractions'.[36] This led Ørsted to define a working method, when approaching his own analysis of the general part, which connected each general concept and doctrine with a variety of instances in which said concept or doctrine could come into play, thus showing their practical effects. Ørsted reasoned that the foundation of legal scholarship should not be 'an abstract philosophy'. Legal scholars

> 'with detailed knowledge of the statutes and with the historical tools to explain them, should strive to bring together an extensive practical experience and the nature of those legal relationships that the statutes intend to regulate.'[37]

The last quote reveals Ørsted's knowledge of the German historical school. Ørsted was indeed one of the first Nordic scholars to praise Savigny, although his pragmatic tendencies led him to reject some of the more extreme positions of the school. Ørsted, coherently with his previous statements, recognized that

> 'the service that philosophy can provide positive law is of little importance compared to what can be obtained by following the way of history and that (positive law) with the untimely use of philosophy runs the risk of being misunderstood.' However, he felt obliged to add that 'the new historical school clearly exaggerates when it claims that no legal truth can be correctly understood without following it in its historical development (…)'.[38]

Despite this cautious attitude by Ørsted, it is fair to say that the German historical school had lasting effects on the Nordic legal culture that would resonate through the whole 19th century. Its most enduring legacy, however, would not be to completely assimilate the Nordic legal systems into the continental tradition but rather to crystallize their peculiarities. This apparent paradox can be explained with reference to Savigny's idea that law is 'life observed from a particular perspective'

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[34] S. Blandhol, n 3 above, 163.

[35] A.S. Ørsted, *Haandbog over Den Danske Og Norske Lovkyndighed: Med Stadigt Hensyn Til Hr. Etatsraad Og Professor Hurtigkarls Lærebog. Bd 1* (Copenhagen: Soldin, 1822), VII.

[36] ibid VI.

[37] ibid VIII-IX, XIV-XV.

[38] ibid 291.

and that it flows through the history of a people similarly to language.[39] It is a notion that can easily be framed within the broader cultural context of romanticism. Savigny used it to argue against the adoption of a civil code and to urge German legal scholars to improve the quality of their legal culture by studying the history of the legal categories. In Germany, Savigny's ideas delayed the adoption of a civil code by almost a century. In the Nordic countries, the effect was even more radical: no codification was ever adopted.

One should of course be very cautious about suggesting oversimplistic causal links. Indeed, one could argue that the historical school merely reinforced a tendency which was already in place. The clearest example of this development can be found in Sweden, where a commission was created in 1811, seven years after the French civil code and three years before Savigny's *Vom Beruf*, to work on proposals for the codification of private law as well as of criminal law. The directives given to the committee excluded, however, a codification based on the French model, forcing the committee to keep the structure of the private law parts of the old Law of the Kingdom of Sweden of 1734. Interestingly, the committee in preparatory works to the civil code proposal, delivered in 1826, remarked that 'a more systematic structure' would have facilitated the draft of the code but also added (possibly for diplomatic reasons) that 'legislation is a book for the people (…). (I)t should not be reshaped or be presented in a form that the people would not recognize and understand.'[40] The whole project was abandoned after a very critical opinion of the Supreme Court (according to the constitution of 1809 it had to be consulted), which used arguments derived from the historical school.[41]

It must be stressed that the absence of codifications in the modern sense of the word has shielded the Nordic legal systems from adhering to the view, espoused by Charles Demolombe[42] and destined to become prevalent in 19th century France, that the civil code formed a closed and complete system. This also meant that the judge was not supposed to refer to equity (thus to something outside the code) when deciding hard cases but rather to general principles derived from the rules of the code itself.

It may seem odd to refer to the influence of the historical school of law as a step towards pragmatism. After all, the school has been often referred to as highly formalistic in the literature as Savigny's ambition was to create a system by understanding the inner connections of the various parts of the law and thus representing them as an organic whole. However, as Stephan Meder points out, to simply pigeonhole Savigny as a formalist would be an oversimplification.

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[39] F.C. von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Freiburg: Mohr, 1892), 5-8, 18.

[40] *Förslag till allmän civillag med de förändringar, som, wid utarbetande af förslag till criminal-lag, blifwit gjorde, och tillökt med register*, (Stockholm: Hörberg, 1838).

[41] S. Jägerskiöld, *Den historiska skolan och Lund: rättshistoriskt symposium i Lund 6-7 maj 1980* (Lund: Juridiska fören Studentlitt distr, 1982), 69.

[42] Ch. Demolombe, *Cours de Code civil. Tome 1* (Bruxelles: J. Stienon, 1847), 52.

Savigny's theory was in fact based on an interaction between *jus strictum* and *aequitas*. While the former was a *condictio sine qua non* of any type of legality, it needed to be corrected by equity.[43]

These thoughts entered into the Nordic legal culture. A clear example is provided by the Swede Ernst Viktor Nordling. At his 1867 inaugural lecture for the professorship in roman law, legal philosophy and legal history at Uppsala, Nordling argued that the subjects that had been entrusted to him were necessary to bind together the various loose parts of the law in 'an organic whole'. This was required to ensure a 'good and certain' administration of justice[44]. Nordling also shared Savigny's view of the relationship between formal law and equity (albeit without quoting him directly). He maintained that it was only through the mediation of equity that 'legal concepts could become viable guides for a theoretically rich and practical activity'[45].

Most tellingly, the interest for historical school of law in the Nordic legal culture never translated into a deep-rooted *Begriffsjurisprudenz*. Indeed, the German tradition that had in Savigny's pupil Puchta its founding father was, generally speaking, treated with suspicion and often outright criticism by Nordic jurists. This is not an adequate occasion to discuss the very interesting topic of whether an historical *Begriffjurisprudenz* has ever truly existed, or if it is - as the more recent German legal historical research seems to confirm - an illusion, created among others by von Jhering.[46] In this context, the question can be left aside. Regardless of whether Nordic jurists, such as the Norwegian Anton Martin Schweigaard, reacted against a historical phenomenon or against a strawman, their criticism tells us something about the inclinations of the Nordic legal culture. Such criticism became a springboard for the arguably most influential Nordic theoretical movement of the 20th century: Scandinavian legal realism.

4. The Rise of Scandinavian Legal Realism

In the previous paragraphs, we have been able to observe various elements that suggest an early propensity of the Nordic legal culture to prefer concrete problem solving to conceptual abstraction or, at the very least, to temper such abstractions with an interest in the practical life of the law. Such propensity can

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[43] S. Meder, 'Savigny, Friedrich Carl Von', in G. Zanetti, M. Sellers, and S. Kirste eds, *Handbook of the History of the Philosophy of Law and Social Philosophy: Volume 2: From Kant to Nietzsche* (Cham: Springer Nature Switzerland, 2023), XXIII, 295.

[44] E.V. Nordling, *Om romerske rättens, juridiska encyclopediens och rättshistoriens betydelse för rätts-studiet – Aftryck ur 'Tid skrift för Lagstiftning, Lagskipning och Förvaltning'* (Stockholm, 1867), 2.

[45] E.V. Nordling, *Anteckningar efter prof. E. V. Nordlings föreläsningar i svensk civilrätt: Allmänna delen H.T. 1877–V.T. 1879 – Utgifna af Juridiska föreningen i Upsala* (Uppsala: Victor Roos, 1882), 45-46.

[46] On the topic see the interesting contribution of O. Mossberg, 'Den konstruktiva riktningen och "begreppsjurisprudensen" ' *Tidsskrift for Rettsvitenskap*, 289-355 (2022).

arguably be understood as pre-condition to the most important Nordic legal movement of the 20th century, the so-called Scandinavian legal realism, that at an academic level contributed to cementing the pragmatic nature of law.

The topic is obviously complex, and my ambition here can thus only be to illustrate its bare bones. The main elements that need to be understood to appreciate the basic content and the development of this movement are two: the ambition to transform legal scholarship in a 'true science' and the view of law as a tool for social engineering.

A reader aware of American legal realism, might recognize the latter element but be puzzled by the former. Legal realists across the Atlantic certainly conceived law as a tool for social engineering, but they did so by denying the scientific nature of legal scholarship and rather stress its similarity to politics. The route chosen by Nordic legal realists was thus very different and must be understood with regard to the ideas of Uppsala philosopher Axel Hägerström, who became the *maître à penser* for a whole generation of reformist-leaning Nordic intellectuals.[47]

To understand his perspective, it is useful to refer to his work on the Roman law of obligations. Hägerström used the example of the *mancipatio* - the sale of a *res mancipi*, such as a slave - to argue that Roman law, and thus much of the Western legal tradition, was infected by magical thinking, which can be defined as the belief that reality can be altered by the use of words and gestures. The *mancipatio* required the buyer to put his hand on the slave in front of witnesses, to state that the slave now belonged to him having been purchased 'with the scales and a piece of bronze' and to finally hit a scale with a piece of bronze. With this ritual, akin to a legal abracadabra, ownership had been transferred from the seller to the buyer and thus reality had been changed.[48] Ownership itself was conceived by Hägerström as a metaphysical concept without any connection to reality. The mission of legal scholars, as for any scientist, was rather to engage with facts.[49]

A direct consequence of this way of thinking was the rejection of what Vilhelm Lundstedt - a prominent follower of Hägerström in Uppsala's law faculty - denounced as the autonomous role occupied by 'fantasy concepts' - such as '*dominium*, *obligatio*, *ius* (in a subjective sense), *possession*' - in the reasoning of jurists. Lundstedt claimed that these concepts had been 'treated as real things' in the Roman legal tradition and that such an attitude had distorted the reasoning of generations of jurists. Lundstedt rejected this type of reasoning, claiming that the 'right of property' was just an empty vessel that made jurists oblivious to a much

[47] A somewhat longer version of this section concerning Scandinavian legal realism can be found in F. Valguarnera, 'The Historical Development of Welfare Law in Sweden', in J. Reichel and M. Zamboni eds, *The Constitutional Conditions of the Welfare States: In the Contexts of South Korea and Sweden* (Stockholm: Stockholm University Press, forthcoming).

[48] A. Hägerström, *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung* (Uppsala: Almqvist & Wiksell, 1927), I, 25-41.

[49] A. Hägerström, *Inquiries into the Nature of Law and Morals* (Stockolm: Almqvist and Wiksell, 1953), 4.

more complex reality made of relationships that are psychological. My neighbors avoid interfering with my property not because of some mystical 'right of property' but rather because of concrete repercussions (such as the intervention of the public authority) or because of a moral imperative not to violate somebody else's 'right'.[50] The word 'right' (with scare quotes) in this scenario is not signaling a contradiction in Lundstedt's reasoning. The 'right' in question is still a scientifically invalid notion. However, the fear of violating such a 'right' is a fact and as such a valid object of scientific study, in the same vein as a cultural anthropologist does not need to share the beliefs of other cultures to study their attitudes to them.

It must be observed that this attitude dismantled any resistance that legal dogmas could present against policy choices. The legal system was now conceived as a set of mechanisms that could freely be manipulated to achieve a desired policy. This development coincided - not at all by chance - with the growing reformist ambitions of social democratic governments from the 1930s and onward. The massive social reforms and policies of wealth redistribution could now be carried out with very little resistance offered by 'metaphysical' concepts such as ownership.

To orient the work of the policymaker, Lundstedt offered the notion of 'social welfare' (*samhällsnytta* in Swedish):

> 'With the method of social welfare (…) as a guiding motive for legal activities, I mean in the first place the encouragement in the best possible way of that – according to what everybody standing above a certain minimum degree of culture is able to understand – which *people in general strive to attain* (italics in the original)'.[51]

What 'people in general strive to attain' is described by Lundstedt as a set of material and immaterial goods: good food, appropriate clothing, a well-furnished home, a sense of safety etc. Such goods were not predetermined or universal but rather dependent on historical circumstances. It was primarily the legislator's job to determine what goods were relevant at any given point in time by paying attention to the desires of the citizens. When there is no unisonous and clear desire expressed by the citizens, the legislator

> 'has a freer position and he may then allow his valuation of the most appropriate measure to be determined exclusively by his knowledge of the construction of the society, which obviously includes knowledge of the citizens as psychological beings'.[52]

While the more extreme positions of Scandinavian legal realism are in the

[50] V. Lundstedt, *Grundlinjer i skadeståndsrätten, Senare delen, Bd. 1* (Uppsala: Norblad, 1944), 518.

[51] V. Lundstedt, *Legal Thinking Revised – My Views on Law* (Stockholm: Almqvist & Wiksell, 1956), 140.

[52] ibid 150.

rear mirror of the Nordic legal tradition, the school's influence on how the law is discussed and analysed is clear to any observer whose legal training was carried out in continental Europe. For instance, it is still inconceivable to let a solution to a legal issue depend on a purely conceptual analysis. This has important ramifications that impact most areas of the law. Typically speaking, a Nordic jurist does not address a legal problem by merely applying abstract legal categories to concrete facts and reaching a conclusion. A lot of attention is dedicated to the concrete interests involved, to potentially conflicting values and more broadly to the consequences of a legal solution. Swedish scholar Claes Martinson offers a good example. He stresses that a typical conflict over property (where A sells a car to B. Can A use the car until the vehicle is delivered to B?) will not be centered around the transfer of ownership, as it would in most continental legal traditions. The discussion will rather be about the concrete interests at play. For instance, it could be argued that using the car increases the risk that it will be damaged. On the other hand, the buyer is protected by the rule that locates the risk on the seller until the car has been delivered.[53]

III. PRAGMATISM IN CONTEMPORARY SWEDISH LAW

As discussed earlier, Scandinavian legal realism was a product of the legal culture in which it emerged. At the same time, it left a lasting impact on Swedish law and influenced legal development over the last century. This influence can be seen in all aspects of legal culture. In this article, we focus on three areas: legal education, legal scholarship, and court practice.

1. Pragmatism in Legal Education

While it is true that Scandinavian legal realism has had a long-lasting impact on all aspects of Swedish legal culture, its influence on legal education is somewhat paradoxical. An Italian lawyer might expect that many hours of teaching at Swedish universities would be dedicated to the ideas and theories of Olivecrona, Lundstedt and Ross. However, this is not the case. One of the main features of legal realism is, in fact, its lack of interest in theory. Therefore, compared to Italian and, more generally, continental European legal education, there is relatively little focus on theoretical questions in Swedish legal education. Scandinavian legal realism is reflected more in the methods than in the content of legal education.

Several of the ten defining elements of pragmatism described in section 1.1

[53] C. Martinson, 'How Swedish Lawyers Think about "Ownership" – Are We Just Peculiar or Actually Ahead?', in W. Faber and B. Lurger eds, *Rules for the Transfer of Movables: A Candidate for European Harmonisation or National Reform?* 13 *Edinburgh Law Review*, 69-95 (2008).

can be observed in Swedish legal education. While the Swedish law curriculum does include a compulsory course in legal history and legal theory (the two subjects are typically taught together), the other courses on the various fields of law, both substantive and procedural, pay little attention to historical and theoretical questions. The focus is generally on legislation (including their preparatory works) and case law, with some practical exercises, such as moot courts. Uppsala University, one of the historic law schools, promotes its law program by emphasizing that it is built on a method that teaches how lawyers work, using problem-based learning to train students to find solutions to legal problems.[54] This approach to legal education reflects pragmatism's problem orientation and experience orientation.

Swedish legal education typically begins with a general introductory semester that includes many practical exercises designed to train students in 'the legal method'. This approach is supported by the strong presence of a 'doctrine of legal sources' (*rättskällelära*) in the Nordic legal tradition, which is itself rather pragmatic and based on a broad consensus among domestic legal scholars, as described in the following section. Practical exercises may include active, graded participation in discussion seminars, simulations of parliamentary committee hearings, writing short papers and case summaries, and engaging in rhetorical exercises.

In general, there is a strong focus on methodology. Swedish bachelor's and master's theses always include a section titled 'Methods and Materials', in which students are required to reflect on their own methodological choices and the sources used. The grading criteria used by professors when evaluating student theses provide a clear representation of the pragmatic approach to legal education in Sweden. Although these criteria may vary slightly among Swedish law schools, they all emphasize assessing the following abilities: 1) defining a legal problem, 2) finding relevant materials, 3) applying the legal method to address the problem (with the option to complement it with a method from an adjacent discipline), 3) presenting arguments in an analytical, insightful, and legally convincing manner, and 4) submitting the thesis within the pre-established timeframe, which is 10 weeks for a bachelor's thesis and 20 weeks for a master's thesis. Indeed, Swedish legal education is structured so that most students complete their degree in 4.5 years without significant delay. In Italian legal education, the only explicit qualitative criterion for a thesis is the ability to address a legal topic in an accurate and exhaustive manner.[55] In contrast, Swedish grading criteria, which are more detailed, do not have a similar requirement. Instead, the focus in Sweden is on producing an acceptable and reasonable piece of work within a given timeframe that demonstrates the student's practical ability to address a legal problem. Italian law theses are

[54] Uppsala universitet, 'Juristprogrammet', available at https://tinyurl.com/mr32c3a6 (last visited 30 May 2025).

[55] See, for example, the criteria used at the University of Florence available at https://tinyurl.com/yvsmzedk (last visited 30 May 2025). Final valutation (except): 'Perché possa essere attribuito un numero di punti superiore a 4 l'elaborato deve affrontare una trattazione accurata ed esauriente dell'argomento, esprimendo autonomia e approfondita riflessione critica.'

not required to be problem-based; instead, students are expected to explore all theoretical and conceptual aspects of a given legal topic.

Another (pragmatic) link between Swedish legal education and legal practice is the unique grading system, which consists of three passing grades (AB, Ba, and B) dictated by Domstolsverket, the Swedish National Courts Administration.[56] Indeed, Swedish legal education was designed to prepare students for the judicial career.

2. Pragmatism in Legal Scholarship

A significantly pragmatic element of the Nordic doctrine(s) of legal sources is that they also include formally non-binding sources, such as legal doctrine, legal historical arguments, and practical considerations. The latter often consist of general legal assessments in a particular case and involve, for example, the interests of the parties at stake, the fairness and equity of the decisions and various purpose-oriented arguments.[57] Indeed, all Nordic authors who wrote about legal sources and legal interpretation distinguish between binding sources on the one hand and permitted or practical sources on the other hand.

The Finnish Aulis Aarnio, for example, divided legal sources into three categories: strongly-binding, weakly-binding, and permitted sources of law.[58] Hannu Tolonen developed this classification further and introduced the concept of 'notions of legal sources', making a distinction between formal, substantial, and practical sources of law.[59] Tolonen's theory is based on the idea that the social and legal world is constructed out of human activity by processes conveyed by language at different times. While formal sources of law consist of commands or expressions of the lawmaker's will, substantial sources of law, such as legal precedents and legal principles, are connected with discretion, which require assessment by the judge. Practical legal sources would, instead, relate to the fact that law involves social relations, factual consequences and societal aims. Tolonen included customary law and preparatory works in this third category.

In addition to following a pragmatic doctrine of legal sources, Nordic legal scholars typically prefer to address practical questions in their research rather than theoretical ones. Although Italian law journals also publish articles analysing current issues of substantive and procedural law or commenting on recent judgments, they address these issues using several abstract concepts and place significant emphasis on conceptual and theoretical analysis. This type of analysis

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[56] For more detailed information see Domstolsverket's official website available at https://tinyurl.com/4tw2fzvn (last visited 30 May 2025).

[57] These are often referred to as teleological considerations. See J. Boucht, 'Introduction to Finnish and Swedish Legal Method', in I. Helland and S. Koch eds, *Nordic and Germanic Legal Methods* (Tübingen, Germany: Mohr Siebeck, 2014), 169.

[58] A. Aarnio, *The Rational as Reasonable: A Treatise on Legal Justification*, *The Rational as Reasonalble: A Treatise on Legal Justification* (Dordrecht: D. Reidel Publishing Company, 1987), IV, 91.

[59] J. Boucht, n 57 above, 171. See H. Tolonen, *Oikeuslähdeoppi* (WSLT, 2003).

is less common in studies published in Nordic law journals.

3. Pragmatism in Court Practice

Pragmatism also permeates the application of the law in general and court practice in particular, and it is manifested in several ways. First, the well-known deferential attitude of Nordic judges towards the legislature can be partially explained by pragmatism. In addition to reflecting a tendency to privilege politics over law, this deference is also a result of the practical availability of a vast amount of preparatory works of high quality.[60] Nordic legislation is typically kept simple and general, with the necessary details for its application found in the legislative materials.[61]

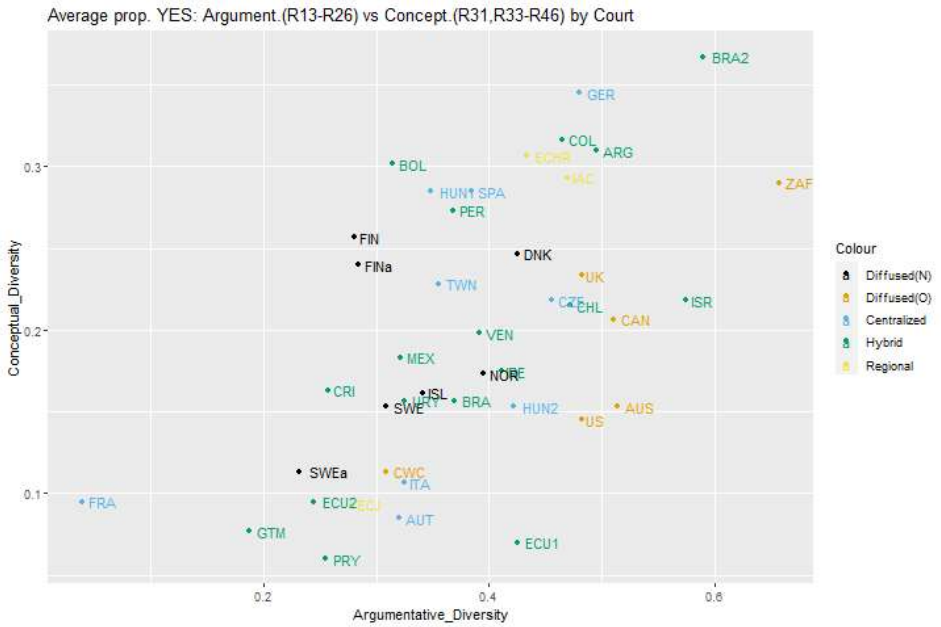
The widespread lack of interest in theory that characterizes Swedish legal education and scholarship is even more apparent in court practices and the way judgments are written. Swedish judgments are typically concise and avoid elaborate language, stating only what is necessary to explain how the court reached its conclusion. In fact, recent empirical comparative research has shown that the conceptual and argumentative diversity of Sweden's two supreme courts (the ordinary and the administrative supreme courts) in their leading constitutional cases is significantly lower than that of most other supreme courts around the world with the power of judicial review (see Figure 1).[62]

Figure 1: Global comparison of argumentative and conceptual diversity of supreme and constitutional courts in their leading constitutional cases

[60] U. Kischel, *Comparative Law* (Oxford: Oxford University Press, 2019), 560-561.

[61] ibid 561. As Kischel observed, 'Scandinavian lawyers clearly do not care much about the precise theoretical classification of legislative materials, legal practice, and legal doctrine as a source of law, so long as it is clear *that* they are used in practice, and *how* they are used in practice'.

[62] The results of this research have not yet been published. See the Nordic CONREASON project funded by the Swedish Riksbankens Jubileumsfond, led by the Örebro University at https://www.oru.se/nordic-conreason/ (last visited 30 May 2025). In this and the following two figures, SWEa and FINa stand for the supreme administrative courts of Sweden and Finland. The other three Nordic countries do not have a separate supreme administrative court.



This means that Swedish judges use a narrower range of arguments and concepts in their constitutional reasoning compared to their foreign counterparts, including judges in other Nordic countries (although the Icelandic Supreme Court shows a similar pattern to that of the Swedish Supreme Court). The Italian Constitutional Court is similar to the Swedish Administrative Supreme Court in that it also draws on a restrictive repertoire of arguments and concepts.[63] This can be attributed to the civil law tradition of the Italian legal system, which has a strong French influence, and a court culture that relies extensively on the technique of looking for a broader consensus among the judges.[64] The absence of separate opinions at the Italian Constitutional Court (and in Italian courts generally) further pushes the court to take more inclusive and shared decisions.[65] In contrast, Swedish judges are permitted to write dissenting and concurring opinions, but these are typically brief and terse.[66] As a result, even when separate opinions are present, the overall judgment still exhibits a low level of argumentative and conceptual diversity.

Still considering constitutional reasoning, we can also observe that the pragmatic judges of Sweden's two supreme courts tend to blend constitutional

[63] See also A. Jakab, A. Dyevre, and G. Itzcovich, 'Conclusion', in Ead eds, *Comparative Constitutional Reasoning* (Cambridge: Cambridge University Press, 2017), 766.

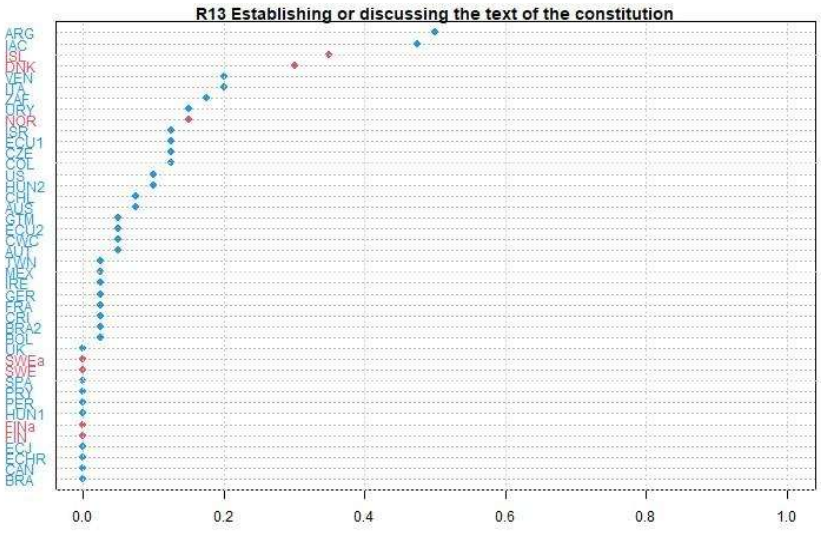
[64] T. Groppi and I. Spigno, 'The Constitutional Court of Italy', in A. Jakab, A. Dyevre, and G. Itzcovich eds, *Comparative Constitutional Reasoning*, n 63 above, 529.

[65] ibid 529.

[66] A. Simoni and F. Valguarnera, 'La tradizione giuridica dei Paesi nordici', in V. Varano and V. Barsotti eds, *La tradizione giuridica Occidentale. Testo e materiali per un confronto civil law common law* (Torino: Giappichelli, 6th ed, 2018), 487.

and statutory arguments without clearly distinguishing between them.[67] In this sense, they are not unlike common law judges. Since both common law and Nordic judges have broad general jurisdiction, they do not need to restrict themselves to constitutional arguments as specialized constitutional courts, such as the Italian Constitutional Court, do. Indeed, Swedish judges rarely discuss explicitly what counts as constitutional text and what counts as statutory law (see Figure 2). This is also part of their pragmatic approach, which lacks a principled and conceptual discussion. Furthermore, in the Nordic context, the intertwinement of constitutional and statutory reasoning is particularly evident in human rights cases, as all Nordic constitutions operate on the premise that the concretization or regulation of human rights can only occur through parliamentary legislation.[68]

Figure 2: Global comparison of the use of arguments establishing or discussing the text of the constitution in the leading constitutional cases of supreme and constitutional courts



As *Figure 2* shows, Finland's two supreme courts have similarly low rates, while the supreme courts of the other three Nordic countries (Iceland, Denmark, and Norway) exhibit a comparatively high proportion of arguments focused on

[67] See, for example, case RÅ 1996 ref. 28 of the Swedish Supreme Administrative Court. See also Å. Elmerot, 'Constitutional reasoning in the Swedish supreme courts' (on file with the authors, chapter in the forthcoming book K. Kelemen ed, *Constitutional Reasoning in the Nordic Supreme Courts: An Empirical and Comparative Legal Perspective* (Oxford: Hart Publishing, 2026)).

[68] T. Ojanen, 'Human Rights in Nordic Constitutions and the Impact of International Obligations', in H. Krunke and B. Thorarensen eds, *The Nordic Constitutions: A Comparative and Contextual Study* (Oxford, UK: Hart Publishing, 2018), 144.

establishing or discussing the text of the constitution. The explanation for this intra-Nordic difference is twofold. First, the Swedish and Finnish constitutions are the youngest among the Nordic constitutions, making it reasonable to assume that older constitutions raise more questions about the applicability of constitutional customs and traditions.[69] Second, the Icelandic Supreme Court has a significant proportion of leading constitutional cases in which the constitutional status of the European Convention of Human Rights (ECHR) is discussed.[70] In contrast, the constitutional status of the ECHR, and of other sources of international law, is not a topic of discussion before the other Nordic supreme courts.[71] We may observe more of a parallel use of the constitution and international human rights treaties, including the ECHR, rather than a harmonization between them.[72]

The relatively high proportion of cases before the Italian Constitutional Court that use arguments establishing or discussing the text of the constitution is, instead, due to the creation of the category of 'interposed norms.' These norms, which include generally recognized principles of international law,[73] the ECHR,[74] and European Union law,[75] occupy a position between statutory law and the constitution in the hierarchy of sources and can be used as a standard of review.[76] As a result, the Italian Constitutional Court, unlike most Nordic supreme courts, does not shy away from discussing the position of the ECHR in the hierarchy of sources.

In general, Swedish judges prefer to apply more specific and concrete provisions over vaguer, more general ones, even when the latter may be found in a higher source of law.[77] This attitude is further reinforced by the unique nature of Swedish constitutional norms, which include special fundamental laws such as the Freedom of the Press Act and the Freedom of Expression Act.[78] These two Acts are unusual constitutional documents from a comparative perspective, as they contain highly detailed rules, including provisions on criminal liability and court procedure in cases concerning free speech. As Bull and Cameron observed,

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[69] In the Nordic CONREASON Project, we considered this as a subcategory of this type of argument. Our findings show that only the Danish, Icelandic, and Norwegian supreme courts discuss whether a tradition or custom is considered part of the constitution. This type of argument is absent in the 160 leading constitutional cases examined from the Swedish and Finnish supreme courts.

[70] In our sample, this type of argument appeared in 12 out of 40 judgments.

[71] See K. Kelemen et al, 'Constitutional Reasoning in the Nordic Supreme Courts: A Comparative Empirical Analysis' (on file with the authors, forthcoming in *International Journal of Constitutional Law*, 2025).

[72] T. Ojanen, n 68 above, 157.

[73] Decision no 172/1999.

[74] Decision no 80/2011.

[75] Decision no 102/2008.

[76] T. Groppi and I. Spigno, n 64 above, 530.

[77] T. Bull and I. Cameron, 'The Evolution and Gestalt of the Swedish Constitution', in A. Von Bogdandy, PM. Huber, and S. Ragone eds, *The Max Planck Handbooks in European Public Law: Volume II: Constitutional Foundations* (Oxford: Oxford University Press, 2023), 619.

[78] *Tryckfrihetsförordningen* (TF) of 1949 and *Yttrandefrihetsgrundlagen* (YGL) of 1991.

'(t)hey are in essence constitutionalized criminal law'.[79]

Swedish legal scholars distinguish between 'strict' and 'pragmatic' methods of constitutional interpretation.[80] The former involves examining the ordinary meaning of a provision's words in light of its preparatory works. In contrast, the pragmatic method also takes into account practical considerations. According to Håkan Strömberg, a late Swedish public law scholar at Lund University, the pragmatic method requires highly sophisticated argumentation techniques.[81] He differentiated between constitutional interpretation by the Council on Legislation, in charge of preventive constitutional review of legislative proposals, and constitutional interpretation by courts in concrete cases. Strömberg argued that, in the preventive phase, the strict method cannot lead to significant practical inconveniences, unless the constitutional provisions themselves are flawed, in which case a constitutional amendment may be warranted. However, even this situation presents a dilemma: while a pragmatic interpretation of the flawed constitutional provision might eliminate the practical inconveniences, it also preserves the inconsistency between the text of the flawed provision and its application. On the other hand, a strict interpretation might cause serious practical inconveniences but could expedite a desirable constitutional amendment. When it comes to constitutional interpretation by courts, the situation differs. The issue in these cases is the constitutionality of an already enacted statutory provision. In this context, the pragmatic method may appear beneficial in the short term but maintains the discrepancy between the constitution and the criticized statutory provision. Conversely, a strict interpretation might prompt an amendment to the criticized statutory provision rather than the constitution itself, which is not an unusual outcome.[82]

The findings of the Nordic CONREASON project suggest that Swedish supreme court judges prefer the strict method and rarely employ pragmatic interpretations of the constitution. This is demonstrated by the comparatively low level of argumentative diversity in their leading constitutional judgments (see Figure 1 above). It is also confirmed by the comparatively significantly high proportion of cases in which the preparatory works of the constitution are referenced (see Figure 3 below).

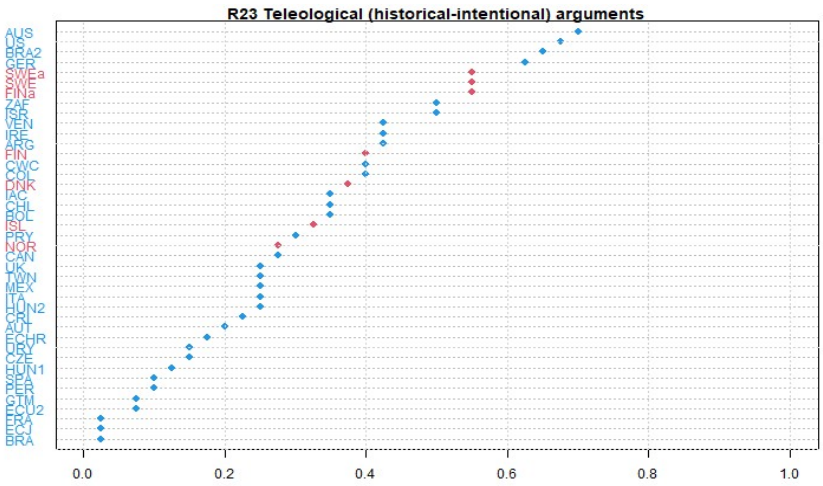
Figure 3: Global comparison of the use of subjective teleological arguments in the leading constitutional cases of supreme and constitutional courts

[79] T. Bull and I. Cameron, n 77 above, 602.

[80] H. Strömberg, *Normgivningsmakten enligt 1974 års regeringsform*, (Lund: Juristförl., 3rd ed, 1999), 201–204.

[81] ibid 201.

[82] ibid 203–204.



Even in this case, the relatively young age of the Swedish and Finnish constitutions partly explains the more frequent use of subjective teleological arguments. The preparatory works are more recent and thus closer to today's socio-economic context, making it easier for judges to rely on them. The Supreme Court of Norway, the country with the oldest constitution in Northern Europe, uses this type of argument less frequently. In Iceland, the 1944 Constitution was formally an act of the Danish King, which helps explain why the Icelandic Supreme Court is more reluctant to use its preparatory works to interpret constitutional provisions.

IV. CONCLUDING REMARKS

In conclusion, the Nordic legal tradition's distinctively pragmatic approach has deep historical roots and continues to shape contemporary legal practice, scholarship, and education. This pragmatism, marked by a focus on problem-solving and a flexible, context-sensitive interpretation of law, contrasts with the more concept-oriented continental European tradition, which emphasizes theoretical and systematic considerations. This is especially true for Sweden. As seen, comparative empirical research on constitutional reasoning confirms that the Swedish supreme courts' judgments exhibit a notably low level of conceptual and argumentative diversity, even in comparison to other Nordic supreme courts. Our discussion of the contemporary Swedish legal tradition seeks to illustrate that legal pragmatism is not merely a theoretical construct but a lived tradition.