

Nordic Criminal Law: Philosophy, History, and Comparison

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As a serious monograph on Nordic legal history, Jørn Jacobsen’s book, *Power, Principle, and Progress: Kant and the Republican Philosophy of Nordic Criminal Law* (2024), is the first of its kind. It is coherent and well-argued – a pleasure to read. Jacobsen covers a wide range of Nordic criminal law literature, demonstrating the author’s excellent command of the field.

Nordic legal scholars often view the existence of a “Nordic” criminal law as self-evident. To be sure, many historical, sociological, and dogmatic studies have touched upon the theme. The concept of Nordic criminal law rouses images of a mild penal climate and of legal policies that aim at integration. The Nordicness of criminal law is a positive attribute, and notions such as “humanity and rationality” and criminal law as the *ultima ratio* are typically attached to it. As Jacobsen puts it, “the ideal and wisdom of this style of criminal law seem to unite Nordic criminal law scholars” (36).

However, no thorough studies exist specifically on what Nordic criminal law really is, and how it emerged historically. Jacobsen’s book is also not historical. Instead, he wishes to fill another gap in the research, as “the deeper justification of Nordic criminal law is not discussed” in previous scholarly works (7). He regrets that normative philosophy has practically disappeared from Nordic criminal law discussions, and wishes to remedy this absence.

Jacobsen’s method is thus philosophical. More specifically in this case, it means that the author uses one of the ideological grandfathers of modern criminal law, Immanuel Kant, as his interlocutor. Kant’s ideas on criminal law, primarily such as they appear in *Metaphysik der Sitten* (1797), are taken as the starting point of evaluating Nordic criminal law. In this note, I will make three points: one on philosophy, one on history, and one on comparison.

Discussing modern problems with a philosophy classic is one way of approaching both philosophy and contemporary issues. By doing this, one extracts the philosopher and his (rarely her, when talking about pre-nineteenth century thinkers) work completely from his contextual surroundings. One is thus not interested in the tradition that a particular philosopher followed or argued against, or how his personal experiences, surroundings, social standing, or political views impacted the way in which he or she formulated theories and arguments. Viewpoints are rather taken at their face value, as potentially serious arguments that could serve in modern discussions.

This is the way that Jacobsen approaches Kant's philosophy on criminal law. He argues, rather unconventionally, that Nordic criminal is best understood against the background of Kant's thinking. This view is unconventional, in that Jacobsen here jumps over Hegel, often seen as the fundamental philosophical basis of much of nineteenth-century Nordic criminal law thinking. Jacobsen has a reason for this: he underlines Kant's republicanism, which he says has been neglected in Nordic discussions. Instead, Nordic criminal law has often taken Kant as one of the main representatives of harsh criminal law. Jacobsen sees Kant's role differently, arguing that his republicanism may add important elements that would help legitimize criminal law in modern Nordic societies.

Is Kant given an overwhelming task here? If we accept the author's basic method of using Kant as a discussion partner (as I do), we may, however, still wonder whether Jacobsen demands too much of Kant. Nordic criminal law, the way Jacobsen also sees it, is a product of the twentieth-century welfare state. This was something that Kant, writing in the late eighteenth and early nineteenth century, had no way of envisaging. Therefore, the reader of Jacobsen's volume cannot help wondering whether too much imagination is needed to fit current concerns into the writings of the great man of Königsberg. However, let this remain a side remark only. It does not dilute Jacobsen's main point that protecting "Kantian" republican freedoms may indeed be an appropriate legitimation for Nordic criminal law.

My second point concerns history. As already noted above, Jacobsen's is not a book on history but on legal philosophy. However, one might have expected a slightly more historical take in the beginning of the book, where definitions of Nordic criminal law are given. The problem with Nordic criminal law is that it is like the proverbial elephant that everybody can recognize but nobody cares to define properly. I admit, again, that doing so would be a secondary concern of this book, the focus of which lies elsewhere, and it would have been a tall order. Nevertheless, a tentative outline of Nordic criminal law's emergence might have been in order.

Without a historical perspective it is difficult, indeed impossible, to define Nordic legal history. Intellectual history is important here. Intellectual history means asking what scholars wrote, whom they influenced, and by whom were they influenced. Intellectual history is about asking how ideas emerge and how they travel. The historian will also ask why some ideas persist while others vanish. An intellectual historian will be interested in finding out about the social, political, economic, and scholarly circumstances in which an idea is born. History is, of course, not only about the development of ideas. The different contexts set limits not only on the intellectual structures of criminal law, but also on law-making, the significance of which has emerged as paramount since the nineteenth century and the rise of the legality principle.

An important context, without which hardly any large-scale legal concept can be explained, is the international one – and this brings me to my third point, comparative research. Ideas move together with literature, people, and international connections. When ideas move, they often take new shape to adjust to new environments. As criminal law is concerned, the international context is certainly no less important than in some other fields of law. Ideas of criminal law have spread efficiently ever since criminal law and criminal legal procedure were conceptually separated from other forms of law in the revolutionary changes of the twelfth and thirteenth centuries. Therefore, a deep understanding of the emergence and existence of Nordic criminal law without comparison is well-nigh impossible.

To explain the origins and perseverance of Nordic criminal law, all this would need to be done, which really would have been too much to demand from Jacobsen's book. Although the task is even more hopeless in this short note, I cannot resist the temptation of attempting a brief sketch of how and why Nordic criminal law may have developed.

Before the nineteenth century, Nordic countries formed no cultural unity. Indeed, before that time they did not even form national units. Yet they shared features that have had lasting consequences until today. They all turned Lutheran during the Reformation, which helped to concentrate political power, but also fostered learning. Although by no means socially homogenous, Nordic societies were relatively so, at least in comparison to most regions in Europe. Nordic towns were nowhere close to the size and importance of large European towns, and the local nobilities were equally small.

As in many countries in Europe and elsewhere, the Nordic peoples started – following Benedict Anderson's famous terminology – imagining themselves as nations only during the nineteenth century.^[1] In addition to many other cultural phenomena (such as music, architecture, and literature), law played a part of this, as legal historians created national

legal pasts for their countries. Then, around mid-century, a regional cultural identity began to take shape in the form of Scandinavianism, a movement that emphasized the cultural, linguistic, and historical ties between the Scandinavian peoples. The cultural feeling of belonging together was reflected in law, as wide-ranging legislative cooperation between Denmark, Norway, and Sweden started to emerge. Common law projects took place in the field of private law, but at the same time Nordic lawyers started convening regularly in conferences of Nordic lawyers – a tradition which still continues today. The late nineteenth and early twentieth century is, I would propose, a decisive moment in the building of the common ideological background on which Nordic criminal law could later be constructed.

From the late nineteenth century onwards, Nordic criminal law has been under the constant influence of the scholarly powerhouse of Europe, Germany. Classical criminal law and the different forms of positivistic criminal law (such as the Sociological School) arrived in the Nordic countries mainly from Germany. The second world war caused only a short break here. Although Germany has remained a vital contact and influence, from the 1990s onwards American and English influences have rapidly increased. The historical trajectories of the Nordic countries are not, however, identical. We cannot go into the details here, but let us take one example. Swedish criminal law scholars, probably as a result of Scandinavian legal realism, grew increasingly apart from German scholarship in the 1960s. Their Finnish colleagues, in turn, remained more attached to the German criminal law literature. Given the weak influence of legal realism in Finland, this is not surprising.

The ideas that shaped Nordic criminal law started to crystallize in the 1960s and 1970s, when several Nordic criminal law scholars found themselves sharing similar ideas of how criminal law should be developed. Many of them were criminologically oriented. In other words, they thought that criminal law should take its practical consequences into consideration, and that these considerations needed to be based on scientific knowledge. The problems that the ideology of special prevention in the form of (often quasi-) scientific “treatment ideology” had caused in the previous decades now became a target of harsh criticism. As far as theories of punishment were concerned, the emphasis shifted from special prevention to general prevention. Punishments had to be proportionate to the crime, and not reflect the wrongdoer’s past record or be based on predictions of his or her future behavior. Because of these characteristics, and the rational and humane criminal policy towards which it strove, the Nordic criminal law that arose has often been called “neoclassical.”^[2]

Most criminal law scholars that participated in the making of Nordic criminal law were politically on the left, or at least liberal. They considered criminal law the *ultima ratio*, the last means of combatting criminality, and

less effective than well-planned social policy. To what extent Nordic publics at large shared the views of the liberal experts is hard to say. Nevertheless, liberal criminal policies are indistinguishable from other legal reforms of the time, and are embedded in the rising political and social trends that lay at the background of the construction of Nordic social welfare states. Now that the structures of the welfare state have proved to be anything other than self-evident, including in the Nordic countries, while the political scene and party structure have experienced significant changes in all Nordic countries, can we expect Nordic criminal policy to stay the same? That is a question to which different branches of criminal law – historical, sociological, comparative, and dogmatic – can and should contribute. Jacobsen’s fine book is leading the way.

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[1] See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1983).

[2] See Tapio Lappi-Seppälä, “Humane Neoclassicism: Proportionality and Other Values in Nordic Sentencing,” in Michael Tonry (ed.), *Of One-Eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (2019), 209-235, and the literature cited therein.
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