Civil Procedure and the Rule of Law in Scandinavia

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1 Introduction

Courts are an essential institution in the rule of law. Scandinavian civil procedure law thinking has, nevertheless, only to a limited extent discussed the nexus of civil procedure and rule of law. One reason for this could be that the balance of powers and the role of courts in it, which belongs primarily to the domain of constitutional law, has been the focal point, not the specific aspects related to access of courts in cases between two private parties. Scandinavian 'rights exceptionalism' both in the weak constitutional protection of human rights and in that thinking in terms of rights (*rättighet*) in the Scandinavian sense of the word, is foreign to Scandinavian lawyers,[1] are also possible explanations for the limited focus on the rule of law and civil litigation in the literature.

Legal rights and courts enforcing those rights are essential for the rule of law, for a rule-based society, governance through law, and for the equal treatment of citizens. Equal access to legal remedies and access to court proceedings where courts establish facts and decide the case by applying legal rules contribute to social stability through predictability and performance of justice. To some extent, these ideals are at variance with intrinsic elements of Scandinavian legal thinking, particularly pragmatism,[2] the communitarian social democratic project in which the state is construed as 'good',[3] and the 'rights scepticism' of Scandinavian legal realism. Hence, Scandinavian civil procedural doctrine has largely regarded courts as producers of dispute resolution through adjudication: as an organ rendering 'justice through law',[4] and a vehicle for implementing the will of the parliament, rather than essential bodies in the rule of law.[5]

This text posits that the historical and prevailing legal ideologies, in particular views on the (primary) function of civil litigation, shape how the values of rule of law are materialised through court proceedings.[6] As a consequence, the perceived primary role of Scandinavian courts oscillates between stressing the

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1 Ran Hirschl, 'The Nordic counternarrative: Democracy, human development, and judicial review' (2001) 9 Int J Constl L 449; Johan Karlsson Schaffer, 'Mellan aktivism och ambivalens: Norden och de mänskliga rättigheterna' (2017) 40 Retfærd 54.

2 Pia Letto-Vanamo and Ditlev Tamm, 'Nordic Legal Mind' in Pia Letto-Vanamo, Ditlev Tamm and Bent Ole Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019); Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäki, 'Nordic Law: Between Tradition and Dynamism', in Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäki (eds), *Nordic Law: Between Tradition and Dynamism* (Intersentia 2008) 9–10 and 17; Ulf Bernitz, 'What is Scandinavian Law' (2007) 50 Sc St L 14.

3 E.g., Pia Letto-Vanamo, 'Courts and proceedings: Some Nordic characteristics' in Laura Ervo, Pia Letto-Vanamo and Anna Nylund (eds), *Rethinking Nordic Courts* (Springer 2021) 23–24; Letto-Vanamo and Tamm, (n 2) 8.

4 Jacqueline M. Nolan-Haley, 'Court mediation and the search for justice through law' (1996) 74 Wash ULQ 47.

5 Malcom Langford, Mikael Madsen and Johan Karlsson Schaffer, 'The Scandinavian Rights Revolution: Courts, Rights and Legal Mobilization Since the 1970s' (2019), https://ssrn.com/abstract=3395834 accessed 2 January 2022; Jaakko Husa, 'Nordic Constitutionalism and European Human Rights – Mixing Oil and Water?' (2010) 55 Sc St L 101.

6 This approach bears resemblance to Mirjan R. Damaška, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process* (Yale University Press 1986).

private and the public functions of courts. It also correlates with fluctuation in the views on legal rights and the role of courts in a democratic society, viz. the rule of law. The analysis is divided into three periods: the zenith of Scandinavian realism and welfare state (approximately 1920-1980); the influx of the access to justice movement and European law (approximately 1980-2010); and the current period in which New Public Management (NPM) and related phenomena have made their mark on procedural law. The time periods are approximate; changes are typically gradual rather than abrupt, and while the underpinning ideas often become diluted and less potent with time, they are not necessarily completely eradicated. The focus will be on regular civil proceedings primarily in cases between two individuals (i.e., physical persons, businesses, etc.), rather than on cases in which recourse against administrative decisions is sought. While the role of courts as the third state power, enforcing 'checks and balances', and government bound by law also have a substantial influence on the societal position of courts, a discussion of this aspect would be beyond the scope of this article.

The analysis is structured as follows: Part 2 discusses the role of courts when deciding ordinary civil cases in the rule of law. Next, parts 3 (Scandinavian legal realism and welfarism), 4 (access to justice and Europeanisation) and 5 (NPM) discuss how the respective undercurrents of societal and legal ideologies are manifested in the conceptualisation of the roles and functions of civil courts. There will also be brief comments on how these ideas promote or hamper the role of civil courts in the rule of law. While this article includes Finland under the panoply of Scandinavia, Finnish law is not discussed in detail in part 3 because Scandinavian legal realism was never dominant in Finland,[7] the Finnish welfare state developed later than its Scandinavian counterparts, and Finnish civil procedure law was not modernised until 1993.

2 The Rule of Law and Civil Procedure

Three principles of the rule of law,[8] are of particular importance for civil procedure, namely (1) law not discretion, (2) equality before the law, and (3) access to dispute resolution and a fair trial. Law not discretion refers to efforts to curb arbitrariness through predictable, general rules. When citizens know which norms apply, they can adjust their actions accordingly and voluntary comply with the law and resolve their disputes in accordance with legal rules. Of course, this does not prevent the parties from deviating from those rules, particularly when 'private ordering' is an informed choice. Equality before the law refers both to ideals of equal treatment and non-discrimination as beacons for substantive law, and, at least to some extent, for procedural rules to level the playing field, such as by requiring judges to give more guidance to self-represented parties or by designing distinct procedures that cater for such litigants. Equal access to dispute resolution and a fair trial is a corollary of the

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[7] Toni Malminen, 'So You Thought Transplanting Law is Easy? Fear of Scandinavian Legal Realism in Finland, 1918-1965' in Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäki (eds), *Nordic Law: Between Tradition and Dynamism* (Intersentia 2008).

[8] Tom Bingham, *The Rule of Law* (Penguin Books 2010).

equal application of law. In absence of real access to adjudication, stronger parties can avoid public regulation by forcing weaker parties to settle.[9] A fair trial is contingent on the parties having equal and adequate opportunities to argue their case, to comment on all information presented to the court, and a public 'performance' of justice.[10]

Brian Tamanaha observes how the rule of law encompasses 'rule by law': the idea of governance through the general laws. He argues that the use of 'public, prospective laws, with the qualities of generality, equality of application, and certainty' formed a fertile ground for modern Western societies.[11] Because law is not self-interpreting or self-applying, judges are the 'special guardians of the law' who must be 'unbiased, free of passion, prejudice and arbitrariness, loyal to the law alone.'[12] Law is then a 'neutral' yardstick for determining which rights and duties should prevail in a dispute.

The rule of law manifests itself in indicating several private (individual) and public functions for civil courts. As Dame Hazel Genn notes, courts have both private and public functions:[13]

> Effective access to justice involves the ability to access public processes for resolving disputes and rights claims, that lead to enforceable remedies reflecting the merits of cases according to law (the concept of substantive justice), by means of procedures that are conspicuously fair and perceived to be so (participation, procedural justice and trust) … That is the individual benefit of access to justice. But the societal benefit goes further than that. Public determination of cases … states what the law is, communicates and reinforces important norms of social and economic behaviour, and provides a framework for the settlement of future similar disputes.

The private function consists of both the resolution of individual disputes and providing a vehicle for individuals and businesses to vindicate and enforce their rights, to seek 'justice through law'. As Alexandra Lahav notes, litigation in the

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9 Judith Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015) 124 Yale LJ 2804, 2849.

10 E.g., Valérie-Laure Benabou and Emmanuel Jeuland, 'From the Principle of Immediacy to the Principle of Presence: A French Example and a Comparative Law Perspective' (2022) 12 Intl J Proc L 40; Fernando Gascón Inchausti, 'Challenges for Orality in Times of Remote Hearings: Efficiency, Immediacy and Public Proceedings' (2022) 12 Intl J Proc L 8.

11 Brian Z. Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge University Press 2012) 92–93 and 119.

12 Tamanaha (n 11) 123.

13 Hazel Genn, 'Online Courts and the Future of Justice' Birkenhead Lecture 2017 Gray's Inn 16 October 2017, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwj-_M-aq8n7AhWixIsKHRnBAoEQFnoECA8QAQ&url=https%3A%2F%2Fwww.ucl.ac.uk%2Flaws%2Fsites%2Flaws%2Ffiles%2Fbirkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf&usg=AOvVaw1h5nO7JJpdF6BEsBVmN92F, 6, accessed 14 January 2022. See also Alan Uzelac, 'Goals of Civil Justice and Civil Procedure in the Contemporary World: Global Developments: Towards Harmonisation (and Back)' in Alan Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 5 et seq.

courts 'requires alleged wrongdoers to answer for their conduct and provides a process for them to be held accountable'.[14] Though more powerful parties have tangible advantages *vis-a-vis* less powerful parties[15] civil procedure still aims at, to some extent, levelling the playing-field.[16]

The public functions of civil procedure are manifold. By being a vehicle for effective enforcement of legal rights and obligations, courts create incentives for voluntary compliance with legal rules. Courts promote predictability and equality, a society in which legal rules serve as a standard for separating rightful from wrongful conduct.[17] They can force even the government to obey the law.

Applying the law, courts put the policy goals underpinning the law into practice.[18] Courts clarify and adapt the law to new circumstances by constantly reiterating and reinterpreting it. Court rulings can be an impetus for legal reform when they shed light on rules that are out of tune with prevailing values and social realities.

Additionally, courts are a stage for performing justice. However, courts can only emulate the truth, due to the limitations posed by procedural and substantive rules.[19] Through public scrutiny of the legal and factual argumentation of the parties, court proceedings can, nevertheless, contribute to a sense of justice having been done, of order having been (re-)established.[20] In enabling parties to participate in performing justice by allowing them to present their views and arguments, the proceedings serve procedural justice.[21] Public hearings contribute to ensuring that all power is constrained through transparency. Judith Resnik reminds us that 'courts are, like legislatures, a place in which *democratic practices* occur in real-time.'[22]

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14 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press 2017) 54.

15 Marc Galanter, 'Why the haves come out ahead: Speculations on the limits of legal change' (1974) 9 L Soc Rev 95.

16 Lahav (n 14) 66 et seq and 119 et seq.; Judith Resnik, 'Courts: In and Out of Sight, Site, and Cite' (2008) 53 Villanova L Rev 771, 804 et seq.

17 Lahav (n 14).

18 Uzelac (n 11) 9 et seq.

19 Peter Westberg, *Civilrättskipning* (2nd ed, Norstedts juridik 2013) 63–66.

20 See also Lahav (n 14) 65–66; Resnik, 'Courts' (n 16) 781–783.

21 E.g., Jean-Francois Roberge, 'Sense of Access to Justice as a Framework for Civil Procedure Reform: An Empirical Assessment of Judicial Settlement Conferences in Quebec (Canada)' (2016) 17 Cardozo J Confl Resol 341; Rebecca Hollander-Blumoff and Tom R. Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' (2011) 5–6 J Disp Resol, 1; E. Allan Lind, Ruth Kanfer and P. Christopher Earley, 'Voice, control, and procedural justice: Instrumental and noninstrumental concerns in fairness judgements (1990) 59 J Personal Soc Psychol, 952, 958.

22 Judith Resnik, 'Constituting a Civil Legal System Called "Just": Law, Money, Power, and Publicity', in Xandra Kramer and others (eds), *New Pathways to Civil Justice in Europe* (Springer 2021).

3 Scandinavian Realism, Welfarism, and Courts

3.1 Rise of the Scandinavian Welfare State and Civil Procedure Reforms

From the years leading to the enactment of the German Civil Procedure Code in 1877 and until the reforms of Danish and Norwegian civil procedure in 1916 and 1915, Scandinavian civil procedure thinking was dominated by German theories, particularly the idea of legal (or judicial) protection (*rättsskydd*), i.e., that courts are essential for enabling citizens to vindicate their rights and for maintaining the ideals of the liberal democracy.[23] The two reforms were a turn from the *laissez-faire* liberal to the 'social' civil procedure model envisioned by Franz Klein, and towards utilitarianism.[24] Due to limited resources, the Norwegian rules did not enter fully in force until some decades after their enactment.[25] The Swedish civil procedure rules, while modernised in 1942, were influenced by the same ideas, and by the burgeoning of the welfare state.[26]

The active state as a prerequisite for a good society and equality is an axiom in Scandinavian welfarism, because the state is intended to ensure the proper combination of capitalism and socialism through 'social engineering'.[27] Many of the welfarist reforms formed the backbone of Scandinavian social democratic societies.[28] Courts were vital in this process: apolitical judges are engineers who implement the reforms to maximise the underlying societal rationale. Despite the reformist agenda, both the 'social engineering' project and the reforms of civil procedure maintained many of the previous societal structures, including power structures, remoulding them to fit the social democratic ideals rather than decimating them.[29] For historical reasons, the need to demonstrate a distance to the old elites was probably more acute in Denmark and Sweden than in Norway (and Finland): As Norway gained autonomy in 1814 and then independence in

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[23] Henrik Bellander, *Rättegångskostnader. Om kostnadsbördan i dispositive tvistemål* (Iustus 2017) 93–94; Kjell Å. Modéer, 'Den stora reformen. Rättegångsbalkens förebilder och förverkligande' (1999) SvJT 400, 401–403; Per Olof Ekelöf, *Rättegång. Första häftet* (2nd edn, P.A. Norstedt & Söners förlag 1963) 13.

[24] Maria Astrup Hjort, 'Sources of Inspiration of Nordic Procedural Law: Choices and Objectives of the Legal Reforms' in Laura Ervo, Pia Letto-Vanamo and Anna Nylund (eds) *Rethinking Nordic Courts* (Springer 2021) 72–74 and 79–81; Bellander, *Rättegångskostnader* (n 23) 52–57; Per Henrik Lindblom, 'Rättegångsbalken 50 år. En saga och sex sanningar' (1999) SvJT 496, 499; Modéer (n 23) 403–405.

[25] Hjort, 'Sources of Inspiration' (n 24).

[26] Bellander, *Rättegångskostnader* (n 23) 52 et seq.

[27] Linus J. McManaman, 'Social Engineering: The Legal Philosophy of Roscoe Pound' (1958) 33 St. John's LR 1, 30 et seq.

[28] Johan Strang, 'Two Generations of Scandinavian Legal Realists' (2009) Retfærd 74; Bo Sträth, 'The Normative Foundation of the Scandinavian welfare states in historical perspective', in Nanna Kildal and Stein Kuhnle (eds), *Normative Foundations of the Welfare State: The Nordic Experience* (Taylor & Francis 2005); Heikki Pihlajamäki, 'Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared' (2004) 52 AmJCompL 469, 473.

[29] Francis Sejersted, *The Age of Social Democracy. Norway and Sweden in the Twentieth Century* (Richard Daly tr, Madeleine B. Adams ed, Princeton University Press 2010) 256–257; Modéer (n 23).

1905, the elite was replaced, and there was a pressing need to construct a national identity that reflected the interests of farmers and manufacturers, not just apex social groups.

3.2 Scandinavian Legal Realism and Civil Procedure

There are many historical and ideological connections between Scandinavian legal realism and Scandinavian welfarism. Law was a vehicle for social reform and judges were seen as disinterested technicians that lubricate and service the machinery of law in the spirit of legal instrumentalism and utilitarianism.[30] As Jes Bjarup notes, for Axel Hägerström, the founder of Scandinavian realism, 'the law is devoid of any conceptual content but the imperative sentences are used by legal officials to bring about appropriate behaviour among people.'[31]

The agenda of the Danish realist Alf Ross could be characterised as anti-metaphysical, as it called for a secular 'nihilist', 'amoral', or moral-sceptical outlook of law and discarded rights as meta-physical pseudo concepts.[32] In contrast to his Scandinavian colleagues, he dismissed the explicit social democratic agenda by insisting on separating law and politics.[33] Ross devoted very limited attention to courts in his works.[34] The primacy of the political over law requires judges to be loyal to the legislature and precludes judicial review: Judges are only to operate the machinery of justice by applying the law to the facts at hand.[35] In this thinking, there is limited room for the rule of law.

The impact of the ideas of Swedish realists – and civil proceduralists – Per Olof Ekelöf and Karl Olivecrona can hardly be overstated. While they shared the view of Ross on the non-existence of rights, they regarded courts as paramount to the social democratic project.[36] When courts enforce the law, and when necessary, clarify it, and in reiterating legal rules, the law becomes established as the prevailing social norm. Efficient enforcement both creates strong incentives to comply with the law and gives strong guidance on how to resolve disputes without resorting to courts. This effect is referred to as the 'behaviour modification' (*handlingsdirigering*) function of courts.

Ekelöf vigorously promoted the teleological method which requires courts to decide hard cases by interpreting statutes and other legal sources 'in such a way that the judgment will contribute to the achieving of *the total result* which may

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30 Gregory S. Alexander, 'Comparing the two legal realisms-American and Scandinavian' (2002) 50 Am J Comp L 131, 172–174; Schaffer (n 1).

31 Jes Bjarup, 'The Philosophy of Scandinavian Legal Realism' (2005) 18 Ratio Juris 1, 8.

32 Alf Ross, *On Law and Justice* (reprint, The Lawbook Exchange 2004); Toni Malminen, 'Scandinavian Legal Realism: Some Unfinished Business' (2016) 60 Retfærd 57, 61–62; Johan Strang, 'Scandinavian Legal Realism and Human Rights: Axel Hägerström, Alf Ross and the Persistent Attack on Natural Law' (2018) 36 Nordic J Hum Rights 202, 209; Strang. 'Two Generations' (n 28).

33 Jens Evald, *Alf Ross – A life* (DJØF publishing 2014) 227 and 284. Evald notes, nevertheless that Ross privately supported social democracy.

34 This includes the book *Why Democracy?* (Harvard University Press 1952).

35 Strang, 'Two Generations' (n 28) 213–215.

36 Per Olof Ekelöf, 'Teleological Construction of Statutes' (1958) 2 Sc St L 75, 86–88.

be regarded as the purpose of the statute,' which is determined 'by taking as a starting point the statute as a means of achieving the purpose.'[37] Olivecrona posited that the interaction between substantive and procedural rules shall lead to attainment of the underlying policy goals.[38] In deciding a case, the court creates law because there will always be a discretionary aspect to judicial decision-making, and all law involves the use of power.[39] Courts then, contribute to upholding and recreating state power, and the role of courts becomes utilitarian: to maximise the policy goals underpinning the law,[40] which was congruous with 19th century civil procedure thinking. Using panels consisting of both professional and lay judges, the powers of courts – to be precise, professional judges – were put under popular control.[41]

In addition to the public functions, courts are, in resolving disputes, a mechanism whereby 'legal peace' (*rättsfrid*) is upheld and restored.[42] The private function was nevertheless subordinate to the public functions.

The Norwegian realists Vilhelm Aubert and Torstein Eckhoff represented a sociologically oriented form of legal realism. Their sociological studies had demonstrated the limits of legal engineering, which probably contributed to softening their views on the primacy of the public functions of court. By applying norms, Aubert argued, courts contribute to predictability through ensuring coherent and continuous application of laws.[43] Courts also provide valuable feedback to the legislative body when the outcome is out of tune with shifting views in society. Courts are indispensable and natural resolvers of disputes. Parties turn to courts when they fail to negotiate a settlement either due to the nature of the dispute or because the parties need the assistance of a neutral third-party. Unlike the means-ends rationality of mediation and settlement, courts provide norm-rationality, that is, 'objective' outcomes that are more acceptable to the losing party.[44] Courts are neutral: they are anchored in the impartiality that pre-determined parameters for the outcome provides.[45] Eckhoff notes that 'from the point of view of the decision-maker, rules not only set bounds but also give guidance, support and protection.'[46] Guidance refers to

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37 Ekelöf, 'Teleological Construction' (n 36) 84.

38 Karl Olivecrona, *Bevisskyldigheten och den materiella rätten* (Almqvist & Wiksells Boktryckeri 1930) 130–133.

39 Karl Olivecrona, *Law as Fact* (2nd edn, Steven & Sons 1971) 208–211. See also Torben Spaak, 'Karl Olivecrona on Judicial Law-Making' (2009) 22 Ratio Juris 483.

40 See also e.g., Magne Strandberg, *Beviskrav i sivile saker* (Fagbokforlaget 2012) 101–104.

41 Pia Letto-Vanamo, 'Judicial Dispute Resolution and its Many Alternatives: The Nordic Experience' in Joachim Zekoll, Moritz Bälz and Iwo Amelung (eds), *Formalization and Flexiblisation in Dispute Resolution* (Brill 2014) 153–155.

42 Per Olof Ekelöf and others, *Rättegång. Första häftet* (9 edn, Wolters Kluwer 2016) 13–26.

43 Vilhelm Aubert, *Rettens sosiale funksjon* (Universitetsforlaget 1976) 135–140, 204–207 and 213–214.

44 Aubert (n 43) 174–176.

45 Torstein Eckhoff, 'Impartiality, Separation of Powers, and Judicial Independence' (1965) 9 Sc St L 10, 20–22.

46 Torstein Eckhoff, 'Impartiality, Separation of Powers, and Judicial Independence' reprinted in Bjørn Smørgard (ed), *Justice and the Rule of Law: Articles Collected on the Occasion of*

determining what is relevant and irrelevant arguments, support to withstanding undue influence, and protection to how decision-making limited by the law shields them from criticism.

Eckhoff recognised the room for judicial discretion but underlined how it is constrained by legal rules: Law is not value-free. Rather, legislation is the product of the balancing of different interests in parliament and government. Because the balancing of interests has already been done, courts should, as a rule, not question the underlying rationale of the law.[47] However, courts are also guardians of legal and moral conceptions, and must, when necessary, prevent the two other state powers from interfering with them.[48] In recognising courts as political organs, Aubert and Eckhoff diluted the distinction between law and politics, in contrast to Ross.[49] Judges should resort to utilitarian and empirical arguments when deciding cases in order to render the 'best' outcome. Because establishing societal causalities is an almost insurmountable task for courts, courts must rely on presuppositions of such causalities.[50] To avoid arbitrariness, courts can simply seek to loyally fulfil the societal goals of law as expressed in the text of the statute, preparatory works, previous court decisions, and other relevant documents.

Civil procedure thinking in the interwar and post-war periods was dominated by the prevailing legal and societal ideologies of the social democratic Scandinavian welfare state project. The rule of law was subordinate to these ideas with limited room – and perceived need – for considering individual interests. Aubert and Eckhoff assigned more weight to the private functions than did their Scandinavian peers, thus paving the way for new attitudes to the role of courts. The number of legal experts was still low in this period; therefore, the personal inclination of a legal thinker could have momentous effect on law. Thus, differences between the countries could reflect the beliefs held by each thinker rather than differences in societal context between Scandinavian countries or differences in legal philosophical inclinations.[51]

Professor Torstein Eckhoff's 50th Birthday, June 5th, 1966 (Johan Grundt Tanum Forlag 1966) 118. The cited text is not found in the original version of the article, Eckhoff (n 45). See also Torstein Eckhoff, 'The Mediator, the Judge and the Administrator in Conflict-resolution' (1966) Acta Sociologica 148.

47 Eckhoff, 'Impartiality, Separation of Powers' (n 45) 28–32 and 44–46.

48 Torstein Eckhoff, 'Havnåsdommen – kritikk og refleksjoner' reprinted in Bjørn Smørgard (ed), *Justice and the Rule of Law: Articles Collected on the Occasion of Professor Torstein Eckhoff's 50th Birthday, June 5th, 1966* (Johan Grundt Tanum Forlag 1966) 169.

49 Rune Slagstad, 'Norwegian Legal Realism Since 1945' (1991) 35 Sc St L 216, 228–229.

50 Slagstad (n 49) 232.

51 Jørn Øyrehagen Sunde, '"Der organische Zusammenhang des Rechts": How the reception of Savigny came to influence legal reception in Norwegian law in the 19th and first part of the 20th century' in Volker Lipp and Halvard Haukeland Fredriksen (eds), *Reforms of Civil Procedure in Germany and Norway* (Mohr Siebeck 2011).

4 Access to Justice, Europeanisation, and Individual Rights

4.1 The Access to Justice Movement in Scandinavia

The 1970s marked a turn to 'welfarist' contract law in Scandinavia:[52] New rules were enacted to improve the protection of vulnerable parties, and to ensure fairness. Arguably, this represents revived acceptance of legal rights.[53] The combination of mandatory rules and rules that allow courts to adjust unfair agreements, suggests a recognition of the value of individual justice and that collective enforcement does not suffice.[54] Hence, it is not surprising that this period also marked the emergence of the Scandinavian consumer dispute resolution (CDR) model, with accessible, low-cost proceedings. Although the outcomes of many CDR processes are non-enforceable, most traders comply with them.[55]

The access to justice movement, ignited by the writings of Mauro Cappelletti and Bryant Garth,[56] resonated well with prevailing ideas in Scandinavia. Cappelletti and Garth argued that people have a right to access to justice, viz. an equal and real access to 'vindicate their rights and/or resolve their disputes under the general auspices of the state',[57] in a procedure that leads to individually and socially just results. To facilitate equal access to justice, they suggested three mechanisms or, in their terminology, 'waves': sufficient legal aid and new forms of legal services to combat economic hindrances; collective redress proceedings to facilitate vindication of diffuse rights and interests; and alternatives to traditional court proceedings through simplified adjudicative proceedings in and outside courts (e.g., small claims proceedings and CDR) and through proceedings seeking at an amicable solution.

Both 'welfarist' contract law and the access to justice movement combine the vindication of individual rights and welfarism, thus challenging the legal realist dogmas denying the existence of legal rights while still maintaining many of the social democratic paradigms. In stressing the importance of equal access to court, Per Henrik Lindblom was an early advocate for the access to justice

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52 Thomas Wilhelmsson, *Critical Studies in Private Law* (Kluwer Academic Publishers 1992); Thomas Wilhelmsson, 'The Philosophy of Welfarism and its Emergence in the Modern Scandinavian Contract Law' in Roger Brownsword, Geraint Howells and Thomas Wilhelmsson (eds), *Welfarism in Contract Law* (Dartmouth 1994) 63.

53 See also Husa, Nuotio and Pihlajamäki (n 2) 35.

54 E.g., Johan Bärlund and Peter Moegelvang-Hansen, 'Contracting with a Social Dimension' in Pia Letto-Vanamo, Ditlev Tamm and Bent Ole Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019) 126–130.

55 E.g., Letto-Vanamo, 'Judicial Dispute Resolution' (n 41) 159–160.

56 Mauro Cappelletti and Bryant Garth, 'Access to justice: the newest wave in the worldwide movement to make rights effective' (1977) 27 Buff L Rev 181, 241; Mauro Cappelletti, Bryant Garth, and Nicolo Trocker, 'Access to justice: comparative general report' (1976) 40 The Rabel J Comp Intl Priv L 669.

57 Cappelletti and Garth (n 56) 182.

movement in Scandinavia.[58] He was one of the pioneers of fully recognising the reparative (i.e., vindication of rights to obtain a remedy) function of civil proceedings, in addition to its public functions. [59] He furthermore softened 'behaviour modification' by reimagining it as the preventive function, acknowledging that the link between effective vindication of rights and behaviour is empirically weak, while the existence of a nexus between efficient enforcement of rights and voluntary compliance seems probable. Additionally, he acknowledged the function of courts as controlling the two other state powers. Hence, his views on the manifold functions of courts in effect coincide with theories of the rule of law.

This shift towards recognising the private functions of courts was also embodied in the report of the Swedish government committee preparing the procedural law reform in the mid-1980s.[60] The committee noted that almost half of all civil cases settled, even though the primary function of courts is to resolve disputes by applying the rules of law. It recommended that courts would have a duty to promote settlement whenever appropriate, such as when settlement would be beneficial for maintaining the relationship between the parties or for the parties to agree on a payment plan. As a result, it closed the gap between the intended and the actual functions of courts and paved the way for a shift towards emphasising the private functions of courts.

4.2 Europeanisation, Human Rights, and Individualisation

The 1980s and 1990s was a period of Europeanisation in Scandinavian law which consequently exposed the Scandinavian welfare states to the rights-based thinking of the European Convention of Human Rights (ECHR) and what would become the European Union (EU) and European Economic Area (EEA) law. This period constituted a series of interrelated seismic shifts in the rights-sceptic Scandinavian civil procedure thinking. Political and societal shifts in the 1970s that questioned the idea of the state as inherently 'good', social democratic dogmas, and the lack of individualism paved the way for the rights turn in Scandinavian law.[61]

Particularly the ECHR regime, but also EU law, are embedded in a belief that individual rights are one of the backbones of modern democracies and the rule of law. The doctrine of deference to the parliament was no longer fully tenable. In the wake of Europeanisation, Scandinavian constitutions, except the Danish one, were amended to include a catalogue of human rights, thus creating

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58 Per Henrik Lindblom, *Progressive Procedure. The Role of Courts, Access to Justice, Group Actions, Complex Litigation and Alternative Dispute Resolution in Comparative Perspective. Twelve Essays 1985–2015* (Iustus 2017), ch 2, 5 and 10.

59 Per Henrik Lindblom, 'Tes, antintes, syntes – perspektiv på processrätten' (1984) SvJT 787, 798; Per Henrik Lindblom, 'The protection of diffuse, fragmented and collective interests in civil litigation in Sweden' (1985) Sc St L 101; Per Henrik Lindblom, *Progressiv process. Spridda uppsatser om domstolsprocessen och samhällsutvecklingen* (Iustus 2000) 46 et seq.

60 SOU 1982:25–26, *Översyn av rättegångsbalken 1. Processen i tingsrätten*. Rättegångsutredningens delbetänkande, 137–151.

61 Sejersted (n 29) 429 and 458–459.

obligations based on national law to perform judicial review. The justifications for the Danish reluctance to take part in this echo the ideas of Ross.[62]

European law has shaped Scandinavian civil procedure institutions and thinking, although the process has been far from smooth.[63] In Finland and Sweden, administrative courts became central organs for recourse against administrative decisions, after a series of reforms.[64] The reluctance, notably in Sweden, to allow judges, i.e., the 'elite', to overturn administrative decisions rendered by anti-elitist bodies representing the people or the 'good' government, had thus been overcome.[65]

To render rights derived from European law effective, courts must ensure efficient enforcement of those rights. As Torbjörn Andersson has observed, this kind of thinking is akin to the 'legal protection' doctrine that had preceded legal realism.[66] This coincided with a shift in the views on individual rights in general, especially the duty of the government to honour the rights of individuals, not just advancing the public good.[67] Additionally, the EU law teleological method, despite being based on advancing the single market, not social democratic principles, to some extent resembles the teleological – utilitarian – method of Ekelöf.

Principle-oriented arguments that stressed the centricity of fair trial rights permeated civil procedure thinking in this period.[68] The absorption of procedural rights contributed to acknowledging the existence of substantive rights and the need for remedies to enforce those rights. In Norway, a catalogue of fair trial rights is found in the first section of the 2005 Dispute Act (civil procedure act), and the powerful Finnish Constitutional Law Committee constantly puts human

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62 Olli Mäenpää and Niels Fenger, 'Public Administration and Good Governance' in Pia Letto-Vanamo, Ditlev Tamm and Bent Ole Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019) 166–167.

63 E.g., Anna Nylund, 'Europeanisation of Nordic Civil Procedure: Does the Map Match the Terrain?' in Laura Ervo, Pia Letto-Vanamo and Anna Nylund (eds), *Rethinking Nordic Courts* (Springer 2021).

64 Wiweka Warnling-Nerep, *Rättsmedel. Om- och överprövining av förvaltningsbeslut* (Jure 2015) 30–31 and 183–187.

65 Henrik Wenander, 'Varför en rätt till domstolsprövning av förvaltningsbeslut? Utvecklingslinjer i svensk och finsk rätt mot bakgrund av Europakonventionen' in Richard Arvidsson and others (eds), *Festskrift till Wiweka Warnling Conradson* (Jure 2019) 439 and 444; Henrik Wenander, 'Full Judicial Review or Administrative Discretion? A Swedish Perspective on Deference to the Administration' in Guobin Zhu (ed), *Deference to the Administration in Judicial Review: Comparative Perspectives* (Springer 2019).

66 Torbjörn Andersson, *Rättsskyddsprincipen: EG-rätt och nationell sanktions- och processrätt ur ett svenskt civilprocessuellt perspektiv* (Iustus 1997) 202 et seq.; Torbjörn Andersson, *Dispositionsprincipen och EG:s konkurrensregler: en studie i snittet av svensk civilprocess och EG-rätten* (Iustus 1999) 195 et seq.

67 E.g., Janne Aer, 'Lääninoikeuksien itsenäistyminen osana liberaalin oikeusvaltion kehitystä' (2021) 119 Lakimies 719.

68 E.g., Eric Bylander, *Muntlighetsprincipen. En rättsvetenskaplig studie av processuella handläggningsformer i svensk rätt* (Iustus 2006); Laura Ervo, *Oikeudenmukainen oikeudenkäynti* (Sanoma Pro 2005); Lindblom, *Progressiv process* (n 59) 263; Jens Edvin A. Skoghøy, *Tvistemål* (Universitetsforlaget 1998) 403 et seq.

rights on the agenda when scrutinising the constitutionality of bills.[69] The visibility of human rights is less pronounced in Swedish, and, particularly, Danish law.[70]

European influences through both human rights and EU (and EEA) law rendered the role of courts in the rule of law visible in that they stress access to courts, fair trial rights and effective enforcement of rights. Europeanisation clearly advanced the values of the rule of law, of equal enforcement of rights, and equal access to courts.

4.3 Mediation and Alternatives to Adjudicative Dispute Resolution

Civil mediation emerged in its modern form in the 1960s and 1970s as an amalgamation of advances in research on negotiation and dispute resolution that stressed interest-based, collaborative processes, and increasing discontent with the functioning of the courts.[71] The result was alternative dispute resolution (ADR) programs proliferating across the US, and settlement conferences becoming the norm rather than the exception.[72]

While the proponents praised the new forms of dispute resolution, critics soon noted how ADR processes in lieu of interests-based, collaborative processes often resulted in settlement-oriented processes – meaning that settlement itself, regardless of its contents and the process leading to it, was the sole success criteria. This, critics observed, often reduced access to justice and the rule of law.[73] In becoming part of the justice system, ADR was frequently reduced from a search for alternative forms of justice to reducing costs for courts.

Concurrently, Nils Christie, in his seminal article 'Conflicts as Property' criticised formal justice and formal proceedings for their inability to include the parties themselves in the proceedings. It served as an impetus for introducing restorative justice in especially Norway,[74] but left limited direct marks on civil procedure. Nevertheless, in propagating the supremacy of settlement and individually negotiated outcomes over those determined by legal rules, it shared

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69 Jaakko Husa, 'Locking in Constitutionality Control in Finland' (2020) 16 Eur Constl L Rev 249; Jaakko Husa, 'Constitutional mentality' in Pia Letto-Vanamo, Ditlev Tamm and Bent Ole Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019).

70 Marlene Wind, 'The Hesitant European? The Constitutional Foundation of Denmark's EU Membership and its Material Reality' in Stefan Griller, Lina Papadopoulou and Roman Puff (eds), *National Constitutions and EU Integration* (Bloomsbury 2022).

71 Warren E. Burger, 'Isn't there a better way' (1982) 68 Am Bar Ass J 274; Frank E.A. Sander, 'The multi-door courthouse' (1976) 3 Barrister 18.

72 E.g., Judith, Resnik, 'Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century' (1994) 41 UCLA L Rev 1471.

73 E.g., Dwight Golann, 'Is Legal Mediation a Process of Repair- or Separation. An Empirical Study, and Its Implications' (2002) 7 Harv Negot L Rev 301; James J. Alfini, 'Trashing, bashing, and hashing it out: Is this the end of good mediation' (1991) 19 Fla St U LR 47; Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or the Law of ADR' (1991) 19 Fla St U LR 1; Owen M. Fiss, 'Against settlement' (1983) 93 Yale LJ 1073.

74 Christie Nils, 'Conflicts as property' (1977) 17 Br J Criminol 1.

a praise of individualised justice and emphasised shortcomings of court proceedings with the US mediation movement despite emanating from leftist ideology that lacked neo-liberal undercurrents.

By the mid-1990s, mediation reached Scandinavia, with Vibeke Vindeløf, Bengt Lindell, Kaijus Ervasti, and a group of Norwegian lawyers, as the main proponents,[75] intrigued by the promise of interest-based, collaborative justice. The interest-based agenda of mediation resonates with the pragmatic Scandinavian legal culture and thinking where individual rights occupy a subordinate position. Its praise of individualised outcomes, however, represented a stark contrast to the 'social engineering' mantra of the legal realists.

Court-connected mediation diversified available dispute resolution processes, providing the option to choose between processes that offered different types of procedural and substantive justice.[76] As a result, trials on court-connected mediation were initiated first in Norway, later in Denmark and Finland.[77] Swedish lawyers considered a separate mediation process as redundant because judges already had potent tools to facilitate settlement during regular court proceedings.[78] The Finnish and Norwegian schemes are widely used, whereas court-connected mediation is less popular in Denmark.[79]

The role of judges promoting settlement was simultaneously strengthened. In 2001, both a Norwegian and a Swedish government report recommended that judges should be required to facilitate settlement whenever appropriate.[80] The Norwegian committee postulated that settlements yield favourable outcomes (i.e., more favourable than litigating the case and receiving a ruling on the merits would do) for the parties and saves money for the government. The Swedish report only alluded to benefits without naming them explicitly. Similar rules are found in Denmark and Finland.[81] Equally to court-connected mediation, facilitation of settlement can be regarded as Scandinavian civil procedure law partly abandoning the idea of 'behaviour modification' and the public functions

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[75] Kaijus Ervasti, *Käräjäoikeuksien sovintomenettely: empiirinen tutkimus sovinnon edistämisestä riitaprosessissa* (Oikeuspoliittinen tutkimuslaitos 2004); Bengt Lindell, *Alternativ tvistlösning* (Iustus 2000); Anne Vibeke Vindeløf. *Konflikt, tvist og mægling: konfliktløsning ved forhandling* (Akademisk forlag) 1997; NOU 2001: 32, *Rett på sak. Lov om tvisteløsning (tvisteloven)* 224–226.

[76] Anna Nylund, 'Alternative dispute resolution, justice and accountability in Norwegian civil justice' in Xandra Kramer and others (eds), *Frontiers in Civil Justice. Privatisation, Monetisation and Digitisation* (Edward Elgar 2022).

[77] Retsplejerådet, *Reform af den civile retspleje: Retsmægling*, Betænkning nr. 1481, 2006, 51–55; NOU 2001: 32 (n 75) 216–217.

[78] SOU 2001:103, *En modernare rättegång* 289.

[79] Anna Nylund, 'Institutional Aspects of the Nordic Justice Systems: Striving for Consolidation and Settlements' in Laura Ervo, Pia Letto-Vanamo and Anna Nylund (eds), *Rethinking Nordic Courts* (Springer 2021) 192–193; Lin Adrian, 'Retsmægling: en revolutionær fuser?' in Ulrik Rammeskow Bang-Pedersen and others (eds), *Retsplejeloven 100 år* (DJØF 2019).

[80] NOU 2001: 32 (n 75) 720–728; SOU 2001:103 (n 78) 289.

[81] Danish Administration of Justice Act (retsplejelov) ss 268–279; Finnish Code of Judicial Procedure (rättegångsbalken) ch 5 s 26.

of courts in favour of considering courts as providers of dispute resolution services.

In this process, the challenges in preserving the quality of process and outcomes in mediation and judicial settlement conferences in the US were downplayed: Proper regulation, e.g., prohibiting mediators from recommending outcomes or providing specific evaluations, would curb these tendencies.[82] The main objection seemed to be whether courts were the ideal organisation for mediation, or whether other bodies were better suited.[83] Discussions regarding the mediation rule of law nexus, including effective vindication of rights and governance through law, were absent with a few exceptions, notably Lindblom.[84]

4.4 Shifts in the Views of the Role of Courts and the Rule of Law

The shift to equal weighting of the public and private functions of courts and acknowledgment of the importance of individual rights were manifested in reforms of Scandinavian civil procedure in the 2000s. The 2005 Dispute Act (Act relating to mediation and procedure in civil disputes, *lov om mekling og rettergang i sivile saker*) epitomises these changes in that its title reflects the centricity of dispute resolution, and the first section of the Act states the private and public functions of the courts and basic fair trial principles. Similar ideas can be found in Finnish and Swedish committee reports.[85] Moreover, the role of courts as enforcers of human rights and rights arising from EU and EEA law was recognised.

The Danish procedural law committee, however, clearly stated that the primary task of courts is to adjudicate disputes in accordance with the rules of the law and establish the facts of the case.[86] By doing so, courts contribute to societal stability, and are likely to shape the behaviour and attitudes of the citizens. This statement depicts courts as subordinate to the two other state powers and assigns less importance to the law-making and state controlling functions.

The access to justice movement prompted a concern for the, sometimes, disproportionate cost of civil litigation. Therefore, the proportionate use of resources in relation to the value of the dispute became an explicit aim of

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82 NOU 2001: 32 (n 75) 216–217 and 720–728.

83 Retsplejerådet, *Retsmægling* (n 77) 51–55; Komiteanmietintö 2003:3, *Tuomioistuinlaitoksen kehittämiskomitean mietintö* 318–321; RP 114/2004 rd *Regeringens proposition till Riksdagen med förslag till lagstiftning om medling i tvistemål och stadfästelse av förlikning i allmänna domstolar* 18–19.

84 Lindblom, *Progressive Procedure* (n 58) ch 11.

85 SOU 2001:103 (n 78) 74–82; Komiteanmietintö 2003:3 (n 83) 318–321. See also Lindblom, *Progressive Procedure* (n 58) ch 3

86 Retsplejerådet, *Reform af den civile retspleje I: Instansordningen, byrettens sammensætning og almindelige regler om sagsbehandlingen i første instans*, Betænkning nr 1401, 2001, 83–84.

procedural rules and recognised as a principle of civil procedure.[87] Economic efficiency became a guiding star.

In their combined effect, the recognition of the value of individual enforcement of rights, the importance of procedural rights, and the equal access to court was a manifestation of the recognition of the role of courts in the rule of law, in providing both equal access to 'justice through law' and governance through the law. Perhaps the smooth transition can be partly attributed to ideas that, while they had been neglected during the apex of legal realism, had been implicitly present, and now surfaced in a modernised form.

5 New Public Management and Its Counterforces

5.1 New Public Management and the Functions of Civil Courts

New Public Management (NPM) refers to a panoply of ideas interconnected with neo-liberalist trends of privatisation, deregulation, and curbing public spending through disaggregation, free choice, and 'marketisation' of public service.[88] As Steven Van de Walle notes:

> Whereas Weberian bureaucracies derived their legitimacy from due process and the pursuit of the public interest, NPM-style public sectors derive their legitimacy from delivering the services customers want in a cost-effective, efficient, and customer-friendly way.[89]

In NPM, measurements of user satisfaction, input, and output are important tools for management. However, measuring 'justice' and other intangible values is an insurmountable task and 'quality' is thus conflated with easily measurable factors such as case disposition times or settlement rates.[90] Bringing efficiency to the forefront results in an increased concern with the high public expenditure

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87 Retsplejerådet, *Instansordningen* (n 87) 84–86; Komiteanmietintö 2003:3 (n 83) 86–91; NOU 2001: 32 (n 75) 131–133; SOU 2001:103 (n 78) 80–82. See also Clement Salung Petersen, 'A Comparative Perspective on Recent Nordic Reforms of Civil Justice' in Laura Ervo and Anna Nylund (eds), *The Future of Civil Litigation. Access to Courts and Court-annexed Mediation in the Nordic Countries* (Springer 2014).

88 E.g., Jonathan Boston, 'Basic NMP ideas and Their Development' in Tom Christensen and Per Lægreid (eds), *The Ashgate Research Companion to New Public Management* (Taylor and Francis 2016) 31–33; Tom Christensen and Per Lægreid, 'Public Governance and Public Services: A "Brave New World" or New Wine in Old Bottles?' in Tom Christensen and Per Lægreid (eds), *The Ashgate Research Companion to New Public Management* (Taylor and Francis 2016) 388; Hanne Foss Hansen, 'NPM in Scandinavia' in Tom Christensen and Per Lægreid (eds), *The Ashgate Research Companion to New Public Management* (Taylor and Francis 2016).

89 Steven Van de Walle, 'NPM: Restoring the Public Trust through Creating Distrust?' in Tom Christensen and Per Lægreid (eds), *The Ashgate Research Companion to New Public Management* (Taylor and Francis 2016) 298.

90 E.g., Anna Nylund, 'Comparing the efficiency and quality of civil justice in Scandinavia: the role of structural differences and definitions of quality' (2019) 38 Civ Just Q 427; Christopher Pollitt and Geert Bouckaert. *Public Management Reform: A Comparative Analysis. New Public Management, Governance, and the Neo-Weberian State* (Oxford University Press 2011).

on courts, shifting attention away from how the high costs of litigation hinder access to courts.[91] The political aspect of NPM is expressed in the use of the term 'customers', which denotes a role as a consumer of public services, rather than citizen, which denotes a political role when referring to members of the public.[92] The political role of institutions is also repudiated, or at least reduced, accordingly.

While NPM has been particularly influential in the Anglo-Saxon world, it has also made its mark on Scandinavian societies and judiciaries.[93] The general trend towards NPM started in the 1980s and reached its peak in the 1990s and 2000, it reached Scandinavian judiciaries with full strength later. An early, and illustrative example can be found in the Danish rules on court fees.

Danish court fees, which were calculated as a percentage of the amount in dispute, were doubled overnight in 2000 without the government having considered the consequences of the radical increase on the functions of and access to courts. In large cases, the fee could exceed the cost incurred to the court.[94] A few years later, the reform was reversed.[95] Considering that a recent Danish committee report opined that it was for the parliament to decide how courts are financed,[96] the interrelation between the rule of law and court fees seem to have fallen into oblivion. At least the statement could be seen as a token of the Danish tradition of deference of the judiciary to the parliament in line with the thinking of Ross. Accordingly, it would be for the parliament to decide whether courts are reduced to primarily providers of dispute resolution services, not providers of public justice through case law, legal certainty, and governance through law.

Apart from this example, there are few traces of NPM driven policies in the committee reports of the early 2000s.[97] However, more recent reforms are clearly inspired by NPM. One example is the lack of adequate funding to digitise Norwegian court rooms.[98] Other examples are promoting settlement primarily for its capacity to save costs, not its potential for creating better justice, and measures that have diminished the public role of courts.

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91 Hazel Genn, *Judging Civil Justice* (Cambridge University Press 2010) ch 2; Richard Marcus, 'Procedure in Time of Austerity' (2013) 3 Intl J Proc L 133.

92 B. Guy Peters, 'Responses to NPM: From Input Democracy to Output Democracy' in Tom Christensen and Per Lægreid (eds), *The Ashgate Research Companion to New Public Management* (Taylor and Francis 2016) 340

93 Foss Hansen (n 88) 117.

94 Retsplejerådet, *Instansordningen* (n 87) 75–81.

95 Retsplejerådet, *Reform av den civile retspleje III: Adgang til domstolene*, Betænkning nr. 1434, 2004, 237 et seq.

96 Retsplejerådet, *Reform av den civile retspleje X: Retsavgifter*, Betænkning nr. 1572, 2019, 52 et seq.

97 See parts 4.3 and 4.4. above.

98 E.g., NOU 2020: 11, *Den tredje statsmakt. Domstolene i endring* 273–274.

5.2 Gradual Displacement of Courts

For a few decades, the number of civil cases has been declining in Scandinavia, specifically in Finland and Norway.[99] Both have considerably fewer litigious civil non-family cases than in other European countries, and especially very few small cases (i.e., the value of the dispute is below 10-15.000 euros). Denmark has faced a decline of mid-size cases, i.e., those in which the interest is between 6.000 and 60.000 euros (DKK 50.000-500.000), while the number of small claims has decreased less.[100] In Sweden, only the number of small claims (i.e., the value of the dispute is beneath approximately 2.300 euros) has declined, which makes it an outlier.[101] Additionally, most large companies prefer arbitration to litigation.[102] In Denmark and Finland, average case disposition times have increased significantly. In Finland, disposition times have been a persistent challenge.[103]

Given that the Scandinavian legal aid schemes are far from sufficient,[104] litigation in the courts is a 'luxury', and partly also a slow one, that the average citizen, not to mention small businesses, can hardly afford. Perhaps the policy shift in the welfare state from universal benefits to conditional benefits[105] has also trickled into the views on access to court: Courts are reserved for the deserving, i.e., those who can afford them or secure litigation funding elsewhere, such as through their labour union or a consumer or tenants' association.

Despite disparate ideological backgrounds, the disaggregation and marketisation ideals of NPM coupled well with the early Scandinavian 'welfarist' CDR model as well as Scandinavian housing dispute resolution processes. Courts should be organs for adjudication of cases involving a real dispute, not small routine cases, which should be handled by other organs. In addition to consumer and housing cases, undisputed pecuniary claims have been

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[99] NOU 2020: 11 (n 98) 56–61; Oikeusministeriö, *Oikeudenkäytön kehitystyöryhmän arviomuistio.* Mietintöjä ja lausuntoja 2022:39 39.

[100] Ulrik Rammeskow Bang-Pedersen, 'Har domstolene en fremtid som konfliktløser i civile sager?' in Ulrik Rammeskow Bang-Pedersen and others (eds), *Retsplejeloven 100 år* (DJØF 2019) 367–372.

[101] Domstolsverket, *Domstolsstatistik 2021* 9; Domstolsverket, *Domstolsstatistik 2014* 9. The threshold for small claims is tied to an index in Sweden.

[102] Roschier Dispute Index 2021, A survey of facts and trends in international dispute resolution from a Nordic perspective. https://www.roschier.com/newsroom/the-sixth-edition-of-the-roschier-disputes-index-is-published/

[103] Danmarks Domstole, *Årsrapport* 2021 9–16; Oikeusministeriö (n 99) 40.

[104] E.g., Jon T. Johnsen, 'Offentlig rettshjelp og tilgang til rettshåndheving' in Anna Wallerman Ghavanini and Sebastian Wejedal (eds), *Access to justice i Skandinavien* (Santérus Academic Press 2022); Sebastian Wejedal, 'Rättshjälp i förvaltningsmål: Två utvecklingslinjer i svensk rätt' in Anna Wallerman Ghavanini and Sebastian Wejedal (eds), *Access to justice i Skandinavien* (Santérus Academic Press 2022); Olaf Halvorsen Rønning, and Ole Hammerslev (eds), *Outsourcing Legal Aid in the Nordic Welfare States* (Springer 2018).

[105] E.g., Mikko Kautto and Kati Kuitto, 'The Nordic Countries' in Daniel Bélan and others (eds), *The Oxford Handbook of the Welfare State* (Oxford University Press 2021); Bent Greve, 'Reflecting on Nordic Welfare States: Continuity or Social Change?' in Patricia Kennett and Noemi Lendvai-Bainton (eds), *Handbook of European Social Policy* (Edward Elgar 2017).

transferred to enforcement authorities in Norway and Sweden.[106] Moreover, in Denmark and Norway, recourse against administrative decisions still takes place almost exclusively outside the formal court system in various types of administrative complaint boards,[107] whereas these cases have been consolidated to administrative courts in Finland and especially Sweden.[108] While the tale of simplified, fast, and cheap proceedings tailored to self-represented parties in ADR bodies is appealing, concerns regarding the quality and efficiency of the proceedings have been voiced.[109] Commentators have questioned whether these bodies are equipped to deal with complex legal issues; have procedural rules that enable them to render procedural justice and arrive at an outcome that emulates the truth; are sufficiently independent; and provide justice within reasonable time. Obtaining a decision or recommendation in a CDR process is often far slower than litigating a small claim.[110] Consequently, these alternatives to court might, in fact, offer less access to justice than courts do, despite the aspiration towards the opposite. Because ADR bodies are situated in the periphery of the justice system, they are often forgotten and not held up to the same, or equivalent, standards as court proceedings are.

In recent years, the push towards court-connected mediation and facilitating settlement has increased, at least in Finland and Norway. To remedy high costs of litigation, the Norwegian government considered making court-connected mediation mandatory, but later forwarded a bill mandating court-connected mediation only when the case is well-suited.[111] In 2022, a Finnish government report promoted mediation and settlement as the remedy to slow justice.[112] Considering the high number of mediated cases and high threshold for bringing an action, especially in small cases in these two countries, the push for further mediation and settlement might seem surprising. It would also constitute a turn away from the values of the rule of law embraced during the 1990s and 2000s.

Although Peter Westberg notes how procedures aiming at settlement, originally conceived as a 'side-track' in Swedish civil justice, have now become

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[106] Nylund, 'Comparing the Efficiency' (n 90) 483.

[107] Bettina Lemann Kristiansen, 'Access to Justice i forvaltningssager i Danmark' in Anna Wallerman Ghavanini and Sebastian Wejedal (eds), *Access to justice i Skandinavien* (Santérus Academic Press 2022); Eivind Smith, 'Døren er høy, porten vid. Hvorfor er det så få som går inn?' in Eivind Smith (ed), *Våre perifere domstoler* (Fagbokforlaget 2022); Frederik Waage, 'Råd og nævn – surrogater for forvaltningsdomstole i Danmark' in Eivind Smith (ed), *Våre perifere domstoler* (Fagbokforlaget 2022), Nylund, 'Comparing the Efficiency' (n 90).

[108] Nylund, 'Institutional Aspects' (n 79) 194–196.

[109] Smith (n 108); Nylund, 'Comparing the Efficiency' (n 90); Anna Wallerman, 'Manoeuvring Procedural Autonomy in Sweden: Is *Materielle Prozessleitung* the Answer?' in Bart Krans and Anna Nylund (eds), *Procedural Autonomy Across Europe* (Intersentia 2019).

[110] E.g., Statsrådets publikationer 2022:68, *Statsrådets redogörelse för rättsvården*. SRR 13/2022 rd, 61; Forbrukerrådet, *Årsrapport 2020*, 41 and 43.

[111] Justis- og beredskapsdepartementet, *Høringsnotat om forslag til endringer i tvisteloven mv. Ankesiling, rettsmekling mv.* Snr 20/4753, 7. Oktober 2020, 21 et seq.; Prop. 34 L (2022–2023). Endringer i tvisteloven mv. (rettsmekling, ankenektelse mv.).

[112] Statsrådets publikationer 2022:68 (n 111) 40–41 and 46–48.

the main track in the civil justice system,[113] the trend towards settlement has been less pronounced in Denmark and Sweden. This difference between the Scandinavian countries could be partly attributed to the pronounced pragmatism of Finnish and Norwegian legal cultures, which arguably has facilitated the uptake of mediation.[114] Settlement would be the perfect merger of communitarian values with individually tailored outcomes, while it would also mitigate the effects of limited access and high cost of court proceedings. Courts in both countries tend to strive for outcomes blending formal justice and reasonableness, which is more easily achieved when the case is settled than when the court renders a ruling.[115] Another explanation could be the strong emphasis on courts as vehicles for government policies promulgated by Ross, Ekelöf, and Olivecrona, who were Danish and Swedish. As Henrik Bellander argues, this view seems to support keeping dispute resolution within the domain of court proceedings.[116]

The dilution of the public role of courts could also be regarded as a by-product of the diminishing role of social democratic doctrines and strong focus on 'behaviour modification' that were once embedded in civil procedure thinking. Although many ideologies have proved to be remarkably resilient and adaptable to new times,[117] the demise of social democracy and legal realism have created an 'ideological' void, which could be unintendedly appropriated by ideas derived from NPM and neo-liberalism. If courts are viewed primarily as providers of dispute resolution services, and free choice is considered the paramount value, then ADR, mediation, and settlement must be inherently good as they embody these ideas.

Settlements harbour the potential of offering better justice than adjudication because the outcome could more accurately reflect the litigation aims and interests of the parties, and balance the direct and indirect, tangible and intangible costs, gains, and risks at hand.[118] However, conflating settlement with procedural and substantive justice increases the risk of rewarding judges, mediators, and disputants for settlement regardless of the quality of the process and the outcome.[119] Forced and uninformed settlements could entail significant error costs for the parties and the justice system. Findings on the adverse effects

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[113] Peter Westberg, *Civilrättskipning I: Tvistemål* (Norstedts Juridik 2021) 426.

[114] E.g., Marius Mikkel Kjølstad, Sören Koch and Jørn Øyrehagen Sunde, 'An Introduction to Norwegian Legal Culture' in Sören Koch and Jørn Øyrehagen Sunde (eds), *Comparing Legal Cultures* (2nd edn, Fagbokforlaget 2020) and Anna Nylund, 'An Introduction to Finnish Legal Culture' in Sören Koch and Jørn Øyrehagen Sunde (eds), *Comparing Legal Cultures* (2nd edn, Fagbokforlaget 2020).

[115] Ervasti (n 75) 400–407.

[116] Henrik Bellander, 'Från statlig rättskipning till privat riskhantering. Mot en ökad användning av tredjemansfinansiering och riskavtal … eller för?' in Anna Wallerman Ghavanini and Sebastian Wejedal (eds), *Access to justice i Skandinavien* (Santérus Academic Press 2022).

[117] See also Bellander (n 116); Henrik Bellander, 'På egna ben och utan ideologisk överrock. Om teleologisk tillämpning av processuella regler' in Torbjörn Andersson, Eric Bylander and Henrik Bellander (eds), *Processrättsliga studier tillägnade Bengt Lindell* (Iustus 2021).

[118] Bengt Lindell, *Alternativ rättskipning eller alternativ till rättskipning?* (Iustus 2006) 58–65

[119] E.g., Jacqueline M. Nolan-Haley, 'Does ADR's Access to Justice Come at the Expense of Meaningful Consent' (2018) 33 Ohio St J Disp Resol 373.

of private ordering when the parties have unequal bargaining power should not be underestimated.[120] Also, studies indicate that, contrary to what advocates of mediation posit, disputants do not prefer dispute resolution processes that maximise private ordering.[121] It could be said that reasonability and efficiency as standards for quality court proceedings depart from both the doctrine of the rule of law, notably equality, curbing arbitrariness and governance through law, and Eckhoff's view on how legal rules provide judges bounds, guidance, support and protection. Given that lay judges have been eliminated from virtually all civil cases, one can ask who defines fairness and reasonableness, and who renders judges accountable to these standards in present-day Scandinavian civil justice.

Furthermore, the displacement of courts will have ramifications for the rule of law. Even if alternatives to courts would provide high quality processes and outcomes, citizens could be bereaved of an effective mechanism for vindicating their rights. The fragmentation of dispute resolution processes could have repercussions for courts as organs clarifying and developing the law and maintaining the coherence of the legal system. Governance through law and weakening courts as a stage for performing justice and an arena for democracy would also be undermined.[122]

Even proponents of ADR recognise that it is a valuable supplement to, not a substitute for, courts.[123] Still, few steps have been taken to remedy the problem of limited access to courts. Surprisingly few concerns have been voiced in public that disputants might prefer ADR or settle only because the costs and risks associated with court proceedings are too high, not because they find ADR or a settlement more attractive. Against this background, it is reasonable to ask whether ADR, mediation, and settlement in Scandinavia represent alternative justice, or whether they are merely 'alternatives to justice'[124] devised to reduce the costs of operating the justice system, only posing as a manifestation of efficiency and free choice. In uncritically promoting ADR, we run the risk that '[c]itizens are lulled into a false sense of readily available and qualitative access to justice in society'.[125]

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[120] Nolan-Haley, (n 119) 383; Nancy A. Welsh, 'You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation' (2009) 17 Am Bankr Inst L Rev 427.

[121] Mary Anne Noone and Lola Akin Ojelabi, 'Alternative dispute resolution and access to justice in Australia' (2020) 16 Intl JL in Context 108; Donna Shestowsky, 'How litigants evaluate the characteristics of legal procedures: A multi-court empirical study' (2015) 49 UC Davis L Rev 793; Deborah R. Hensler, 'Suppose It's Not True: Challenging Mediation Ideology' (2002) J Disp Resol 81.

[122] Anna Wallerman Ghavanini and Sebastian Wejedal, 'Gernomslaget för principen om reellt rättskydd i Skandinavien: Dagsläge och framtidsblick' in Anna Wallerman Ghavanini and Sebastian Wejedal (eds), *Access to justice i Skandinavien* (Santérus Academic Press 2022).

[123] Bengt Lindell, *Civilprocessen. Rättegång samt skiljeförfarande och medling* (5 edn, Iustus 2021) 45.

[124] Lindblom, *Progressive Procedure* (n 58) 432.

[125] Lindblom, *Progressive Procedure* (n 58) 432.

5.3 Revival of Access to Justice and Governance through Law

Despite policies favouring ADR and settlement, many scholars believe that courts should have manifold functions, both private and public, in line with the rule of law that promote access to dispute resolution, equal and efficient enforcement of the law, clarification and development of the law, and promoting discussions on the law.[126] Textbooks also advocate this view.[127] Lindell seems to be one of few who oppose 'preventive' functions of court proceedings.[128]

Carrying on the legacy of 'welfarist' civil procedure and the impetuses of the access to justice movement, Anna Wallerman Ghavanini and Sebastian Wejedal have advocated for adapting the concept of access to justice to present-day Scandinavia, reconceptualising it as access to real legal (judicial) protection (*reellt rättsskydd*).[129] This view could be taken as an attempt to modernise and revitalise theories of legal protection and courts as vital institutions in democratic states, which preceded the realist era, combining them with insights on the importance of law as a tool of governance and later turns to access to justice and human rights.

Following the lead of Lindblom, who calls on us to address 'the deficiency illnesses ravaging ordinary civil litigation,'[130] instead of promoting ADR, several commentators have suggested improving court proceedings, especially redesigning small claims proceedings.[131] Doing so would not preclude maintaining some forms of ADR and mediation; it would mean discussing how the civil justice system should be designed to align it with the ideals of access to justice and the rule of law.

EU law appears to be a counterforce to the individualisation, marketisation, and cost-saving tendencies, too, as the Braathens case illustrates. Braathens, a Swedish airline, forced a passenger, thought to be of Arabic origin, to undergo an additional security control. The passenger and the Swedish Equality Ombud

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126 Anna Wallerman Ghavanini and Sebastian Wejedal (eds), *Access to justice i Skandinavien* (Santérus Academic Press 2022); Eivind Smith (ed), *Våre perifere domstoler* (Fagbokforlaget 2022).

127 Mikko Vuorenpää and others, *Prosessioikeus* (6th edn, AlmaTalent 2021) 69–74; Westberg (n 114) 66–67; Inge Lorange Backer, *Norsk sivilprosess* (2nd edn, Universitetsforlaget 2020) 23 et seq.; Ulrik Rammeskow Bang-Pedersen, Lasse Høylund Christensen and Clement Salung Petersen, *Den civile retspleje* (5th edn, Hans Reitzels forlag 2020) 31–32; Kaijus Ervasti, Kaijus. 'Conflicts before the courts and court-annexed mediation in Finland' (2012) Sc St L 196. In contrast, Jens Edvin A. Skoghøy, *Tvisteløsning* (4th edn, Universitetsforlaget 2022) 3–5.

128 Lindell (n 108) 37.

129 Wallerman Ghavanini and Wejedal (n 122).

130 Lindblom, *Progressive Procedure* (n 58) 432.

131 Anna Wallerman Ghavanini, 'Access to justice för små anspråk i den svenska civilprocessen' in Anna Wallerman Ghavanini and Sebastian Wejedal (eds), *Access to justice i Skandinavien* (Santérus Academic Press 2022); Maria Astrup Hjort, 'Norsk småkravprosess og access to justice' in Anna Wallerman Ghavanini and Sebastian Wejedal (eds), *Access to justice i Skandinavien* (Santérus Academic Press 2022); Christina Jensen, 'Small Claims Procedures in the Scandinavian Countries' in Laura Ervo, Pia Letto-Vanamo and Anna Nylund (eds), *Rethinking Nordic Courts* (Springer 2021). See also Erik Björling, 'Tvistlösningens normativitet: Konsumentprocess i tre varianter' (2022) SvJT 230, 243–247

sued Braathens claiming damages for discrimination. During the proceedings in the first court, Braathens agreed to pay the claimed amount to the passenger while denying the existence of discrimination. The Equality Ombud asked the court to issue a declaratory judgment stating that discrimination had taken place. The court ordered Braathens to pay the compensation claimed, and the legal cost. On request from the Swedish Supreme Court, the Grand Chamber of the European Court of Justice (ECJ) held that real and effective judicial protection of the rights derived from the Race Equality Directive[132] art 7 and 15, as well as the Fundamental Rights Charter[133] art 47 necessitate sanctions that are sufficiently severe and commensurate to the breach, and that the claimant is recognised as a victim of discrimination in order to function as a deterrence for future discrimination.[134] Settlement, i.e., private dispute resolution, had to yield for public interests.

In accentuating the public functions of civil procedure, ECJ case law on effective judicial protection of EU law could be regarded as a counterforce to the increased emphasis on the private functions of courts. It represents a belief in the 'preventive' functions of litigation, in its ability to promote equal application of the law, a rule-based social order, and enforcement of the policy goals underlying the law.

In their combined effect, Scandinavian civil procedure scholars embracing the manifold private and public functions of courts in line with rule of law thinking, the EU and ECHR law doctrines of efficient enforcement of rights, and government policies, form a powerful counterforce to NPM-driven ideas.

6 Scandinavian Civil Procedure at a Crossroads?

This article has argued that Scandinavian civil procedure thinking and its relationship with the rule of law has oscillated between a stance that stresses a few selected functions and tones down the importance of courts as democratic institutions, and a stance that weighs the private and public functions of courts relatively equally in that it recognises courts as paramount institutions in the rule of law. Currently, it is unclear which of these stances will dominate the coming decades. It also remains to be seen whether and in which form utilitarianism will survive as an undercurrent: Will the teleological method of EU law replace Ekelöf's teleological method, or will it take some other shape, or even disappear? The welfarist ideals have arguably morphed into a call for real access to justice, but they could also have to yield for the efficiency and marketisation mantras if judiciaries return to regarding themselves as subordinate to the legislature, as they were during the era of legal realism.

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[132] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

[133] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

[134] Case C-30/19 Diskrimineringsombudsmannen v Braathens Regional Aviation AB [2021] ECLI:EU:C:2021:269, paras 38, 43–44, 49 and 56–57. See also Anna Wallerman Ghavanini, 'Remedies for non-material damages: Striking out in a new direction? Braathens' (2022) 59 CMLR 151.

The four Scandinavian countries might not follow the same path, just as their paths have been divergent in the past. Currently, Denmark seems to be prone to lean towards efficiency and downplaying courts as apex agents in the rule of law, while Sweden seems to have the most vocal resistance toward such tendencies both in the scholarly debate and in having a justice system relying less on ADR compared to its neighbours. Finland and Norway run the risk of inadvertently, in the name of pragmatism and efficiency, following the path of Denmark, although the relatively strong position of human and constitutional rights could prove to be a potent counterforce.