

INTRODUCTION – NORDIC RELUCTANCE TOWARDS JUDICIAL REVIEW UNDER SIEGE

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A. INTRODUCTION

Is the judicial review in accordance with our democratic sensibilities? In a Nordic context this is a question that has caused much public consternation in all five countries in recent years, most likely because you find courts and constitutionalism appearing almost everywhere you look and because judicial power seems to continue to increase. Not only has the European Court of Justice cemented its powers with the EU's enlargement and with EU legislation on the rise and becoming increasingly open to interpretation; the Strasbourg court and other international dispute-settlement bodies have also become more powerful. In the Nordic countries, judicial review has generated a wide debate not only among specialists but equally among the wider public. Consider the following examples.

Danes are increasingly worried by the prospect of the ever expanding legal interpretations by the European Court of Justice (ECJ), challenging their strict immigration policy. In a few recent judgements the ECJ has interpreted the EU's residence directive in favour of European freedom of movement, forcing Denmark to grant residence to non-approved asylum seekers married to EU citizens.

Swedes have equally debated the constraints imposed by the ECJ on attempts by labour unions to force foreign companies to sign collective agreements when operating in Sweden (Laval).¹ Proposed changes to judicial review by an expert group for the Committee on Constitutional Reform have also been the subject of lively debates.²

In Norway, a recent 'Power and Democracy Study' worried about international conventions which served to undermine and emasculate popular rule.³ Proposals to incorporate the

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¹ "Unions fear ECJ ruling in Laval case could lead to social dumping" (<http://www.eurofound.europa.eu/eiro/2008/01/articles/eu0801019i.htm>) (accessed 1 June 2009).

² SOU 2007:85: "Olika former av normkontroll".

³ NOU 2003:19: "Makt- og demokratiutredningen".

Convention against Discrimination against Women (CEDAW) with legal standing above ordinary law in the Human Rights Act have met with strong criticism.

In Iceland, the public debated the legitimacy of judicial review after incorporating a new bill of rights into the constitution in 1995, and then after incorporating the EEA agreement. However, judicial review does not seem to cause as much dissent in Iceland as in the other Nordic states.

In Finland, the empowerment of courts and the adjudication of politics has proceeded rapidly in recent years, particularly after judicial review of legislation by courts was considered directly illegal until the constitutional change of 2000.⁴

Of central concern in this special issue however is the effect on the Nordic countries and what we refer to as *European Judicial Review*: review of *domestic legislative acts* on the basis of the European Convention on Human Rights and the European Union Treaties, on the basis of judgments by the European Court on Human Rights (ECtHR) and the European Court of Justice (ECJ). Constitutional and judicial review covers several other topics, and the two courts pose several further important challenges beyond our current concern, i.e. *the normative legitimacy of European Judicial Review* and the way judicial review by courts has been received in the Nordic democracies.

The Nordic states are normally considered to be well functioning, homogenous and stable democracies. They are anti-hierarchical welfare states uncomfortable with rigorous judicial review by courts. Accordingly, controversial and dynamic legal interpretations of vague European treaties and legislation by foreign judges are bound to fan the flames of debate. One of the questions most frequently asked is whether European judicial review can be justified.

Like other key mechanisms of legal harmonization in Europe, European judicial review also merits research as a symptom and cause of the reconfiguration of a world order of sovereign states as they move ever closer to a complex, multi-level political and legal regional and global order with fragmented sovereignty; indeed, we seem forced to reconsider traditional conceptions of 'sovereignty' and 'democracy'. Understanding and assessing the variety of impacts of European Judicial Review on national institutions might also shed light on the normative legitimacy of these larger shifts.

B. SOME DISTINCTIONS

One may distinguish between constitutional review in general, and judicial review. The former may be done by various bodies, including parliamentary committees and specialized courts. The latter is performed by ordinary and specialized courts. Among reviews, it is again helpful to distinguish between the review of legislative acts and that of administrative acts and court decisions. As will be apparent, there are important differences between *ex ante* review of proposed legislation in the abstract, and *ex post* review of applications of the law in practice. The main focus of the contributions here is on judicial review of legislative acts, prima-

⁴ Joakim Nergelius: *Komparativ statsrätt* (4th ed., Lund: Juristförlaget 2001) 85.

⁵ A.M. Slaughter: *A new world order* (Princeton: Princeton University Press 2004).

rily ex-post though other forms of review are often described and assessed when relevant. We chose this focus because judicial review of legislative acts poses the gravest concerns. Critics find the procedures and results undemocratic and illegitimate.

In particular, review by domestic bodies ultimately accountable to parliament, such as parliamentary committees or ombudsmen, are not ‘undemocratic’ in the sense we are concerned with here. Nor can they be categorized as review bodies in the sense understood here.

The relative power of the legislature and courts is affected by at least three other not unrelated changes that merit normative scrutiny. Due to the international development and the increasing power of judicial bodies the Nordics are forced to shift their focus when it comes to sources of law. Judges increasingly substitute wider international perspectives, to which international and foreign sources of law are central, for the purely national legal perspective. They are also forced to pay less attention to travaux préparatoires, and thus give more weight to case law and teleological interpretations since this is prevailing procedure in international courts and many European constitutional courts. These trends tend to reduce the significance of the will of the legislature, and increase the weight of and the discretion given to the judgments of the judiciary.

A second development stems from the peculiar legal structure of the European Union, which affects not only the national supreme courts, but brings all domestic courts into direct relationship with the ECJ through the preliminary reference mechanism (art. 234). It introduces de facto judicial review of national legislation (and implementation) by national and supranational courts in unison and thus enhances the power of the judiciary. It challenges the classical vision of ‘no one over or above parliament’ which is well known not only in most Nordic countries but equally in Great Britain. As international and national judicial oversight widens its ambit, the role of an emerging multi-level – ‘vertical’ – network of judges is enhanced, stimulating processes of ‘judicial cross-fertilization’, as Joseph Weiler has observed. Networking by judges and other elites might, however, help redress the democratic deficit of globalisation: it offers one way for national governments to regain regulatory control.⁵ Others warn of the lack of accountability coupled with coercive power enjoyed by these networks, of which the European Union may be a good case.⁶

There are at least two aspects of domestic and European judicial review that are of interest as we set out to understand and gauge how reluctant the Nordics feel about these phenomena. First, we may ask whether *judicial review* is practised in a given country and how we can see it when we find it. Does the country’s constitution allow for such review? Does it occur often enough for a pattern to emerge and expectations among parliamentarians and judges to form?

Another important distinction to make in comparing and assessing various forms of judicial review concerns its effects. *Strong judicial review* may make a piece of legislation inapplicable and even invalid. A court may even replace it. *Weak judicial review*, on the other hand, does not directly affect the validity or applicability of the law in the internal legal order, but it does give notice if the law is judged to be incompatible with treaty obligations.

⁶ K. Anderson: “Squaring the circle? Reconciling sovereignty and global governance through global government networks – review of Slaughter 2004” (2005) *Harvard Law Review* 1255.

Of course, these two European courts are different in function and impact. They represent judicial review in two different roles, both of which gain influence under Europeanisation, and both of which have met with resistance in the Nordic countries and elsewhere. One important role of judicial review found in most states is to maintain the constitutional division of power and protect individual rights against encroachment by the legislature. Generally, review seeks to protect the interests of citizens against abuse of power by the state. In federal and quasi-federal arrangements, however, a court serves a different role: to secure implementation of central decisions within each subunit, and to settle conflicts concerning competence allocation among the subunits and the central authorities. To this comes of course the almost daily task of settling conflicting interpretations of federal laws. This mechanism is justified largely by the interests of those *outside* the sub-unit itself, by alleviating fears of free riders. In several ways the ECtHR and the ECJ exemplify these two functions. Other relevant differences include how the EU, but not the ECHR, empowers all domestic courts to perform European judicial review.

C. THE CONTRIBUTIONS TO THIS SPECIAL ISSUE

The various contributions in this special issue serve to highlight the long, complex, and sometimes shared origin of the Nordic countries' reluctance to embrace judicial review. European judicial review not only fans these old concerns, it may also hasten profound social, political and legal changes in these societies. The present special issue addresses these tensions, past, present and future.

A NOTE ON CONTESTED TERMS

The remainder of this introduction provides a brief overview of some of the more prevalent explanations for Nordic resistance to judicial review, and concludes with some changes in the Nordic communities, often tied to Europeanisation or globalisation, likely to affect the level and forms of resistance to judicial review. But a cautionary note is in order concerning the challenges of multi-disciplinarity and the use of common terms. Even a charitable reader could be confused by the use of central terms in such a multi-disciplinary endeavour. In particular, it may be appropriate to keep in mind that 'democracy,' 'majoritarian democracy,' 'rule of law' or 'constitutionalism' come close to being 'essentially contested concepts,' in Gallie's original sense: they are explicated in interestingly different ways as part of often competing theories; thus their 'proper' use is in part a matter of what the theory seeks to illuminate.⁷ A modest hope is that the different uses of these terms by this set of distinguished authors indeed lives up to Gallie's expectations of "a marked raising of the level of quality of arguments in the disputes of the contestant parties".⁸

To enhance consistency across the contributions we might have been well advised to harmonize terminology. However, that would also hinder comprehension by others in each aca-

⁷ W. Gallie: "Essentially contested concepts" (1956) *Proceedings of the Aristotelian Society* 167, 156.

⁸ Gaillie (1956) 193.

democratic community, be it law, political science or democratic theory. Since the latter audiences are equally important, we have chosen to not impose a common set of terms, beyond 'European judicial review.' Instead, each author takes unusual care to define their use of these central terms.

PART 1: STATUS PRESENS

Part 1 lays out the current national practices and debates about European judicial review in the Nordic countries. It includes reports and reflections from all Nordic countries on the historical backdrop and some of the salient legal cases. Some contributors explore recent political conflicts over European judicial review in parts of the Nordic countries.

Participants of public debates in the Nordics have tended to conflate legitimacy and majoritarian parliamentarianism. Parliament is seen as the site of legitimacy, as the privileged arena for the expression of the general will. The constitutions and constitutional conventions allow significant parliamentary discretion. This does not mean that there are no constraints on legislation at all, but it is for the parliaments themselves to decide whether legislation is within the bounds of the constitution. It marked a significant shift from earlier constitutional practice in Norway, for instance, the first country in Europe to acknowledge judicial review. In Sweden and Finland, the judiciary may still only intervene if legislation is in 'obvious violation' of the constitution. As the contributors to Part 1 make clear, the extent and form of judicial review, and resistance thereto, vary across the five countries, likewise the causes and forms taken by this sense of reluctance.

Joakim Nergelius reviews current legal status, salient cases, and some contemplated changes in Sweden.⁹ Sten Schaumburg-Müller accounts for the legal situation in Denmark and explores important cases. Toumas Ojanen presents the Finnish situation and Ragnhildur Helgadóttir pursues some of the most important cases to reach the courts in Iceland. Inger-Johanne discusses some of the salient issues in the Norwegian setting.

All five Nordic states have the *de jure* weak judicial review, but not all have a tradition of judicial *censure*: the number of cases has been low, at least until the European judicial review began proliferating.

VARIATIONS AND PUZZLES

The Nordic comparison shows that even though all the Nordic countries have long had some form of *de jure* judicial review, at least as a legal possibility if not in actual practice, they differ on important points. Any sound explanatory theory should seek to account for them. We review them here in succession.

HOW ARE THE EUROPEAN TREATIES TRANSFORMED INTO DOMESTIC LAW?

The Nordic states vary significantly in how they incorporate the treaties; in Norway some but not all human rights treaties have precedence over ordinary legislation. Most Nordic countries

⁹ J. Nergelius: *Konstitutionellt rättighetskydd: Svensk rätt i et komparativt perspektiv* (Lund: Norstedts/Fritzes 1996).

have a dualist legal order, however, and international law must therefore be transformed into national law to have legal effect.

WHICH ISSUES/RIGHTS?

The domain of domestic laws subject to judicial review also varies across jurisdictions. It might be limited to rights held to be necessary components of or preconditions for a functioning democracy: political rights, freedom of organisation and speech, and possibly certain minimum survival rights to secure basic needs etc.

A wider list of rights would include such historically well-established rights such as religious freedom and components of rule of law. An even more ambitious list would include many cultural, social and economic rights, whose content and tradeoffs are often seen as more properly the task of democratically accountable representatives.

Finally, European judicial review often cuts across these distinctions, since the rights and directives may pertain to gender equality or non-discrimination, with implications even for the level of social security payments.

WHAT IMPACT?

All Nordic states today have a formal right to judicial review - i.e. some role for courts in checking parliaments. But none of them have the 'strong' powers of review by which a court can replace one piece of legislation with another, as enjoyed by US Supreme Court. In some countries the domestic courts refer only sparingly to European treaties when domestic laws are sufficient, and only in some jurisdictions do courts refer additionally to European case law.

DO COUNTRIES CONSIDER INTERNATIONAL JUDICIAL REVIEW TO BE MORE PROBLEMATIC THAN DOMESTIC?

In some jurisdictions the opposition may focus on worries about the supremacy of the legislature challenged by the judiciary, while in others it is the fear of national decisions being overruled by review. When national supreme courts find legislation to contravene the constitution, or European treaties, the reactions can vary depending on the country. Likewise, supreme courts in some countries may cite domestic or European sources in situations where both might be appropriate

PART 2: EXPLANATORY STRATEGIES AND NORMATIVE ASSESSMENTS OF RELUCTANCE TO EUROPEAN JUDICIAL REVIEW

That countries are reluctant to embrace European judicial review and remain sceptical is neither new, nor exclusive to the Nordic countries - witness similar wariness in the UK leading up to the adoption of the Human Rights Act when the preliminary ruling procedure and British courts were scrutinized.¹⁰ Yet certain attributes of Nordic societies and states are often thought to inspire even greater reluctance about judicial review.

¹⁰ T. Campbell, K. D. Ewing and A. Tomkins: *Skeptical essays on human rights* (Oxford: Oxford University Press 2001). See also Wind, Martinsen & Rotger 2009.

There are at least seven clusters of hypotheses purporting to explain opposition to judicial review among politicians, the public, and government administrations that merit exploration. The first two may also be in flux, which makes explaining current shifts even more challenging. We examine the last four in more detail in this special issue.

UNITARY SELF-PERCEPTIONS

At least at first glance, the Nordic countries are close to the ideal-type of the *unitary* nation-state. This is not completely accurate - Greenland and the Faroe Islands are self-governing administrative divisions of Denmark. The Swedish-speaking minority in Finland, including inhabitants of Åland island, enjoy extensive self-rule, particularly regarding Swedish language and culture. Such details notwithstanding, the lack of a federal structure means there has never been a need for courts to settle conflicts over the competences of a sub-unit *vis-à-vis* central legislative bodies.¹¹ To this comes the centralised form of government that lends credence to the view that parliament is *the* institutional embodiment of the ‘common will’ - unlike any parliament can be assumed to be in a federal state. Europeanisation in the form of EU membership has challenged the very foundation of this unitary conception, not least as the EU becomes increasingly federal.

PERCEPTIONS OF THE HOMOGENOUS NORDIC POPULATION

The Nordic countries have also had a self-perception as ethnically and culturally homogenous populations, largely belonging to Lutheran state churches. This self-understanding may have reduced the perceived salience of deep conflicts between a majority and minorities. Of course, such political and cultural homogeneity is a misnomer. For instance, the Sámi people in Finland, Norway and Sweden have suffered from governments’ forced assimilatory policies, and have more recently claimed legal status as an indigenous people. Recent more visible immigrants, partly due to Europeanisation, make this description more obviously flawed. The prevalence of communitarian narratives of the Nordic nation states as culturally homogenous and normatively upright, egalitarian peoples with a strong emphasis on the value of grass-root movements and participatory democracy may help explain reluctance toward the elitist power of the (unelected) judiciary implied in judicial review in general. On top of this comes a strong scepticism toward international influence in particular – as by European courts staffed largely by foreigners.

NATIONALISM

While the horrors of World War II led many European countries to realise the necessity of constraining and checking the legislative branch to prevent the commission of future atrocities in the name of the ‘nation’, the Nordic peoples emerged with their national patriotism relatively unscathed. If anything, their experiences underscored the illegitimacy of foreign interference with the popular will.

¹¹ See Martin Shapiro: “The Success of Judicial Review” in S. J. Kenney, W. M. Reisinger and J. C. Reitz, *Constitutional dialogues in comparative perspective* (New York: St. Martin’s Press 1999)193–219, on the link between judicial review and federalism.

These three features may help explain the remarkable conflation of state and society in several of the Nordic states. In terms of political theory its strengths and weaknesses are discussed under the heading of 'communitarianism'. It is typically coupled with a suspicion of individual rights, a privileging of the interests of 'the' (monolithic) community together with an overwhelming trust in the state. –All of which may account for the resistance to judicial review. In this special issue Uffe Jakobsen explores some of these elements.

EGALITARIAN WELFARE STATE REGIMES

By many standards the Nordic countries form an egalitarianist cluster with similar modes of public welfare provision. Norway, Sweden, Finland and Denmark are among the five countries with best scores in the UNDP Human Poverty Index, and they score low on standard poverty and inequality measures.¹² The Nordic states tend to have both extensive public provision with egalitarian effects, and egalitarian income distribution. They are often said to subscribe to a 'Nordic welfare state model', which the social scientists Walter Korpi and Gøsta Esping-Andersen call 'social democratic'.¹³ Government policies seek more egalitarian ends than those of other welfare states, and tend to provide a high standard of universal coverage. While the Nordic countries are largely social democratic in this sense¹⁴, the categories are contested.¹⁵ Indeed, some regard it a mistake to speak of a Nordic model at all.¹⁶

What brought this welfare state regime into being remains¹⁷ a disputed topic, but scholars often point to long traditions of social democratic party dominance and corporatist arrangements between state, capital and labour. This heritage may help explain the relative robust nature of, and support for, welfare institutions even under economic downturns and liberal/conservative governments.

¹² Such as ca 7 % of the population with less than 50% of median income; and on the share of income received by the richest versus the poorest 20% of the populations. Cf. UNDP - United Nations Development Programme *Human Development Yearbook*: Table 5 (New York 2000). Data on Iceland are not provided, nor are they easily found in the Luxembourg income and poverty studies.

¹³ Gøsta Esping-Andersen, and Walter Korpi: *From Poor Relief to Institutional Welfare States: The Development of Scandinavian Social Policy* (Stockholm: Särtrycksserie (Institutet för social forskning) 1987); Robert Erikson: *The Scandinavian Model: Welfare States and Welfare Research* (Armonk, NY: M.E. Sharpe 1987) 39-74; Gøsta Esping-Andersen: *The Three Worlds of Welfare Capitalism* (Cambridge: Polity Press 1990); their taxonomy is reminiscent of Richard M. Titmuss: *Social Policy* (London: Allen and Unwin 1974).

¹⁴ Though Finland and Iceland do not fit neatly into this category, which also includes the Netherlands.

¹⁵ Ignoring gender Jane Lewis: *Women and Social Policies in Europe* (Aldershot: Edward Elgar 1993); and cf. Robert E. Goodin, et al.: *The Real Worlds of Welfare Capitalism* (Cambridge: Cambridge University Press 1999).

¹⁶ Lars Mjøset: "The Nordic Model never Existed, but does it have a Future?" (1992) 64 *Scandinavian Studies*, 652.

¹⁷ Though the Netherlands, Finland and Iceland do not fit this pattern. See Mjøset (1992) fn 16 for presentation and critique of attempts at identifying a Nordic model.

PARTICIPATORY, MAJORITARIAN DEMOCRACY: THE WESTMINSTER MODEL

Many of the Nordic states have had democratic traditions with inclusive or participatory elements that foster negotiation and compromise. In particular, the prevalence of minority governments and corporatist elements have encouraged the inclusion and co-opting of veto players. The result is a culture of policy making that aims for consensus, or at least tacit public acceptance of policies, of the people's representatives and organizations. One effect is to internalize and domesticate many political conflicts; another may have been to foster a belief in the legislature's ability to cater already to all legitimate concerns through mechanisms of hearings and participation. To have these negotiated pieces of legislation challenged by a court whose democratic credentials are unclear, has often appeared unnecessary at best, and contrary to the 'popular will' at worst. Palle Svenson explores some of the salient definitions of democracy, to help specify this hypothesis. Marlene Wind and Mats Lundström explore 'democracy' hypotheses further in their contributions.

NOT THE WESTMINSTER MODEL, BUT THE 'YES, MINISTER' MODEL

A detailed analysis of some of the resistance to European judicial review reveals its origin not in the public at large, nor politicians, but in the state administration. Eager to protect national sovereignty, political opportunity and space for elected, accountable governments and politicians, they seek to prevent domination by foreign judges. Marlene Wind describes its practice in Denmark and shows the reluctance of national judges to turn to international courts because they are unfamiliar with judicial review at the national level. They also dislike the risk that legislation adopted by a democratically elected majority could be overturned by an international judicial body.

SCANDINAVIAN LEGAL REALISM

Hägerström (1868-1939) founded with his devoted disciple Vilhelm Lundstedt (1882-1955) the 'Uppsala School' that came to enjoy great influence in Scandinavia.¹⁸ From it emerged the tradition in legal philosophy that has come to be known as Scandinavian legal realism.¹⁹ Hägerström maintained a version of moral non-cognitivism, rejecting the possibility of moral facts and instead endorsing ethical emotivism. His views influenced the Swedish legal scholar Karl Olivecrona (1897-1980) and, in Denmark, Alf Ross (1899-1979).²⁰ Scandinavian legal realism rejected speculations over the metaphysical nature of law, rejected natural law, and held that the only meaningful content of law is that which can be verified. This was not to deny the need for politics and values, but that values could be the subject of scholarly arguments. One effect was to steer legal scholars away from open debates about political issues,

¹⁸ Finland was not influenced much, instead following German traditions.

¹⁹ Cf. H. L. A. Hart: "Scandinavian Realism" (1959) *Cambridge Law Journal* 233; Jan-Erik Lane and Hans Stenlund: *Politisk teori* (Lund: Studentlitteratur 1989).

²⁰ Karl Olivecrona: *Law as Fact* (2nd ed., London: Stevens 1971); Alf Ross: *Toward a Realistic Jurisprudence* (Copenhagen: Einar Munksgaard 1946); Alf Ross: *On Law and Justice* (Berkeley: University of California Press 1959).

placing such topics squarely within the domain of legislatures.²¹ Judicial review would therefore seem completely misguided, both reminiscent of natural law and a violation of the structure of professional. Both Mats Lundström and Marlene discuss Scandinavian legal realism, the plausibility of perceiving it as a unique Nordic legal tradition, located somewhere in between Continental and common law, and its causal impact.

IS EUROPEAN JUDICIAL REVIEW UNDEMOCRATIC AND ILLEGITIMATE?

Follesdal starts on the task of assessing the normative qualms raised by judicial review on the basis of democratic theory. He lays out some of the normatively salient features of the ECtHR, and argues that many, if not all of the concerns are misplaced, due to the way that court works.

D. CONCLUSION: RESEARCH CHALLENGES

The concluding section of this special issue will identify questions requiring further research study designs to emerge as a result of the volume's general discussions and explanatory sketches. We points out there the necessity of assessing hypotheses on the emergence of present forms of judicial review, how to explore the option space, and how to test explanations of emerging Nordic responses to European Judicial Review.

Consider some of the complex research challenges. First, any observed changes in practices and attitudes toward judicial review in the Nordic countries could be due in part to judicial Europeanisation and partly to the federal elements of the European Union. Both stand in stark contrast to the unitary traditions of the Nordic countries. Are the Nordic democracies, and their largely majoritarian principles, destined to become constitutional democracies? Several things - also explored in this special issue - suggest an answer in the affirmative. It would be interesting to take a closer look at the judicial behaviour of Nordic courts and judges. Are cases increasingly submitted to supranational judicial bodies? Are national politicians gradually coming round to the idea that courts can - and sometimes should - exercise powers of judicial review and set aside what a majority in parliament has democratically decided? Or will we, on the contrary, see a succession of 'Metoc cases' for years to come, and cry out against international judicial bodies?

There is an urgent need for international judicial dispute settlement-systems. When twenty-seven members of the Union legislate together, they have to compromise. Legislation achieved through accommodation is often unclear and in need of judicial re-interpretation. One of the interesting issues meriting study is the degree to which EU enlargement increases the demand for judicial dispute settlement. Does enlargement per definition result in sloppier, unclear lawmaking? If so, will it automatically increase the juridification of politics?

Looking specifically at the Nordic states, the clusters of hypotheses and explanations have changed in other ways, often because of Europeanisation or globalisation. Importantly,

²¹ Cf. Eivind Smith: *Høyesterett og folkestyret* (Oslo: Universitetsforlaget 1993); and Eivind Smith: "Fra Eidsvold til Westminster? Om synet på grunnloven som politisk redskap", in Trond Berg Eriksen et al.: *Fakler om vitenskap og samfunn: Til den Polytekniske Forenings 150-Årsjubileum* 146-207 (Oslo: Gyldendal 2002).

what is said to characterise the Nordic countries is changing. Increased awareness of ethnic and cultural *heterogeneity* within states has led to tensions and political debates over multiculturalism. Labour migration within the E U, combined with immigrants and asylum seekers from non-Western states, have changed the ethnic and cultural balance and character of the Nordic countries - particularly in urban areas. The ensuing policy challenges have wrought political conflicts and crises in several Nordic countries. This may mean the beginning of the end of perceptions of Nordic homogeneity, and could lead to increased demand for judicial review. Indigenous people's demand for self-rule, clearly visible ethnic minorities and a changing political order in Europe require publics to reflect over the moral right of a majority to make decisions that affect minorities, and about the minorities' need for protection.

Fourth, *popular democratic theory* may be changing, with a greater awareness of the need to regulate and constrain the legislature. Parliamentary supremacy is under siege, generating perhaps more concern for constitutional elements.²² This may partly be due to the emergence of democratic accountability mechanisms also at the European Union level, and partly to the increased attention to multiculturalism. The fact that judicial review and constitutional democracy have been seen as part and parcel of democratic rule in all those countries where dictatorships were replaced by democracies in Europe is a case in point. We know these countries have chosen judicial review, and limited government rather than the type of parliamentary supremacy and unconstrained government we know from the Nordic countries and Great Britain in particular, but we do not know why this has happened. Is it pressure from Brussels (Europeanisation *push*) or is it much more due to past experience (the *pull* factor) where all encroaching political systems saw no limits to their powers? We urgently need research-based answers to these questions.

Fifth, *legal and constitutional culture* also evolves, for at least two reasons. First, the role of parliament is being rethought, not only because of European integration.²³ Iceland included human rights in the constitution in 1994-95 and the new Finnish constitution now includes a broad range of economic and social rights and judicial review, which before 2000 used to be strictly forbidden (see this issue for a description of both cases).²⁴ Moreover, the legal and constitutional ties to the Continent foisted upon the Nordic countries by European integration, along with much scholarly interaction with the US, confront the Scandinavian legal realist tradition with other conceptions of constitutions and democracy. These competing legal theories include the widespread existence and acceptance of constitutional courts, a less hostile attitude to various forms of natural law, different attitudes towards the importance of travaux préparatoires in the interpretation of rules and regulations, and a shift towards 'dynamic' interpretation.

All in all, there are doubtless several reasons why attitudes towards judicial review have been changing in the Nordic countries. Only careful scrutiny of the paths, shared norms, values and beliefs that have led them to their present procedures, can help us to adjust to present and future challenges while remaining loyal to those norms and values that are worth keeping.

²² See Tom Ginsburg: *Judicial review in new democracies: constitutional courts in Asian cases* (Cambridge: Cambridge University Press 2003); and Shapiro (1999).

²³ cf. Smith fn. 10, 284-85; Arnason fn. 17.

²⁴ See Joachim Nergelius, in Martin Scheinin (ed.): *The Welfare State and Constitutionalism in the Nordic countries* (Copenhagen: Nord 2001) 85.

JUDICIAL REVIEW IN SWEDISH LAW – A CRITICAL ANALYSIS

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Abstract: *This text aims at describing recent developments in Swedish constitutional law, especially concerning the judicial protection of basic human rights. It does so by examining judicial preview as exercised by the Law Council (lagrådet) and judicial review as exercised by the courts. Special emphasis is devoted to changes in recent years, which have been brought about by the influence of European law, which has probably been stronger than in other Nordic countries, given the rather weak tradition of judicial review in Sweden.*

Keywords: *Human Rights, Judicial review, Swedish constitutional history.*

A. RELATION BETWEEN JUDICIAL REVIEW AND JUDICIAL PREVIEW

In order to understand the historically rather limited impact of judicial review in Swedish law, we must be aware of the heavy emphasis on popular sovereignty in Swedish political and constitutional thinking. That paradigm has dominated the Swedish constitutional debate ever since the early twentieth century. However, that is probably not the only explanation. Also the important work of the Law Council,¹ which has exercised a kind of judicial *preview* in relation to law proposals since 1909, must be observed in this respect.²

According to chapter 8, article 18 of the main Swedish constitutional act Instrument of Government (IG) of 1974, the Law Council, which consists of justices or former justices from the two supreme courts, shall pronounce opinions on draft legislation. The opinion of the Council is obtained by the Government or sometimes by a committee of the Riksdag. In order to understand a little bit more how the Council works, the remaining parts of the article, sections 2-4, shall be quoted in extenso (in the official translation, whatever we may think of it):

The opinion of the Council on Legislation should be obtained before the Riksdag takes a decision on fundamental law relating to the freedom of the press or the corresponding freedom of expression on sound radio, television and certain like transmissions and cer-

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¹ Which is thus, in the official translation, called the Council of Legislation.

² Thus, the creation of the Law Council stands in a close relation to the simultaneously installed Supreme Administrative Court, both reforms aiming at distributing the many tasks that the Supreme Court had under the old constitution of 1809 to some new bodies.

tain like transmissions and technical recordings; on an act of law restricting the right of access to official documents; an act of law under Chapter 2, Article 3, paragraph two, Article 12 paragraph one, Articles 17 to 19 or Article 22, paragraph two, or an act of law amending or abrogating such an act; an act of law relating to local taxation; an act of law under Article 2 or 3³; or an act of law under Chapter 11, if such an act has significance for private subjects, or having regard to the public interest. The foregoing does however not apply, if obtaining the opinion of the Council on Legislation would delay the handling of legislation in such a way that serious detriment would result. If the Government submits a proposal to the Riksdag for the making of an act of law in any matter referred to in sentence one, and there has been no prior consultation of the Council on Legislation, the Government shall at the same time inform the Riksdag of the reason for the omission. Failure to obtain the opinion of the Council on Legislation on a draft law never constitutes an obstacle to the application of the law.

The Council's scrutiny shall relate to

1. the manner in which the draft law relates to the fundamental laws and the legal system in general;
2. the manner in which the different provisions of the draft law relate to one another; the manner in which the draft law relates to the requirements of the rule of law⁴;
3. whether the draft law is so framed that the resulting act of law may be expected to satisfy the stated purposes of the proposed law;
4. what problems are likely to arise in applying the act of law.

More detailed rules concerning the composition and working procedures of the Council on Legislation are laid down in law.⁵

There are a number of questions to be asked in relation to this provision. For instance, what does it mean that an opinion should be obtained? How important are the exceptions from that rule? And what do the general provisions in section 3 on the emphasis of the scrutiny really mean?

What is probably more important than analysing these and other parts of the provision in detail⁶ is to observe the two main constraints on the power of the Council that should always be kept in mind, namely that it is never, ever compulsory for the Government to ask for the Council's opinion nor, as the article states unequivocally, does failure to obtain such an opinion ever constitute an obstacle to the application of the law. This fact could lead to the conclusion that the Council lacks importance, but that is hardly correct, as will be shown below.

³ I.e. of chapter 8.

⁴ This is actually the only provision in the Swedish Constitutional Acts which uses this expression, a point worth observing.

⁵ This refers to a special law setting forth detailed instructions for the work of the Council, the *Lagen om lagrådet*, amended in 2003.

In Swedish doctrine, the meaning of the criteria established in section 3 of the provision has been vividly discussed.⁷ In short, there seems to be general agreement that not only should the text of the draft law be taken into account but its *travaux préparatoires* (which in Swedish law are normally quite important) as well. Since 1995, surveys by the Law Council must also address the compatibility of a draft law with EU law and the European Convention on Human Rights (ECHR), which is one of the main reasons the Law Council has at least since 2000 been increasingly and even alarmingly critical against many new draft laws.⁸

While the criteria concerning how different provisions of the draft law relate to one another are mainly technical and normally uncontroversial, the mentioning in the text of the requirements of the rule of law (*rättssäkerhet*) has provoked widespread criticism, and a discussion on in what circumstances the survey should take account not only of strictly legal, but also of the more political aspects of a draft law. In short, the Law Council obviously feels freer today to criticise proposals on points of policy, which may have something to do with the lower quality of legislation today than twenty years ago, when there was less pressure on legislators to produce laws quickly.⁹

It is of little use to the Law Council, that the Government and Parliament are able to ignore its warnings (which is legally possible, since the opinions of the Law Council are never legally binding). Whatever constitutional status the opinions of the Council may or may not have, is still somewhat unclear. They are, of course, much more important than ordinary comments on legislation from NGOs or public authorities (*remisser*), since the Council is a body of legal experts and represents no party interests. Furthermore, a draft law, i.e., a finished legislative product which the Government intends to submit to Parliament, is much more than work produced by a legislative committee or group of some kind.

The Law Council does not by any means lack the power to shape the bills adopted by Parliament.¹⁰ Still, given the clear wording of chapter 8, article 18, it would be impossible to give greater weight to the opinion of the Law Council than the contradictory opinion of Parliament, enacting a law despite Council's objections. But such a case, which is far from unusual, that the legislator has chosen to disregard the opinions of the Law Council may explain why it might be more natural and logical for a court to set the law aside in a subsequent case of judicial review.¹¹

⁶ For such a detailed analysis, see Joakim Nergelius, *Svensk statsrätt* (Lund: 2006) 182. See also R. Lavin, *Lagrådet och den offentliga rätten 1999-2001* (Lund: 2001).

⁷ See Nergelius (2006) 185 with further references.

⁸ This tendency was observed and analysed in a sharply critical article by a former member of the Council, Justice Danelius, in *Svensk Juristtidning* (2004) 25–33.

⁹ Cf. Danelius (2004).

¹⁰ Cf. Nergelius (2006) 194 for a recent analysis.

¹¹ Cf. Nergelius (2006) 218.

B. THE DEVELOPMENT OF JUDICIAL REVIEW BY THE COURTS – A BRIEF HISTORICAL BACKGROUND

Judicial review was not incorporated in the constitutional text until 1979, when chapter 11, article 14 IG was enacted. The mere existence of judicial review in the legal doctrine has been the subject of discussion at least since the 1880s. Its inclusion in the doctrine was generally acknowledged by the 1930s, and finally accepted as a fact by the Supreme Court in a case in 1964.¹² After that, while it was clear that the courts, but probably not other public authorities, could exercise judicial review, it was also clear that they exercised this possibility with great self-restraint and that the requirement that manifest error be demonstrated for a law to be set aside – a requirement which actually originated in a judgment in 1951¹³ – was a part of this institution.

In the wake of that 1951 judgment, whether judicial review should be written into the constitution became one of several questions debated during the huge reform work that was conducted before the new Constitution, the Instrument of Government, was finally adopted.¹⁴ It took until 1979, however, during the second reform wave of the new constitution, before judicial review was finally written into the new constitutional text, and then not only with the reservations that follow from the requirement of manifest error but some influential political statements in the *travaux préparatoires*, notably by the Constitutional Committee, on the restraint required of the courts to avoid them gradually undermining the popular Swedish democracy.¹⁵ But are those statements binding or equally influential today, almost thirty years later?

As seen above, chapter 11, article 14, which has not been changed since 1979,¹⁶ states that if a court or other public body finds that a provision is in conflict with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law was disregarded in any important respect when the provision was made, the provision may not be applied; but if it has been approved by Parliament or the Government, it shall be waived only if the error is manifest. Thus, judicial review pertains both to courts and other public authorities, a fact that in reality has probably diminished the importance of judicial review, since the public authorities will normally hesitate before involving themselves in such an activity, while the

¹² NJA – *Nytt Juridiskt Arkiv* (1964) 471, concerning opening hours in shops (although that law was actually considered to be constitutional). For a thorough historical account, see Nergelius (2006) 198.

¹³ NJA (1951) 39, as well as the case NJA (1948) 188.

¹⁴ For details, see Nergelius (2006) 204.

¹⁵ See in particular KU – *Konstitutionsutskottet, the Constitutional Committee of the Parliament* (1978/79:39) 13. The constitutional reforms of the 1970s, the reasoning and political controversies surrounding them have been analysed in an important 1987 study by Algotsson, *Medborgarrätten och regeeringsformen*.

¹⁶ But may on the other hand be changed in 2010, since it falls within the mandate of the Committee preparing a constitutional reform. A special study was that very reason produced by a group of experts in 2006; see governmental bill SOU, *Statens offentliga utredningar* (2006:96), *Ett nytt grundlagsskydd för tryck- och yttrandefriheten?*

article's mention of them does not give the courts any real feeling that this is their own, important task, so to speak.¹⁷

As the wording of chapter 11, article 14 also makes clear, the review exercised may be either formal or material to its nature. It is possible that the margin for the courts to exercise judicial review may be slightly greater in the formal cases, since they are politically perhaps more neutral. What the article fails to make completely clear, or the doctrine or jurisprudence for that matter, is whether the courts have an obligation to exercise judicial review whenever the situation arises in a case before them – which would force them actively to look for possible conflicts of norms – or if they may do so only when the argument is raised by the parties to a case.¹⁸ Surprisingly enough, this issue has still not been resolved.

What is clear, however, is the lack of an autonomous right to an *abstract* judicial review, independent of a specific case or dispute. This was actually established in a case as far back as 1987¹⁹ and was recently confirmed by the ECJ in the *Unibet* case, which showed that EU law does not impose specific conditions on Member States in terms of allowing specific forms of judicial review, as long as effective remedies exist before independent courts of law.²⁰

But as jurisprudence, though not the text itself, also makes clear, logically enough, judicial review is not always exercised of a law or another rule in itself, but rather of the practical use or application of that rule by a public authority in a specific case.²¹ In reality, judicial review would have been more or less impossible for the courts to use it as an instrument had that not been the case.²²

Concerning the requirement of manifest error, it may be surprising, not least from points of view of democracy and popular sovereignty, that the provisions passed by the Government (i.e., so-called regulations, *förordningar*) do enjoy the same degree of protection in this respect as the laws passed by Parliament. Government regulations do not enjoy the same constitutional status, as chapter 8 IG demonstrates, nor is the Government anywhere near being able to invoke democracy and legitimacy as forced underlying its regulations in the same way

¹⁷ There is actually no sign at all of this idea in older doctrine or jurisprudence, which only dealt with judicial review exercised by the courts. It was in 1973 that the then Minister of Justice came up with the idea apparently from nowhere (prop. 1973:90, 200). It has since hardly been questioned, surprisingly enough. For an international point of view on this issue, we may refer to A.R. Brewer-Carias: *Judicial Review in Comparative Law* (Cambridge: 1992) 132: "Theoretically, all public authorities and individuals could be entitled to inspect the irregularity of state acts and to consider whether the act is valid and obligatory. Since this would lead to juridical anarchy, positive law normally reserves this power to the judges."

¹⁸ See Nergelius (2006) 210 for further discussion.

¹⁹ NJA (1987) 198.

²⁰ Case C-432/05, Judgment 13 March 2007, ECR I (2007) 2271.

²¹ For some very clear examples of this, see the two so-called Kurd cases, NJA (1989) 131 and NJA (1990) 636. Also NJA (1986) 489 may be observed here.

²² For an analysis, see Joakim Nergelius: *Förvaltningsprocess, normprövning och Europarätt* (Stockholm: Norstedts 2000) chap. 6.

as Parliament may do.²³ Thus, were any kind of swift reform to be envisaged in this area, abolishing the right of all the public authorities to exercise judicial review *as well as* the manifest error condition in relation to acts of Government would be two very suitable places to start, and would probably be passed without major controversy.²⁴

Against this background, one may of course ask what the content and effect of chapter 11, article 14 really are. Here, opinions are divided. Some believe that the judicial review would actually have been stronger had the article never been enacted.²⁵ Some see chapter 11, article 14 as a product of the 1970s, which can hardly be interpreted literally today.²⁶ One major difficulty in the latter respect, apart from what was said above, is undoubtedly the vagueness of the term “manifest” (*uppenbar*): it can mean different things to different persons. Thus, one leading, now retired professor and justice of the Supreme Court, Bertil Bengtsson, has said in public that respect for the requirement may force him to uphold laws which he himself finds unconstitutional, as long as his learned colleagues have a different opinion. He has shown in practice, in two dissenting votes, his reluctance to set aside laws his colleagues find valid, clearly illustrating some of the problems of the rule.²⁷ One way to avoid them would be for Swedish judges to *interpret* laws regularly in a manner which made them consistent with the Constitution and European law, but as studies reveal, Swedish courts have not availed themselves of the method on a regular basis.²⁸ Thus, the problem does not seem easy to remedy without amending the article itself.

C. SOME IMPORTANT CASES

A very thorough recent study into the history of the Swedish judicial review between 1995 and 2002, is particularly interesting since it covers the first seven years of Swedish EU membership. Its author is a young scholar, Karin Åhman, and it was her first official report for the

²³ There are in fact certain examples of the two Supreme Courts showing less self-restraint in relation to regulations from the Government than when reviewing the constitutionality of laws; see e.g. RÅ – *Regeringsrättens Årsbok* (1993:10 and 79), as well as NJA (1996) 370. This tendency is however far from constant.

²⁴ Incidentally, those are exactly the same changes that have been introduced in Finland; see art. 106 of the Finnish Constitution from 2000.

²⁵ An opinion somewhat surprisingly expressed by Bernitz: *Sverige och Europarätten* (Stockholm 2002) ch. 5.

²⁶ Most sharply by Nergelius (2006).

²⁷ Those are the two cases NJA (1981) 1, concerning rights of the Sami population (cf. today chap. 2, art. 20, sect. 2 IG) and NJA (1989) 131, concerning controversial restrictions in the freedom of movement for a group of Kurdish refugees.

²⁸ See in particular Joakim Nergelius (1996): *Svensk Juristtidning*, 835–870. For a slightly different view, see K. Åhman: ”Rättighetsskyddet i praktiken – skydd på papperet eller verkligt genomslag?”, in O. Petersson/E. Smith (eds.), *Konstitutionell demokrati* (Stockholm: SNS 2004) 172–203.

Ministry of Justice. She published it later as part of an anthology on constitutional law.²⁹ According to the official figures in that study, judicial review had been exercised by Swedish courts in 131 cases during the period, 71 of which were (finally) settled by the Supreme Court, 38 by the Supreme Administrative Court and 22 were judgments from courts of appeal. In 70 of those 131 cases, the courts found no conflict between lower level norms and IG, ECHR or EU law.³⁰ No less than 48 cases were resolved by means of interpretation, which is actually quite surprising and contrary to the findings of a 1996 study.³¹ Chapter 11, article 14 were invoked in nine cases, of which the law or regulation was set aside in five. Apart from that, Swedish rules were set aside because of inconsistency with European law in three cases, but without the article being explicitly invoked.

If we go even further back, quite a few cases concerned the prohibition against retroactive tax laws set out in chapter 2, article 2, section 2. Those cases were initially rather technical, which perhaps made it easier for the courts to set aside some of the rules,³² but in the NJA 2000 case, s. 132, a law was explicitly set aside, surprisingly, for violating that rule. Generally speaking, however, it seems clear that technical rules like the ones in chapter 8 IG have been easier for the courts to invoke against legislation that has not met certain formal requirements than material, crucial human rights rules like the ones in chapter 2 IG or in ECHR.

The examples of this in the jurisprudence are numerous, in particular from the Supreme Administrative Court. For instance, in the 1980 RÅ case 1:92, the Court found that a law on the right of companies to make tax deductions for certain losses was found not to be general and thus not compatible with chapter 11, article 8 IG. And in 1981,³³ the same court found that rules in chapters 2 and 8 on how to enact restrictions of basic rights had been respected in two cases, but not in a third. The Supreme Court was more reluctant to exercise judicial review even in cases of that kind,³⁴ finally changing its view in a 2005 case,³⁵ where penal rules in a case concerning legislation on forests were seen to be enacted contrary to chapter 8, articles 7 and 13 IG (rules that are extremely technical).

These cases must be seen in the light of the general reluctance to exercise judicial review that until recently has prevailed in Swedish constitutional and political thinking, where it was simply seen as an undemocratic measure, not worthy of a living, vital democracy. It is only lately, under the influence of European law, that this opinion has begun to change and it is therefore only logical that we find the most interesting judicial review cases from the last few years in this area.

²⁹ Åhman (2004) 172-203.

³⁰ Conflicts between lower norms and FPA or FSA are of course also theoretically possible, but in reality much less likely to occur, since almost all the cases under those two constitutional acts that come before the court are criminal cases where the system for penal responsibility in the two acts is being examined.

³¹ Nergelius (1996).

³² See not least RÅ (1982 1) 74 and in more detail Nergelius (2006) 222.

³³ RÅ (1981 2) 1, 14 and 15.

³⁴ See e.g. NJA (1984) 648.

³⁵ NJA (2005) 33.

D. JUDICIAL REVIEW IN RELATION TO EUROPEAN LAW

Although the supremacy of European law in general and EU law in particular over Swedish domestic law should of course have been a clear and generally recognised fact ever since Sweden joined the European Union in 1995, it is nevertheless the case that Swedish courts have reacted slowly to the possible implications of European law in Swedish legislation, and taken much time to fully recognise and acknowledge that accession to the European Union placed, among other things, clear constraints on the powers of the sovereign legislator, also in politically highly sensitive matters. This became evident in cases in which the highest courts, the Supreme Court (*Högsta Domstolen*) as well as the Supreme Administrative Court (*Regeringsrätten*) simply misinterpreted preliminary ECJ rulings³⁶ or failed to request ECJ judgments in cases where it would not only have been justified but even required.³⁷ Also a clearly contestable interpretation of the European Convention of Human Rights, contrary to the interpretation made afterwards by the Strasbourg court in a similar case, should be mentioned here.³⁸

These issues, and the general attitudes of Swedish courts in view of the new situation in particular, have been widely debated in relation to Swedish legal doctrine,³⁹ where “positive” tendencies, in terms of increased judicial review and even a kind of judicial activism, are taken as the effect of the “Europeanization” of Swedish law in the late 1990s.⁴⁰ To summarise this

³⁶ In particular the so-called *Data Delecta* case, NJA (1996) 668. Also the so-called *Volvo Service* case, NJA (1998) 474, where the Supreme Court refused to await the outcome in a similar case pending before the ECJ before rendering its own judgment (and then deciding in favour of Volvo, against the interest of a small car repair service, contrary to the conclusion to which ECJ a few months later arrived in the case C-63/97, *BMW v. Deenik*, ECR 1999 I p. 905) may be mentioned here.

³⁷ Apart from the *Volvo Service* case, mentioned in the previous footnote, in particular the rather well-known *Barsebäck* case concerning the closure of a nuclear reactor comes to mind here; see RÅ (1999) ref. 76 (criticised most recently by the former ECJ *référéndaire* Martin Johansson, in Sveinbjörnsdóttir confirmed by *Högsta Domstolen* – But reluctance to apply Community law seems to persist, *Europarättslig tidskrift* (ERT) 2005 p. 507-519).

³⁸ NJA (1998) 817, concerning the fate of a journalist protesting against Norwegian seal hunting, which ran contrary to the judgment of the European Court of Human Rights in *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999 in case 21980/93.

³⁹ In the vast literature on the topic, see e.g. Nergelius: *Förvaltningsprocess, normprövning och Europarätt* (Stockholm 2000), Ulf Bernitz: *Sverige och Europarätten* (Stockholm 2002) (also published in English, Sweden and European law) and Iain Cameron: “The Swedish Experience of the European Convention of Human Rights since Incorporation” (1999) *International Comparative Law Quarterly*, 20-56. More detailed analysis of case-law from Swedish courts in this respect may be found in Kent Karlsson/F. Hägglund, *En kartläggning av Sveriges första fem år med EG-rätt, Europarättslig tidskrift* ERT (1999) 437-519 and in a special addendum to no 3 of that journal in 1999 (concerning EC law), as well as in J. Södergren, *Axplock*, ERT (2002) 664 and ERT (2005) 33 (concerning ECHR).

⁴⁰ See e.g. Ola Wiklund: “EG-rättens inflytande över svensk rätt – En konstitutionell omvandling” in U. Bernitz/O. Wiklund (eds), *Nordiskt lagstiftnings-samarbete i det nya Europa* (Stockholm: 1996) 59

discussion, I think it is fair to say that the “sub-ordination”, more or less, of Swedish law to European law represents the most important constitutional change in modern Swedish constitutional history. But it has transformed the constitutional perspective also in other ways. Above all, the traditionally so important and very rarely contested legislation, is now superseded in Sweden and other Nordic countries not only by some rather old and rarely invoked constitutions, but also the European Convention of Human Rights⁴¹ and the whole edifice of EU law (“*l’acquis communautaire*”). The result, firstly, is an increase in the frequency of conflicts between the traditionally highly respected and hardly contested laws and norms of a higher dignity and, secondly, that invoking the constitution itself in legal proceedings – a fact that is undoubtedly important at least in Sweden – is no longer considered such a strange course of action.

In the already mentioned 1997 Lassagård case, the plaintiff applied for an agricultural subsidy to a regional administrative authority (*Länsstyrelsen*) in May 1995. The application, based on an EC Regulation, was rejected because the time limit was not respected. Lassagård AB exercised its right to appeal to the superior administrative agency. The agency, however, upheld the previous decision in January 1996. There was no general recourse to judicial review of decisions made by administrative authorities and the review was conditioned by the existence of an explicit statutory provision. Finally, after numerous appeals to different courts,⁴² the case reached the Supreme Administrative Court. The main question at issue was whether the lack of judicial review was contrary to Community law, though the issue of Community law was not elucidated by the lower administrative courts who preferred to rely on Article 6 ECHR.

as well as Nergelius: “The Impact of EC Law in Swedish National Law – A Cultural Revolution”, in I. Cameron/A. Simoni (eds), *Dealing with Integration* – Vol. 2 (Uppsala 1998) 165-82 and *Maktindelning och politikens judikalisering*, in SOU 1999:58 (*Löser juridiken demokratins problem?*) 55-84. Perhaps the clearest expression of an awareness by Swedish courts of the supremacy of EU law is the so-called Lassagård case from 1997 (RÅ 1997 ref. 65), where the Supreme Administrative Court set aside a crucial law concerning legal remedies in administrative law because it was found to be contrary to the general principles of EU law.

⁴¹ During the 1990s, the other Nordic states incorporated the Convention into national law, necessary to give it a legally binding force in those countries, which are traditionally dualistic in the way they consider the relationship between national and international law. Incorporation was not done at exactly the same time or in exactly the same way in all the five states, but that is a detail that will not be dealt with here.

⁴² The company appealed to the District Administrative Court in Jönköping in May 1996 (the regional agency was located in Jönköping), and the Court considered that the right to a subsidy constituted a civil right in the sense of Article 6 ECHR. In consequence, Lassagård was entitled to judicial review. However, the competence was not fixed. In the view of the Jönköping Administrative Court of Appeal (August 1996), the absence of judicial review was contrary to Article 6 ECHR and declared the administrative court to be competent. As to the substance, the Court of Appeal handed the case to the District Administrative Court of Halmstad. (Lassagård was located in Halmstad). The Court declared itself competent but rejected the application since it was lodged too late. Lassagård appealed to the Administrative Court of Gothenburg, which declared itself incompetent.

The Supreme Administrative Court stressed that no right to judicial review was explicitly provided by Community law, i.e., by the applicable EC regulation. Thus it was necessary to consider the *general principles* of Community law enshrined in the jurisprudence of the ECJ.⁴³ It is worth noting that the general principle that enshrines the right to effective judicial protection results from the Johnston case,⁴⁴ in which it was stated that the national constitutions and the ECHR (Articles 6 and 13) constituted sources of inspiration regarding the elaboration of the right to effective judicial protection. The national court did however not refer to Johnston but to the Borelli case of the ECJ.⁴⁵ This case constituted an application of the *stare decisis* principle, and emphasized that all types of decisions by national authorities regarding individuals' rights stemming from Community law must be subject to judicial review and that Community law prevails over national law. A Community law right was, thus, encroached.⁴⁶ Consequently, the Court considered that a court should have jurisdiction to try the case, thereby putting aside the domestic rule under which there existed no possibility of judicial review. Following the judgment in the *Lassagård* case, the Administrative Act (*Förvaltningslagen*) was amended in 1998 when an article 22 (a) was incorporated so as to give a general competence to the administrative courts to consider appeals against decisions taken by administrative authorities.

The *Lassagård* case is of fundamental importance to understanding the extension of the scope of judicial review in Sweden and its interaction with European law. First, the priority of Community law over domestic law stems clearly from the case. Second, it may be stated that EC law permits the development of the scope of judicial review in the Swedish legal order. As we saw above, the application of the general principle of effective protection by the Supreme administrative Court has resulted in the invalidation of the national regulation limiting review and the simultaneous incorporation of a new provision ensuring the general competence of the administrative courts to review administrative decisions.

Going further, it must be remarked that EC law obviously offers a better and more far-reaching protection of basic human rights *under Swedish law* than the European Convention of Human Rights (ECHR).⁴⁷ That conclusion is based on the fact that the Swedish rules were set aside because they were contrary to articles 6 and 13 ECHR *under EC law*, as well as to the general principles of EC law, but not because ECHR did apply "in its own right", so to speak.⁴⁸ It also illustrates the weak or unclear legal status of ECHR in Swedish law, where, according to IG chapter 2, article 23, no act of law or other provision may be adopted which contravenes Sweden's undertakings under the Convention. ECHR as such was then incorporated through

⁴³ Concerning general principles of EU law as a topic, see Bernitz, C. Cardner, Nergelius: *General Principles of EC Law in a Process of Development* (The Hague 2008).

⁴⁴ 222/84, ECR (1986) 1651.

⁴⁵ Case C-97/91 Borelli [1992] ECR I-6113.

⁴⁶ Also, the court found the Swedish ordinance incompatible with Article 6.1 of the ECHR.

⁴⁷ It may also be said the general principle of effective judicial protection offers a better scope of protection than Articles 6 and 13 ECHR and their corresponding jurisprudence.

⁴⁸ This question is dealt with further by Nergelius "The Impact of EC Law in Swedish National Law – A Cultural Revolution", in I. Cameron/A. Simoni (ed.), *Dealing with Integration* (vol. 2) – *Perspectives from Seminars on European Law 1996-98* (Uppsala 1998) 165-182.

an ordinary law (1994:1219). It still says nothing about what would actually happen should a Swedish law after all be found to be contrary to the provision (an issue that is not dealt with in a satisfactory way by the *travaux préparatoires* either).⁴⁹

In general, the courts have thus not been wholly unwilling to face up to this new challenge, though certain errors have been made by different Swedish courts (not least by the two Supreme Courts), as mentioned above. Still, given the reactions and reflexes also of courts like, e.g., the Labour Court (*Arbetsdomstolen*⁵⁰), one would be justified in fact in stating that the full, total extent of the impact of European law in general and EU law in particular had not really dawned on the Swedish courts during the first ten years of EU membership.

So much was apparent when the EU Commission, in the autumn of 2004, asked the Swedish government for an explanation for why it had availed itself so rarely of the Swedish courts since 1995, and asked for preliminary rulings from the ECJ.⁵¹ Having faced this criticism, Sweden decided to enact a new law by the 1 July 2006, which states that if leave for appeal (*prövningstillstånd*) is not granted by any of the two highest courts in cases where matters of EU law are invoked, those two courts have to state the reasons for such an omission or decision.⁵² Undoubtedly, also this “move under pressure” from the Swedish legislator – which proved that allegations of exaggerated caution by the highest courts were not entirely wrong – has sharpened and heightened awareness of the importance and relevance of European law among Swedish lawyers.

Still, it was only in 2005 that the Supreme Court, in particular, showed that it was finally willing to grasp and comply with the full effect not only of the supremacy of EU law, but also of the European Convention of Human Rights. In two judgments during that year (as well as in one request for a preliminary ruling), the Supreme Court arrived at conclusions that may in light of its previous case-law in this area only be described as sensational, having used arguments that were highly unusual and unexpected in a historical context.

⁴⁹ For criticism against this fact, see Bernitz: *European Law in Sweden* (Stockholm 2002) 81.

⁵⁰ As far as that court is concerned, it could even be said that until it asked for a preliminary ruling in the highly contested Vaxholm case in 2005, it hardly showed any awareness at all of the relevance of EU law within the field of labour law, or rather, at least not when it comes to asking for preliminary rulings.

⁵¹ The official name or reference of the letter from the Commission is 2003/2161, C (2004) 3899. The cases that led the Commission to initiate this action included the above-mentioned Barsebäck case (RÅ 1999 ref. 76), which led to a lively debate, but also the *Lyckeskog* case, C-99/00, ECR I 2002, 4839, where the Court of Appeal in Gothenburg asked whether it was to be considered as the highest instance in a petty criminal case. During the proceedings of that case, it seems to have occurred to the EU Commission that when the two highest courts in Sweden decide *not* to grant a leave for appeal, they are not obliged to justify their decisions, and could in effect “ignore” art. 234 sect. 3 of the EC Treaty without there being any real possibility to control their actions. The Commission, hardly surprisingly, found this possibility in combination with the generally low frequency of requests for preliminary rulings by Swedish courts unsatisfactory and thus decided to take action against it.

⁵² The new law is called lag med vissa bestämmelser om förhandsavgörande från EG-domstolen (2006:502). It was based on the report Förhandsavgörande från EG-domstolen, Ju2004/9463/DOM and governmental bill 2005/06:157.

E. TWO UNEXPECTED JUDGEMENTS FROM 2005

The two important judgments delivered by the Supreme Court both concerned the European Convention of Human Rights, the status of which in Swedish domestic law has been disputed since 1 January 1995, when Sweden joined the European Union. At the same time, a decision was made by the Swedish Parliament to finally incorporate the ECHR into Swedish national law, a necessary move in order to make it legally binding in Sweden, given the country's traditionally dualistic view on the relationship between international and national law. It was a logical move, given that ECHR is also a part of EU law and the Convention was already being used by Swedish courts as a means of interpretation.⁵³ But the Convention was not said unequivocally at the time to be superior to Swedish law. Instead, as mentioned previously, an article was invoked in chapter 2 of the Swedish constitution (IG), according to which laws which are contrary to the Convention may not be enacted. This article (chapter 2, article 23), does not, however, reveal what would actually happen were a law that is contrary to the European Convention to be passed by the Swedish Parliament, which is the result of a legally rather unhappy political compromise in 1993.⁵⁴ One of the results is that a basic right may be better protected if it can be invoked under EC law than if it is "only" part of and protected by the ECHR, something the 1997 Lassagård case illuminated, where the fact that a right to a legal hearing and a fair trial could be deduced not only from ECHR but also from EC law was decisive for the outcome, as seen above.⁵⁵

In other words, the ECHR, despite reference to it by IG chapter 2, article 23, has not been given constitutional status, but is incorporated through an ordinary law.⁵⁶ As IG 2:23 simply states, "No act of law or other provision may be adopted" which contravenes Sweden's undertakings under the ECHR. In which case it should possibly be seen as a rule directed at the legislator rather than the courts.⁵⁷

What does this mean in practice, then? It could of course be seen to indicate that when a conflict, which is not manifest, arises between the ECHR and a Swedish law or ordinance, the law or ordinance shall be applied.⁵⁸ But we also need to note that the government and the Con-

⁵³ See e.g. the Supreme Court cases NJA (1988) 572 and NJA (1991) 512 (I).

⁵⁴ The *travaux préparatoires* where some not so convincing reasons for seeking the compromise are presented may be found in SOU 1993:40, prop. 1993/94:117 and the report from the Constitutional Committee of the Parliament (*Konstitutionsutskottet*) 1993/94:24. For critical discussions on the doctrine, see Bernitz, op.cit. chapter 5 of *The Incorporation of the European Human Rights Convention into Swedish Law – A half Measure* and Nergelius (2006) 153.

⁵⁵ RÅ (1997) ref. 65.

⁵⁶ The number of which is 1994:1500.

⁵⁷ Cf. Cameron: *An Introduction to the European Convention on Human Rights* (4th ed., Uppsala 2002) 155, as well as Bernitz: *European Law in Sweden*, 81.

⁵⁸ This is the view presented by Cameron (2002) 159. Of course, the similarities between ECHR and chapter 2 IG, which contains a rights catalogue, are striking. The main difference is that the protection of personal integrity and family life (art. 8 ECHR) is definitely weaker in the Swedish constitution(s), given not least the wide right to access to documents in Sweden.

stitutional Committee of the Parliament both mention the “special character” and status of ECHR in the *travaux préparatoires*, which ought to give it a certain weight of its own in future conflicts with domestic laws (or ordinances).⁵⁹ On the basis of those remarks, Swedish courts ought to be able to find at least some *latitude* if they want to secure the respect (or even supremacy) of the ECHR.

Still, and perhaps not entirely surprising against this background, the Swedish courts have so far been reluctant to use the ECHR, at least when it would mean setting aside a national law. In one case, from 1998,⁶⁰ the Supreme Court, as mentioned above, even refused to uphold the Convention (as well as the Freedom of Speech Act, *Yttrandefrihetsgrundlagen*) against a demand from Swedish and Norwegian authorities to execute a penal judgment from a Norwegian court (which was all the more embarrassing since Norway was six months later condemned by EctHR for violating the ECHR concerning the same issue).⁶¹ At the same time, both the highest courts have been very clear in terms of acknowledging e.g. the impact of the principle of proportionality, flowing from ECHR.⁶²

In the last few years, questions related to administrative tax sanctions (or penalties) and the possibility for Swedish courts to impose damages when the Convention has been violated have been widely debated, as mentioned above. In both areas, it seems clear that while EctHR found certain violations of ECHR to have taken place in Sweden, Swedish courts were slow or even reluctant to act on those judgments and come to the same conclusions as the EctHR in almost identical cases.⁶³ As far as economic compensation for violations of the convention is concerned, Swedish courts tended to view it as an exclusive competence of the EctHR, though it was not quite in line with the case-law of that court, nor with the Convention itself (see not least its article 13).

⁵⁹ Prop 1993/94:117, 37 s as well as KU 1993/94:24, 19 s.

⁶⁰ NJA (1998) 817.

⁶¹ *Bladet Tromsø and Stensaas v. Norway*, case 21980/93, Reports 1999 p. The case concerned Norwegian fishermen who had publicly criticised methods used in the hunting of seal. For this, they were condemned to penalties by Norwegian courts, which in the case before EctHR was considered to be a violation of their freedom of speech (art. 10 ECHR). The Swedish case concerned a fisher, Odd Lindberg, who had made such critical comments on a TV show which was later broadcast in Sweden (and thus also seen in Norway, where almost everyone is able to watch Swedish TV). He was therefore also sentenced to a fine by a Norwegian court. The Norwegian authorities then chased him, after he had taken refuge to Sweden, to have the penalty imposed. They were helped by the Swedish authorities and the Supreme Court could not find that the ECHR prevented those from executing the fine in Sweden (despite the fact that under the Freedom of Speech Act, the editor of the TV programme and not Lindberg himself was legally responsible for any comments made in the programme). From at least two points of view (and maybe also considering so-called *ordre public* in private international law), therefore, this judgment must be considered as a clear error.

⁶² See e.g., besides the cases referred to above in fn 47, the case NJA (2001) 439.

⁶³ The procedure for imposing administrative tax sanctions (*skattetillägg*) has for example been found by EctHR to be contrary to article 6 ECHR in the cases *Janosevic and Västberga Taxi/Vulic v. Sweden*, 34619 and 36985/97, judgment 23 July 2002, Reports 2002.

The importance of the *Lundgren case*, NJA 2005 p. 462, should thus be seen in this light. It marked a breakthrough for the direct applicability of the ECHR in Swedish law. The case revolved around a man who had been informed that he was suspected of economic crimes in 1991. Since that time, he had had difficulty supporting himself; his company had gone bankrupt and finding another job proved virtually impossible. A criminal charge was brought against him in 1993, but the trial did not take place until 1997 and his acquittal by the court of first instance did not gain full legal force and effect (*laga kraft*) before the autumn of 1998. The length of the procedure was considered unacceptable and contrary to article 6 of ECHR by the Supreme Court, which granted Lundgren, the former defendant and now the claimant in the tort case, financial compensation due to the fact that Swedish public authorities had not complied with the ECHR. As indicated above, the judgment followed in the wake of other cases in which the lower courts had blankly refused to grant financial compensation for violations of the ECHR by public authorities. Still, the Supreme Court in 2003, in the Holm case,⁶⁴ had indicated the possibility of granting financial compensation, if the Convention had really been violated, which was indeed found to be the case here, two years later. Lundgren was consequently awarded the sum of 700,000 SEK in compensation from the state first for his financial losses, based on his loss of income over a number of years, formally according to the rules in the Swedish Tort law (*Skadeståndslagen*) but in reality because Swedish authorities had violated article 6 of ECHR. On top of that, he was granted another 100,000 SEK in compensation for the violation as such, so to speak (*ideell skada* or immaterial damage). In that latter respect, the right to compensation, interestingly enough, was considered an obligation under national law, according to article 13 of ECHR, to provide efficient remedies in order to prevent or compensate violations of the Convention within due time.

One effect of the judgment is, in my view, that article 13 of ECHR may now be considered a general rule on financial compensation, and should henceforth be applied by national courts when it has been clearly established that violations of the Convention have really taken place. So far, there has been fairly little debate in the Swedish doctrine environment on the implications of the judgment,⁶⁵ but such a conclusion could hardly be considered too far reaching. Apart from that, the judgment will likely impact future situations in which individuals rightly or wrongly feel badly treated by the authorities. The judgment in the Lundgren case is therefore likely to increase the rule of law and legal certainty in Sweden, hopefully also in cases where the claimant argues that the IG or some other constitutional act has been violated.⁶⁶

⁶⁴ NJA (2003) 217.

⁶⁵ See however Åhman in (2005/06) *Juridisk Tidskrift* (JT) 424-430, as well as Södergren in that same journal 2004/05, 762-775.

⁶⁶ A similar case of equal interest can be noted: Here, the basis for a claim for compensation is the Swedish constitution, not ECHR (in particular chapter 2, article 18 and chapter 10, article 5 IG). It is currently pending before the Supreme Court; see T-3772/06, *Innala v. the state*, which concerns restrictions in fishing rights in the north of Sweden and is a sequel to the previous cases NJA (1996) 370 and NJA (2001) 210. These two cases have already established the state's violation of the IG, and the question now is what kind of financial compensation the affected fishermen may be entitled to.

The circumstances in the other remarkable case of 2005, the internationally well-known and observed *Reverend Åke Green* case, which merited considerable attention worldwide, were perhaps even more peculiar. As the reader may remember, the case concerned a cleric (not of the official, former state church [*Svenska kyrkan*] but of a smaller religious community), who in a sermon in July 2003 made an unprecedented, unexpected and very brutal and even violent attack against gays as a group. Quoting and referring to the bible he warned, among other things, that the legalization of same-sex partnerships would lead to higher HIV infection and AIDS rates, and called the responsible legislators legal “lunatics”. Gays, he denounced as a “cancerous growth” on the body politic. He also made it clear that he had been in touch with media before the sermon and had already made his views public. He had also invited newspapers and a local TV station to be present at his sermon.

The Swedish law against agitation or incitement to inflame public opinion against certain minorities or groups (*hets mot folkgrupp*) had actually been amended only a few years before, in order to include persecution of persons based on their sexual orientation. Thus, Green had clearly offended against this Swedish law and he was sentenced for it (to one month in prison) by the Kalmar city court, in south-east Sweden. Still, the question was of course if the Swedish law was compatible with the Swedish constitution and the European Convention of Human Rights, both of which protect freedom of speech as well as freedom of religion. The Court of Appeal did not think so and found that freedom of religion, in particular, given that the remarks were made during a sermon, outweighed Swedish legislation (given also that according to the Swedish Constitution, IG chapter 2, articles 1, 12 and 13, the freedom of religion is as such unrestricted and not possible to limit by law).

The state prosecutor (*Riksåklagaren*), who has unlimited powers to bring cases to the Supreme Court, appealed against Green’s acquittal. He should serve a term in prison, he argued. The argumentation of the Supreme Court in this case was particularly interesting – and at the same time slightly puzzling and confusing – in a European law perspective.

The Supreme Court, acting with surprising or at least unexpected rapidity, analysed the new Swedish legislation in some detail, finding it not contrary to the protection of freedom of speech and religion in the Swedish constitution. It did this by invoking the requirement of manifest error set out in IG chapter 11, article 14, which may have been right or wrong in this case but was here definitely not catered to in a very convincing way. Above all, it should be noted that this restriction on judicial review by the courts applies also in relation to the European Convention on Human Rights, according to IG chapter 2, article 23 and its *travaux préparatoires*.⁶⁷ Thus, once the Supreme Court had come to its conclusion, it should in fact have been impossible to claim in addition that Swedish law was incompatible with ECHR and, consequently, that Green should be acquitted.

Nevertheless, the Supreme Court arrived at exactly that result, using a quite complicated train of reasoning according to which the case-law of the Strasbourg court clearly showed that the only kind of speech in religious situations which is not protected by the rights to freedom of religion and speech in articles 9-10 of the Convention is what is known as “hate speech”, i.e., clear incitement to commit acts of violence or to persecute certain groups. Once again,

⁶⁷ But not in relation to EC law, for obvious reasons, as shown e.g. by the *Lassagård* case (RÅ 1997 ref. 65).

this conclusion may be right or wrong as such,⁶⁸ but in this specific case, it led to some quite strange and puzzling results.

First of all, the Supreme Court here showed a clear reluctance to really exercise judicial review and decide whether the law in question was after all incompatible with ECHR. Instead, it said that if Green were sentenced and he brought the case back to the Strasbourg court – which he had publicly avowed to do – the European Court of Human Rights would probably find Sweden in violation of the ECHR. But as everyone can see, the judgment is based less on the legal rules which the Supreme Court has to apply and more on speculation as to the future outcome, should a certain individual decide to act in a certain way and, certain judges in Strasbourg were to decide on the merits of the case in a certain manner, some four or five years hence (given the heavy workload of the Strasbourg court). This attitude could of course be seen as very pro-European indeed, but at the same time, the Supreme Court could be criticised for not fully exercising its competence to decide a case and, in fact, even for abdicating from its duties as the highest court of the land (and conveniently, in a very controversial case, more or less deferring to the Strasbourg court).

What actually seems to have been the crucial issue, from the point of view of the Swedish Supreme Court, was to avoid applying the Swedish law without really having to spell out whether it violated the ECHR. It would explain the emphasis and detail of the jurisprudence of the Strasbourg court in the judgment. Referring to that jurisprudence, the Supreme Court found it would be impossible to sentence Green, though the new law is still not considered incompatible with the Convention. Thus, the judgment is “pro-European” while still expressing a traditional, cautious attitude to the exercise of judicial review.⁶⁹ Time will tell whether it will be considered a wise and bold judgment or not in the years ahead, but there is no doubt it reveals a strong – perhaps even too strong – respect by the Supreme Court of the European Court of Human Rights.⁷⁰

On top of those two judgments, we may mention a third interesting case from 2005, where the Supreme Court, contrary to its previous positions and not a few patent errors in its handling of EU law, asked, quite surprisingly, for a preliminary ruling in the above mentioned Unibet case.⁷¹ Its request was surprising because Swedish law provides no right to an *abstract* judicial review⁷²; in other words, the courts will only exercise judicial review – under or without the restrictions imposed by IG chapter 11, article 14 – when there is a concrete case or dis-

⁶⁸ It was in fact based on a heavy amount of quoted case-law, including many old and new cases falling under both those two articles, which must as such be described as solid.

⁶⁹ In this latter respect, it is similar to yet another – strictly national – case on judicial review from 2005, NJA (2005) 33.

⁷⁰ Apart from that, it also seems clear that opinions made public during religious activities are likely to attract “preferential” treatment in relation to other verbal abuse of a similar nature, a fact that became even clearer when the Supreme Court in 2006 came to a totally different conclusion in a similar case in which some neo-Nazis who had launched an attack against gays in leaflets, with far less provocative speech than the Reverend Green was found guilty of; see NJA (2006).

⁷¹ The case in question, C-432/05, was decided by the ECJ 12 March 2007.

⁷² See in particular NJA (1987) 198, where this was clearly declared by the Supreme Court. See also RÅ (1994) n. 277 and 654.

pute pending and the law or legal act in question could be applied, but not *in abstracto*, just because a certain party believed for one reason or another that a certain legal act was unconstitutional.⁷³ Against that background, the Supreme Court surprised everyone in November 2005 when it asked the ECJ whether this lack of possibilities in the exercise of judicial review or rather, this limitation of the possible ways under which judicial review may be exercised by Swedish courts, was compatible with EU law.⁷⁴

If you consider the circumstances of the case, the request is even more surprising, not least given absence of any request by the ECJ for specific details or design of a particular model of judicial review within the legal systems of the member states, as long as a right to an effective remedy can be said to exist (also as far as review of the relationship between EU law and national law is concerned). In this particular case, the gambling company Unibet had been charged by a Swedish prosecutor for violating Swedish gambling and lottery rules. Thus, a criminal case was pending in which Unibet was free to invoke an alleged unconstitutionality or incompatibility between EU law and Swedish legislation. At the same time, Unibet was suing the Swedish state for compensation enforced loss of trade. And if that were not enough, Unibet had also initiated an administrative complaints or appeals procedure against not being granted a certain gambling licence. In both of two latter proceedings, Unibet was also free to invoke any legal arguments it wished, urging the courts to exercise judicial review included.⁷⁵ Thus, the likeliness that the ECJ should find Swedish law on this particular point to be contrary to EU law seemed limited, to put it mildly, which the judgment confirmed because the ECJ leaves it to member states to design particularities of their court system, as long as a right to an effective remedy exists.⁷⁶

The cautious attitude of the Supreme Court in asking for the opinion of the ECJ in this case definitely stands in strong contrast to the attitude(s) previously shown by that court in those kind of cases. It is thus yet another example of a change in the positions recently taken by Swedish courts in relation to European law, the reasons for which we must now analyse a little bit more.

F. CONCLUSIONS AND A VIEW TO THE FUTURE

There can be no doubt, in my view, that the case-law of the Swedish Supreme Court, which I have presented and analysed above, does indeed represent a change of direction by the high-

⁷³ To keep things simple, I do not deal with certain special features of IG chapter 11, art. 14, like the fact that not only courts but also other public authorities may exercise judicial review and that such review may also concern the compatibility of a regulation or decree with a superior rule.

⁷⁴ The request in question was made in the case(s) Ö-4474-04 and 752-05.

⁷⁵ In fact, the case which did reach the Supreme Court, and finally the ECJ, was a spin-off effect of one of those procedures, in which Unibet claimed that it had the right to have judicial review exercised independently of the specific dispute taking place before the court. When the court of first instance rejected that claim, Unibet appealed both to the Court of Appeal and later to the Supreme Court, that took an unexpected interest in the arguments raised by the company.

⁷⁶ Cfr above fn. 20.

est Swedish judicial body in relation to European law, from its earlier attitude to that particular court (and this applies in part also by the Supreme Administrative Court). The two judgments are thus important and significant, but in many different ways.

At the same time, we need to ask whether the Supreme Court really wants to deal with European law in a serious way – as indeed the preliminary ruling requested by the Supreme Court in the Unibet case indicates –, or should it rather be seen as a retreat to former positions under pressure, under the gun so to speak – given that the EU Commission had in 2004 protested against a limited use of the instrument of preliminary ruling by Swedish courts (and by the two highest courts in particular) and because criticism was being levelled at parts of the jurisprudence from those two courts. Thus, though highly interesting, those two important judgments and the surprising request for a preliminary ruling concerning a very peculiar constitutional matter, do not provide as convincing evidence of a sudden pro-European stance as they seem to suggest on first sight. Further substantive proof of a real change of mind by the Swedish justices is required, and indeed wished for in this respect, also in cases that do not involve European law so clearly, in order for the critical parts of the doctrine to believe that this sudden reversal of opinion is really to be taken seriously.

In December 2008, the Government unveiled a new bill aiming at constitutional changes. It would, if passed, change the rules of judicial preview and judicial review.⁷⁷ A referral of new law proposals to the Law Council would thus be compulsory for laws falling within the areas mentioned in chapter 8, art. 18 IG and at the same time, the requirement of “manifest error” in chapter 11, art. 14 would be abandoned. Needless to say, that would change the nature of judicial review within Swedish law quite dramatically. If approved by Parliament, those new rules – which as of early 2009, are supported by all political parties – may enter into force in the autumn of 2010 or early 2011.

⁷⁷ See SOU 2008:125, En reformerad grundlag.

JUDICIAL REVIEW IN NORWAY UNDER RECENT CONDITIONS OF EUROPEAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW – A COMMENT

By INGER-JOHANNE SAND*

Abstract: Norway has a long tradition of judicial review which has previously been applied particularly in relation to §§ 97 and 105 of the Norwegian Constitution. With the Human Rights Act of 1999 there has been an increased attention to conflicts between human rights treaties incorporated by the act and other Norwegian legislation. The practice of the Norwegian Supreme Court on these issues shows different views depending on the rights in question and also clearly dissenting opinions. The Court seems to try to strike a balance between the implementation of human rights and a protection of other qualities of Norwegian legislation. **Key words:** Human rights, judicial review, constitutional law, international human rights treaties, EEA law.

A. INTRODUCTION

Judicial review is not explicitly mentioned in the Norwegian Constitutional Act of 1814, or its amendments, but may follow from an interpretation of the Act. Judicial review of parliamentary legislation has evolved over time, and long been accepted as integral to Norwegian law by theorists and practitioners. Focal cases from 1976 and 2007, see below, have given the principle a more precise formulation. It is my view that the tradition and practice of judicial review in Norway have had a significant effect on how Norwegian courts deal with matters involving the incorporation of EEA law (EU law) and international human rights treaties, elements of which at times run contrary to Norwegian legislation. As I discuss below, moderate judicial review can be seen as a pattern of normative argumentation.

B. HISTORICAL BACKGROUND AND THE PRACTICE OF CONSTITUTIONAL JUDICIAL REVIEW

The Norwegian Constitution of 1814 came into being in unusual historical circumstances. Allied to the losing forces in the Napoleonic wars, Denmark was required to cede Norway to Sweden under the provisions of the 1814 Treaty of Kiel. The Norwegian Constitution was cre-

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ated in May 1814 by representatives from Norwegian regions and was accepted as an expression of partial Norwegian sovereignty, albeit under the King Charles VIII of Sweden. While Norway elected its own parliament, the government and Supreme Court were appointed by the King Charles VIII. The written constitution and its application were vital to the gradual establishment of Norwegian constitutional institutions, and their powers and sovereignty, fully achieved by Norway in 1905 with the dissolution of the union with Sweden. The constitution was seminal in shaping the separation of and relations between the various constitutional powers.¹ Interpreting the paragraphs of the constitution concerning the powers of the parliament, the government and the king, and their mutual relations, was vital to ensure the new regime's stability and legitimacy. Law thus became a crucial element of the political interaction. By the 1840s, a moderate form of judicial review is evident in Supreme Court decisions involving the interpretation of laws in relation to the Constitution, but is not yet stated as a clear principle. In 1866 an authoritative work on Norwegian constitutional law mentions the practice and principle of judicial review in relation to the constitution for the first time.² There are different opinions as to how significant and how elaborate the principle of judicial review was in Norway in the nineteenth century, but it was clearly enshrined in constitutional practice, albeit in a moderate form. The case heard by Norway's Court of Impeachment in 1884 over the Swedish king's power to veto amendments to the Constitution passed by the Norwegian parliament helped create this constitutional tradition. The majority of the bench, which comprised members of parliament, overruled the minority of Supreme Court justices in finding the powers of the king to veto constitutional amendments to be limited. This case is paradoxical insofar as the majority of the bench was politicians who used legal means for political ends, affirming the validity of using the courts in such matters.

In the twentieth century, some seminal Supreme Court decisions have invoked the judicial review, i.e., Rt.1918/401 (waterfall concessions), Rt.1962/369 (gold standard clause), Rt.1970/67 (coastal area zoning), 1976/1 (the Kløfta case – compensation for losses due to area planning), Rt.1996/1415 and 1440 (the pension cases) etc. The practice of judicial review in Norway falls primarily under §§ 97 and 105 of the Constitution, both of which address the rights of citizens and corporations in relation to retroactive legislation and appropriation of private property. The principle is now an accepted part of Norwegian constitutional law, though it has taken time to reach the current formulation of the balance between judicial review and respect for the democratic legislator. In the 1976 plenary decision, the close major-

¹ Johs. Andenæs: *Statsforfatningen i Norge*, (The Constitution of Norway) (9.edition by Arne Fliflet, Oslo: Universitetsforlaget 2004), Eivind Smith: *Høyesterett og folkestyret*, (The Supreme Court and democratic government) (Oslo: Universitetsforlaget 1993); and *Konstitusjonelt demokrati*, (Constitutional Democracy) (Bergen: Fagbokforlaget 2008).

² Rune Slagstad: "Prøvsretten i det norske system" (Judicial Review in the Norwegian System) (1989) 4 *Nytt Norsk Tidsskrift*; and *De nasjonale strateger* (The National Strategists) (Oslo: Pax forlag 1998) 53. It is referred to here that constitutional judicial review had been discussed in several theoretical contributions since 1814, some of them by the Norwegian Supreme Court Justice P.C. Lasson, and that the theory is regarded as being finally accepted when being referred to and sustained in lectures on constitutional law by professor T.H. Aschehoug in 1866.

ity expressed what is now seen as the authoritative statement of this balance. It was followed by supplementary remarks in a 2007 decision.³ In the 1976 decision, the judicial review of parliamentary legislation in relation to the Constitution was held to be fully acceptable as customary constitutional law. The Court issued a Norwegian version of the “preferred position principle.” Basic freedom rights should enjoy the strongest constitutional protection. In matters to do with economic and social rights, the voice of parliament should be given somewhat greater weight. These were the rights addressed in that 1976 case. Third the express opinion of parliament in the legislative act should inform the constitutional review, and courts should be careful before overruling their opinion. In cases of reasonable doubt as to whether constitutional conflict obtained or not, the courts should refrain from declaring laws unconstitutional. Fourth, if, however, the legislative act was found beyond reasonable doubt to be in breach of the constitution, then the court should perform a judicial review.⁴ In the view of the minority, the constitutional review of legislation was primarily a parliamentary responsibility, and parliament should therefore be given considerable leeway in its interpretation and application of the Constitution. Before overruling the opinions of the legislators on constitutional matters, the court should have very strong reasons.⁵

In a case concerning pension rights the majority ruled that the legislator should enjoy a relatively wide margin of freedom to make changes to pension rights, as it does in other economic and social rights, as the economic basis for such rights would need reviewing from time to time.⁶ Changing pension regulations was thus not considered unconstitutional under § 97 (retroactive legislation) of the Norwegian Constitution. In a 2007 case concerning the constitutionality of an economic regulation of land-lease, the Supreme Court delivered a lengthy argument on the principles of the constitutional question.⁷ It referred to the 1976 decision and developed further the point concerning the relative importance of the opinion of parliament on the constitutional matter at hand. The Court found that both the government and parliament had discussed and considered the question of constitutionality in ways it considered irreproachable. The substantive issue concerned the lease of land for houses used for living quarters and owned by those living there. The regulations had been enacted at the time to strengthen the basic right to a place to live. The normative expectations of either side were thus in conflict and the Court found in favor of the house owners living on the leased land vs. the landowners.⁸

These recent cases show where the constitutional judicial review stands today in Norway and set out have become the authoritative, *lex lata* views on the matter. Norway has, therefore a clear, if tempered version of constitutional judicial review. While it is some way before the principle of the preferred position prevails completely, the Supreme Court takes great heed of what parliament thinks in the constitutionality question, particularly in cases concerning economic and social rights.

³ Rt.1976/5-6.

⁴ Rt.1976/6.

⁵ Rt.1976/22.

⁶ Rt.1996/1433-1434.

⁷ Rt.2007/1281, para.76-84.

C. NORWEGIAN LAW, EEA LAW AND INTERNATIONAL HUMAN RIGHTS TREATIES – ANOTHER TYPE OF DEMOCRATIC AND JUDICIAL REVIEW

In recent years, incompatibilities between Norwegian legislation originating in Norwegian ministries and parliament and Norway's obligations under the EEA treaty, originating as legislation in EU institutions, and international human rights treaties as enacted in Norwegian law, have served as a testing ground for the powers of the courts to initiate a judicial review between different types of legislation. In 1992 Norway incorporated the European Economic Area Treaty into law (under the EEA Act), introducing many of the Treaty's economic and some of its social regulations into Norwegian law. In 1999, the Human Rights Act (HRA) similarly incorporated some of the most important international human rights treaties to which Norway is signatory (the European Convention on Human Rights (EConHR), the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights (CESC and CCP), the Convention on the Rights of the Child (CRC)). In the event of incompatibilities with domestic legislation both Acts give precedence to the legal norms of the treaties.⁹ These are classified as conflict-of-norms rules rather than constitutional-level rules. They are not provided for under the Constitution. They do however raise questions similar to those of judicial review in relation to the Constitution. In the following I discuss cases where such conflicts have arisen and argue that the acceptance of the judicial review under Norwegian constitutional law and appurtenant case-law, displays a distinctive argumentative pattern in Norwegian law which could be seen as enabling the judicial review in instances involving international human rights treaties and the EEA treaty in more effective ways than in countries without the same tradition of judicial review.

D. THE EEA LAW AND THE PRACTICE OF THE NORWEGIAN SUPREME COURT

Numerous cases have been heard by the Supreme Court concerning the implementation and interpretation of EEA law under Norwegian law and of the EEA Act. Here, I shall explore only a pair of them, the Finnanger I and II cases.¹⁰ The first involved a clear conflict between the wording of the EU/EEA directive and the domestic Car Liability Act implementing the directive. In the second case the liability of the Norwegian state for a wrongful implementation was the theme. The cases concerned the liability of the insurance company and the driver in cases

⁸ Rt.2007/1281, para.102-114.

⁹ Legislation concerning the incorporation of the main part of the treaty on the European Economic Area (lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomisk samarbeidsområde (EØS) m.v.) no.109, 27.11.1992 (EØS-loven, EEA Act); Legislation concerning the strengthening of the position of human rights in Norwegian law (lov om styrking av menneskerettighetenes stilling i norsk rett) no.30, 21.05.1999 (menneskerettsloven, the Human Rights Act).

¹⁰ Rt.2000/1811, Rt.2005/1365.

¹¹ Rt.2000/1820 flw.

of drunk driving. Under previous Norwegian law, if passengers were aware of the driver's inebriated condition, the insurance company could not be held liable for injuries sustained by them. The EEA directives granted cover for all passengers without such exceptions, however. In implementing the directive, and with reference to certain provisions in it, Norway had retained the exception clause. The wording of the EEA directive was however quite clear. The first case from 2000 was decided by the Supreme Court in plenary session and with a clear majority. The wording of the Norwegian Act of Implementation with the exception was so clear that it could not be deviated from.¹¹ The decision held that there existed a general principle of presumption that Norwegian law complied with the relevant obligations of international law. Norway was also under treaty obligations of loyalty to EEA law, its directives and its practices by the EU and EFTA. The majority of ten found however that it did not have the powers to exceed the clear wording of the Norwegian Car Liability Act. The legislator itself would have to change it. The minority of five held that while the preparatory works made clear the intention of the legislator to implement the liability directive correctly and loyally,¹² the legislator had made a wrongful interpretation of the directives and of Norwegian law. The case should thus be decided on the basis of the wording of the directives and a correct interpretation and implementation of these in Norwegian law. The case encapsulates the different opinions within the Norwegian legal environment at the time on Norway's obligations under the EEA treaty provisions on loyal implementation. There was a clear division in the Court on the interpretation of the general obligations under the EEA treaty and on a specific implementation of such obligations.¹³ It probably also serves as testimony of a division in the Court on the more general interpretation of international legal obligations in relation to Norwegian legislation.

E. THE IMPLEMENTATION OF HUMAN RIGHTS AND THE NORWEGIAN SUPREME COURT

Previous to the HRA the practice of the Norwegian Supreme Court (SC) tended to uphold the principle of dualism. Judging from the way in which the principle was interpreted and applied in practice, international treaty obligations were presumed to be consistent with Norwegian law, but not at the same level as domestic legislation before incorporation had been decided. In several cases the Court presumed there to be consistency between Norwegian legislation and international treaties. In the event of a conflict of norms, domestic legislation had priority. One of the seminal cases was Rt.1994/610 (Bølgepapp). Here the Court said that if an international norm was to be given priority, it would have to "appear as sufficiently clear and manifest". In a 1999 case, Rt.1999/961 (Rest-Jugoslavia), the norm of the international treaty

¹² Rt.2000/1835 flw.

¹³ In the second decision in the Finnanger case from 2005 a clear majority agreed that the Norwegian state was liable for wrongful implementation of the relevant EEA directive, cfr. Rt.2005 para.83-104.

¹⁴ Innstill. O.no.51 (1998-99) 6, as also referred to in Rt.2000/996.

was accepted as sufficiently clear, with one justice dissenting, but without the principle of “sufficiently clear” being set aside.

In 1999 the Human Rights Act was passed in order to improve and clarify the status of human rights in Norwegian law by incorporating the most comprehensive international human rights treaties and a priority principle which favored the human rights norm where a conflict prevailed. As the parliamentary committee stated in its report, the legislation served the general purpose of *strengthening the legal status of individuals*.¹⁴ There was an expressed desire to listen to international human rights tribunals and take account of their practices with *an open attitude*. Norwegian legal practice should strive for as much consistency with international legal practice as possible in the field. It was crucial at the same time to maintain and protect the *autonomy and independence* of the courts in the application of the law and of treaties.¹⁵

In the first case to come before the Supreme Court concerning the EConHR norm post the Human Rights Act, the Court sitting in plenary session analyzed at length the principles underlying the legal status of the international human rights treaties incorporated under the Act, Rt.2000/996 (Double taxation case). The case concerned the Norwegian tax law which allowed an administrative penalty to be issued by the tax authorities and further economic penalties by the courts at the later stage of an eventual court case. At stake were EConHR art.6 no.1, concerning fair trial, and more specifically, the right to trial within a “reasonable time,” and Protocol no.7 art.4 no.1 enshrining the right “not to be punished twice”. Agreeing with the litigant, the Supreme Court found breaches under Norwegian tax and criminal procedure law of the right to have a hearing “within a reasonable time” and not to be punished twice for the same offence. The results in this case led to a series of other cases concerning the same legal questions and to legislative reform.

In its prolegomenon to Rt.2000/996, the Supreme Court analyzed the situation post the enactment of the Human Rights Act, remarking the clarity with which the preparatory works explained the purpose of the incorporation, i.e., to change Norwegian law by incorporating the treaties and by listening to and observing the practice of the Strasbourg Court (ECHR) and other international tribunals with an open attitude.¹⁶ As the preparatory works emphasized, it must be up to the Norwegian courts to interpret with diligence and decide on matters concerning international treaties and domestic law. Even if there were a general rule or guideline setting out the principles of harmonization and priority, exactly how a treaty article bears on domestic law must be interpreted and dealt with on a case by case basis.

According to the Court, some of the articles of the EConHR are either vague or general, and creating in many instances grounds for reasonable doubt concerning their interpretation and application. The Court refers to the “dynamic practice” of the ECHR, and its perception of the Convention as “a living instrument”, but does not itself intend apply an equally dynamic method. The ECHR, the Court opines, is better suited to the role of the primary interpreter of the convention, and Norwegian courts must guard their autonomy and make their own decisions in light of the convention, Norwegian law and relevant practice. Finally, Norwegian courts must be free to include “traditional Norwegian values” in their argumentation and

¹⁵ Innstill. O.no.51 (1998-99) 6, as also referred to in Rt.2000/996.

¹⁶ Rt.2000/1006.

should refrain from “too dynamic [a] style of reasoning”. The courts should also avoid applying safety margins in order for Norway not to be found in breach of the convention.¹⁷

F. THE GUIDELINES OF THE DOUBLE TAXATION CASE AND LATER COURT PRACTICE

Since 2000 numerous cases involving the EConHR have been brought before the Supreme Court. The guidelines laid down in the double taxation case have been neither rejected nor changed, but affirmed. But because they are so general and even contradictory, they encourage a variety of takes in the application of the HRA. Rather than pursue a discussion of principles, the Supreme Court has engaged with many concrete issues concerning the practical application of the conventions.¹⁸

In the decision delivered in the double taxation case, the Court seemingly expressed *a certain ambiguity* concerning the balance between domestic law and treaty implementation. It uses the phrase “different along several dimensions” to describe the international treaties and their international implementation compared to domestic law. Some statutes are vague and general, providing reasonable doubt as to their interpretation. Adjudication by the ECHR is described as *dynamic* in the creation of new law, more so than is common for national courts. It is presumed to have a better oversight over the implementation of the treaty and thus to stand in a better position to facilitate dynamic practice. These qualifiers, however, could also be read as an expression of a certain reluctance to incorporate the international treaties and case law into domestic law and as creating a distance or a difference, rather than including them directly.

In relation to the presumed “vagueness” of international human rights statutes the Supreme Court has repeatedly called for what it terms “sufficient clarity” before the human rights statutes can be said to be “comparable” to domestic law. Prior to the Act’s enactment the term “sufficient clarity” was applied as a general standard. Under the 2000/996 decision of the Court rephrases it as “reasonably clear”, a more moderate version, which it reiterates in a later decision. It does not mean “clear” in a qualified way. It remains, however, a way of treating norms emanating from international treaties in a special way. Its meaning remains unclear beyond the processes of interpretation which would be there in any case. It does illustrate the sense of ambiguity pervading the Court in relation to international human rights statutes. Arguably then, the Court in 2000 was possibly more reserved towards the implementation of international human rights than the parliamentary committee. As the Committee report makes clear, they wanted full implementation and consistency with international practice.

The Supreme Court, in that decision from 2000, advised Norwegian courts to resist the dynamic practices of the ECHR. It is clearly defensible to differentiate between the role of the European tribunal and the national courts in this field, but it is also legally questionable. That both types of court must interpret and apply the international statutes in the most legally cor-

¹⁷ Rt.2000/1006.

¹⁸ Rt.2002/257.

rect way possibly goes without saying. Their respective contexts are different, though, and will probably develop different practices. One could argue that the Court's remark in Rt.2000/1006 was a strategy to highlight the difference between the European and the national regimes and institutions and to carry on seeing them differently in terms of the law and of values. The implication was also to keep the national version as the legal standard, the normal version.

Following the enactment of the Human Rights Act and publication of the Court's own principled position in 2000, the Supreme Court seems to prefer a case by case approach, attending to the specificities in a pragmatic way, but with sensitivity to the wider issues. Several cases on the right to fair trial and not to be punished twice for the same offense have been heard since then, in which lawyers attempting to stand up for Norwegian traditions and customs, such as administrative reactions in tax cases and such like, contrast with those with more loyalty to the international human rights tradition within criminal procedural law (Rt.2002/557, 2003/359). Underlying the various legal interpretations and arguments are different regulatory, political and legal traditions. The Norwegian tradition is strong on administrative regulation and pursues effectiveness in criminal procedures. European human rights encourage the adoption of liberal human rights in criminal law procedures.

A unanimous plenary decision, Rt.2005/833 (though there was division on the reasoning) found § 195 third section of the Norwegian penal code to be inconsistent with EConHR art.6 no.2, the right to be presumed innocent until proved guilty according to law.¹⁹ The Norwegian statute concerned a very qualified rule on the defendant's knowledge of the age of the victim (burden-of-proof) in cases of sexual abuse of persons under the age of 14. The Court read the statute as providing special protection for minors, but found internal inconsistencies. Following this discovery, the Court elected to give precedence to the principle of innocence until proven otherwise.

Other important cases concern the protection of the right to free speech. In a plenary decision, Rt.2002/1618, the Court examines the Norwegian Criminal Justice Act § 135a in light of the practice of the ECHR concerning EConHR art.10. The case rested on an alleged instance of verbal racism, and divided the Court between a majority of eleven justices in favor of acquitting the defendant on the charges of racism and a minority of six finding the expressions to be racist. The majority found in favor of free speech; the expressions used were not sufficiently inflammatory or offensive. The minority found the expressions clearly discriminatory and offensive and sufficiently threatening to fall under § 135 a, also when taking the context of the situation into consideration. The minority wanted a stronger emphasis on the legislators' motivation for § 135a as an expression of an incorporation of the anti-discrimination treaty and to develop a practice consistent with that of the relevant international tribunals.²⁰ The majority and minority also differ on how the behavior involved should be described normatively and where the balance should be struck between § 100 of the Norwegian Constitution (protection of the freedom of speech), EConHR art.10 and the Criminal Justice Act § 135 a. The majority emphasized freedom of speech as a liberal right. The minority emphasized

¹⁹ Rt.2005/833, section 82-87 and 112-116.

²⁰ Rt.2002/1633-34.

what they saw to be Norway's obligations under international treaties and participation in international tribunals. The decision is remarkable insofar as the two factions disagree so sharply on the matter of Norwegian and international law. The minority seeks consistency with the practice of international tribunals whose practice Norway has undertaken to observe, and on the responsibility for all citizens involved in the practice of free speech. The minority finds the interpretation of the majority difficult to reconcile with Norway's international obligations.

G. TENDENCIES IN NORWEGIAN LEGAL PRACTICE

From the practice of the Supreme Court after 1999 it is possible to point to several aspects in the implementation of international human rights treaties by domestic legislation. By enacting the Human Rights Act the legislator helped accelerate such implementation. It could have taken a bigger step and incorporated more treaties completely or in part in the Constitution. The parliamentary committee called for and emphasized a loyal implementation of international human rights. The preparatory works also expressed a clear intention on the part of the legislator to see Norwegian law changed by the act of incorporation.²¹

In the practice of the Supreme Court we see a wider variety of responses, however. Several cases have resulted in a divided bench, between loyalties to Norwegian legislation, and advocates of incorporating international human rights law. Domestic regulatory regimes rest on other important considerations such as social and gender equality, effectiveness in criminal procedures, children's welfare etc. Elements of these regulatory regimes and their effectiveness could be compromised and challenged by certain other elements of international human rights as practiced by the ECHR. The Court has not been afraid to show its divisions and differences.

The post 1999 cases also show how much the justices remain skeptical to a strong implementation of international human rights, more sometimes than certain politicians. Skepticism may arguably be stronger among lawyers and legal institutions than the Norwegian parliament and government.²² Implementation has nevertheless generally been on a case-by-case basis, not by pursuit of the grand principles. There have been nuanced discussions throughout.

Implementation and general views do differ somewhat according to the legal field in question. There have been economic cases dealt with under criminal procedural law, common offences under criminal law and cases about freedom of speech. There is a quite strong view in the Court in support of a very liberal and unconditional freedom of speech, whereas anti-discrimination has had a smaller following. Cases under criminal procedural law have divided the Court as well, but there seems to be increasing support for EConHR art.6 on fair trial. Overall it does however seem fair to say that there is an increasing tendency of support of a loyal implementation of international human rights and an open mind to the practice of the ECHR.

²¹ Cfr. references in footnote 14.

²² See Innstill.O.nr.51 (1998-99), p.6, with further references, in the view of the Parliament.

The implementation of international human rights conventions under the Human Rights Act does take Norwegian law a step closer to integrating international and domestic law. Because this is a new aspect of Norwegian law, it may be difficult to compare contemporary reactions of the Norwegian Supreme Court to earlier judicial review doctrines. The legal constellations are different, and the substantive legal questions are different too. The recent practice of the Court, post 1999, does arguably reflect previous practice in one particular way. While it maintains an open mind on principles or rules of (liberal) international law, the Court is careful not to let its open mind subvert what it sees as qualities of Norwegian legislation, particularly in administrative law, or its capacity to balance social considerations. The open discussions and dissenting opinions of the Court should also be seen as an advantage as they promote transparency in a time of legal transition and change.

PARLIAMENTARY PRECEDENCE IN DENMARK – A JURISPRUDENTIAL ASSESSMENT

By STEN SCHAUMBURG-MÜLLER*

Abstract: *This contribution explores if and how parliamentary precedence is a feature of Danish legal thinking and legal practice. Taking legal philosophy into consideration and going through various aspects, such as the ranking of state powers, the conception of the role of the courts, legal sources, judicial review and the reception of European law, the following can be concluded: There is a propensity for parliamentary precedence as a soft or defeasible hierarchy, but the inclination is somewhat equivocal and not strictly Danish. Scandinavian realism fits well with parliamentary precedence and the influence lingers on in the minds of the lawyers brought up under Alf Ross's reign.*

Keywords: *Parliamentary precedence, judicial review, role of courts, Scandinavian realism, tripartition of powers, reception of European law.*

A. INTRODUCTION

This contribution explores whether parliamentary precedence is a feature of Danish legal thinking and legal practice, and if so, in what manner. The aim is twofold: firstly, to give an account of the present state of affairs, and secondly, to establish whether the situation is peculiar to Denmark and whether it is attached to a particular kind of legal philosophy.

The notion of 'parliamentary precedence' entails that the Parliament – the most important part of the legislative power – has a qualified or preferred¹ position *vis-à-vis* the executive and the judiciary, the latter of which is in focus here. Judicial review of legislative acts is but one aspect of the relationship between the courts and the Parliament, others being the ordering of legal sources and the question of the courts as rule appliers or co-generators of law.

Parliamentary precedence is somewhat at odds with a wider European trend of courts playing a more active role. At the European level the two regional courts, the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) take active part in the creation of EU law and human rights law, and their decisions are likely to affect politics and legislation, national as well as European. And at the national level many jurisdictions have constitutional courts with the authority to set aside legislative decisions even in politically con-

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¹ Jens Elo Rytter: "Judicial Review of Legislation", in Martin Scheinin (ed.): *The Welfare State and Constitutionalism in the Nordic Countries* (Copenhagen: Nordic Council of Ministers 2001) 138, 137–174.

tested areas. The two distinguishable traditions – parliamentary precedence and prominent courts – may therefore present a challenge, if not an obstacle, to the integration of current legal systems at the national as well as the European level.

B. SUPERIORITY OF THE LEGISLATURE VIS-À-VIS THE JUDICIARY

In his presentation of the idea of the separation of powers, Montesquieu did not rank the three powers. Nevertheless, he held the judicial power to be invisible and “in a way nothing”,² indicating the judiciary’s lack of real power. The important thing, according to Montesquieu, is to separate the judiciary from the two remaining powers, a separation that is paramount for the sake of *freedom*. The role of the judges is to pronounce the words of the law (see below section C), the laws being enacted by the legislature. It seems obvious that Montesquieu did not consider the legislature and the judiciary as equal. The main thing for him, as for the legislature and the judiciary, was not the equal footing, but separation.

The first Danish constitution was set in force on June 5, 1849, prior to which King Fredrik VII accepted formal popular influence on the legislative process. One of the first clauses of the Constitution provided that “Legislative authority shall be vested in the King and the Folketing conjointly. Executive authority shall be vested in the King. Judicial authority shall be vested in the courts of justice.”³ Apart from ‘Rigsdagen’ being replaced by ‘Folketing’ with the 1953 revision’s doing away with the second chamber, the wording is unaltered from 1849 up to this date.

The notion of ‘separation of powers’ was not discussed much at the constitutional assembly, although two points are worth mentioning. One, the legal scholar A.S. Ørsted remarked that it may not be correct to equal the judiciary with the two other powers (or authorities), and, two, a motion for a clause providing for the invalidity of any legislative or administrative act in case of inconsistency with the Constitution was outvoted by 114 to 1.

The question of the ranking of the three powers apparently attracted only little attention in legal doctrine until Alf Ross, who was also a legal philosopher and a strong proponent of legal realism, wrote an essay “Om statsmagterne og deres organisatoriske fordeling” [On State Power and their Organizational Division] in 1959. A major point was the supremacy of the legislature in the sense that only the legislature has direct constitutional competence. The legislature can fulfil its function relying on the Constitution alone, whereas the executive and the judiciary in addition must have legal authority from legislated acts. The powers as institutions are all mentioned in the Constitution, but as *functions*, the legislature is superior.

This idea of the supremacy of the legislature is largely consonant with Ross’s conception of democracy.⁴ His conception of the separation of powers did not gain general acceptance,

² Charles Montesquieu: *De l’esprit des lois* (Paris: Editions Garnier Frères, no year indicated, orig. 1748) 165 and 168.

³ Translation from the Folketing website (<http://www.folketinget.dk/pdf/constitution.pdf>).

⁴ The democracy aspect of Ross and Scandinavian realism is dealt with by Uffe Jakobsen and Mats Lundström in the present volume.

neither in doctrine nor in practice. Yet, his version of the theory of separation of powers may have had an influence. He was a renowned legal scholar and philosopher who frequently attacked his opponents quite aggressively, and one could even speak of a ‘Rossian hegemony’ in the 1950s and 60s, for law students even until the mid 1980s. Scholars at the time often referred to Ross’s legal philosophy, even if he was not used or integrated as such into their work, and until about 1980 his textbooks on constitutional law, international law and legal philosophy were part of the curriculum of the Copenhagen law school, which produces two thirds of the country’s lawyers (and probably an even higher proportion of the law graduates filling senior positions in government and judiciary).⁵

Palmer Olsen, who made the most recent and comprehensive presentation in Denmark on the separation of powers, criticizes Ross for the idea that only the legislature has direct constitutional backing. Yet, he concludes, “there is no doubt that the Folketing is the highest organ of the state in Denmark or that legislation is the strongest component. Even though the legislature is not omnipotent, the legislature’s competence is only restricted by the Constitution, whereas the competences of the executive and the judiciary are restricted by the Constitution *and* by legislative acts”.⁶

I find it fair to conclude that there is a bent towards parliamentary precedence in Danish legal thinking. But I find it harder to say whether it is a peculiarly Danish, Scandinavian, or European trait or is simply inherent in Montesquieu’s idea of the separation of powers. Montesquieu, in a famous chapter “De la Constitution de l’Angleterre”, was positively wrong about the active role of the English courts. According to Montesquieu, they were not connected to any societal power and their part of the tripartition of powers was nil.

I therefore suggest the hypothesis that the idea of courts being on an equal footing with other state powers – in contradistinction to the Montesquieuian idea of the powerless court – is basically a US Republican, constitutionalist idea which was introduced into Europe after the Second World War, and into the construction of what became the European Union and the reconstruction of Germany – ‘from pax Americana to lex Americana’ as Helle Porsdam has called it.⁷ This may explain the difficulties in countries such as Denmark, UK, Norway, Sweden and, maybe, France, in accommodating the courts-and-rights focused approach, whereas countries such as Germany in its present constitution already has the focus built into the constitution. The same goes for Spain, whose constitution is German inspired, and also for most eastern European countries – countries which all have no difficulty in understanding the reasonableness of strong courts *vis-à-vis* the political fora.

⁵ In 1975 all judges in the Supreme Court had their law degree from Copenhagen, in 2000 about 80 per cent. (Ole Hammerslev: *Danish Judges in the 20th Century – a Socio-legal Study* (Copenhagen: DJØF Publishing 2003) 174-176 with more figures).

⁶ Henrik Palmer Olsen: *Magtfordeling* (København: Jurist- og Økonomforbundets Forlag 2005) 321 (my translation).

⁷ Helle Porsdam: *Fra pax americana til lex americana? En diskussion af dansk retliggørelse som en påvirkning fra USA* (Aarhus: Magtudredningen 2002).

C. THE COURTS AS THE LEGISLATURE'S MOUTHPIECE

Another part of the idea of legislative superiority in relation to the judiciary is that the role of the courts is to apply general rules, mainly or solely generated by the legislature, to particular cases. Conceived in this way, the courts merely pronounce the words of the law and the judges are mere automatons, “des êtres inanimés”,⁸ with no part in the creation of the law. They merely apply it.

On the one hand, the conception of courts as applying general rules to concrete cases definitely makes sense. For instance, murder is generally prohibited, but it is up to the courts to decide whether in a particular case a murder has actually been committed, and in civil cases the courts decide whether in fact an agreement has been made, under the general rule ‘pacta sunt servanda’, be it incorporated into explicit legislation or not (see e.g. *Ugeskrift for Retsvæsen (UfR)* 1981.1041H and *UfR* 1985.81Ø).

On the other hand, it is impossible to conceive of courts as a mere mouthpiece of the law, as mere automatons with no independent lawmaking capacity and no other task than to implement the legislature's general rules. ‘Law’ is obviously more than legislative acts – in Denmark, law of torts is mainly unlegislated – and sometimes the enacted statute has either been left deliberately open for the courts to devise the law, or is too vague for a result to be derived, both cases indicating that courts must be creative – within boundaries, of course, but creative nevertheless. Sometimes several provisions must be drawn on, with no obvious legal result, and occasionally the courts have to create the legal backing themselves. *UfR* 1984.1061H is illustrative. The tax authorities required a person to pay stamp duty of approximately DKK 1 million (€150.000). The person paid, but filed an appeal against the decision. A year after, the tax authorities agreed with the applicant and paid back the amount.

The person demanded interest – this was in the early 1980s when interest rates were as high as 15–20% – the tax authorities refused, arguing correctly that there was no legal basis for such a payment. However, the court sided with the applicant, requiring the administration to pay the interest, on the grounds of – this is the main point here – “basic legal principles”. Thus, the courts are, at times, not only the mouthpiece, but also the hands or brains, playing their part in the creation of the law; not the same part as the legislature, but a part nevertheless. The active role of the courts is particularly important when the protection of rights is at stake, as it was in the last example. Rights protection – or freedom, as Montesquieu framed it – requires a truly independent judiciary, not only a mouthpiece of the law.

In a Danish context, the development of a more adequate comprehension of the role of courts can be traced almost simultaneously in constitutional law and in legal sources theory. In 1869, the constitutional lawyer C.G. Holck described the role of the legislator to generate general rules and the role of the courts to apply these rules to cases brought before them. Later, in 1916, Knud Berlin stated that “even if the judges have to conform to the rules, enacted by the legislature, the interpretation of the acts does not consist in a subjection to the strict

⁸ Montesquieu (orig. 1748) 171.

wording of the act, and when the words of the acts are dubious, it is, in fact, only through the courts that the law gets its content. The judiciary is, in reality, law making.”⁹

In legal sources doctrine – the important legal doctrine relating to the legal sources on which the courts and other law-applying institutions should or do rely – the idea right after the Constitution was rather that the two main legal sources were custom and acts by the legislature. Gradually, the doctrine emphasized the importance of taking court decisions into consideration, but without appointing court practice as a proper legal source.¹⁰ Later, court practice was accepted as a valid legal source to be taken into consideration, which is the generally accepted view today. It is important to note that the idea of court practice as a legal source does not fit into the picture of courts as mere automatons. Officially, French law still does not accept court decisions as relevant legal source (even though, of course, working lawyers will have to take into consideration the way courts work in practice, including previous court decisions), whereas English law has the opposite point of departure: courts are law making institutions on a par with Parliament (a fact totally missed by Montesquieu). Scandinavian law is usually described as a sub-branch of the continental law family with its own special traits and features, one of them being the acceptance of court decisions as relevant legal sources.

As for the question of courts as mere rule appliers, Alf Ross is particularly interesting. In his philosophical work, which includes considerations on legal sources, he strongly opposes “mechanical positivism”: judges should not merely state facts but must be constructive; they must actively engage in evaluating, not only facts but also the normative material. Ross includes court practice in the body of relevant legal sources.¹¹ This is far from Montesquieu’s automatons, and, as mentioned, conforms to contemporary doctrine on legal sources. However, when dealing with the theory of separation of powers, Ross somehow seems to forget his philosophical knowledge: “‘Judicial authority’ according to clause 3 of the Constitution signifies the power to definitively set the law in a concrete situation by judging facts according to *rules*.”¹² The problem is, of course, that rules are insufficient and that the law also must be set in accordance with court practice. Apparently Ross gets caught by the simple and seductive notion of ‘the legislature as general rule makers and the judiciary as rule appliers’. Ross does not imply that the rules to be applied by the courts must necessarily be legislatively enacted rules, but still, he maintains – wrongly and in contradistinction to his own views – courts make decisions only according to *rules*.

⁹ C.G. Holck: *Den danske Statsforfatningsret* (Kjøbenhavn: Gyldendal 1869) 183, here cited from Palmer Olsen (2005) 186 and 189; Knud Berlin: *Den danske Statsforfatningsret* (København: i kommission hos Gad 1916) 308, quoted from Palmer Olsen (2005) 221-222 (my translation).

¹⁰ Lars Björne: *Nordisk rättskällelära. Studier i rättskälleläran på 1800-talet* (Lund: Nordiska bokhandeln i distribution: 1991) 40, with reference to Deuntzer, Scheel and Goos.

¹¹ Alf Ross: *Om ret og retfærdighed. En indførelse i den analytiske retsfilosofi* (København: Nyt Nordisk Forlag 1953) 160 f. (my translation).

¹² In Alf Ross’s words, *Statsretlige studier* (København: Nyt Nordisk Forlag 1959) 53, and reiterated until the latest edition of the textbook in constitutional law, *Dansk statsforfatningsret* (3. gennemarb. udg., København: Nyt Nordisk Forlag Arnold Busck 1980) 226 (my translation and my italics).

Probably the only Danish lawyer to ardently defend this view of courts as mere rule appliers is Gorm Toftegaard Nielsen, who is professor in criminal law with a strong interest in constitutional law, especially the theory of separation of powers. He simply states that the courts ought not make laws but apply rules.¹³ Apparently the mixture of dealing with criminal law – in which, of course, courts cannot make up the legal backing for a criminalizing decision – and dealing with the theory of separation of powers, makes the notion of courts as mere rule appliers especially seductive.

In conclusion, I contend that the notion of courts as mere automats is not particularly a part of Danish legal tradition. However, especially when dealing with the theory of separation of powers, legal authors tend to miss their footing by more (Toftegaard Nielsen) or less (Ross) openly employing the notion of courts as mere rule applying workmen.

D. COURTS AS POLITICAL DECISION MAKERS

Even though the courts do not act as a mere mouthpiece of the legislator, but in fact actively generate law, they definitely do not want to act as legislators, and they are obviously reluctant to get involved in politically sensitive issues. As Mogens Hvidt, former president of the Supreme Court, stated: “We do not interfere, but we are present.”¹⁴

The Christiania case, *UfR* 1978.315H, is probably the most illustrative. ‘Christiania’ used to be a military barracks but was taken over by squatters when decamped in 1971. After negotiating with the squatters, the Ministry of Defence required the area evacuated. This was followed by a lawsuit filed by “The Free City of Christiania”. The Supreme Court found that no lease had been entered into and added that the Court was unable to let human and social considerations affect its ruling, as that was the job of the government and legislator, not the judiciary, referring to clause 3 of the Constitution (the division of power clause, see above section B).

The judgment is interesting. Nothing in the Constitution prevents the courts from considering human and social factors,¹⁵ and in fact they often do.¹⁶ But the Christiania case was highly controversial and politicized, and the Court obviously did not want to interfere.

In *UfR* 1984.166/2H the Supreme Court was faced with the task of deciding how to deal with property upon the dissolution of a non marital cohabitation. The Parliament had debated the general issue, but never agreed on a solution. Now, the Supreme Court had to decide whether a woman should be left with nothing after sixteen years of living with a partner, and

¹³ Gorm Toftegaard Nielsen: “Domstolene som den tredje statsmagt”, in Gorm Toftegaard Nielsen (ed.): *Parlamentarismen – hvem tog magten?* (Aarhus: Aarhus University Press 2001) 147 ff.

¹⁴ Mogens Hvidt: “Retsplejen kræver respekt for systemet” [The administration of justice demands deference to the system], in *Folketinget og folkestyret* (Skodsborg: Rolighed 1979) 75.

¹⁵ Peter Germer: *Statsforfatningsret* (København: Jurist- og Økonomforbundets Forlag 2007) 26.

¹⁶ *Ugeskrift for Retsvæsen* 1964.803H. In a civil case with no obvious result, the Supreme Court weighed the economic strengths of the parties, and thus included human and social considerations, just to mention one example.

bringing up two children. A majority of five judges awarded the woman compensation, whereas four judges voted against compensation, arguing that problems of this nature should be addressed by the legislator. The small majority here wanted to grant the woman a right, based on principles in the civil legal system, whereas a large minority did not want to interfere in the legislator's business, even when the outcome was patently unjust.

In *UfR* 1994.536, the Supreme Court had to deal with the question of provisional judges. The Court stated, on the one hand, that the use of provisional judges had been accepted ever since the enactment of the Procedural Code in 1919 and, even though the number of provisional judges had increased over the years, the Court did not find a "sufficient basis" in the Constitution or ECtHR practice to set aside the general arrangement. On the other hand, the Court decided that the actual judge, because of her connection to the specific department in the Ministry of Justice which dealt with criminal offences, was disqualified as judge in the particular case.

The case shows, I believe, that the courts are reluctant to get mixed up in wider, politically and economically sensitive issues, such as setting aside a substantial component of the Danish administration of justice. The Court adopts a kind of 'soft' judicial review (or indirect review by way of interpretation¹⁷) by granting the particular person a right – the right to be tried by an impartial judge – without interfering with the general, more political issue. In a later case, *UfR* 1995.428H, the Supreme Court allowed another provisional judge employed at the Ministry of Justice to sit, but this person worked in the general "Lovafdeling" dealing with drafting of bills etc.. There was therefore no tangible problem and, importantly, a commission was in the process of proposing an arrangement of the judges in (better) line with the requirements of the European Human Rights Convention.

I find it fair to conclude that the judiciary is reluctant to interfere in politically and economically sensitive issues. Still, the courts are prepared to protect the rights of the citizens, especially if this can be done in an aloof, reserved, and seemingly neutral manner. It is worth noticing that the courts displayed hardly any reluctance before checking the administration, eventually scrutinizing administrative decisions in detail, even though this activity was not foreseen by the Constitution's founding fathers nor generally accepted in the decades following the first Constitution of 1849.¹⁸

There may be a tendency towards a stronger judicial stand: Although the judiciary tries not to interfere in politics, it may be more self-confident as regards protection of the law and of citizens' rights. Besides, the Christiania case could be seen as rather special. The plaintiffs openly fought their case as a political case, possibly making the judicial reaction more system deferential than rights protecting.

¹⁷ Tuomas Ojanen: "From Constitutional Periphery toward the Center – Transformations of Judicial Review in Finland" (present volume) mentions directly as well as indirectly judicial review.

¹⁸ Jens Peter Christensen: *Domstolene – den tredje statsmagt* (Aarhus: Magtudredningen 2003) 33 ff.

E. LEGAL SOURCES

As a rule in Denmark, the statutes neither identify the legal sources nor indicate their relative importance. Finding the relevant legal sources is therefore a matter of (mainly court) practice and legal doctrine, in contradistinction to other legal cultures in which legal sources tend to be indicated in statutory acts and, consequently, formally decided over by the legislature. As an important exception, the Penal Code itself requires statutory backing for the imposition of any punishment.

Another feature of Danish legal sources is the absence of ranking in a one-dimensional hierarchy, which is probably linked to the non-statutory regulation of the legal sources. As for hierarchy, there are variations within the system. Thus, in administrative law the principle of legality is paramount, this being a central part of the “Rechtsstaat”, the rule of law: Administrative decisions must have legal backing and be within the scope of the Constitution and legislated statutes. Also the courts are organized in a hierarchical manner, with district courts, high courts and Supreme Court. However, the relation between the various types of sources could rather be characterized as a soft or defeasible hierarchy. The courts use statutes as a point of departure (if any relevant statute is available), but in practice, courts may interpret statutes, even to such an extent that the wording of the statute cannot be recognized as the prevailing law. In rare cases courts may even openly set aside legislation. Courts do *not* routinely set aside (the wording of) the legislation, but do occasionally. Following the same principle, customs do not regularly overrule legislation, in which case the democratic regulation of society would be impossible. But occasionally a custom may overrule even a clearly worded statutory provision (e.g. *UfR* 1983.454Ø).

I find it fair to conclude that as regards legal sources, parliamentary acts take precedence in Danish legal practice. In penal as well as administrative law, parliamentary statutes constitute the necessary legal backing, and in other areas statutes constitute a point of departure for a legal decision. However, the point of departure is defeasible, leaving room for courts to use other sources, to interpret and even set aside the content of the statute, either by way of interpretation or – in rare cases – by directly overriding a statute.

Ross is once again interesting, firstly because, when classifying ‘lov’ as a legal source, he includes not only statutes enacted by parliament, but also by-laws and general rules generated by the administration,¹⁹ which leaves some doubt as to whether parliamentary precedence, in the Rossian view, entails judicial inferiority in relation to any general rule. Secondly, when speaking as a realist he claims that the courts in fact feel significantly bound by parliamentary pronouncements (“tilkendegivelser”),²⁰ thereby indicating that the courts not only take statutes very seriously, but also other political pronouncements by parliamentarian politicians.

¹⁹ Ross (1953) 94.

²⁰ Ross (1953) 93.

F. JUDICIAL REVIEW OF LEGISLATIVE ACTS

The power of the courts under prevailing Danish law to set aside (allegedly) counter-constitutional legislation can briefly be described as existing but exercised with care.

The courts, and especially the Supreme Court, have seen the setting aside of legislation as within their competence since at least the 1920s. Such powers were exercised in a cautious manner, without resulting in the quashing of any legislative acts until the Tvind-case, *UfR* 1999.841H, with a partial reversal in *UfR* 1971.299H. Whether the Tvind judgment marks a new era with a more active and powerful judiciary, or whether the judgment is only a minor ripple on the surface of a calm sea has been debated quite extensively by legal scholars. I find it worth noting that in most previous cases, the questions were of a more substantive character relating to property and compensation issues, whereas the rejection of the act in the Tvind case dealt with a procedural issue: The courts had to decide whether it was in accordance with the Constitution clause 3 for the legislature to enact singular acts, depriving citizens, in this case certain schools, of their rights to have their case tried by a court, as their cases were already decided by the legislature. To me, the judgment does not seem to be a marked deviation from previous practice, but rather a way of making the point clear. The legislator is *not* omnipotent but bound by the Constitution, and the courts will take action, especially when it comes to protection of rights. Making such a point clear could, of course, indicate a subtle expansion of the powers of the courts.

1. TWO DEVELOPMENTS ARE WORTH MENTIONING.

Firstly, legal doctrine and practice in relation to judicial review of administrative decisions have clearly changed since the days of the first Constitution. To begin with, the courts were reluctant to set aside administrative acts, and the doctrine even doubted whether they had the power to do so. Now – cutting short the history of expansion – all legal actors agree with the courts that they do in fact have the power not only to examine the legality of an administrative decision, but even to scrutinize in light of mainly judge-made law (the principle of abuse of law, of proportionality and of equality, to mention the most important ones).²¹

Secondly, the political acceptance of the courts' power to quash unconstitutional legislation also seems to have undergone a development. In the 1920s and 30s spokesmen of a large and significant faction in Parliament rejected the idea of courts setting aside legislation, and a former prime minister issued a public warning to the Supreme Court in a pending appeal case in which the Eastern High Court had actually ruled an act unconstitutional. In contrast, spokesmen of the various parties in Parliament, including the prime minister, accepted and even welcomed the Tvind judgment no matter their initial vote in favour of the act.²² Observations by members of Parliament may in a political science context not be seen

²¹ Christensen (2003) 34–35, with further references.

²² Christensen (2003) 14 f. and 27 f.; Ross (1980) 192, note 42.

as a sign of “political acceptance”. At any rate, it may be taken as an indication of the attitude of members of the legislature to the idea of courts setting aside their acts.

Interestingly, C.G. Holck, an early writer on constitutional law, was against the courts’ setting aside legislative acts, reasoning that the legislature would be unlikely to accept the court’s decision in such a case.²³ This was probably true in 1869, but history indicates widening acceptance among members of the legislative body of the courts’ competence to set aside legislative acts.

Again, Ross is significant. He acknowledged, of course, that the courts held it to be within their power to set aside legislation, but insisted that the solution was ultimately in the hands of the legislator, which, according to him, is the superior power (see above, section B). As the Constitution is silent, Ross argues, the question of the competences of the courts *vis-à-vis* legislation is open, and the legislator can at any time make new acts, making previous judgments obsolete, as long as the acts do not violate any express provision of the Constitution.²⁴

Summing up, I find it important to point out that there is no doubt about the courts’ power to set aside administrative acts nor that this power has increased significantly since the Constitution came into force in 1849. Secondly, there is no doubt either, that the courts do have the power to set aside legislative acts though they do this very rarely. As for the scope of the power and willingness to set aside statutes, it is not primarily a question of the statute being in evident conflict with the Constitution²⁵ – it was far from evident that the statute in the Tvind case conflicted with clause 3 of the Danish Constitution – but rather a question of protection of rights, and particularly protection of civil rights (right to fair trial, right to be tried before an impartial tribunal etc.), compared to social and economic rights and generally issues of larger economic and structural consequence.²⁶

In conclusion, parliamentary precedence is conspicuous. Courts are reticent to overrule parliamentary statutes, more so as regards issues of larger economic and structural implications, but less so in cases when principled rights issues are at stake. There may also be a trend away from the *separation* of powers – separation indicating that each authority runs its own show, so to speak – and a trend towards *balancing* of powers, a trend towards interfering and accommodating the three powers, a trend in which the courts may strengthen their loyalty towards the law rather than towards (parliamentary) politicians.

G. EUROPEANIZATION: DISTURBANCE OF PAROCHIAL IDYLL?

Denmark ratified the European Human Rights Convention (EHRC) in 1953, joined the EU in 1973 (which by then was the European Economic Community) and incorporated the EHRC on par with other statutes in 1992. In all of this, Parliament was involved.

²³ Holck (1869) here quoted from Palmer Olsen (2005) 190.

²⁴ Ross (1980) 190.

²⁵ Compare the Finnish Constitution, section 106, see Ojanen (present volume).

²⁶ See also Rytter (2001) 148 f; and *Ugeskrift for Retsvæsen* (1999) 1798H in which the Supreme Court argued against unconstitutionality on the basis of rights.

It is obvious that the import of European law into Danish law has an impact on Danish legal culture and legal practice. The former Supreme Court president, Niels Pontoppidan, speaks of “a rude awakening” for a whole generation of lawyers brought up on a national tradition of little Nordic and much less international cooperation to disturb Danish tranquillity.²⁷ However, the awakening can also be characterized as somewhat slow.

In relation to EU law, Denmark has in fact been quite slow in getting accustomed to the new legal situation. Teaching EU law did not start until the 1970s, leaving many lawyers (in the administration, the courts as well as private practice) with little knowledge of the relevant law to begin with. In addition, the EU law which was taught was rather limited and, one could easily argue, still insufficient in comparison with the practical influence of EU law (10 ECTS out of 180 at the bachelor studies in Aarhus). Courts tend to decide cases with a reference to Danish law even though EU law is (more) relevant, Danish politicians have been reluctant to let go of special Danish arrangements even when they conflict with EU law,²⁸ and Danish courts have been very reluctant to submit questions to the European Court of Justice (ECJ).²⁹

It is noteworthy, however, that EU law was not a fully developed package in 1973 when Denmark entered the Union. Although the principles of community law’s precedence and direct applicability of EU law were known, the ECJ refined and articulated the duties and obligations of member states after 1973, such as expanding direct applicability to the horizontal level (i.e. not only in the relation state-citizen but also citizen-citizen).

The Danish legal (and political) establishment therefore faced – and still faces – two challenges, one of getting accustomed to a new or at least different legal system with different legal sources, another of getting accustomed to a different way of handling law, especially the ECJ’s dynamic and activist approach.

As for European human rights law (the EHRC with additional protocols and case law from the Commission and, since 1998, only from the Court, the ECtHR) progress has also been slow. The ECtHR did not handle any cases in the 1950s, less than one per year in the 1960s, and case processing on a larger scale did not take off until the late 1970s or mid 1980s.³⁰ In Denmark, there were few references to the EHRC in Danish court cases in the 1960s and 1970s. In the mid 1980s this seemed to speed up a bit, and after 1989, when a commission was set up to consider whether the EHRC ought to be incorporated into Danish law, the number of references rose.³¹ Incidentally, it was 1989 that Denmark was for the first time

²⁷ Niels Pontoppidan: “Introduktion”, in *Festskrift til Ole Due. Liber Amicorum* (København: Gad 1994) 10 f.

²⁸ Birgitte Egelund Olsen og Karsten Engsig Sørensen (red.): *Europæiseringen af dansk ret* (København: Jurist- og Økonomforbundets Forlag 2008) 30–34.

²⁹ Peter Pagh: “Præjudicielle forelæggelser og Juridisk Specialudvalg”, *Ugeskrift for Retsvæsen* 2004B, 305–314; Niels Fenger og Morten Broberg: “Kære meddommer; ingen domstol i Den Europæiske Union vil være enig i din fortolkning...”, *Ugeskrift for Retsvæsen* (2009)B, 5–11.

³⁰ Figures from Council of Europe’s website: HUDOC.

³¹ For specific figures, see *Betænkning 1220: On the Incorporation of the European Convention of Human Rights and Fundamental Freedoms* (København 1991) ch. 5; *Betænkning 1407: On the Incorporation of the European Convention of Human Rights and Fundamental Freedoms* (København 1991) ch. 5.

found in violation of the Convention,³² which of course brought European human rights law in focus, not least among lawyers.

I find it worth noticing that the ‘rights evolution’,³³ the increasing emphasis on rights, is not so much a question of European human rights law’s influence on Danish law, but rather a parallel development in Europe and Denmark. As an example, in freedom of speech cases, from the late 1970s, Danish courts took a more principled approach, not merely citing the relevant statute, but including considerations on the importance of freedom of speech – at exactly the same time as the ECtHR started to take off as an important rights creating institution. In *UfR* 1977.872V, the Western High Court acquitted bill distributors, requiring a very clear legal backing before restricting freedom of speech. In *UfR* 1980.1037H a person was acquitted for defamation with a reference to his contribution to the discussion of an important social issue; and in *UfR* 1989.726H the Supreme Court rejected a claim for prohibitory injunction for the same kind of reasons. Interestingly, the cases were decided with reference neither to European human rights, nor to Danish constitutional rights.

I am not arguing that European human rights law has not had any influence on Danish law, the opposite is the case, not least in freedom of speech cases. All I am arguing is that the increasing focus on ‘rights’ is not an imported phenomenon, but rather emerged in national Danish law and European human rights law simultaneously as facets of a common trend. But as with EU law, Danish lawyers had to cope with a new legal source as well as a new way of handling law, the ECtHR also being activist in its approach to human rights protection. As for parliamentary precedence the conclusion here is not crystal clear.

On the one hand, it looks more like a question of Danish precedence – or at least protection of Danish traditions and Danish law. When Danish courts are reluctant to forward legal questions to the ECJ, and when doing so they involve the Ministry of Justice and the Special Committee (under the executive authority!), it does not look like deference towards the legislature, but rather an expression of a sense of uneasiness as to how to go about it, and – not least – as an effort to protect little Denmark from the much greater Europe. Besides, ever since Denmark’s accession, there has been marked opposition to EU, and Danish governments have twice lost referenda relating to EU issues. (Resistance towards European human rights, in contradistinction, does not enjoy broad popular backing, but is rather pursued by some lawyers and some politicians).

On the other hand, reticence to accept European legal influence mingles with the tradition of parliamentary precedence. More legal actors and more law generating bodies, and especially the EU law conceiving itself as having precedence over national law, obviously challenge the position of the national legislator. The same goes for the ECtHR, although to a much lesser extent, as it may set aside parliamentary acts by judging prevalent Danish law in violation of the EHRC.

poration of Human Rights Conventions in Danish Law (København 2001) 36 ff.; and Kristina Ravn: “Oversigt over trykte afgørelser afsagt af danske domstole, hvor internationale konventioner om menneskerettigheder er blevet påberåbt eller anvendt” (2005) *Retsvidenskabeligt Tidsskrift* 119 f.

³² EMD Hauschildt mod Danmark, 24 May 1989.

³³ Jens Elo Rytter: ”Rettighedsevolutionen i dansk ret”, (2000) 4 *Lov og Ret*, 11-14.

With a rising number of law creators and a rising number of laws and rules – and an ever increasing risk of conflict between the various rules, laws, decisions, directives etc. – the courts will inevitably find themselves in a more conspicuous and prominent position *vis-à-vis* the national Parliament.

This does not necessarily mean that Danish courts must take over the dynamic, activist approach of the European courts. After all, the European courts have a project and a mission to fulfil, the creation of EU and the protection of human rights respectively, whereas Danish courts merely have to apply the law as loyally and well as possible. But it does mean that Danish courts are finding themselves in more troubled waters, having to accommodate the various traditions and styles and knit them together in a reasonably coherent system of law.

H. LEGAL REALISM VERSION ROSS AND PARLIAMENTARY PRECEDENCE

Scandinavian realism is roughly made up of 1) a Benthamite conception of law: law as a means of social change, decided over by the sovereign parliament in a centralized, well-functioning state, and 2) a non-cognitive conception of morals and judgment: we have no knowledge whatsoever of what engages an ‘ought’. Morals, judgment and justice are rather emotions, popping up spontaneously. We can fight for our emotional persuasions, but we cannot reason with emotions.

Scandinavian realism, as well as Benthamism, is, in a certain sense, *rights hostile*: Law is only what the Parliament enacts; there are no rights before or above; and a rights based approach will lead to anarchy. It is *nationalistic* in the sense of focusing on national legislation through Parliament. It is *weakly democratic* in the sense of supporting and defending democracy and democratic institutions against any concept of immutable legal principles, while at the same time admitting that a pro-democratic stand is as emotional and irrational as any other political persuasion. And finally it favours the democratically elected government and Parliament above the courts which have no democratic legitimacy.

And both are *reformatory*. Bentham wanted to transform the conservative, English legal system into a modern one, in which law is a means of generating social welfare rather than weird traditions handed down from time immemorial. Similarly, the Scandinavian realists, and especially the Swedish Vilhelm Lundstedt and the Danish Alf Ross, were reformers, attacking traditional conceptions of law in order to make room for a social welfare state. Whereas Bentham did not have much success in his home country, the Scandinavian welfare state was accomplished, with the assistance of the proclaimed Social Democrats Lundstedt and Ross.

Seen in this way, Scandinavian realism fits very well with a picture of a legal system with little room for active courts, little law generation by the courts and little or no judicial review of parliamentary acts. Parliamentary precedence or even supremacy rather than checks and balances; no individual rights apart from the ones granted by democratically elected politicians; and a dualistic, non-intervening and non overlapping conception of the relationship between national and international law.

However, one could consider the relevance and significance of a particular legal philosophy. *Firstly*, as any other legal philosophy, Scandinavian realism is not a description of a

legal system, but an attempt to conceive law, an attempt that inevitably will focus on some aspects and understandings at the expense of others. Despite its claim of scientific neutrality, Scandinavian realism is highly normative. *Secondly*, legal realism has never been the one and only philosophy, but has been contested from the outset, strongly at times. Thus, it is possible to trace a pragmatic tradition in Danish (and Norwegian) legal thinking and practice, and renowned legal scholars such as Henry Ussing and Knud Illum have been sharply critical of the Rossian understanding of law. *Thirdly*, the legal system seems somewhat immune to legal philosophy as the practical daily handling of cases hardly invites of abstract philosophical deliberations.³⁴ In his review of Ross's major work from the 1930s, Ussing dryly remarked that "lawyers can calmly continue their activity, Ross' philosophical analysis notwithstanding".³⁵ In addition, Ross was at times self-contradictory and often incomprehensible.

Rather than conceiving Scandinavian realism as the cause of parliamentary precedence, this particular (and peculiar) legal philosophy, I suggest, is itself a part of a way of thinking, a frame of mind, influenced by and influencing Danish culture, legal culture, legal practice and legal thinking, never the sole actor, but with a strong influence on the legal establishment especially in the 1950s and 1960s – the welfare state's "happy moment", as Jørgen Dalberg-Larsen called it.³⁶

This influence lingers on in the minds of the many students socialized into a Rossian way of thinking. Thus, Scandinavian realism can be seen as a Kuhnian paradigm, not losing its grip until those who had to read Ross's or Ross-inspired textbooks are out of their respective offices as administrators, judges, evaluators of dissertations etc. In addition, one may point to the fact that no obvious successor to Scandinavian realism has appeared on the legal philosophical stage. Apart from Marxist attempts that were not attractive to the legal system, Preben Stuer Lauridsen made an attempt with his 1974 dissertation *Studier i retspolitisk argumentation* [Studies in legal policy argumentation], but did not challenge parliamentary precedence, and besides he disappeared all of a sudden.

I. CONCLUSIONS

I find clear evidence of a propensity for parliamentary precedence in Denmark, not as a strict hierarchy with Parliament at the summit, but a clearly traceable phenomenon. It is conspicuous in Denmark, but is not conspicuously Danish, as it has roots in European rationalism, Enlightenment and Montesquieu.

³⁴ This aspect is further elaborated in my *Fem retsfilosofiske teser* (København: Jurist- og Økonomforbundets Forlag 2009).

³⁵ Henry Ussing: "To Værker om Moral- og Retsfilosofi", *Ugeskrift for Retsvæsen* 1934B, 292.

³⁶ Jørgen Dalberg-Larsen: "Lige linjer, cirkler, trekkanter eller spiraler i rettens og samfundets udvikling", i Asmund Born m.fl. (red.): *Refleksiv ret* (København: Nyt fra Samfundsvidenskaberne 1988) 175-195.

I also find clear evidence that different courts have different functions. Danish courts have been working in a democratic climate since at least 1901, and in contrast to many European countries such as Germany, Spain and Eastern European countries, rights have been reasonably well protected by the legislature and respected by the executive. The role and context of two European courts are somewhat different. Both being post Second World War phenomena, they have a strong obligation to protect rights and an important task building a peaceful, rights-acknowledging Europe – a European ‘Rechtsgemeinschaft’ as opposed to the insufficient, individual state, all too easily slipping out of the ‘Rechtsstaat’ mode.

There is not only one right way of being a court – the European courts are not wrong because they do not behave like Danish courts, and vice versa – but there may be better ways for both. And certainly it requires willingness as well as competence to accommodate, integrate, and develop the various roles and traditions.

STATUS PRESENS – JUDICIAL REVIEW IN ICELAND

BY RAGNHILDUR HELGADÓTTIR*

Abstract: *This paper discusses the current status of judicial review in Iceland based on theory, recent jurisprudence and some older cases. It is argued that Icelandic courts openly and unhesitatingly examine whether laws are consistent with a broad array of constitutional provisions. The institution and practice of judicial review are largely uncontroversial, although the outcome of a handful of cases is disputed. However, it is argued that the role of the courts regarding judicial review is undertheorized and possibly undervalued. Neither the exercise of judicial review in general nor individual cases receive the necessary attention.*

Keywords: *Judicial review, Iceland, Icelandic constitution, international law in domestic courts.*

A. INTRODUCTION

Judicial review of legislation's constitutionality has been practiced in Iceland since around 1900.¹ Early constitutional treatises rationalized it as a consequence of the constitutional

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¹ The emergence of judicial review in Iceland is frequently dated to 1943, as the first case in which legislation was held to be unconstitutional, was decided that year (Hrd. 1943.237 although Hrd. 1943.154 is arguably also such a case). However, the cases which result in laws being struck are obviously not the only cases in which judicial review is exercised. The outcome of judicial review cases may also be a holding that laws are constitutional. The Icelandic (and before 1920 Danish) Supreme Court had frequently exercised judicial review prior to 1943, even though no law was judged to be unconstitutional until that year. Examples of cases where judicial review was explicitly exercised by the courts prior to 1943 are e.g. Lyrð. IX.809 and X.601 (both concern the same case regarding a liquor license, decided 7. August 1916 by the Icelandic High Court and 22. October 1918 by the Danish Supreme Court) and Hrd. 1937.332. I mention the year 1900, because in Lyrð. VI.176 (decided 19. March 1900), the court wrote that the accused had refused to pay a yearly licensing fee on pubs due to his belief that “the law refuses him civic equality by exacting a fee only on the business he engages in, and thus violates art. 51 of the Constitution. These arguments do not have merits, and in the Constitution there are neither in art. 51 nor elsewhere articles that prevent law exacting a tax or fee like the one at issue from certain industries only... The validity of the Law from Nov. 11 is therefore unquestionable.” (177-178). Kári á Rógvi discusses the case but mentions without elaborating that viewing it as an example of judicial review may be overly optimistic. However, he describes numerous judicial review cases predating 1943. See

order and of having a written constitution but with a few exceptions, it was only in the 1990s, that it was discussed and theorized in Icelandic law. This coincided with a shift in the awareness of human rights in the early 1990s; developments that culminated in the incorporation of the European Convention on Human Rights and the amendment of the constitution.

The textual background of the current situation regarding judicial review is the constitution as amended.² In 1995, a new bill of rights replaced the older chapter on human rights. The amendment was, to a great degree, based on international treaties, especially the European Convention on Human Rights.³ The convention, which was also incorporated into ordinary legislation in 1994, is therefore important as background material for constitutional interpretation.⁴ Iceland is a member of the EEA but not the EU. The EEA agreement is incorporated into domestic legislation like the European Convention on Human Rights.⁵ The courts thus work with these incorporated treaties,⁶ a multitude of unincorporated treaties⁷ and relatively recent human rights provisions in the constitution. In this article judicial review in Iceland will be described briefly. First very briefly by reference to theory, then based on constitutional jurisprudence in the past few years⁸ and finally, based on seminal older cases, which form the basis for most theory on the subject.

Judicial review became a political issue in Iceland in the late 1990s and early 2000s when it was argued, *inter alia* by the then Prime Minister Davíð Oddsson, that the courts were going too far in the exercise of their power of judicial review.⁹ This discussion, which originated in

Kári á Rógvi: *West-Nordic Constitutional Judicial Review* (unpublished PhD thesis, University of Iceland 2009) 171.

² The constitution of the Republic of Iceland is Act no. 33/1944. That document was, with the exception of some provisions about the head of state, similar to the Constitution of the Monarchy of Iceland from 1920 and the text still shows its resemblance to the Danish Constitution of 1849 and the Constitution for Iceland's Internal Affairs from 1874.

³ See the *travaux préparatoires* to the amendment, act no. 97/1995. See e.g. Alþingistiðindi A-deild 1994-95, 2081.

⁴ See act no. 62/1994.

⁵ See act no. 2/1993.

⁶ On the impact of the EEA agreement, see *inter alia* Davíð Þór Björgvinsson: *EES-réttur og landsréttur* (Reykjavík: Bókaútgáfan Codex 2006). On the impact of the ECHR, see *inter alia* Björg Thorarensen et al. (eds.): *Mannréttindasáttmáli Evrópu: Meginreglur, framkvæmd og áhrif á íslenskan rétt* (Reykjavík: Mannréttindastofnun Háskóla Íslands & Lagadeild Háskólans í Reykjavík 2005) as well as Guðrún Gauksdóttir: "Iceland", in Robert Blackburn & Jörg Polakiewicz (eds.): *Fundamental Rights in Europe – The European Convention on Human Rights and its Member States, 1950-2000* (Oxford: Oxford University Press 2001) 399.

⁷ On the impact of non-incorporated treaties, see Ragnhildur Helgadóttir: "The UN Convention in Nordic Domestic Law – Lessons Learned from other Treaties", in Oddný Mjöll Arnardóttir and Gerard Quinn (eds.): *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden: Martinus Nijhoff 2009).

⁸ I did not search further back than 2002 for judicial review cases because I did a somewhat similar study in 2002. See Ragnhildur Helgadóttir: "*Afstaða dómstóla til hlutverks síns við mat á stjórnskipulegu gildi laga – þróun síðustu ára*" (2002) 55 *Úlfjótur* 97.

two important cases concerning the constitutionality of the country's fishing quota system¹⁰ and a case concerning the right to social security, which will be discussed *infra*, concerned partly judicial review, partly legal and constitutional interpretation and partly how individual constitutional provisions should be applied and interpreted. The only strand of this discussion that still garners some attention (as well it should!) concerns legal and constitutional interpretation.¹¹

In an article in 2002, which formed part of this discussion in the early 2000s,¹² I pointed out that alleged changes in constitutional jurisprudence in the past decade or so¹³ were primarily due to the constitutional amendments of 1995. As mentioned, the new chapter¹⁴ was based on the European Convention on Human Rights and replaced the very brief human rights provisions that had been in the constitution since 1944 and in many cases since 1874 or 1849 in the Danish constitution. Obviously, the substance of constitutional protection changed when the constitution was amended. But it is also likely that with relatively detailed provisions, newly added to the constitution and accompanied by detailed discussions from Althingi and civil society, all of which presumed judicial review, the courts would be less hesitant to enforce and apply constitutional provisions than they had been before the amendments.

Writing in 2002, I also found that Icelandic courts do apply unclear constitutional provisions and those constitutional provisions that require positive action without hesitation. This is evidenced, e.g., by Hrd. no. 125/2000,¹⁵ which will be discussed *infra* and Hrd. no. 167/2002.¹⁶ Finally, there was evidence of changes in constitutional interpretation, especially concerning the impact of international treaties, which seemed to be increasing.¹⁷ There was thus evidence of newly amended or written constitutional provisions being interpreted in light of international treaties to a greater degree than their predecessors. I believe that with regard to jurisprudence predating 2002, these three factors explain much of what has – by some, but by no means all, commentators – been described as judicial activism and judicial law-making.¹⁸

⁹ See *inter alia* Davíð Oddsson: “Valdheimildir löggjafans og úrskurðarvald dómstóla” (2002) 52 *Tímarit lögfræðinga* 7; Jón Steinar Gunnlaugsson: “Um valdmörk dómstóla” 55 *Úlfjótur* 217.

¹⁰ Hrd. 1998.4076 and Hrd. no. 12/2000.

¹¹ See e.g. Ólafur Þorvaldsson: “Hlutverk dómstóla” in *Afmælisrit – Jón Steinar Gunnlaugsson* (Reykjavík: Lögrétta 2008).

¹² See Ragnhildur Helgadóttir (2002).

¹³ It is still unclear, in my view, whether there were any changes in the jurisprudence in the late 1990s and early 2000s that cannot be explained by reference to changing constitutional norms.

¹⁴ See act no. 97/1995.

¹⁵ ILDC 68 (IS 2000) in the data-base *International Law in Domestic Courts*, (<www.ildc.oxfordlawreports.com>) (visited 9 February 2009).

¹⁶ In this case, a temporary ban on a labor strike and forced arbitration was upheld except as against certain unions which had not called a strike. The substance of the decision is, in my view, correct but it shows that the courts do not view some provisions or arguments as “unjusticiable”.

¹⁷ See Ragnhildur Helgadóttir (2002) 104–105.

¹⁸ See e.g. Ólafur Þorvaldsson (2008).

B. AN OVERVIEW OF CONSTITUTIONAL JURISPRUDENCE 2002–2008

It is frequently an open question whether a line can be drawn between interpretation of ordinary legislation in accordance with international treaties, such interpretation in accordance with the constitution and the direct application of either constitutional provisions or provisions of international treaties. If the jurisprudence of the Icelandic Supreme Court is examined for the years 2002–08, it emerges that an average of four cases per year concerned the explicitly contested constitutionality of laws.¹⁹ In many of those cases, the European Con-

¹⁹ The cases I refer to are no. 220/2005 & 462/2005 (amendments to the tobacco law held unconstitutional) and 19/2006 (a provision providing for a “ceiling” on damages to be paid in personal injury cases when the injured had a high income, upheld), all decided in 2006. The certain cases in 2007 are no. 599/2006 (ban on advertising alcoholic beverages upheld); 182/2007 (a classical vested rights case in which a license-holder challenged new environmental regulations and the decision that all licenses would have to be renewed after 5 years. His challenge was unsuccessful) and 109/2007 (the law on the State Church was held to be non-discriminatory vis-à-vis other religious groups). It is likely that case no. 92/2007 should be listed here too. In this criminal case against the former CEOs of oil companies, it was held that the law on competition did not provide clearly for procedures when suspicion arose of criminal activity. The Court therefore concluded that it was unclear whether the accused had enjoyed the rights guaranteed by art. 70 of the constitution and art. 6 of the European Convention on Human Rights. In 2008, there was another case sustaining the “ceiling” on damages for personal injury (no. 128/2008). In case no. 152/2008, taxation on reserves of diesel fuel was upheld. The taxation was part of the change from basing the tax on each driven km. to basing it on each liter of fuel. Finally, in case no. 114/2008 the Court held (in what seems to be obiter dictum) that even when legislative acts narrow the right of action before executive authorities, that cannot narrow the right of action before the courts, which is guaranteed in the constitution’s article 70. In 2005, a certain tax was upheld in case no. 315/2005. In 2004, laws were struck in two instances (concerning retroactivity (case no. 465/2004) and the principle of *nulle poena sine lege* (case no. 236/2004)) but upheld in three: case no. 221/2004 (equality challenge to the fisheries quota system), no. 112/2004 (a question of equality in taxation of real property) and 334/2003 (equality in taxation on deeds regarding transactions (stamp duty)); In 2003, 9 cases concerned the constitutionality of laws; no. 177/2003 (agricultural regulations upheld), 520/2002 (law on compensation upheld), 472/2003 (fisheries quota system upheld), 381/2002 (pricing of houses at avalanche risk upheld), 16/2003 (section of the road law upheld); 499/2002 (phasing out of tax exemption scheme that had been used to encourage investment in certain companies held unconstitutional), 549/2002 (act addressing the status of those whose social security benefits had been unconstitutionally curtailed (sequel to case no. 125/2000) held unconstitutional), 151/2003 (law regarding database on health matters must be optional since there are not enough safeguards for the constitutional right of privacy), 46/2003 (a minority of one believed a law was unconstitutional but the majority did not address the issue). In 2002, 5 cases explicitly addressed the constitutionality of laws. In case no. 167/2002, a law prohibiting a labor strike was struck in part. In case no. 101/2002, an amendment to the act regarding nurses’ pension fund was upheld. In cases no. 24/2002 and 25/2002, the legal provision providing that

vention on Human Rights was argued alongside the constitution. There are more cases each year in which regulatory enactments (stemming from the executive) are contested as unconstitutional²⁰ and some in which official actions are challenged as unconstitutional even though no law is questioned as such,²¹ but the cases dealing explicitly with alleged unconstitutional acts of Parliament have held an annual average of 4.3 in the last seven years.

In ten of those cases, the Supreme Court found that laws were inconsistent with the constitution. These cases vary in the explicitness of the inconsistency. In some of them, the Court states clearly, even in its summary of the case, that a certain provision was held to be inconsistent with a certain constitutional provision. Other cases are less clear but the borderline cases are few enough to allow it to be said with full certainty that on average, a law is held clearly unconstitutional at least once a year. Possible explanations and factors contributing to this prevalence will be discussed below.

First, however, it is necessary to note that the legal and political discussion of judicial review from the early 2000s has not been based on such an overview.²² Instead, the focus has been on a few cases stemming from around 2000 and to a lesser degree on broader constitutional and legal theory.

C. SEMINAL OLDER CASES AND THE INFLUENCE OF INTERNATIONAL LAW

Arguably the most famous – and most important – of the cases that inform the discussion of judicial review is the so-called *Social Security Case* from 2000.²³ It concerned the constitutionality of the curtailing of social security benefits to those married to or cohabiting with people whose income exceeded a certain threshold. In its decision the Supreme Court cited art. 76 of the constitution, which stipulates, “The law shall guarantee for everyone the necessary assistance in case of sickness, invalidity, infirmity by reason of old age, unemployment and similar circumstances.” The Court then stated, “It is a recognised rule in Nordic legislation that legislation shall be construed, as far as possible, in accordance with the international conventions that the State has ratified” and referred to

Articles 12 and 13 of the European Social Charter, ratified by Iceland on 15 January 1976, (Government Gazette, C-series No. 31976) and Articles 11 and 12 of the Covenant

collective agreements be minimum rights was upheld and finally, in case no. 156/2002, a time limit for filing suit because of taxes was upheld against a constitutional challenge.

²⁰ See e.g. Hrd. no. 484/2007, which concerned a regulatory provision expressing a prejudice against the artificial insemination of women over aged 42 but leaving the decision in each case to the woman’s physician, until the woman has reached the age of 45. The provisions were held to have sufficient basis in the act in question and to be consistent with the constitution’s equality clause, art. 65.

²¹ See e.g. Hrd. no. 618/2008, which concerned a requirement by the criminal authorities that the telephone companies disclose all use of telephones in a certain area at a certain time.

²² This research is original to this article so no compendium of these cases has been available.

²³ Hrd. no. 125/2000.

on Economic, Social and Cultural Rights, ratified by Iceland on 22 August 1979. (Government Gazette, C-series No. 10/1979) Parties to the first convention undertake to *i.a.* establish or maintain social securities or maintain them at a satisfactory level at least equal to that required for the ratification of the International Labour Convention No. 102 Concerning Minimum Standards of Social Security. Article 67 of this Convention establishes the rules that this minimum must fulfil and states that no curtailments may be made except in the case of substantial additional amounts. The second convention involves *i.a.* that the parties to the Covenant recognise the right of everyone to an adequate standard of living for himself/herself and his/her family.

The court concluded that

According to the above, Article 76 of the Constitution must be construed so as to legally ensure the right of each individual to at least some minimum maintenance pursuant to a predetermined arrangement, determined in an objective manner

and found that the curtailing of payments violated art. 76 of the constitution in conjunction with the equality clause in art. 65.

The case has proven the cornerstone of many arguments about judicial review. This is due partly to the political importance and cost of the decision and partly to the fact that the court enforced article 76 on certain welfare rights, which had never been argued before the Supreme Court until this case was decided, and interpreted it in light of international obligations. It thus became a *cause célèbre* of judicial review cases.²⁴ It is noteworthy that even though the Supreme court split in this case, both the majority and the minority wanted to enforce article 76. The difference of opinion concerned whether the curtailed social security payments were sufficient to satisfy the requirement of article 76 that everyone be guaranteed “necessary assistance”. The majority and minority did not differ on the role of the courts in enforcing these economic rights or in their approach to judicial review, only in their substantive interpretation of art. 76.²⁵

Another case which has received much attention in theory concerns not the constitutionality of laws but the duties of the state under of the EEA agreement. Known as the *Erla María* case²⁶ it concerned a worker who was denied payment of a wage claim lodged with the State’s Wage Guarantee Fund because she was sister to the insolvent company’s biggest shareholder and chairman of the board. In its advisory opinion, the EFTA Court interpreted Council Directive 80/987/EEC as precluding Iceland from maintaining a provision to this effect in national law. The EFTA Court also stated that contracting parties to the EEA were obliged to provide for compensation for loss and damage to individuals if such loss and damage were

²⁴ See *inter alia* Dóra Guðmundsdóttir: “Stjórnarskrárbundnar meginreglur og stjórnarskrárvarin réttindi”, in Pétur Kr. Hafstein et al. (eds): *Guðrúnarbók*, (Reykjavík: Hið íslenska bókmenntafélag 2006) 133; Jón Steinar Gunnlaugsson (2002) 224–225.

²⁵ See Ragnhildur Helgadóttir (2002) 103; Dóra Guðmundsdóttir (2006) 133.

²⁶ Hrd. no. 236/1999.

caused by incorrect implementation of a directive incorporated into the EEA agreement. After receiving this opinion, the Icelandic Supreme Court noted that interpretation was insufficient to resolve the discrepancy and that it was clear that the appellee would have been paid the back wages had the implementation of the directive been correct. While noting that the EEA agreement did not delegate legislative power, it added that the text of the EEA agreement proper does have legal force in Iceland and concluded that

It is appropriate, according to what has just been said, to interpret the law giving legal force to the main text of the [EEA] agreement in such a way that individuals have a claim to Icelandic legislation conforming to EEA regulation. If that does not happen, it follows from act no. 2/1993 and the principles and goals of the EEA agreement that the appellant will have to pay compensation according to Icelandic law. Based on this, as well as the origins and purpose of act no. 2/1993 the duty of [the state] to pay compensation because of the unsatisfactory implementation of the directive, has sufficient legal basis in that act.

This case has been much discussed in the context of EEA law since it was disputed both before the EFTA Court and the Icelandic Supreme Court whether there could be question of state responsibility in this and similar situations. But it has also been discussed as an example of judicial activism: In fact a judicial decree that Alþingi could not enact a law because it was contrary to principles inherent in another act passed by Alþingi – the one incorporating the EEA agreement.²⁷

Regarding treaties more generally, it should be noted that unincorporated treaties are frequently cited before the Icelandic courts.²⁸ The emphasis of the courts has, however, been firmly on the treaties²⁹ without special thought to cases. However, parties to Supreme Court cases have argued on the basis of cases in a few instances (five or six from the year 2000). In one of those cases, the Supreme Court addressed the issue, saying that

Even though the judgments of the European Court of Human Rights are not binding under Icelandic law, cf. art. 2 of act no. 62/1994 [incorporating the Convention], the Court's application of the aforementioned provisions should be considered. According to chapter V of act no. 90/1989 [a person in the situation of the appellee] has the opportunity to bring disputes concerning the action before the courts, as was done in this case. Since the appellee has proven that she has neither property nor income that would enable her to pay for legal representation, the conclusion of the lower court should be affirmed, with reference to his rationale that art. 168:3 of the Criminal Procedure Act should be interpreted with regard to the aforementioned article of the European Convention.³⁰

²⁷ See Ólafur Þórkur Þorvaldsson (2008) 13–14.

²⁸ See Ragnhildur Helgadóttir (2009).

²⁹ See *inter alia* Ragnhildur Helgadóttir (2002) and Ólafur Þórkur Þorvaldsson (2008).

³⁰ Hrd. no. 248/2005. Prior to the incorporation of the ECHR, the Supreme court applied the ECHR directly in a case concerning the right to interpretation in a criminal case. See Hrd. 1992.174. This case may be seen as a direct continuation of that one, although the legal situation was quite different once the ECHR had been incorporated.

In only one case has a (dissenting) Supreme Court justice referred by name to cases of the European Court of Human Rights.³¹ The majority of the Court has not done that with regard to the European Convention of Human Rights, although the European Court's decisions have impacted legislation and, presumably, courts as well. The decisions of the EEA Court have, by contrast, been discussed more openly by courts, in part of course because of the EEA Court's advisory opinions.

D. STATUS PRESENS

It is my opinion that important points are lost when the discussion of judicial review is based only on the *Social security case, Erla María* and a handful of other cases.

First of all, Icelandic courts unhesitatingly and openly exercise judicial review. They are not apologetic about their role as reviewers of the constitutionality of parliamentary action. This is emphatically not to say that they are "activist." On the contrary the courts' construing of the constitution in the cases where laws are struck seems fairly uncontroversial. But a court that finds at least once a year that legislation is unconstitutional and says so clearly and succinctly, does not seem to view its role as problematic. There is thus little subterfuge and disguising of constitutional review. As briefly mentioned above, this may stem in part from the constitutional amendments of 1995 and the discussion around the amendment process. Having better tools to do the same job (i.e. judicial review) may have influenced judicial attitudes toward judicial review.

Secondly, there is no pattern regarding which constitutional provisions are invoked and are successful. So there is no question of economic vs. non-economic rights being more or less successful. There are plenty of taxation and takings cases just as there are plenty of privacy and freedom of expression cases.

Thirdly, the courts' exercise of judicial review seems uncontroversial. Individual cases can certainly be controversial, as evidenced by the discussion regarding case no. 125/2000 above, but frequently the controversy revolves around the interpretation of individual constitutional provisions rather than judicial review per se. And again as mentioned above, Supreme Court cases decided after 2002 have received very little or no attention in legal theory and commentary.³² It is therefore tempting to conclude that the courts' constitutional interpretation and application in those cases would seem uncontroversial. While there is no space here for a detailed discussion of the cases, this coincides with my opinion that for the most part these decisions are not far-reaching or activist at all. But in a comparative context, it is noteworthy that in spite of the numbers of cases, judicial review has given rise to very little discussion in the past few years, and none at all based on recent cases: It seems that Icelandic

³¹ Hrd. of March 30, 2007, no. 178/2007. The Justice referred to Eur. Ct. HR Letellier vs. France, Series A 207 (1991) and to Eur. Ct. HR Tomasi vs. France, Series A-241-A (1992).

³² A quick survey of the literature shows no discussion of these cases. However, the survey was not exhaustive.

constitutional lawyers are still resolving the fallout of the seminal cases mentioned above, i.e., the social security case, the fishing quota cases and possibly a handful of others.

Fourthly, the role of the Supreme Court as a constitutional court is undertheorized and possibly undervalued. While any discussion of judicial activism centers on the courts and their relationship with Parliament, Icelandic lawyers and politicians have not acknowledged the prevalence of judicial review. The number of laws held unconstitutional alone should give rise to serious discussions about the quality of laws passed by Althingi and about the professional and moral pressure brought to bear on Althingi. It is surprising that such a frequent striking down of laws should not cause comment in legal circles or embarrassment for the legislature. But in any case, it should be acknowledged that irrespective of individual controversial cases, the courts play an important and largely uncontroversial role in the constitutional scheme.

In sum, Icelandic courts do exercise judicial review like they have from the late nineteenth century. They work with a relatively new human rights chapter in the constitution, incorporated and unincorporated treaties. The courts are not particularly hesitant to openly characterize judicial review of legislation's constitutionality as such and they continue to utilize international law or rules stemming from international law when construing and interpreting constitutional provisions. Perhaps most importantly, the exercise of judicial review seems uncontroversial even though the outcome of individual older cases is disputed.

FROM CONSTITUTIONAL PERIPHERY TOWARD THE CENTER –TRANSFORMATIONS OF JUDICIAL REVIEW IN FINLAND

By TUOMAS OJANEN*

Abstract: *Transformations within the institution of judicial review and the growing role of the judiciary in general have been one of the most significant constitutional developments in recent years in Finland. The power of courts to review the compatibility of parliamentary legislation with EU law, international human rights treaties and the Constitution is linked to the issue of the appropriate division of powers between the legislature and the judiciary, as well as the increasing “politicization of adjudication” and “adjudication of politics”. As a consequence, the proper scope and legitimacy of judicial review have become one of the central issues in Finnish constitutional debate. The article provides an overview of the major transformations within the institution of judicial review in Finland, arguing that the reciprocal influence of certain domestic sources of dynamics, EU membership and international human rights treaties have had a fundamental impact on judicial review and role of courts in general. This shift of competence to the judiciary has also brought it from the periphery toward the center of the Finnish constitutional and political system.*

Key words: *judicial review, constitutional rights, human rights, EU law, the scope and legitimacy of judicial review, democracy.*

A. INTRODUCTION: THE PURPOSE AND SCOPE OF THE PAPER

The purpose of this article is to provide an overview of the major transformations within the institution of judicial review in Finland. While the focus will be on the current state of affairs, the article also seeks to situate the topic within its wider historical context. After all, the current situation is inevitably shaped by the particulars of the Finnish constitutional history and political tradition.

The concept of judicial review will be used in a wide sense. While it includes judicial review of the *constitutionality* of Acts of Parliament it transcends this domestic topic and covers judicial review of domestic legislation for compatibility with *European Union (EU) law* and *international human rights obligations binding upon Finland*. However, since the focus is on judicial review of *legislative* acts, judicial review of executive and administrative acts fall beyond the scope of this paper.

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The paper is divided in four sections. The initial section locates judicial review in its wider historical context (Section 2). There will then be a discussion of the impact of international human rights treaties, especially the European Convention on Human Rights and EU membership on the scope of judicial review (Sections 3 and 4). The final section discusses judicial review of the constitutionality of legislation under Section 106 of the Constitution of Finland of 2000 (Section 5).

Although different sections will thus revolve around a particular topic, the theme permeating this paper is *the reciprocal influences between certain domestic sources of dynamics, EU membership and international human rights treaties on judicial review and the role of courts in general*. In particular, the paper seeks to illustrate how change wrought by European integration and international human rights treaties accelerated an already established domestic constitutional tendency toward the review of the constitutionality of Acts of Parliament by courts. Indeed, the most bewildering transformations are ultimately due to the several ways in which EU membership, international human rights treaties and certain domestic sources of dynamics increasingly played on the institution of judicial review in Finland and changed the traditionally highly restrained role of the judiciary in the Finnish constitutional-political system.

B. HISTORICAL BACKGROUND

Up until the late 1980s, courts played a very limited role in the constitutional and political system of Finland. As with other Nordic countries, Parliament enjoyed a sovereign status *vis-à-vis* the courts.¹ It is a different thing that the Finnish system was not a genuine parliamentary government as parliamentarism was counterbalanced by effective semi-presidential rule.² The sovereignty of Parliament and, conversely, the very limited role of the judiciary in Finland's constitutional and political system, manifested themselves in many ways.

First of all, Section 92, subsection 2, of the old Constitution of Act of 1919 was interpreted as *a prohibition of judicial review* of the constitutionality of Acts of Parliament. Consequently, the major control mechanism for ensuring the constitutionality of legislation was – and still is – the abstract *ex ante* review carried out by the *Constitutional Law Committee of Parliament*.

In practice, review by the Constitutional Law Committee takes place during the progress of the bill through Parliament, and the findings of the Committee are statements on the constitutionality of the bills and other matters submitted to it, as well as on their relation to the international human rights treaties (Section 74 of the Constitution of Finland of 2000). It is important to note that the practice of the Constitutional Law Committee also extends to the

¹ For an overview of the role of the judiciary in the Finnish constitutional system, see e.g. Tuomas Ojanen: "The Europeanization of Finnish Law", in Paul Luif (ed.): *Österreich, Schweden, Finnland. Zehn Jahre Mitgliedschaft in der Europäischen Union* (Böhlau: Wien 2007) 145, 171-172.

² See Jaakko Nousiainen: "From Semi-presidentialism to Parliamentary Government: Political and Constitutional Developments in Finland" (2001) 24 *Scandinavian Political Studies* 95.

review of international obligations and proposals for EU measures for their compatibility with the Constitution.

Although the Committee is a Parliamentary body and, accordingly, composed of MPs, its practice is characterized by a search for constitutionally well-founded interpretations and consistent use of precedents. Before issuing its Opinions or Reports, the Committee regularly hears experts in constitutional law, notably university professors.

The Committee has achieved a special status and respect for its integrity and its non-partisan approach. The independence of the constitutional review by the Committee is expected to be respected, and any attempt at exerting political pressure on the Committee is considered unacceptable. The views of the Committee enjoy strong authority, and are treated as binding on Parliament.

The sovereignty of Parliament *vis-à-vis* the judiciary is also apparent at the level of *the sources of law*. Various forms of written law and, above all, Acts of Parliament were regarded as primary sources of law. The status of *travaux préparatoires* was also higher in the hierarchy of legal sources than that of case law, which was regarded as having no more than persuasive value in the process of “identifying” the law.

The prohibition of judicial review of the constitutionality of Acts of Parliament resulted in limited applicability of constitutional rights³ and constitutional provisions in general in the practice of Finnish courts. In fact, constitutional rights were understood to be binding primarily on the legislature.⁴ Although it has been stressed in constitutional law doctrine since the 1970s that Finnish law, including Acts of Parliament, must be interpreted in conformity with the Constitution, constitutional provisions played a very limited role in everyday court practice until the late 1980s,⁵ causing the Constitutional Law Committee of Parliament to reiterate on several occasions that all Acts of Parliament must be interpreted in harmony with the Constitution.⁶ In practice, the outcome of “the constitution-oriented interpretation approach” may be the same as the direct application of constitutional provisions by courts.

In addition, the sovereignty of Parliament entailed, together with the positivist or legalistic tradition of the Finnish legal culture, a focus in the interpretive tradition of the courts on what may be described as the *textual or literal approach*, i.e., the meticulous examination of the wording of the text and the meaning, on the face of it, of the language used. Conversely,

³ The term *constitutional rights* is used in order to indicate the pertinence of the discussion to fundamental rights protected under Chapter 2 of the Constitution of Finland. Translation of the Constitution of Finland in English is available at: (<http://www.finlex.fi/pdf/saadkaan/E9990731.PDF>) (visited 2 April 2009).

⁴ See e.g. Martin Scheinin: “Incorporation and Implementation of Human Rights Treaties in Finland”, in Martin Scheinin (ed.): *International Human Rights Norms in the Nordic and Baltic Countries* (The Hague: *Martinus Nijhoff Publishers* 1996) 257, 260.

⁵ See Scheinin (1996), 261.

⁶ The most authoritative statement of the Constitutional Law Committee on the necessity of the “constitution-oriented interpretation approach” can be found from the Committee’s Opinion PeVM 25/1994 vp. The abbreviation PeVL is short for *perustuslakivaliokunnan lausunto* (Opinion of the Constitutional Law Committee). The abbreviation ‘vp’ refers to ‘*valtiopäivät*’, the annual session of Parliament.

the courts were reluctant to employ what might be described as the teleological or purposive interpretation approach, especially in situations where this would have entailed going beyond the wording of legislative provisions.

Finally, the form of legal reasoning by Finnish courts was markedly concise, formal and rule-focused. One looks in vain after court judgments involving broad statements of principle and substantive legal reasoning.

C. IMPACT OF INTERNATIONAL HUMAN RIGHTS TREATIES, ESPECIALLY THE EUROPEAN CONVENTION ON HUMAN RIGHTS

1. GENERAL REMARKS

In Finland, the relationship between international law and domestic law is generally resolved according to the *dualistic* model. The most frequently used method of implementing international treaties, including international human rights treaties, is *incorporation* through an Act of Parliament *in blanco*.

The outcome of the predominance of the incorporation method is, firstly, *direct application* of international human rights treaties by Finnish courts and authorities. Secondly, this incorporation method entails *the power of Finnish courts to examine the compatibility of Finnish law with human rights* because, as a matter of Finnish constitutional law doctrine, the hierarchical status of the domestic incorporating enactment of international treaties determines the formal status of the treaty in Finnish law. Thus, Section 92 of the Constitution Act of 1919 already authorized the direct application and precedence of human rights treaties incorporated through Acts of Parliament in cases where the domestic provision was hierarchically inferior to an Act of Parliament. In addition, in relation to domestic Acts of Parliament, these human rights treaties assumed the same status.⁷

2. ROLE OF HUMAN RIGHTS TREATIES IN COURT PRACTICE

Until the mid-1980s, cases where human rights treaties were invoked by Finnish courts remained few in number, for one reason because there was a tradition not to invoke constitutional rights in courts either. However, things started to change in the late 1980s. The number of cases involving human rights gradually increased, and Finnish court became more and more aware of the existence and applicability of human rights treaties.⁸

The entry into force of the ECHR in 1990 proved a turning point. In its Opinion on the ECHR the Constitutional Law Committee of Parliament emphasized that the method of incorporation entailed direct application of international human rights treaties by domestic

⁷ See Scheinin (1996) 257-261.

⁸ See Scheinin (1996) 259-270.

courts and authorities. The Committee also confirmed the position already adopted in the academic doctrine on constitutional law according to which the hierarchical status of the domestic incorporating enactment determined the formal status of the treaty provisions in Finnish law. Furthermore, the Committee emphasized the importance of the “human-rights-oriented” interpretation of all domestic law, including all Acts of Parliament, for the purpose of avoiding conflicts between Finnish law and human rights treaties. However, the Committee also noted that the rule *lex posterior derogat legi priori* may apply in conflicts between incorporated treaty provisions and (other) domestic acts. Hence, as a matter of domestic constitutional law, Parliament continued to retain its constitutional competence to enact new Acts of Parliament even if they conflict with human rights treaties binding upon Finland.⁹

Post the entry into force of the ECHR in 1990, there has been a significant upgrade in the number of court references to international human rights treaties. Today, Finnish courts routinely take into account the ECHR, including the case law of the European Court of Human Rights, but their references to human rights treaties also extend other human rights treaties and their monitoring bodies. Usually, courts take advantage of human rights norms indirectly (as an interpretive aid or standard), but there are cases in which human rights norms have been applied directly and by giving priority to them over conflicting domestic law. One important dimension of this trend is the significant role of international human rights norms in the interpretation of domestic provisions on *constitutional rights* – a development which results in the *harmonization* of the international and domestic protection of constitutional rights and human rights.¹⁰

The developments described above have also contributed to the following changes in Finnish constitutional law and culture.

(I) International human rights treaties, with the ECHR at their apex, brought a marked change in the Finnish *constitutional and human rights culture*. In particular, international human rights treaties provided a major source of inspiration for the comprehensive reform of the domestic system for the protection of constitutional rights, which was under consideration between 1989-1995 and which entered into force on 1 August 1995 (hereinafter the 1995 Constitutional Rights Reform, Act No 969/1995).¹¹

The influence of the ECHR and other human rights treaties is most visible in the concrete formulations of the various material provisions on constitutional rights, but the influence of human rights covers the methods of giving legal protection to constitutional rights. The clauses in question regulate to the duty of public authorities to guarantee the observance of constitutional and human rights (now Section 22 of the new Constitution of Finland of 2000) to the limitations on derogations in times of public emergencies (Section 23) and to the duties of the

⁹ Opinion of the Constitutional Law Committee, PeVL 2/1990.

¹⁰ See Scheinin (1996) 22. For the application of international human rights treaties, including the case law of the European Court of Human Rights, by Finnish courts, see Tuomas Ojanen: ”Eurooppa-tuomioistuimet ja suomalaiset tuomioistuimet” [European Courts and Finnish Courts] (2005) 7-8 *Lakimies* 1210.

¹¹ See e.g. Martin Scheinin: ”Kansainväliset ihmisoikeussopimukset ja Suomen perusoikeusjärjestelmä”, in Pekka Hallberg et al. (eds.): *Perusoikeudet* (Saarijärvi 1999) 187.

Constitutional Law Committee of Parliament, Chancellor of Justice and Parliamentary Ombudsman.

As a result of the 1995 Constitutional Rights Reform, the current constitutional rights catalogue in the Constitution of Finland (Chapter 2 of the Constitution), is very comprehensive. It sets out a range of economic, social and cultural rights, in addition to the more traditional civil and political rights. Moreover, there are specific provisions on the protection of personal data (Section 10), responsibility for the environment and environmental rights (Section 20) as well as for the right to good administration (Section 21, subsection 2). Almost all rights are granted to everyone, an exception being made only with regard to the freedom of movement (Section 9) and certain electoral rights (Section 14).

The domestic standard of protection of constitutional rights is generally high. Although international human rights treaties were a major influence on the 1995 Constitutional Rights Reform, the Constitution formulates these rights in a new way and, above all, accords to them the status of *constitutional rights*. Besides, it is well established that Finnish authorities should not only interpret and apply constitutional rights and human rights in harmony. They should also offer more extensive protection to constitutional rights than that available for corresponding human rights under human rights treaties.¹²

One of the most important aims of the Reform was to increase the significance of constitutional rights in every day court practice. Thus, several provisions on constitutional rights were deliberately formulated so as to allow their direct application by courts. This aim was achieved since the number of cases where constitutional rights have been invoked by courts has steadily increased since the entry into force of the Reform on 1 August 1995, which also shows that the direct application of provisions on constitutional rights should not be confused with the power of courts to review the constitutionality of Acts of Parliament. Indeed, the 1995 Constitutional Rights Reform did not entail any substantial changes insofar as the prohibition of the courts to examine the constitutionality of Acts of Parliament was concerned.

(II) A second important change initiated by the ECHR and other human rights treaties relates to the role of Finnish courts. As already noted, Finnish legal culture has a strong tradition of formal legalism, with the judiciary traditionally enjoying a very limited role in the Finnish constitutional system. However, international human rights began to reshape these structures, not least because the ECHR and other human rights treaties, incorporated *via* Acts of Parliament into the law of the land, require Finnish courts to engage in a form of judicial review to ensure the compatibility of domestic law with human rights. As a result, human rights treaties consolidated the already growing role of the judiciary in the Finnish constitutional and political system.

(III) The third significant impact of human rights treaties was to give human rights obligations binding upon Finland a part in the reshaping of the traditional doctrines of sources of law and the patterns of legal reasoning by courts. Gradually, the effect of human rights treaties, especially those of the ECHR, has spread to practically all sectors of Finnish law, thereby penetrating the classic civil law-criminal law and public law-private law distinctions characterizing Finnish law. The effect of the latter goes now beyond substantive law, implicat-

¹² For a brief overview of the 1995 Constitutional Rights Reform, see e.g. Ojanen (2007) 156-158.

ing fundamental institutions of procedural law. Indeed, the impact of the ECHR has probably been strongest with respect to such procedural matters as access to courts, the standing of natural and legal persons, rules of evidence, remedies and the like. In addition, the application of human rights norms impelled the courts to deviate from their traditional, markedly formal and rule-focused legal reasoning toward more principle-based reasoning. Last but not least, the great significance of the case law of the European Court on Human Rights within the framework of the ECHR has also provided a significant impulse to take case law much more seriously as a source of law.

D. THE EFFECTS OF EU MEMBERSHIP ON JUDICIAL ROLE AND STYLE

The immediate result of Finland's accession to the European Union in 1995 was the entry into force of EU law with a concomitant power granted to Finnish courts to review all national law for its compatibility with EU law.¹³ This new competence was, of course, all the more striking because, as a matter of EU law, the primacy of EU law covers *all* conflicting national law, irrespective of the *lex posterior* nature or the hierarchical status of the latter. Yet, at the time of Finland's accession in 1995, courts were not allowed to examine the constitutionality of Acts of Parliament.

The incorporation Act of the Accession Treaty (Act No 1540 of 1994) – as well as written Finnish law in general – is silent on the issue of the domestic effects and status of EU law within the Finnish legal order. Section 1 of the Incorporation Act provides only that “The Accession Treaty of Finland ... as well as those treaties that are referred to in Article 1, paragraph 1 of the said Treaty, is prescribed to be in force as they have been agreed upon.” However, the prevailing view is that EU law enjoys, within the Finnish legal order, such legal effects and status as are prescribed by EU law itself and interpreted by the European Court of Justice.¹⁴

Finnish courts have not disputed this view. At least so far, there is no evidence of any overt resistance on the part of the Finnish courts against embracing such fundamental qualities of EU law as its direct effect, indirect effect and primacy over conflicting national law.¹⁵ What is, however, noteworthy is that direct effect and primacy have not acquired nearly as much *de facto* significance as might have been expected in light of the extensive academic attention to

¹³ The accession of Finland to the European Economic Area in 1994 already caused changes in the picture, since Finnish courts and authorities became under a duty to examine the harmony of domestic Acts of Parliament with EC law. Such an obligation was established through explicit priority clause in the incorporating Act of the EEA Accession Treaty (Act of Parliament No. 1504 of 1993).

¹⁴ See e.g. Martin Scheinin and Tuomas Ojanen: “Finland” in Joël Rideau (ed.) *Les États Membres de l’Union Européenne. Adaptions-Mutations-Résistances* (Paris, 1997) 185, 191-192.

¹⁵ For a detailed description of the case law by the Finnish courts with reference to indirect effect, direct effect, primacy and Member State liability, see Niilo Jääskinen: “The Application of Community Law in Finland: 1995-1998”, (1999) 36 *Common Market Law Review* 407. For more recent case law, see Ojanen (2005) 1210-1228; and Ojanen (2007) 174-178.

these two classic doctrines over the years. In particular, the cases in which Finnish courts have taken advantage of the primacy of EU law and, accordingly, set aside conflicting provisions of Finnish law, have remained relatively few in number.¹⁶

Having said that, Finnish courts are not necessarily opposed to the primacy of EU law. It is rather that the limited number of cases involving direct effect issues and, in particular, the primacy of EU law over conflicting domestic law, seems to be the outcome of the two related reasons. The first is that, by and large, Finnish legislation *is* in harmony with EU law. The harmonization of Finnish law with EU law started well before accession. Finland has also taken seriously its obligation to implement EU measures. For instance, Finland is regularly at the top of the Commission's internal market league tables highlighting national implementation of EU law.

The other explanation for a lack of cases concerning the primacy of EU law over conflicting national law is that EU law predominantly enters Finnish courts in the form of questions concerning the effect of EU law on the interpretation of Finnish law (the indirect effect of EU law).¹⁷ Indeed, the indirect effect of EU law is by far the most frequent method of giving judicial effect to EU law by Finnish courts. This approach assumes special importance in cases involving a *prima facie* tension between EU law and a provision of national law. In such circumstances, Finnish courts try to interpret, as far as possible, national law in conformity with EU law so as to avoid open conflict. This approach appears to be emphasized in cases involving a *prima facie* tension between EU law and an Act of Parliament.

The Finnish constitutional tradition may go a long way toward explaining why Finnish courts favour the indirect effect of EU law, instead of applying provisions of EU law directly to the facts of the case. Although the role of the courts has expanded in recent years, the legislature is still central to the Finnish constitutional system, and the indirect effect of EU law involves a similar method to that traditionally endorsed by the Finnish courts in situations involving granting judicial effect to constitutional provisions or international human rights treaties.

Up to now, no case-law has been generated by Finnish courts on the *constitutional* aspects of EU membership. Indeed, the approach of the Finnish courts to the application of EU law is largely characterized by a pragmatic case-by-case approach. Each case is dealt with individually, without the court expressing general views about the domestic status of EU law. One looks in vain for the kind of bold and sweeping observations on the relationship between EU law and national law that have been issued by certain English or German courts, for example. Accordingly, there has yet to be a "hard case" in which a Finnish court found it necessary to question its acceptance of the primacy of EU law. Given the current role of constitutional rights and human rights in the Finnish legal order, questions concerning the relationship between EU law and the domestic system for the protection of constitutional rights and human rights might present such a hard case. This is especially so in light of the statements of

¹⁶ The first judgment in which a Finnish court gave primacy to EU law was the judgment of the Supreme Administrative Court on 31 December 1996. See KHO 1996 B 577.

¹⁷ For judgments involving the indirect effect of EU law, see e.g. the judgments of the Supreme Administrative Court KHO 2002:41 and 1042 and 1043/2003 (judgments of 25 April 2003).

the Constitutional Law Committee that the implementation of EU law in Finland must not weaken the domestic standard of protection of constitutional and human rights under the Finnish Constitution.

As the Constitutional Law Committee has stated, domestic implementation of EU law may not lower the level of national protection of constitutional rights and the implementation of EU measures should conform to the requirements originating in the domestic system for the protection of constitutional and human rights.¹⁸ This has not only been a form of lip-service to constitutional and human rights. The Constitutional Law Committee has already issued a host of opinions on *either* proposals for EU measures *or* on domestic legislative measures aimed at implementing EU law in the light of constitutional rights and human rights.

In a clear majority of cases, it has been possible to implement EU law without having to limit the reasonable observance of constitutional and human rights. Occasionally, however, the constitutional premise not to compromise the domestic standard of protection of constitutional and human rights in the implementation of EU law has limited the “maximal” implementation of EU law.

Illustrations are provided by the implementation of the Council Framework Decision of 13 June 2002 on combating terrorism, on the one hand,¹⁹ and the implementation of the Council Framework Decision on the European arrest warrant, on the other. In both situations, the express starting point of the Government proposals was the necessity of taking account of the obligation to safeguard the observance of constitutional rights and international human rights in the implementation of the EU measures in question.²⁰ A number of additional changes and specifications in the bills was made by the Constitutional Law Committee in order to ensure the appropriate observance of constitutional rights and human rights.²¹

Certain other effects of EU membership on the judiciary are also worthy of mention. To start with, EU law emerges, in view of the overall changes in the Finnish constitutional rights and human rights culture, as one of the reasons behind the shift in legal reasoning from formal, rule-focused reasoning toward relying more heavily on reasoning from principle. Similarly, EU law has for its part affected the methods of interpretation, attaching more significance to what can be described as the teleological or purposive interpretation approach.

EU membership has contributed to the trend of attaching greater significance to case law as a source of law, thanks to the great significance of the case law of the European Court of Justice within the framework of the EU legal order. Today, Finnish courts routinely refer to the

¹⁸ PeVL 25/2001 vp.

¹⁹ OJ L 164, 22/06/2002, at 3-7.

²⁰ Government proposal HE 188/2002 vp (terrorismia koskeviksi rikoslain ja pakkokeinolain muutoksiksi), and HE 88/2003 vp (laiksi rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Euroopan unionin jäsenvaltioiden välillä sekä eräiksi siihen liittyviksi laeiksi).

²¹ PeVL 48/2002 vp. For “the Finnish constitutional challenge” towards EU law, see in more detail Tuomas Ojanen: “The European Arrest Warrant in Finland – Taking Fundamental and Human Rights Seriously” in Elspeth Guild (ed.): *Constitutional Challenges to the European Arrest Warrant* (Nijmegen: Wolf Legal Publishers 2006) 89; and Tuomas Ojanen: “EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament” (2007) 52 *Scandinavian Studies in Law*, 203.

individual judgments of the Court of Justice, signaling their acceptance of the authority of the Court of Justice insofar as the interpretation of EU law is concerned.²²

Finally, it deserves notice that the preliminary rulings procedure under Article 234 EC and Article 35 TEU has brought Finnish courts at all levels into direct contact with the Court of Justice. By the end of 2008, Finnish courts had made 56 references to the Court of Justice. All references by the Finnish courts have so far dealt with the *interpretation of EU law*, the major impetus for these references thus simply having been the desire of the referring domestic court to be able to take a position on the issue of the compatibility of national law with EU law. Instead, there have been no references concerning the validity of EU measures. This is somewhat surprising given the current emphasis on considerations grounded on constitutional and human rights at the domestic implementation stage of EU measures. Thus, it should only be a matter of time before a case is pending before a Finnish court questioning whether a certain EU measure – and perhaps also its domestic implementing enactment – falls short of the requirements stemming from constitutional and human rights. In such a case, it may become necessary for the Finnish court to examine the validity of the relevant EU measure by taking advantage of the preliminary rulings procedure under Article 234EC or Article 35 TEU.

Preliminary references by Finnish courts illustrate the micro level tendencies which appear to characterize the reception of EU law by Finnish courts at the macro level, too.

A clear majority of these preliminary references was made by the general administrative courts or by tribunals that deal with administrative law cases. Indeed, the Supreme Administrative Court alone had referred 23 cases to the Court of Justice for its preliminary ruling by the end of 2008. Conversely, courts administering justice in civil, commercial and criminal matters have made far fewer references. The Supreme Court has so far made 10 references. These figures correlate with the general observation that EU law usually assumes relevance before administrative courts and tribunals that deal with administrative law cases.

The number of preliminary references by Finnish courts is very modest, especially compared with the huge number of cases where EU law has become relevant in Finnish courts. Finnish courts are apparently reluctant to take advantage of the preliminary rulings procedure; lower Finnish courts have been particularly circumspect about involving the Court of Justice via the preliminary rulings procedure – something that may suggest muted judicial enthusiasm for and expertise on EU law among the lower courts .

However, the limited use of Article 234EC does not mean Finnish courts are deciding EU law cases entirely by themselves. Indeed, available case law suggests an acceptance by the courts of their obligation to take account of the case law of the Court of Justice. Since the case law of the Court of Justice is vast in scope and rich in detail, part of the explanation for the limited use of the preliminary rulings procedure by Finnish courts may simply be that the existing case law by the Court of Justice already offers enough insights for Finnish courts into the interpretation of EU law, thereby eliminating the need for a new preliminary ruling by the Court of Justice.

²² For details, see Ojanen (2005).

E. JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF ACTS OF PARLIAMENT UNDER SECTION 106 OF THE CONSTITUTION OF FINLAND OF 2000

Up until the late 1980s, there was little constitutional discussion as to when and how the judicial review of the constitutionality of the Acts of Parliament should be exercised. The dominant view was simply that this kind of judicial review was not allowed at all under the Constitution Act of 1919.

However, with the entry into force of the ECHR and the Treaty on the European Economic Area in 1995 the situation began changing, prompting a debate over the appropriate scope of judicial review. Over the course of the 1990s, doubts began to emerge over the viability of the absolute prohibition of judicial review of the *constitutionality* of Acts of Parliament. In the end, EU membership proved the final straw. By empowering *all* courts to review *all* Finnish law, including Acts of Parliament and even the Constitution of Finland, for compatibility with EU law, EU membership provided the decisive incentive to reconsider the prohibition stopping courts from examining the constitutionality of Acts of Parliament.

The outcome of this reconsideration was the introduction of concrete *ex post* review by courts under Section 106 of the new Constitution of Finland of 2000. Section 106, entitled “the primacy of the Constitution”, provides as follows:

If in a matter being tried by a court, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.

Section 106 of the Constitution acknowledges only a very limited role for courts in reviewing the constitutionality of Acts of Parliament. It is not intended to tilt the balance in the review of the constitutionality of Acts of Parliament from the Constitutional Committee toward the judiciary. Instead, the current constitutional premise is that the abstract *ex ante* review carried out by the Constitutional Law Committee of Parliament continues to be the primary mechanism for reviewing the constitutionality of legislation. The *travaux préparatoires* of Section 106 are very clear on this point.²³

Indeed, as the *travaux préparatoires* of Section 106 display, Section 106 is intended to amount to a form of weak judicial review which deliberately seeks to combine the abstract *ex ante* constitutional review of legislation by the Constitutional Law Committee of Parliament with the concrete *ex post* constitutional review by courts. In this model, the *ex ante* constitutional review by the Constitutional Law Committee is supposed to remain primary, whereas judicial review under Section 106 is basically designed to plug loopholes left in the abstract *ex ante* review of the constitutionality of bills by the Constitutional Law Committee, inasmuch as unprecedented constitutional problems may arise in applying the law by the courts in particular cases.

Moreover, Section 106 is clearly designed to apply in extreme cases only where no other judicial method of giving effect to the Constitution is able to resolve the tension between an

²³ See government proposal for the new Constitution HE 1/1998, 164. See also the Report by the Constitutional Law Committee on government proposal HE 1/1998, PeVM 10/1998, 31.

Act of Parliament and the Constitution. Indeed, it is explicitly emphasized in the *travaux préparatoires* of Section 106 that the primary method of giving effect to the Constitution remains to be the “constitution-oriented interpretation approach” in which courts construe Finnish law, including all Acts of Parliament, in accordance with the Constitution.

The criterion of an “evident conflict” is deliberately designated to guarantee the primacy of the constitutional review by the Constitutional Law Committee. The *travaux préparatoires* of Section 106 explicitly state that, as a rule, a court cannot establish the existence of an evident conflict between an Act of Parliament and the Constitution *if* the Constitutional Law Committee, in its *ex ante* review, has taken the view that the relevant Act of Parliament is in harmony with the Constitution. Of course, the requirement of an evident conflict also informs that courts should not apply Section 106 lightly and frequently, but only rarely, after a careful judicial analysis and against a backdrop of judicial self-restraint.

The new Constitution of Finland of 2000, including Section 106 on the primacy of the Constitution, entered into force on 1 March 2000. So far, there have been *four* cases involving the application of Section 106.²⁴ In addition, there are more cases involving judicial discussion and debate about the applicability of Section 106.²⁵ As courts also engage in judicial review when they uphold the constitutionality of laws and, accordingly, do not apply Section 106 of the Constitution, these cases must also be slotted into the consideration of the *de facto* relevance of Section 106 in everyday court practice.

Section 106 has already produced its own range of case law, and the application of Section 106 by courts has given rise to much academic discussion and criticism by constitutional law scholars.²⁶ The essence of this criticism is that the *de facto* application of Section 106 by courts appears to hinder the effective judicial enforcement of constitutional norms, notably those pertaining to constitutional rights. In particular, the two courts of final instance – the Supreme Court and the Supreme Administrative Court – have interpreted the requirement of “evident conflict” in Section 106 as requiring a strict judicial deference to the views of the Constitutional Law Committee of Parliament and the legislature in general. In addition, cases involving a “mere” conflict between the Constitution and a provision of an Act of Parliament appear to constitute a specific problem area. In such cases, the efficacy of the Constitution cannot be secured through the principle of the constitutional rights-oriented interpretation of an Act of Parliament, whereas the evident conflict criterion under Section 106 also remains unfilled.

One of the current problems relates to the high status enjoyed by the views of the Constitutional Law Committee in the Finnish constitutional system. This can, however, cause difficulties in at least two situations. On the one hand, there may be a high degree of political consensus in Parliament in general and in the Constitutional Law Committee in particular as

²⁴ See the decision of the Supreme Court KKO 2004:26; the decision of the Supreme Administrative Court 2008:25; the decision of the Insurance Court 6254:2005; and the decision of the Helsinki Administrative Court Helsingin HAO 09.10.2006T:06/1410/1. However, the last decision was quashed by the decision of the Supreme Administrative Court 2007:77.

²⁵ See the following decisions by the Supreme Court: KKO 2003:107, KKO 2004:62 and KKO 2006:71; and the following decisions of the Supreme Administrative Court: KHO 11.09.2001/2122, KHO 2005:43 and KHO 2007:77.

regards the necessity of legislation which *de facto* raises serious questions as regards its compatibility with constitutional rights and the Constitution in general. Given the deference of courts to the views of the Constitutional Law Committee, courts may simply accept the Committee's assurance that no constitutional problems pertain and *a fortiori* ignore the existence of an evident conflict between an Act of Parliament and the Constitution.

On the other hand, the high status of the views of the Constitutional Law Committee may invite problems as regards the effective observance of international human rights obligations binding upon Finland. Although the Committee tries to take notice of the case law of the European Court on Human Rights and other international monitoring bodies of human rights treaties, it may miss a relevant case. What is more, the European Court on Human Rights may very well adopt new case law *after* the review of legislation by the Constitutional Law Committee. As should be evident (at least) in the latter situation, a Finnish court cannot mechanically and passively defer to the views of the Constitutional Law Committee if they are in conflict with the subsequent case law of the European Court of Human Rights. Instead, courts should abide by the views of the European Court on Human Rights in such cases because otherwise their judgments would conflict with the ECHR.²⁷

Currently, a parliamentary committee is considering the necessity of a reform of the Constitution of Finland. Among various questions on the agenda is the issue of reforming Section 106, i.e., is whether the criterion of evident conflict should be removed. Although the legitimacy of the current practice of judicial review under Section 106 of the Constitution appears to be widely accepted by both political actors and constitutional law scholars, the extension of the scope of judicial review remains subject to controversy. In fact, there seems to be substantial disagreement as to when and how the power of judicial review should be exercised, and whether it should be exercised at all. It is difficult to forecast the outcome of the current debate over the proper scope and legitimacy of judicial review, but it does show that the role of courts in the Finnish political system has changed considerably from what it was about twenty years ago.

F. CONCLUSION

Post the late 1980s, the institution of judicial review in Finland has undergone several significant transformations. This dynamics has been due to the intricate interaction in which international human rights treaties, EU membership and certain domestic sources of dynamics, notably those owing to the shifts in the domestic constitutional and human rights culture, have contributed and reinforced their respective influences on judicial review and the role of courts in general.

²⁶ For an overview of this academic discussion, see Juha Lavapuro: "Perustuslain ilmeisyyskriteerin vaikutuksista oikeuskäytännössä" (2008) 4 *Lakimies* 582.

²⁷ See also Opinion on the Constitution of Finland adopted by the Venice Commission at its 74th plenary session (Venice, 14-15 March 2008), CDL-AD(2008)010, available at ([http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)010-e.asp](http://www.venice.coe.int/docs/2008/CDL-AD(2008)010-e.asp)) (visited 2 April 2009).

Today, the role of the judiciary within the Finnish constitutional-political system is very different indeed from what it was about twenty years ago raising the issue of the scope and legitimacy of the judicial review to a central place in the Finnish constitutional debate. Although the institution of judicial review has been accepted as an inevitable consequence of European integration and 1995 Constitutional Rights Reform, there appears to be substantial disagreement as to when and how the power of judicial review should be exercised. This debate is closely linked to such fundamental issues as the division of powers between the legislature and the judiciary and “politicization of adjudication” and “adjudication of politics”.²⁸ There are increasingly those who are raising the warning flag and, accordingly, are arguing against any extension of the scope of judicial review.

However, while the tendency has inevitably been toward a stronger role for the judiciary, the application of constitutional provisions, international human rights treaties and EU law by Finnish courts still appears to take place against a backdrop of judicial self-restraint. The *ex ante* review by the Constitutional Law Committee remains the primary mechanism for reviewing the constitutionality of legislation, whereas judicial review under Section 106 of the Constitution is clearly subordinate to the views of the Constitutional Law Committee in its abstract *ex ante* review of the constitutionality of legislation. The practice of courts under Section 106 also displays the considerable judicial restraint imposed by the courts upon themselves and, moreover, their wont to carefully confine their decisions to the application of constitutional norms in *concrete cases*. Similarly, the role of the judiciary still lies in applying human rights and EU law at the level of concrete court cases, without involving any general observations on the relationship between domestic law, on the one hand, and EU law or international human rights treaties, on the other hand.

As a result, it is submitted that neither the judicial protection of constitutional rights and human rights nor the application of EU law by courts have – at least so far – affected the division of powers between the democratically elected legislature and the judiciary to an unacceptable or problematic extent. In particular, as should be emphasized, democracy and the effective protection of constitutional rights and human rights cannot be seen as mutually exclusive or conflicting aims. Rather, democracy and the effective protection of constitutional and human rights must be construed as complementary in a modern state founded on the rule of law (*Rechtstaat*). Thus, any arrangement concerning the relationship between the democratically elected legislature and the judiciary should guarantee the appropriate observance of constitutional and human rights.

²⁸ For Finnish discussion on the role of the judiciary and the proper division of powers between the legislature and the judiciary see especially Kaarlo Tuori: *Oikeuden ratio ja voluntas* (WSOYpro: 2007) 249-275.

CONCEPTIONS OF DEMOCRACY AND JUDICIAL REVIEW

By PALLE SVENSSON*

Abstract: *The article compares a number of conceptions of democracy with regard to the role of judicial review in order to show the many different meanings associated with terms such as “majoritarian” and “constitutional” democracy. At least four categories of the relationship between democracy and judicial review are identified. In a first category are those conceptions of democracy that have no room for judicial review. Second, some conceptions of democracy recognize civil rights as necessary for a democracy to work, but refuse to make independent courts and judicial review a general recommendation. Third, other conceptions of democracy adopt judicial review by independent courts as a part of liberal or constitutional democracy. Finally, in a fourth category are conceptions of democracy that not only recommend judicial review of the constitutionality of legislation in relation to the civil rights, but argue for a more far-reaching judicial review.*

Key words: *Democracy, Constitutionalism, Judicial review.*

A. INTRODUCTION

In relation to democracy the role of judicial review is disputed. Whereas some authors treat judicial review, rule of law and constitutionalism as defining characteristics of democracy, some treat them as conditions for democracy and some don't mention them at all when defining democracy. In addition, the relationship between judicial review and democracy is further complicated by terminological ambiguities and incompatible distinctions. Academics in various disciplines often use the same terms while investing them with different conceptual meanings, likely cause confusion and avoidable disagreement. For instance, Ronald Dworkin, a distinguished professor of law, talks about majoritarian democracy and confronts it with constitutional democracy, while Arend Lijphart, a distinguished professor of political science, talks about majoritarian democracy and confronts it with consensus democracy. But do they mean the same thing when they talk about “majoritarian” democracy? Even within a given discipline, identical terms are sometimes applied with different meanings. For instance,

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¹ David Arter: *Democracy in Scandinavia. Consensual, majoritarian or mixed* (Manchester & New York: Manchester University Press 2006) 12–22.

in political science David Arter¹ gives quite a different understanding to “majoritarian” democracy than that promoted by Arend Lijphart over a number of years.²

The general purpose of this article is to clarify the relationship between democracy and judicial review and discuss the role of judicial review in various conceptions of democracy. More specifically, it is to explain how different meanings become associated with the terms “majoritarian” and “constitutional” democracy. As the literature is comprehensive and space limited, I can only deal with a few selected examples of conceptions of democracy. They were selected because they illustrate the main ways in which judicial review is related to democracy - not because they necessarily are the most widespread or the best elaborated conceptions of democracy. The selection was also made from a political science point of view rather than a legal or philosophical point of view. Whereas various conceptions of democracy are scrutinized, the concept of judicial review is taken for granted and defined in a narrow sense as the power of the courts to invalidate laws and executive actions as unconstitutional,³ or put differently, that courts can test legislation against their understanding of what the nation’s constitution requires and hold legislation invalid if it offends that understanding.⁴ The various conceptions of democracy are dealt with according to the role attributed to judicial review. First, theories with no or little place for judicial review are examined, followed by theories with successively wider roles for the judicial review.

B. JOSEPH A. SCHUMPETER AND COMPETITIVE ELITISM

An important representative of a conception of democracy in which the courts have no defining role at all is Joseph A. Schumpeter. According to him, the 18th-century philosophy of democracy can be expressed in this definition: “The democratic method is that institutional arrangement for arriving at political decisions which realizes the common good by making the people itself decide issues through the election of individuals who are to assemble in order to carry out its will.”⁵ Specifying what he calls the “classical democratic theory”, it is the people itself, he says, i.e., all citizens with the right of suffrage, that makes a choice between alternative policies through the election of political representatives, who, in turn, meet in order to carry out the people’s will. Thus, the selection of political leaders is clearly secondary to the primary function of the voters. The majority of voters decides political issues and itself takes the binding decisions.

Schumpeter criticizes the unrealistic assumptions underlying “the classical doctrine” and wants to give political leadership a much larger role than it allows for.

² Arend Lijphart: *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries* (New Haven & London: Yale University Press 1999).

³ Frank Bealey: *The Blackwell Dictionary of Political Science* (Oxford: Blackwell Publishers 1999) 174.

⁴ Ronald Dworkin: *Sovereign Virtue. The Theory and Practice of Equality* (Cambridge, Massachusetts: Harvard University Press 2000) 208.

⁵ Joseph A. Schumpeter: *Capitalism, Socialism and Democracy* (5. ed., London: George Allen & Unwin 1976) 250.

As the people, according to Schumpeter, by and large are constrained from participating in politics in a rational and independent way, he suggests changing the order of the two defining elements of the classical doctrine: (1) the decision of issues and (2) the election of leaders. While the classics had perceived the decision of issues as primary and the selection of leaders secondary, it is more realistic, Schumpeter argues, and also in line with the intentions of democracy to take the selection of leaders as the primary function of the voters and the popular decision of issues as the secondary. The primary function of the voters is to produce a government.⁶ In this way he arrives at a revised definition of democracy: "The democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."⁷

Among the advantages of this democratic revision, Schumpeter suggests, is its recognition of the need for leadership, something the classical view tends to neglect and which quite unrealistically gives the initiative to the common voters. It also highlights the competition between elites for the people's vote. Even if such competition may not be completely perfect, it is regulated by the electoral method - free competition for a free vote - and excludes other ways by which competing elites can acquire power (military coup or court intrigues).

Despite a fundamental difference between Schumpeter's two definitions, there is also a fundamental similarity. In both cases, Schumpeter perceives democracy as an institutional arrangement for arriving at political decisions - a means of decision-making.

Underlying these formulations Schumpeter is clearly relying on the assumption that democracy is but one of several conceivable political methods. The democratic method is not, however, a supreme end in itself.⁸ On the contrary, democracy has to be evaluated in relation to other, more superior ideals and interests such as freedom of expression, freedom of thought, justice etc.

Schumpeter's conception of democracy has been labeled "democratic elitism,"⁹ which makes sense because it points to the two central elements of the conceptualization. The democratic element requires leaders, at the end of their period in office, to submit to the judgment of the electorate. The elitist element involves that as long as they are in office there must be a considerable separation between the leaders and the led and the political leaders must have freedom of maneuver while in power. The difference from an authoritarian leadership is that democratic leadership is held accountable in an open and competitive election in which it has to submit to the will of the masses to achieve office or suffer replacement by another party or team of leaders.

To Schumpeter, the role of the people and the majority is to produce a government - not to decide issues - and he lists a number of factors deemed necessary for the democratic method to succeed. But it is remarkable that the courts per se and their independence are not among them.¹⁰ The closest Schumpeter comes to discussing courts is in requiring the existence of a well-trained bureaucracy which must be a power in its own right.

⁶ Schumpeter (1976) 273.

⁷ Schumpeter (1976) 269.

⁸ Schumpeter (1976) 242.

⁹ David Held: *Models of Democracy* (3.ed., Stanford: Stanford University Press 2006) 125-57.

¹⁰ Schumpeter (1976) 289- 296.

The basic conditions for a democratic system, as defined by democratic elitists such as Schumpeter, are the institutions of two or more competing parties and free and open elections. The activities of courts, pressure groups and voters in the interval between elections are excluded. He does not directly talk about majoritarian democracy, but it is evident from his argument that the government has to be handed over to the political leaders of the political party commanding more popular support than its rivals. Whether the political leaders really represent a majority of the people is less important, as Schumpeter's conception of democracy does not require an electoral system of proportional representation.¹¹

C. SAMUEL P. HUNTINGTON AND ELECTORAL DEMOCRACY

Schumpeter's conception of democracy has been dealt with extensively because it gives no role to judicial review. More recently, addressing democratization in the late twentieth century, Samuel P. Huntington employs what he calls a minimal definition of democracy:

Following in the Schumpeterian tradition, this study defines a twentieth-century political system as democratic to the extent that its most powerful collective decision makers are selected through fair, honest, and periodic elections in which candidates freely compete for votes and in which virtually all the adult population is eligible to vote.¹²

Although Huntington agrees with Schumpeter on viewing the selection of political leaders through competitive elections by the people they govern as the central procedure of democracy, it is remarkable that he, unlike Schumpeter, includes universal suffrage in his conception of democracy. In fact, after discussing various reasons for withholding the right of suffrage Schumpeter asks, "Must we not leave it to every *populus* to define himself?"¹³

Furthermore, Huntington adds, democracy "also implies the existence of those civil and political freedoms to speak, publish, assemble, and organize that are necessary to political debate and the conduct of electoral campaigns."¹⁴ But he has nothing to say about how these political freedoms should be protected and what role the courts should play in this respect. Thus, judicial review is neither an element of democracy nor a condition for it.

Huntington conceives democracy as a form of government which should not be defined by purpose or outcome. Democracy is one public virtue, but not the only one:

Elections, open, free, and fair are the essence of democracy, the inescapable *sine qua non*. Governments produced by elections may be inefficient, corrupt, shortsighted, irresponsible, dominated by special interests, and incapable of adopting policies demanded by the

¹¹ Schumpeter (1976) 272f.

¹² Samuel P. Huntington: *The Third Wave. Democratization in the Late Twentieth Century* (Norman & London: University of Oklahoma Press 1991) 7.

¹³ Schumpeter (1976) 245. Robert A. Dahl: *Democracy and Its Critics* (New Haven: Yale University Press 1989) 121.

¹⁴ Huntington (1991) 7.

public good. These qualities may make such governments undesirable but they do not make them undemocratic.¹⁵

The conception of democracy as electoral democracy has been criticized for committing what has been called the “fallacy of electoralism”, because it ignores the extent to which multiparty elections exclude groups of the population, such as the poor and ethnic minorities, from exercising their democratic rights and defending their interests. It may further leave significant powers holders, such as the military and the bureaucracy, unaccountable to the electorate.¹⁶

D. ROBERT A. DAHL AND POLYARCHY

Robert A. Dahl holds that a complete democracy that embodies the basic principles of popular sovereignty and political equality does not exist anywhere at the level of nation-states.¹⁷ What we have in the real world, and what in daily language is called “democracy,” is only an approximation of democracy. In order to separate this form of political regime - which approaches the democratic ideal without realizing it completely - Dahl introduces the idea of the “polyarchy,” which he defines in *Polyarchy* (1971) as a system of government based on the political authorities’ responsiveness to the preferences of its citizens. In order to maintain a system of government continuously responsive towards the demands and preferences of the citizens, all citizens must have opportunities (1) to formulate their preferences, (2) to signify their preferences to their fellow citizens and towards the government by individual and collective action, and (3) to have their preferences weighed equally in the political decision-making process, i.e., without any discrimination because of the content or source of the preference.¹⁸

More concretely, Dahl goes through a number of conditions summarized in two dimensions. The first dimension, liberalization, regards the possibility of opposition, i.e., to what extent it is possible to compete for political power. Dahl, in this context, deals with the degree of public contestation which he connects with constitutional rights as freedom of speech, freedom of assembly and freedom of association. The second dimension, inclusiveness, regards the extent of the right to participate in politics, i.e., how many are involved in the political decision-making process. Put differently, it can be taken as the degree of political participation, partly including the extent of the suffrage and partly the actual turnout in elections and other forms of involvement in the political decision-making process.

But neither the securing of political constitutional rights and the possibility of opposition, on the one hand, nor the extension of suffrage, on the other, is synonymous with democracy or

¹⁵ Huntington (1991) 9f.

¹⁶ Larry Diamond, *Larry: Developing Democracy. Toward Consolidation* (Baltimore & London: The John Hopkins University Press 1999) 9.

¹⁷ Robert A. Dahl: *Democracy and Its Critics* (New Haven: Yale University Press 1989) 117 and 340.

¹⁸ Robert A. Dahl: *Polyarchy. Participation and Opposition* (New Haven: Yale University Press 1971) 1f.

polyarchy. More specifically, seven institutions, taken as a whole, define this type of regime which is historically unique.¹⁹

- Elected officials. Control over government decisions about policy is constitutionally vested in elected officials.
- Free and fair elections. Elected officials are chosen in frequent and fair conducted elections in which coercion is absent or at least comparatively uncommon.
- Inclusive suffrage. Practically all adults have the right to vote in the elections of officials.
- Right to run for office. Practically all adults have the right to run for elective offices in the government, though age limits may be higher for holding office than for the suffrage.
- Freedom of expression. Citizens have a right to express themselves on political matters broadly defined, including criticisms of officials, the government, the regime, the socio-economic order, and the prevailing ideology without danger of severe punishment.
- Alternative information. Citizens have a right to seek out alternative sources of information. Moreover, alternative sources of information exist and are protected by law.
- Associational autonomy. To achieve the various rights, including those rights listed above, citizens also have a right to form relatively independent associations or organizations, including independent political parties and interest groups.

For Dahl, these statements characterize actual, not merely nominal rights, institutions and processes. In fact, the countries of the world may be assigned approximate rankings according to the extent to which each of these institutions is present in a realistic sense. Consequently the institutions can serve as criteria for deciding which countries are governed by polyarchy today - or were in earlier times.

The institutions of polyarchy are necessary to democracy on a large scale, such as in the modern nation-state, but they are not sufficient for realizing the democratic process.²⁰ Dahl does not, however, consider separation of powers and autonomous power of other governmental institutions, such as an independent judiciary and the rule of law, as essential elements of polyarchy. In fact, they violate the first tenet of polyarchy - control over government decisions about policy being constitutionally vested in *elected* officials. It makes more sense, according to Dahl, to see a judiciary with final authority over certain substantive and procedural protections as a quasi guardianship.²¹ The U.S. Supreme Court has not, he contends, always stood as a bulwark against violations of fundamental rights, nor does the American experience indicate that employing quasi guardians to protect fundamental rights from invasion by national legislatures provides a promising alternative to democratic processes - "except perhaps in the short run."²²

It would be misleading to suggest there is one universally best solution to the problem of how best to protect fundamental rights and interests in a polyarchy, Dahl tells us: "In the absence of a universally best solution, specific solutions need to be adapted to the historical conditions

¹⁹ Dahl (1989) 221.

²⁰ Dahl (1989) 221f.

²¹ Dahl (1989) 188.

²² Dahl (1989) 190.

and experiences, political culture, and the concrete political institutions of a particular country.”²³ Thus, for Dahl judicial review is neither integral to democracy nor polyarchy, and if judicial review is adopted it can only be made consistent with the democratic process “if the authority of the judicial guardians is sufficiently restricted.”²⁴ Thus, a heavy burden of proof is required before the democratic process is to be displayed by quasi guardianship.²⁵

Dahl’s conception of democracy is not a simple majoritarian democracy; as he admits, majority rule is imperfect – perhaps indeed highly imperfect – nor can we move from this proposition “directly to the conclusion that it should be replaced by an alternative rule for making collective decision,” because alternatives to majority rule are also deeply flawed.²⁶ However, under different national conditions, the democratic process may be carried out under different rules of making collective decisions and various institutions may be applied in polyarchies.²⁷

E. LARRY DIAMOND AND LIBERAL DEMOCRACY

Larry Diamond’s *Developing Democracy. Toward Consolidation* (1999) acknowledges Dahl’s elaboration of the conception of electoral democracy, but goes further than Dahl by pointing to the importance of civil liberty.²⁸ Diamond makes a distinction between a minimalist conception of *electoral* democracy, which is “a civilian, constitutional system in which the legislative and chief executive offices are filled through regular, competitive, multiparty elections with universal suffrage” and *liberal* democracy, which in addition requires (1) the absence of reserved domains of power for the military or other actors not accountable to the electorate; (2) the horizontal accountability of officeholders to one another; “this constrains executive power and so helps protect constitutionalism, legality, and the deliberative process”; (3) the extensive provisions for political and civic pluralism as well as for individual and group freedoms.”²⁹ Whereas Dahl seems to agree fully on (1) and (3) he does not include (2) with the separation of powers and the autonomous power of other governmental institutions, such as an independent judiciary and the rule of law as defining characteristics of polyarchy. Diamond, however, is at pains to show how, in liberal democracies, “the executive power is constrained, constitutionally and in fact, by the autonomous power of other government institutions (such as an independent judiciary, parliament, and other mechanism of horizontal accountability).”³⁰ In liberal democracies, he continues, “individual and group liberties are

²³ Dahl (1989) 192.

²⁴ Dahl (1989) 190.

²⁵ Dahl (1989) 192.

²⁶ Dahl (1989) 152.

²⁷ Dahl (1989) 162.

²⁸ Larry Diamond: *Developing Democracy. Toward Consolidation* (Baltimore & London: The John Hopkins University Press 1999) 8.

²⁹ Diamond (1999) 10ff.

³⁰ Diamond (1999) 11.

effectively protected by an independent, nondiscriminatory judiciary, whose decisions are enforced and respected by other centers of power” and “the rule of law protects citizens from unjustified detention, exile, terror, torture, and undue interference in their personal lives not only by the state but also by organized nonstate or antistate forces.”³¹

In sum, Diamond requires a liberal democracy to have a constitution that is supreme. Quoting Juan Linz, liberal democracies have to be constitutional democracies: “A constitutional state is a state of justice, a *Rechtstaat* in the German, in which the state acts predictably, in accordance with laws, and the courts enforce restrictions on popularly elected governments when they violate the laws or the constitutional rules.”³² In short, judicial review is an essential aspect of a liberal democracy.

F. AREND LIJPHART ON MAJORITARIAN AND CONSENSUS DEMOCRACY

Dahl and Diamond agree that various institutions may be applied in polyarchies and liberal democracies. In *Patterns of Democracy* (1999), Arend Lijphart outlined two basic types or models of democracy, “majoritarian” and “consensus” democracy. If we define democracy as “government by and for the people,” he suggests, it raises a fundamental question: who will do the governing and to whose interests should the government be responsive? One answer is the majority of the people – and forms the basis for the majoritarian model. The alternative answer is as many people as possible, which forms the basis for the consensus model. The latter, he says, “does not differ from the majoritarian model in accepting that majority rule is better than minority rule, but it accepts majority rule only as a minimum requirement: instead of being satisfied with narrow decision-making majorities, it seeks to maximize the size of these majorities.”³³ The institutions and rules of consensus democracy aim at broad participation in government and at broad agreement on the policies. Whereas the majoritarian model concentrates political power in the hands of a majority – and often in a mere plurality – the consensus model shares and disperses political power in various ways.

Lijphart defines the two models in relation to two dimensions – an executive-parties and a federal-unitary dimension – and ten differences with regard to institutions and rules – five for each of the two dimensions. On the basis of national characteristics, countries are placed at either end of a continuum or in between.

Enumerating the difference between majoritarian and consensus democracy on the federal-unitary dimension, he says, “systems in which legislatures have the final word on the constitutionality of their own legislation versus systems in which laws are subject to a judicial review of their constitutionality by supreme or constitutional courts.”³⁴ Under the majoritar-

³¹ Diamond (1999) 12.

³² Diamond (1999) 12 with reference to Juan Linz: “Democracy Today: An Agenda for Students of Democracy” (1997) 20 *Scandinavian Political Studies* 120f.

³³ Arend Lijphart: *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries* (New Haven & London: Yale University Press 1999) 2.

³⁴ Arend Lijphart: *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries* (New Haven & London: Yale University Press 1999) 4.

ian model - or Westminster model in the British version - there is no judicial review, because there is no written constitutional document with the status of a higher law against which the courts can test the constitutionality of regular legislation. "With regard to both changing and interpreting the constitution, therefore, Parliament – that is, the parliamentary majority – can be said to be the ultimate or sovereign authority."³⁵

Whereas the actual and historical situation with regard to judicial review varies in consensus democracies such as Switzerland and Belgium, a key European Union institution, the European Court of Justice, Lijphart contends "has the right of judicial review and can declare both EU laws and national laws unconstitutional if they violate the various EU treaties."³⁶ The Court's approach to its judicial tasks is "creative and activist." In other consensus democracies, such as the Scandinavian countries',³⁷ judicial review can be seen as one of the constraints on majoritarian democracy and the supremacy of parliament and as one of the structures of conciliation and arbitration, but it is neither strong nor creative nor activist. There are no constitutional courts in the Scandinavian countries and there are no (Denmark) or only weak (Norway and Sweden) provisions in the constitutional texts for judicial review, which is mainly established as a constitutional practice.

Lijphart endorses Dahl's conception of democracy as polyarchy.³⁸ His majoritarian model of democracy echoes Schumpeter's and Huntington's electoral democracies on the executive-party dimension with the concentration of power in a single-party majority cabinet, a dominant executive power, two-party system, majoritarian electoral system and competition between interest groups. The only differences, and they are minor, are that Schumpeter and Huntington do not specify the number of political parties and find no place for interest groups in their conceptions of democracy. Lijphart's consensus model of democracy shares a number of characteristics with, but is also broader than Diamond's liberal or constitutional democracy. Main similarities are executive power-sharing, executive-legislative balance of power, multiparty system and proportional representation on the first, executive-parties, dimension, and written constitution, judicial review and independent central bank on the second, federal-unitary, dimension. However, Lijphart's conception of consensus democracy is broader than Diamond's liberal and constitutional democracy because it includes a corporatist interest group system on the first dimension and a federal and decentralized government and bicameral parliament on the second dimension.

Whereas the political scientists dealt with in this article disagree on the extent to which they see judicial review as integral to democracy, in general they agree that courts should not have a wider role than protecting individual rights and constitutional guarantees for democracy. Some lawyers and political philosophers, however, argue for a wider role of courts and for a broader conception of judicial review. Ronald Dworkin is a prominent representative of this position.

³⁵ Lijphart (1999) 19.

³⁶ Lijphart (1999) 41.

³⁷ Lijphart (1999) 250.

³⁸ Lijphart (1999) 48f.

G. RONALD DWORKIN ON MAJORITARIAN AND CONSTITUTIONAL DEMOCRACY

In *Freedom's Law. The Moral Reading of the American Constitution* (1996), Ronald Dworkin states that while democracy means government by the people, political theorists have yet to agree on a definition. Beneath arguments about democracy lies a dispute about the fundamental value of democracy, i.e., whether we should accept or reject what Dworkin terms the majoritarian premise.³⁹ The attitude towards the majoritarian premise forms the basis of his distinction between two conceptions of democracy: majoritarian and constitutional. The first accepts and the second rejects the majoritarian premise.⁴⁰

The majoritarian premise involves - according to Dworkin - "that political procedures should be designed so that, at least on important matters, the decision that is reached is the decision that a majority or plurality of citizens favors, or would favor if it had adequate information."⁴¹ In a majoritarian conception of democracy laws are passed in accordance with procedural requirements that ensure majority rule: "political decisions are made in accordance with the votes or wishes of some function - a majority or plurality - of individual citizens."⁴² Dworkin has also formulated majoritarian democracy as a *detached* conception of democracy: "It insists that we judge the fairness or democratic character of a political process by looking to features of that process alone, asking only whether it distributes political power in an equal way, not what results it promises to produce."⁴³ Thus, in the majoritarian or detached conception of democracy majority rule is the nerve of democracy and "any failure in majority rule is undemocratic, whether or not it can be justified by appeal to some principle that overrides democracy in some circumstances."⁴⁴

In contrast, the constitutional conception of democracy rejects the majority premise. Democracy does not simply mean majority rule, but only *legitimate* majority rule: mere majoritarianism does not constitute democracy unless further conditions are met.⁴⁵ The defining aim of constitutional democracy is "that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect."⁴⁶ Democracy in this sense means that government is subject to conditions of equal status for all citizens, which involves moral membership in a political community: "A political community cannot count anyone as a

³⁹ Ronald Dworkin: *Freedom's Law. The Moral Reading of the American Constitution* (Cambridge, Massachusetts: Harvard University Press 1996) 15.

⁴⁰ Dworkin (1996) 20.

⁴¹ Dworkin (1996) 15f.

⁴² Dworkin (1996) 20.

⁴³ Ronald Dworkin: *Sovereign Virtue. The Theory and Practice of Equality* (Cambridge, Massachusetts: Harvard University Press 2000) 186.

⁴⁴ Dworkin (2000) 189.

⁴⁵ Dworkin (1996).

⁴⁶ Dworkin (1996) 17.

moral member unless it gives that person a *part* in any collective decision, a *stake* in it, and *independence* from it.”⁴⁷

Dworkin’s principle of participation not only requires a system of universal suffrage, effective elections and representation, but also basic political liberties such as freedom of speech, freedom of assembly etc. And these structural provisions must be constitutional, i.e. immune to change by a simple majority vote.

His principle of stake makes democracy more than a mere system of collective decision-making; it exists for a purpose, namely an equal concern for the interests of all members of the community, and in particular a concern for the needs and prospects of its minorities.⁴⁸ He talks about a *dependent* conception of democracy, because it supposes that the best form of democracy is “whatever form is most likely to produce the substantive decisions and results that treat all members of the community with equal concern.”⁴⁹ Whereas the majoritarian or detached conception of democracy only supplies an input test of democracy - that it is essentially a matter of equal distribution of power over political decisions - the constitutional or dependent conception of democracy supplies an output test - that it is essentially a set of devices for producing the right results.

Finally, under Dworkin’s principle of independence - of moral independence - for a genuine democracy to exist, the political community must be a community of independent moral agents: “It must not dictate what its citizens think about matters of political or moral or ethical judgment, but must, on the contrary provide circumstances that encourage them to arrive at beliefs on these matters through their own reflective and finally individual conviction.”⁵⁰ In short, there is a need for constitutional guarantees not only for freedom of speech, association and assembly, but also for tolerance of unpopular views.

A constitutional democracy thus has established individual legal rights that the majority – among the voters or in parliament – does not have the power to override.

When it comes to the role of courts and judicial review in the constitutional or dependent conception of democracy, Dworkin distinguishes between choice-sensitive and choice-insensitive issues. “Choice-sensitive issues are those whose correct solution, as a matter of justice, depends on the character and distribution of preferences within the political community.” They are issues of policy. On choice-insensitive issues the right decision does not depend in any substantial way on how many people want or approve of the decision. These are issues of principle.⁵¹ Dworkin concludes his discussion of judicial review with a warning: “it would corrupt rather than promote accuracy if a court enforcing judicial review were to set aside choice-sensitive decisions legislatures make,” but that accuracy would be enhanced “when a court reviews certain choice-insensitive decisions of a legislature, namely those that reject putative rights against majority decision.”⁵²

⁴⁷ Dworkin (1996) 24, original italics.

⁴⁸ Dworkin (1996) 25.

⁴⁹ Dworkin (2000) 186.

⁵⁰ Dworkin (1996) 26.

⁵¹ Dworkin (2000) 204.

⁵² Dworkin (2000) 209.

Thus, Dworkin finds constitutionalism to be an improvement of democracy as long as, but only as long as, its jurisdiction is limited to choice-insensitive issues of principle.⁵³ He believes that adding a process “that is institutionally structured as a debate over principle rather than a contest over power” is desirable and counts as a strong reason for allowing judicial interpretation of the constitution.⁵⁴

Comparing Dworkin’s majoritarian democracy with the conceptions of democracy presented in this article is not as straightforward as it may seem. Dworkin’s and Lijphart’s majoritarian models of democracy look similar because they both use similar terminology and set value by government in accordance with the majority’s wishes and rejection of judicial review. However, Lijphart’s model is much more detailed than Dworkin’s, with the concentration of power, in particular the executive power, as a defining characteristic. Although Lijphart talks about the majority of the people he is mostly concerned about the various ways in which governmental institutions are organized and the majority he speaks of is more of a parliamentary majority than a popular majority. In contrast, Dworkin sees majority rule ensured when political decisions are made in accordance with the votes a majority or plurality of individual citizens.

As policies in Dworkin’s majoritarian democracy are decided by popular majorities it may have more in common with Schumpeter’s classical democracy, democracy being an institutional arrangement for arriving at political decisions and realizes the common good by making the people itself decide issues through the election of individuals who assemble in order to carry out its will. No political scientist today endorses this theoretical construction nor counts it as an accurate description of actual democracies or polyarchies, and only a few, if any, see it as a normative ideal. Many, undoubtedly, favor the increased participation, which is implied, but virtually none – following Schumpeter strictly – the neglect of civil liberties.

Dworkin’s constitutional democracy, while it differs from Lijphart’s consensus democracy quite considerably, seems to be similar to Diamond’s liberal democracy which Diamond also calls a constitutional democracy at one point. Both concepts cover a written constitution, independent courts and judicial review of the constitutionality of legislation. Nevertheless, Dworkin argues for a wider judicial review than Diamond. Whereas the latter holds that the courts shall protect the political rights that are necessary for a democracy and personal human rights, the former argues for the courts to do a moral reading of constitutional principles.

H. CONCLUSIONS

The lesson to be learned from this brief overview of a number of conceptions of democracy and their relationship to judicial review is that it is too simplistic to distinguish, as Dworkin does, between majoritarian and constitutional democracy. At least four main categories on the relationship can be identified.

First, one conception of democracy has no room for judicial review either because civil rights are not mentioned at all or only briefly as a partial or independent precondition for

⁵³ Dworkin (2000) 209.

⁵⁴ Dworkin (1996) 11.

democracy. Schumpeter, Huntington and Diamond's electoral democracy belong to this category. A number of political scientists recognize the necessity of civil rights such as freedom of speech, association and assembly for a democracy to work. However, they disagree on the extent to which such rights and freedoms should be protected by a written constitution and by judicial review conducted by independent courts.

A second category comprises those who, like Dahl, refuse to make independent courts and judicial review a general recommendation and argue for the protection of civil rights to be organized according to national conditions, historical circumstances etc.

In a third category fall those political scientists and theorists who adopt judicial review by independent courts as a part of a liberal or constitutional democracy. Diamond obviously belongs to this category, as does Lijphart's consensus democracy.

Finally, in a fourth category, we find theorists such as Dworkin who not only recommend judicial review of the constitutionality of legislation in relation to the civil rights as essential to democracy, but argue for a more far-reaching judicial review. Although Dworkin does set limits to judicial review, that the courts should take on a moral reading of the constitution in order to commit the political authorities to treating all citizens as having equal moral and political status and to treating all citizens with equal concern and respect, goes beyond what political scientists endorsing judicial review, such as Diamond, support.

Dworkin's conception of majoritarian democracy in a strict sense covers only what Schumpeter calls "classical democracy", but in a broader sense both the first and the second of the categories mentioned above, and perhaps even the third. What some political scientists and theorists, including Diamond, call constitutional democracy, falls considerably short of what Dworkin recommends under that label. Dworkin wants to give supreme courts a kind of political mission, similar to that of the European Court of Justice - to promote European integration - and that of the mission of the European Court of Human Rights - to promote protection of human rights.

THE CONCEPTION OF “NORDIC DEMOCRACY” AND EUROPEAN JUDICIAL INTEGRATION

By UFFE JAKOBSEN*

Abstract: *The EU scepticism in the Nordic countries is doubtlessly related to conceptions of democracy. However, the hypothesis of this article is that the EU scepticism and scepticism towards judicial review in the EU are particularly generated by the distinction between the national and the supranational rather than the distinction between the judicial and the legislative/executive powers. The article maps three narratives on democracy – a narrative on democracy as “Nordic democracy, on democracy as “separation of powers” and on democracy as “dialogue” – and analyzes their inferences for the desirability and practicability of European integration and judicial review in the EU.*

Keywords: *conceptual history, narratives, democracy, democratization, EU politics, European Union (EU), European integration, judicial review.*

A. INTRODUCTION

EU scepticism is, of course, not a Nordic specialty but reluctance towards European integration in the Nordic countries is doubtlessly more than elsewhere connected to ideas on democracy. The scepticism has traditionally been directed towards democracy in the EU in general, but recently scepticism towards judicial review in the EU has been particularly salient in the public debate due to actual case rulings in the European Court of Justice with relations to the Nordic countries (e.g. the Viking case, the Laval case and the Metock case). The concern of democracy at the national level vs. democracy at a supranational level is not only about the empirical practicability but also the normative desirability of democracy.¹ Whether democracy is desirable and practicable in the EU depends, of course, on the conception of democracy in question. If conceptions of democracy are seen on a spectrum of conceptions from, say, ‘democracy as rule of law’ to ‘democracy as form of life’,² the closer conceptions of democracy are to ‘democracy as form of life’, the more difficult it is to transform democracy to the

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¹ D. Beetham: “Liberal Democracy and the Limits of Democratization” (1992) 40 *Political Studies* (special issue 1) 40–53, 40.

² U. Jakobsen: “Demokratisering – begreber, teorier og processer”, in U. Jakobsen and M. Kelstrup (eds), *Demokrati og demokratisering: Begreber og teorier* (København: Forlaget Politiske Studier 1999), 138–218, 153–177.

supranational level. If democracy is conceived of as ‘rule of law’, or as participation in general elections, democracy can more easily be transformed from the national to the supranational level than when democracy is conceived of as a form of life, or as responsiveness of the governing to the governed. This concern was voiced early in the debate on the applicability of democracy to the supranational level e.g. in the Danish folk high school movement when it was underlined that actual experience of democracy belonged to the national sphere, as well as the local and even the private sphere, but not – so far – to the international sphere.³ Also Danish official conceptions of democracy tend to see its history, contents and forms as specific national or “Danish”.⁴

In analyzing the relations between conceptions of democracy and conceptions of European integration and judicial review, the hypothesis of this paper is that resentments towards judicial review in the EU are generated by the distinction between the national and the supranational rather than the distinction between the judicial and the legislative/executive powers.

The EU’s democracies have found their ways of balancing governance at the national level with supranational cooperation at the EU level, however, not without problems. The reason why is that national and supranational democracy differs in practical terms. For instance, if democracy is “measured by the closeness, responsiveness, representativeness, and accountability of the governors to the governed” in the EU or in any integrated polity, the level of democracy will be lower than in the EU member states or in any non-integrated polity, since voters at the member state level will have a “controlling influence” over actual policies; hence, the “the integrated polity will not be undemocratic but it will be, in terms of the ability of citizens to influence policies affecting them, less democratic”.⁵ In brief, a sufficient majority of voters would be able to outvote an incumbent government and exercise a controlling influence over policies at the national level in the EU. At the EU level, however, governors are not accountable to governed and could not be outvoted in the same way. Again, the question whether democracy is possible in the EU, as seen from the perspectives of different conceptions of democracy in the Nordic countries, depends on the nature of the conception of democracy in question, its depth and its scope. Arguably, the job for democracy at the EU level is easier from the perspective of a ‘constitutional democracy’ than from the perspective of a ‘partnership democracy’.⁶

³ Democracy is “An idea, a way of life, practised first in the confines of one’s own private life among family and neighbours, then in relation to one’s fellow countrymen and finally extending the compass to other nations – though at this latter point, the world has yet to see much of democracy.” See Hal Koch: *Hvad er demokrati?* (København: Gyldendalske Boghandel/Nordisk Forlag 1945) 13.

⁴ At the 100th anniversary of the Danish constitution the social-democratic prime minister stressed the close constellation of democracy and national community: “We, in this country, are content because our form of government allows us, as free women and men, to say: Denmark, that’s you and me, that’s us! The land of our fathers, that’s ours!” See Rigsdagens Bureau: *Grundlovsjubilæet den 5. Juni 1949. Taler m.v.* (København 1949) 49.

⁵ J. Weiler: *The constitution of Europe: ‘Do the new clothes have an emperor or?’ and other essays on European integration* (Cambridge: Cambridge University Press 1999) 81–82.

⁶ R. Dworkin: *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2005).

This paper, therefore, maps conceptions of democracy and analyses the relation between conceptions of democracy and European integration focusing on judicial review. While the actual presence of a ‘Nordic model of democracy’ is contested,⁷ the idea of a “Nordic democracy” was actually launched in the years around the Second World War and later in the post-Second World War period in the Nordic countries and abroad.⁸ In the next section the paper maps the different contributions to what is here termed a ‘narrative’ on a specific “Nordic democracy” in order to analyse in what ways this relates to conceptions of European integration and judicial review. Since democracy is a contested concept, this narrative does not stand alone, and in the following sections the paper also maps two prominent competing narratives on democracy and analyses their relations to European integration and judicial review. (This is, first, the official narrative of the Danish parliament (*Folketinget*) on ‘democracy as separation of powers’ as it is found in official publications by the *Folketinget* and at its website.⁹ And, second, the narrative of ‘democracy as dialogue’ initiated by Hal Koch¹⁰ as a prominent representative of the folk high school movement. These narratives are still distinguishable in Danish public debates, in information material from authorities and semi-official institutions, in textbooks used in public schools, in political science curricula for university introductory courses etc. These narratives all contribute to the understanding of the attitude towards European integration and judicial review by representing different constellations of democracy and national identity formations, homogenous societies, egalitarian ideologies, anti-hierarchical practices and participatory politics oriented towards inclusiveness and compromise in policy decisions – in short the “cooperative democracy” (“det samarbejdende folkestyre”) – in the Nordic countries in the post-Second World War period.

Thus, the object of analysis is not political systems or political institutions as such but *conceptions* of democracy. The analysis is situated at the discursive level of society in order to deploy the interrelations between concepts and discourses on one hand and political behaviour and institutions on the other. Therefore, irrespectively of the actual presence of a ‘Nordic model of democracy’, the paper focuses on the very conception of “Nordic democracy” as it is depicted in public debates. Conceptions as an object of analysis is considered important in itself, since political conceptions must be seen as co-determining political actions, and important as a means for understanding political developments in society by understanding

⁷ P. Svensson: *A Scandinavian Model of Democracy?* (paper for NOPSAs Congress, Tromsø 2008); and L. Mjøset: “The Nordic Model Never Existed, but Does it Have a Future?” (1992) 4 *Scandinavian Studies*, no. 4, 652–671.

⁸ H. Koch and A. Ross (eds): *Nordisk Demokrati* (København: Westermanns Forlag 1949); J.A. Lauwerys (ed.): *Scandinavian Democracy: Development of Democratic Thought and Institutions in Denmark, Norway and Sweden* (Copenhagen: The Danish Institute, The Norwegian Office of Cultural Relations and The Swedish Institute in cooperation with The American Scandinavian Foundation 1958); and E. Allardt et al. (eds.): *Nordic Democracy: Ideas, Issues, and Institutions in Politics, Economy, Education, Social and Cultural Affairs of Denmark, Finland, Iceland, Norway, and Sweden* (Copenhagen: Det Danske Selskab 1981).

⁹ www.folketinget.dk.

¹⁰ H. Koch: *Hvad er demokrati?* (København: Gyldendalske Boghandel/Nordisk Forlag 1945).

actual windows of opportunity and strategic possibilities of concrete actors in concrete societal contexts. Hence, the paper will map the conceptual history of “Nordic democracy” and analyze purposes of and strategies behind three selected narratives of democracy. The underlying thesis is that “ideas matter” for politics and that the study of ideational change is an important part of the study of politics in general including development of democracies.¹¹

In stead of strictly theoretical explanations of the development of democracy, or pure fact-oriented accounts of structures of political systems, this paper maps the usages of the concept of democracy in public discourse. Since theories on the development of democracy are contested, and no general agreement on their explanatory power exists, a combination of different theories will do better in some cases, while in other cases narratives come close to an adequate account on e.g. comparative democratization in Scandinavia.¹² Rather than looking for ‘necessary conditions’ for the development of different models of democracy,¹³ democracy should be understood as the outcome of political struggles¹⁴ and, hence, the development of democracy should be analyzed from the perspective that there is “no a priori reasons to believe that only one set of circumstances produces and sustains democracy”.¹⁵ Narratives are of a different kind and have different purposes than theories since they are key to the understanding of conceptions, attitudes and motives of the actual political actors. By ‘narrative’ is meant both a specific speech act, since these “story tellings” often also have intended purposes, and a specific discourse type (“grand stories” or “collective memory construction”) that are not necessarily fact-oriented but, anyway, deal with causally related sequences of events.¹⁶ Telling, or rather re-telling, the stories of the developments of democracy in particular contexts often involves precisely a redefinition of ‘democracy’ and, hence, a rupture with conventional definitions, ways of thinking or ways of practicing democracy.

Arguably, being a, if not *the*, key concept of the twentieth century, the complexity of ‘democracy’ is due to the fact that it does different sorts of work – within normative theory,

¹¹ D. Rueschemeyer: “How Ideas Matter. The Sequencing of Different Factors”, in Goodin, R.E. and Tilly, Charles (eds), *The Oxford Handbook of Contextual Political Analysis* (Oxford: Oxford University Press 2007).

¹² T. Knudsen and U. Jakobsen: *The Danish Path to Democracy* (Marburg: 2nd ECPR General Conference, Panel on “Comparative Democratization in Scandinavia, 1848-1921” 2003); T. Nordby: *Nation-Building and Democratization in Scandinavia: The Case of Norway* (Marburg: 2nd ECPR General Conference, Panel on “Comparative Democratization in Scandinavia, 1848-1921” 2003); and R. Premfors: *Democratization in Scandinavia: The Case of Sweden* (Marburg: 2nd ECPR General Conference, Panel on “Comparative Democratization in Scandinavia, 1848-1921” 2003).

¹³ D. Held: *Models of democracy* (3rd ed., Cambridge: Polity Press 2006).

¹⁴ A. Przeworski: “Democracy as a Contingent Outcome of Conflicts”, in J. Elster and R. Slagstad (eds) *Constitutionalism and Democracy* (Cambridge: Cambridge University Press Cambridge 1988).

¹⁵ C. Tilly: “Democracy is a lake”, in: G.A. Andrews & H. Chapman (eds): *The social construction of democracy, 1870-1990*, (Cambridge: Cambridge University Press 1995) 365–387, 382; and cf. Tilly: *Democracy* (Cambridge: Cambridge University Press 2007).

¹⁶ M. Hyvärinen: “Towards a Conceptual History of Narrative”, in Hyvärinen, M. et al. (eds): *The traveling Concept of Narrative* (Helsinki: Collegium 2006).

empirical analysis and political rhetoric¹⁷ – and are therefore used in different meanings by different people as is the case with contested concepts.¹⁸ However, in an operational perspective, it is important not to confuse conceptual issues and normative and empirical issues: “Disputes about the meaning of democracy which purport to be conceptual disagreements are generally disputes about how much democracy is either desirable or practicable; that is about where the trade-off should come between democratic and other values, or at what point along the spectrum a given set of institutional arrangements for realizing the principle of control by equal citizens is in practice sustainable”.¹⁹ Therefore, a distinction is made between conceptions and concepts, the concept being the core that these conceptions have in common.²⁰ In this operational perspective, the concept of democracy can be determined as: “a mode of decision-making about collectively binding rules and policies over which the people exercise control”.²¹ The purpose of the paper, then, is to analyse what ‘job’ the conceptions of democracy in different narratives do in relation to conceptions of European integration and judicial review.

B. THREE NARRATIVES ON DEMOCRACY

In the following three subsections three different narratives on democracy will be presented. These narratives originate at different times and in different political contexts, but even though they each had their heydays, they seem to transcend the situations of origin and coexist also in contemporary struggles on the concept of democracy. The three different narratives will be exposed in order to analyse how they can be seen as innovative breaking points in democratic ideas and democratic practices or, alternatively, how they can be seen as conservative maintenance of conventional conceptions, when actors in political debates emerge as “innovative ideologists”.²²

1. A NARRATIVE ON DEMOCRACY AS “NORDIC DEMOCRACY”

Around the Second World War, the idea of “Nordic Democracy” was developing in public debates, in popular movements and political parties, and among politicians and academics in the Scandinavian countries. Modern democracies in the Nordic countries were seen as having

¹⁷ M. Saward: “General Introduction”, in Saward, M. (ed.), *Democracy: critical concepts in political science* (London: Routledge 2007) 1–20.

¹⁸ W.B. Gallie: “Essentially contested concepts”, in *Proceedings of the Aristotelian Society* ([1955], 1956), 167–198.

¹⁹ Beetham (1992) 40.

²⁰ K. Graham: *The Battle of Democracy. Conflict, Consensus and the Individual* (Brighton: Wheatsheaf Books 1986) 1–19; J. Rawls: *A theory of justice* (Cambridge, Massachusetts: Harvard University Press 1972) 5; and H.L.A. Hart: *The concept of law* (Oxford: Oxford University Press 1961).

²¹ D. Beetham: *Defining and measuring democracy* (London: SAGE Publications 1994) 27–28.

²² Q. Skinner: *Visions of Politics*, vol. 1, *Regarding Method* (Cambridge: Cambridge University Press 2002) 149.

its roots in Northern Europe in times dating back to the Viking Age or even earlier. Thus, this narrative of developments of democracy in the Nordic countries takes a quite different perspective from what is usually the case in accounts on the origin and development of democracy. In stead of taking the ancient Greek city-states, especially Athens, as the ‘birthplace’ of democracy, and from there follow how the concept of democracy travels to other parts of the Mediterranean in the next centuries and to the rest of Europe in modern times, the narrative on “Nordic democracy” views the origin of democracy in the modern Nordic countries neither as something new nor as foreign ideas brought to the region from abroad. On the contrary, democracy is something long-termed and deep-rooted in Nordic history. The basic idea behind this narrative, then, is that *parallel* to the developments in classical Athens and Rome, a form of democracy was independently developed in the Nordic countries. Where did these ideas surface, what was the contents of these conceptions of democracy and the implications for conceptions of European integration and judicial review?

ORIGIN AND CONTENTS OF THE NARRATIVE

In the period from the late 1940s to the early 1980s, a number of anthologies on “Nordic Democracy” were published.²³ They were issued by Nordic or national cultural institutions like “The Danish Institute”, “The Swedish Institute” or “The Norwegian Office of Cultural Relations”. The editors and authors of these anthologies are a mixture of academics, politicians, practitioners, journalists and lay people. All anthologies contained articles on the idea of a millennium old democracy in the Nordic countries.²⁴ They specifically stress that this alleged Viking Age democracy formed a legacy for modern democracy in the Nordic countries.

The 1949 anthology carried introductory words by the three Scandinavian social-democratic prime ministers and the three chairs of the organisation “Norden” in the Scandinavian countries. The Swedish prime minister welcomed the book as a contribution to Nordic cooperation,²⁵ and the Norwegian as a contribution to the defence of freedom and democracy by the Nordic people,²⁶ while the Danish prime minister expressed his personal belief that democracy in the Nordic countries meant not only political rights and liberties but also a certain degree of social equality.²⁷ In a contemporary review, the targeted audience of the book was defined as “a broad, politically alert public” and the contribution by Ingvar Andersson on the history of Nordic democracy was characterised as excellent (“*fortrinlig*”). The review also announced a planned English edition of the book.²⁸

²³ Koch and Ross (eds) (1949); Lauwerys (ed.) (1958); and Allardt et al. (eds) (1981).

²⁴ I. Andersson: “Äldre demokratisk tradition i Norden och dess fortsatte utformning i Sverige”, in Koch and Ross (eds) (1949) 5–39; Andersson: “Early democratic tradition in Scandinavia”, in Lauwerys (ed.) (1958) 69–93; Lauwerys (1958); and S. Lindal: “Early democratic tradition in the Nordic countries”, in Allardt, E. et al. (eds.) (1981) 15–43.

²⁵ T. Erlander: “Introduction”, in Koch and Ross (eds) (1949) viii.

²⁶ E. Gerhardsen: “Introduction”, in Koch and Ross (eds) (1949) ix.

²⁷ H. Hedtoft: “Introduction”, in Koch and Ross (eds) (1949) x.

²⁸ Th. Geiger: “Review of Koch and Ross (eds) (1949)” in (1950) 88 *Nationaløkonomisk Tidsskrift*, 90–91, 91.

This English edition by J.A. Lauwerys, professor at the University of London, was, however, not published until 1958 and carried only some of the 1949 contribution together with new contributions by Scandinavian authors and a general introduction as well as introductions to the individual sections on history, justice, economy etc. by the editor.²⁹ Also the article on Nordic democracy was published in the English edition although with “certain abridgements”.³⁰ A review of the book in *The American Political Science Review* was quite critical seeing it mainly as a presentation of the three Northern countries as “idyllic utopias”.³¹

Differing from the two volumes in this respect, the 1981 anthology was truly ‘Nordic’ including all five Nordic countries, whereas the two earlier anthologies only included the three Scandinavian countries. Additionally, while the contributions in the two books on Scandinavian democracy often are case studies of only one country, the contributions in the 1981 book often treats the development in all the Nordic countries on the issue in question (democracy, government, economy, education and mass media, popular movements and organisations, and international relations).

The general impression, however, is that the five countries have both similarities and differences. As for the democratic development, the five countries were influenced by both different international and external conditions and different national and historical conditions for democratization. Due to the varying degree of external dependency between the Nordic countries, in some countries the democratizing processes were also, and perhaps predominantly, processes of national liberation and national independence. This goes for Finland and Norway that were not independent states when democratization began, but part of other states, and for Denmark that was experiencing a transition from a multinational ‘composite’ state to a nation state and the development of a specific national identity during the processes of democratization.³² Therefore, what these countries actually had in common was not the contemporary conditions for democracy during the 19th and 20th century but the “ancient backgrounds”.³³ It is, however, “difficult to ascertain exactly how and to what extent these traditions have been influential” but, anyway, “the early democratic traditions constitute an important factor in the development and character of modern Nordic democracy”.³⁴ These ancient democratic traditions are dealt with in the first chapter of the anthology.³⁵

²⁹ Lauwerys (1958).

³⁰ Lauwerys (1958) 69.

³¹ D. A. Rustow: “Review of Lauwerys (ed.) (1958)” in (1960) 54 *The American Political Science Review*, 559–560, 560.

³² J. Kurunmäki: “The breakthrough of universal suffrage in Finland, 1905-1906”, in Palonen, K. et al. (eds), *The Politics of Democratization in Europe. Concepts and Histories* (Farnham: Ashgate 2008) 355–370; and U. Jakobsen: “The History of Parliamentary Democracy in Denmark in Comparative Perspective”, in Palonen, K. et al. (eds), *The Politics of Democratization in Europe. Concepts and Histories* (Farnham: Ashgate 2008) 301–314.

³³ N. André: “Five roads to parliamentary democracy”, in Allardt et al. (eds) (1981) 44–52, 51.

³⁴ André (1981) 44.

³⁵ Lindal (1981).

Paradoxically, also the 1949 commemoration of the 1849 Danish Constitutional Act saw several vindications of this idea of a Nordic democracy in the Viking Age or even earlier. A number of events around this 100 years jubilee mounted to acts of collective memory construction or “memory political staging of a collective national identity”.³⁶ Democracy and national identity was brought together through narratives on the history of democracy. According to the narrative, democracy in Denmark is of a Nordic origin. One of the speakers, a conservative MP and professor of theology, expressed this idea in his speech on the occasion of the 100 years jubilee when he said that the seeds of the constitution were the Nordic proto-democracy (“urdemokrati”) dating back to the Iron Age: Already from that time existed an extensive cooperation between peasants that became the point of departure for the first “democratic breakthrough” that resulted in a ‘primitive democracy’.³⁷ He insistently argued that what was at stake was the feeling of a popular community that served as the foundation for democracy. In all the speeches, the common theme was this popular community and the close relations between democracy and national identity. Also the social-democratic prime minister and the social-democratic speaker of the *Folketinget* stressed this constellation of democracy and national community.³⁸

Probably, the first occurrence of the term “Nordic Democracy” in public debate can be traced back to the mid-1930’s when the Swedish social democratic prime minister gave a speech under the heading of “Nordic democracy”.³⁹ Later that year when the social democratic youth organisations organized a meeting under the heading of the “day of Nordic democracy” (“Den nordiska demokratins dag”) and the social democratic prime ministers of Denmark, Finland, Norway and Sweden gave speeches on “Nordic democracy”.⁴⁰ In these contexts, the rhetoric of “Nordic democracy” was used as a move towards the “folkhem” ideology and the political goal of establishing Nordic welfare states.⁴¹

In the narrative, special focus is directed towards the organizational form of assemblies, or *ting* in Icelandic and the Scandinavian languages, to develop the specific democratic aspects of political life in the Viking Age. The *ting* or common meetings of the assemblies in the Viking Age is seen as legislative bodies even if they also, and maybe primarily, were courts, arbitrators of disputes, selectors of kings etc.

CRITIQUE OF THE NARRATIVE

In spite of the fact that the forms and procedures of these assemblies were admittedly different from nowadays parliaments, they are presented as democratic. The “government by assem-

³⁶ A. Warring: *Historie, magt og identitet - grundlovsfejring gennem 150 år* (Århus: Aarhus Universitets Forlag (Magtudredningen) 2005) 142.

³⁷ Rigsdagens Bureau (1949) 42.

³⁸ Rigsdagens Bureau (1949) 49, 16.

³⁹ P. Albin Hansson: “Nordisk demokrati”, in Albin Hansson: *Demokrati. Tal och uppsatser* (Stockholm: Tidens Förlag 1935) 217–230.

⁴⁰ P. Albin Hansson et al.: *Fyra tal om nordisk demokrati* (Stockholm: Frihet 1935).

⁴¹ J. Strang: *Why Nordic Democracy? Positivism and the Crisis of Nordic Democracy in the 1930s and 40s* (paper for NOPSAs congress: Reykjavik 2005).

bly” in the Viking Ages is presented as a “highly participatory form of government”. Facts were that only so-called ‘freemen’ could participate in the meetings, majority vote was not always recognized as the decision making principle, the representative principle was unclear etc. This narrative, then, looks to the past for points of relevance for the development of modern democracy. Thus, it depicts modern Nordic democracy as the legacy of a long-term historical development in the Nordic countries.

The idea of the origin of a “Nordic democracy” in the Viking Age or earlier is, of course, similar to the idea on a Teutonic proto-democracy (“germanische Urdemokratie”) first voiced by Tacitus in his work *Germania* from the 2nd century.⁴² Also one of the co-editor of the 1949 anthology on “Nordic Democracy” refers to the Teutonic proto-democracy (“det germanske urdemokrati”) in his own prior account on the development of democracy from ancient to modern times.⁴³

In stead of the contention, found in most exposés on the history of democracy, that the idea of democracy dates back to classical Greece or specifically Athens in the 5th century B.C., meaning that democracy is invented once and for all, as it were, the idea here is that democracy can be and has been invented not just one time in a specific place but in different places and at different times without necessarily any connection between these ‘birthplaces’.⁴⁴ This is perhaps most clearly stated in one of the Danish sources on “Nordic Democracy”: “The type of democracy known to the classical world has nothing at all to do with democracy’s subsequent history”.⁴⁵ Thus, according to this narrative the “Nordic democracy” did evolve independently of the ideas and practices of the democracy in ancient Athens. This is also testified by an internationally authoritative account of democracy and its development: “The Vikings knew little or nothing, and would have cared less, about the democratic and republican political practices a thousand years earlier in Greece and Rome. Operating from the logic of equality that they applied to free men, they seem to have created assemblies on their own”.⁴⁶

What is important in this context, however, is that these historical developments in the Viking Age are seen as a “democratic heritage” of post-Second World War Nordic countries. Independently of the actual degree of democracy measured by modern standard, the Viking Age assemblies are construed as “anchor-points” of Nordic democracy. Although democracy deteriorated after the Viking Age, it left - according to the narrative - a democratic legacy that was important for building modern democracy after the end of absolutist rule. The most important aspect of this heritage is the survival of assemblies in different forms as antecedents of modern parliamentary bodies. The overall assessment, however, of the background of democratization is clear when this narrative contends that “there are distinct threads in modern Nordic democracy which extend all the way back to the Viking Age, and which tie the his-

⁴² O. Brunner et al. (eds.): *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Stuttgart: Klett-Cotta 1972); and J.L. Gillin: “The Origin of Democracy” (1919) 24 *The American Journal of Sociology*, 704–714.

⁴³ A. Ross: *Hvorfor demokrati?* (København: Ejnar Munksgaard 1946) 20ff.

⁴⁴ Cf. also R.A. Dahl: *On Democracy* (New Haven: Yale University Press 1998) 9.

⁴⁵ Ross (1946) 19.

⁴⁶ Dahl (1998) 9.

tory of Nordic democracy together”.⁴⁷ The assessment of the consequences of this is clear cut, too: “This is perhaps why democracy has found such a firm footing in the Nordic nations of today, and has shown such consistent developments there since early in the nineteenth century”.⁴⁸

C. ALTERNATIVE NARRATIVES ON DEMOCRACY

The narrative on “Nordic democracy”, of course, does not stand alone since democracy is a contested concept. In principle, several narratives on democracy could have been selected as alternatives to the narrative on “Nordic democracy”. In the following sections, the paper maps two competing narratives that are selected because of their saliency in official accounts and public debates. The first one is the official narrative of the Danish parliament (*Folketinget*) on ‘democracy as separation on powers’. The second one is the narrative of ‘democracy as dialogue’ initiated by Hal Koch⁴⁹ as a prominent representative of the folk high school movement.

After short characteristics of the narratives, the analysis will first uncover the origin of the narratives and the contents (form, substance and scope) and then make a critique of the narrative in light of facts known from research and consistency with other accounts of democracy. Then, the inferences for conceptions of European integration and judicial review will be considered as possible constraints on democracy and potential sources for Nordic reluctance towards the EU. Finally, this will be linked to the potential intensions and purposes behind the narratives.

1. A NARRATIVE ON ‘DEMOCRACY AS SEPARATION OF POWERS’

The first alternative narrative, here labeled ‘democracy as separation of powers’, contends that Denmark became democratic under the influence of the philosophical and political developments in core European states during the 18th and 19th century. Thus, democracy was imported to the Northern periphery from the centre of Europe. The philosophical ideas that initiated this process of democratization are located in developments during the period of the Enlightenment. The central figures are Montesquieu and his ideas on separation of the legislative, executive and judicial powers and Rousseau and his ideas on ‘popular sovereignty’. The political impulse came from the French Revolution of 1789 and developments in the 1830s and around 1848 in France and Germany and other European countries. In this way, and in contrast to the narrative on “Nordic democracy” and its idea of a millennium old democracy, the wave of democracy that reached Denmark towards the middle of the 19th century is roughly speaking less than 200 years old.

⁴⁷ I. Andersson: “Early democratic tradition in Scandinavia”, in Lauwerys (ed.) (1958) 69–93.

⁴⁸ LÍndal (1981).

⁴⁹ Koch (1945).

ORIGINS AND CONTENTS OF THE NARRATIVE

This narrative is the official version of the origin, development and characteristics of democracy in Denmark and can be found in official publications issued by the Danish Parliament, also available at its website.⁵⁰ In the different booklets issued by the Danish Parliament, it is stated that the origin of democracy in Denmark is “founded on thoughts the seeds of which were sown in Europe during the 18th century”. What, then, were these thoughts about democracy? First, that to prevent any abuse, power is “divided into three independent organs which control one another, i.e. the legislative, the executive and the judicial powers”. This “tripartition of powers” is seen as very important because it “prevent all power from being held by one authority”.⁵¹ Here is a clear reference to the past experiences of the absolutist rule that in Denmark lasted until 1848 and was characterised by the unity of legislative, executive and judicial power in one person – the King – who only was responsible to God. The relation between the legislative and the executive powers is seen as “balanced against each other” by the tools of the Parliament’s right to a “vote of no confidence” and the Prime Minister’s right to dissolve the Parliament and call for a new general election.⁵² Second, that “all men are born free and equal” and, third, that “universal suffrage is the foundation of democracy”. When was these thoughts established in a Danish context? “The principle of universal suffrage was laid down in the Constitutional Act of June 1849” and this principle and others in the 1849 Constitution are “still to be found in the present Constitutional Act of 1953”.⁵³

CRITIQUE OF THE NARRATIVE

The main implication, then, of this narrative is one of continuity since 1849 to the present times and centred on the separation of powers and the rights of the citizens, including the right to vote. There is no indication of any need of adjusting the Constitution due to current developments. Rather, the form of democracy in Denmark is here presented as if it is without history – it is and has always been a constrained, liberal and electoral democracy. The principle of the “tripartition of powers” is often underlined. However, practically speaking, democracy is almost identical with suffrage and elections. This is related to some kind of contractual thinking: The right to rule is “based on a voluntary agreement between the constitutional monarchy and the citizens: The citizens have no direct influence on government, but exert their influence indirectly by voting. ... In return for this, the Constitutional Act gives the citizens some important rights and liberties”. Therefore, a democracy is a system of governance in which all men are “entitled to take part in elections to the legislative assemblies.” So, the conception of democracy is actually quite narrow: “A majority of citizens may, through their rights to vote, remove politicians whom they find unsuited to be in power”. There is apparently an idea of democracy as a rather simple equation: universal suffrage + elections = democracy. In this way, political participation is reduced to the election of representatives, who then make decisions without the interference of “the people” until they

⁵⁰ www.folketinget.dk.

⁵¹ Folketinget (s.d.), *My constitutional Act*, Copenhagen.

⁵² Folketinget (s.d.), *Danish Democracy*, Copenhagen.

⁵³ Folketinget (s.d.), *Danish democracy*, Copenhagen.

post festum may be removed at the next election or may continue by winning sufficient votes again.⁵⁴

If anyone should become suspicious whether this form of democracy is well-functioning, the answer is already given in the texts of the official publications and the website of the Danish parliament: “Danish democracy has been functioning well within the framework of the Constitutional Act for [more than] 150 years”! Although, admittedly, there have been certain periods with “feelings of a distance between voters and the candidates elected”, the conclusion is without the slightest doubts that today “democracy is firmly rooted in Denmark compared to other democracies”.⁵⁵ The overall picture that amounts is one of an easy birth of a new democracy that has steadily developed ever since.

Of course, as research shows, Denmark did not become a full-fledged democracy in 1849. It became a ‘constitutional monarchy’, which is also the characterization in the Constitutional Act itself, which does not even mention the word “democracy”, “popular sovereignty” or the like. The King still preserved the prerogative of appointing the ministers of government, the *Landstinget*, the upper house of the bicameral parliamentary system, had a more “conservative” representation than the *Folketinget*, the lower house, due to different election rules. This meant that the struggle for democratization continued in the years after 1849, and especially after the 1866 revision of the Constitution. The struggle for democracy was primarily directed towards the extension of suffrage, in order to make the parliament more representative, and the introduction of the parliamentary principle for the formation and appointment of government, in order to increase the relation between the expressed preferences of the electorate and the actual policies of the government. The struggle for parliamentarianization of politics was directed against the right of the King to appoint governments, a right that according to the parliamentary principle should belong to the parliament, and against the bicameral system, that meant that the upper house could overrule the lower house.⁵⁶

The goal of the struggles for further democratization towards the end of the 19th century was aptly expressed by the politician and newspaper editor, Viggo Hørup, as “no one above and no one next to the *Folketinget*” (“*ingen over og ingen ved siden af Folketinget*”). The democratic movement saw itself faced with three opponents: The king who had the prerogative of appointing the government independently of the *Rigsdag*’s majority, the government which was appointed by the king and not by the *Rigsdag*, and the *Landsting* which had a much more “conservative” representation than the lower house.⁵⁷ Thus, the goal of the democratic movement as it developed in the 1870s was “*folketingsparlamentarisme*”, the parliamentary principle that the lower house should not contain a majority against the government. According to the Constitution, the executive power belonged to the King (and his Government), the legislative power jointly belonged to the King (and his Government) and the *Rigsdag*, and the judicial power belonged to the courts.⁵⁸ The struggle for “*folketingsparlamentarisme*” was directed against the Upper House, the Government and the King; however, the question of judicial

⁵⁴ Folketinget (*s.d.*), *Danish democracy*, Copenhagen.

⁵⁵ Folketinget (*s.d.*), *Danish democracy*, Copenhagen.

⁵⁶ Cf. Jakobsen (2008).

⁵⁷ C. Friisberg: *Ingen over og ingen ved siden af Folketinget: partiernes kamp om forfatningen 1848-1920* (Varde: Vestjysk Kulturforlag 2007).

power or the power of the courts of justice was, therefore, not part of the struggle for the “folketingsparlamentarisme” that Hørup endorsed by his rally cry of “no one above and no one next to the *Folketing*”.

The context of the Hørup rally cry, therefore, is democracy – not the constitutional principle of separation of powers between executive, legislative and judicial power. It is related to the existence of the bicameral *Rigsdagen* and directed against the more undemocratically elected *Landstinget*.⁵⁹ During the campaign before the general election in January 1879, Hørup, at a meeting in Copenhagen on 30 December 1878, mentioned the principles of the democratic struggles that later was shorthanded as “*ingen over og ingen ved siden af Folketinget*” (“no one above and no one next to the *Folketinget*”). These principles included: “that free elections constitute the foundations of our political life, that parliament, constituted on the outcome of those elections, is the pre-eminent authority in the land with neither peer nor parallel”. Furthermore, Hørup mentioned the principle of popular sovereignty and how it was determining the relations between politicians and the electorate (“*folket*”): “In this our faith in the people we pursue our cause to the end; in that we proceed from the people, the people stand at the head”.⁶⁰ The most recent interpretation of the constitutional consequence of this statement is: “Now given the context in which the words were expressed, the intended meaning was that power resided with the people, and the supremacy of the Folketing [Parliament] should therefore be understood as embodying the supremacy of the people”.⁶¹ So, according to Hørup himself, there *is* something “above the *Folketing*” and that is “the people” (the electorate).

The parliamentary principle was *de facto* introduced in 1901. Finally, in the development towards “folketingsparlamentarisme”, the Upper House – in which the majority until 1936 was of a different political colour than the majority in the Lower House – was eventually abolished according to the 1953 Constitutional Act where the parliamentary principle finally was introduced *de jure*, too. Seen in retrospective, it was only after more than 85 years, at the elections to the *Landstinget* in 1936, that the same political parties (the Social Democratic Party and the Social Liberal Party) had the majority in both chambers. So, not until then, the Hørup rally cry came through that in a democracy the upper house should not be allowed to outvote decisions by the lower house.⁶² The road to a parliamentary democracy in Denmark was certainly long.

The *de jure* parliamentarianism, however, did not lead to a majoritarian style of politics. Parliamentarianism in the Nordic countries is “in several ways peculiar compared to other Western countries”.⁶³ In the Swedish case this is also clear since minority governments have

⁵⁸ H. Zahle: “Om domstolenes forfatning”, in Andersen, O. et al. (eds), *Folketingets festskrift I anledning af grundlovens 150-års-jubilæum den 5. juni 1999* (København: Gyldendal 1999) 313–340.

⁵⁹ T. Vogel-Jørgensen: *Bevingede ord* (København: G.E.C. Gads Forlag 1963) 466.

⁶⁰ The speech was recorded in the newspaper *Morgenbladet* on 31 December 1878; all quotation are taken from Friisberg (2007).

⁶¹ Friisberg (2007) 441.

⁶² Cf. speech in 1936 by the social democratic leader, Thorvald Stauning, quoted in H. Grelle: *Thorvald Stauning. Demokrati eller kaos* (Jyllands-Postens Forlag 2008) 392.

⁶³ Damgaard (1999) 49.

been the norm rather than the exception. Since the 1920s, the small Liberal party often formed the government “by playing the role of a *pivot*, putting together voting majorities from its position in the political middle”; according to the corresponding conception of democracy “the best government was a government that was not based on a majority of the people but rather one whose success was the result of the sincere support of many”.⁶⁴ Likewise, the Swedish Social-democratic party from the 1930s in their vision of the “good society” formed the idea that everyone should have an influence and that good governance was “approximating the preference of all”.⁶⁵ So, not majoritarian, voting democracy but compromising, bargaining democracy has prevailed in the Nordic parliamentary democracies.⁶⁶

EUROPEAN INTEGRATION AND JUDICIAL REVIEW

Since there is no constitutional court in Denmark, it is the ordinary courts of justice that decide whether an act is in accordance with the constitution if an objection is raised. However, this competence is “not laid down in the Constitutional Act” but it is “a legal practice” that “goes back to the beginning of the” 20th century.⁶⁷ Only in 1999, however, for the first time the Supreme Court did actually pass a judgment that the Parliament had infringed the Constitutional Act. Normally, the Speaker of the Parliament has the duty to ensure that the Bills moved by the Parliament are “not in contravention of the Constitutional Act”. If so, the Speaker shall request the Parliament to reject the bill.⁶⁸ However, the overruling of the parliament by the Supreme Court was accepted by the Government and Parliament without any reservation.⁶⁹

A central part of the conception of democracy within the narrative of ‘democracy as separation of powers’ is the independence of the courts, but not their active involvement in political decision-making, not to mention *quasi* legislative power. That would be considered as a violation of the principle of separation of powers. More salient, however, is the cooperation between the three powers. Therefore, even in the case of overruling by the courts, the parliament would see this as cooperation – the courts helping the parliament to its job when it does not do it properly itself.

⁶⁴ L. Lewin: “Majoritarian and Consensus Democracy: The Swedish Example” (1998) 21 *Scandinavian Political Studies*, 195–206, 197.

⁶⁵ Lewin (1998) 202.

⁶⁶ I. Mattson: *Förhandlingsparlamentarism. En jämförande studie av riksdagen och folketinget* (Lund: Lund University Press 1996).

⁶⁷ Folketinget (*s.d.*), *The Parliamentary System of Denmark*, Copenhagen; cf. J.P. Christensen: *Domstolene – den tredje statsmagt* (Århus: Magtudredningen 2003); and R. Helgadóttir: *The Influence of American Theories on Judicial Review in Nordic Constitutional Law* (Leiden/Boston: Martinus Nijhoff Publishers 2006).

⁶⁸ Folketinget (*s.d.*), *The Parliamentary System of Denmark*, Copenhagen.

⁶⁹ Christensen (2003).

2. A NARRATIVE ON ‘DEMOCRACY AS DIALOGUE’

A second alternative and in several respects very different narrative on democracy has been flourishing in the Danish debate. The origin and central text of the narrative is the booklet “What democracy is” (“Hvad er demokrati?”) that was published just after the end of the German occupation of Denmark during the Second World War and the horrors of the Nazi regime; this is also the experience that the booklet refers to as its point of departure.⁷⁰ This narrative, too, is very salient, since the central texts that it is based upon have been part of the curriculum of Danish university level introductory courses in political science and has become standard repertoire in the public debate. In this narrative the contents of democracy is seen, not as a political system, but as a “form of life”, the important aspects of which is not voting and majority decision-making, but dialogue or – to use nowadays’ term – deliberation. The purpose of dialogue is to make citizens pay mutual respect to all and to establish mutual understanding among citizens and to obtain better decisions that balance the different interests of all or most citizens: “The essence of democracy is not characterized by voting but ... by developing a sense of respect for the interests of the whole of the community” (“en sans for helhedens interesse”).⁷¹ Likewise surprising is that the scope of democracy according to this conception is no longer limited to the political sphere, but also includes the social, economic and cultural aspects of society. Since it departs from traditional conceptions of democracy, it is fair to say that it pictures democracy, at least ideally, as something new, or at least very different from earlier forms of political systems, even those that so far have been labelled “democracy”; i.e. a new beginning of democracy. The overall justification for this form of deliberative democracy is (more) qualified and qualitatively better decisions for the community and (more) self-realization for the individual. In this way, “Danish” democracy ends up being something both quite specific for Denmark and at the same time something better, a genuine democracy, thus, a model for others to draw lessons from.

ORIGIN OF THE NARRATIVE

The context of this narrative was the German occupation of Denmark during the Second World War, a period where democracy had been abolished or at least put aside in the waiting room, as it were, until Denmark would again experience its liberation and revival of freedom and democracy. After the Second World War had ended, the situation was described in this way: “The world has suddenly awoken and seen to its amazement that it has become democratic.”⁷² Consequently, the conception of ‘democracy as dialogue’ was presented as a rupture with past conceptions on the background of current experiences and with some future expectations of changing public life in accordance with their ideas.

The narrative on this new, genuine democracy was construed by a group of people connected to the so-called folk high school movement among Danish intellectuals who was

⁷⁰ Koch (1945).

⁷¹ Koch (1945).

⁷² Koch (1945) 7.

engaged in a fierce debate on the meaning of democracy.⁷³ The answer to the question “What is democracy?” must have been a surprise to traditional oriented audiences. Against the traditional concept of democracy the experience of Hitler’s road to power was used as a counter-example: According to Hal Koch, the kind of electoral regime that developed in Germany, partly due to the atrocities of the Nazi movement, had brought about the worst crimes against humanity. Hal Koch saw this as a proof that something was wrong with the traditional conception of democracy and its linkage with elections and voting as the core characteristics of democracy.

Koch’s narrative of the development of democracy as a practise is likewise unconventional and revealing. Democracy is a “form of life”, a “way of thinking” (“tankegang”) or a “state of mind” (“sindelag”) both in private circles and in the public sphere. The development of democracy, therefore, starts at the individual level, in the private sphere, and moves on to larger and larger groups, transcending from the private sphere to the public sphere at the local, national and eventually the supranational level.⁷⁴ The conception of ‘democracy as a dialogue’ means that the development of democracy is an ongoing and never-ending process.

CONTENTS OF THE NARRATIVE

The explosion of the meaning of democracy also includes the scope of democracy. From being a primarily political concept, democracy was gradually extended to other spheres of society. In the 1945-debate in Denmark, it was contended that democracy also included the social, the economic, and the cultural aspects of society. Hal Koch himself saw what he termed “economic democracy” as a condition for a sustainable political democracy. However, nowadays, the broad scope of democracy is seen as part of a specific *Danish* conception of democracy based on a specific political culture. In a book combining the autobiographical genre and layman description of political developments Denmark is characterized by having a broader conception of democracy than elsewhere: “Democracy has to do with content. It is a life form. It is not only political democracy, but to the same degree also economic, cultural and social democracy”.⁷⁵

This actually opens for a broad spectrum of conceptions of democracy put forward by different types of actors in the Danish public debate. Again, the position that Danish democracy is something special *Danish* and something special *democratic* embedded in the conception of democracy as a form of culture is represented by a liberal politician and minister of education: Denmark has a “special Danish version of Western democracy. Denmark has a long tradition of freedom in the cultural sphere, including the school system, the church and the folk high school movement (“folkeoplysningstraditionen”). Therefore, Denmark has a democracy (“folkestyre”) with a strong element of popular participation. This is maybe one of our most important contributions to world culture”!⁷⁶

⁷³ S. Hein Rasmussen and N. Kayser Nielsen: *Strid om demokratiet: artikler fra en dansk debat 1945-46* (Århus: Aarhus Universitetsforlag 2003).

⁷⁴ Koch (1945) 13.

⁷⁵ J. Bøgh: *Alle min kæpheste* (København: Gyldendal 1991).

⁷⁶ B. Haarder: *Grænser for politik* (København: Gyldendal 1991).

Evidently, these are examples of the explosion of the meanings of democracy that has taken place in the post-Second World War period. But, it is equally clear that this is a conscious move to break with old conceptions of democracy. Hal Koch is using the old vocabulary of democracy in a presumably totally new way. He is not pointing to predecessors or authoritative sources of public opinion. He is simply pointing to recent experiences, i.e. the Nazi regime, arguing that an alternative is strongly needed, both in relation to the conception of democracy and in relation to political practices. For Hal Koch and others in the folk high school movement that alternative is ‘democracy as dialogue’. In stead of formal rights and simple majority decision-making the folk high school movement pleaded for dialogue and compromise as means of meeting the expressed preferences of the largest possible number of citizens. In this way, this is an example of conceptual revision and innovation. In stead of the old forms of ‘aggregative’ democracy that treats citizens as voters with pre-given preferences, the narrative on ‘democracy as dialogue’ promised a deliberative democracy in which preferences are formed through discursive interactions between citizens and representative as well as among citizens.⁷⁷

CRITIQUE OF THE NARRATIVE AND INFERENCES FOR EUROPEAN INTEGRATION AND JUDICIAL REVIEW

Already from this, it is obvious that a majority cannot and should not rule unconstrained. However, in this narrative the source of the constraint is citizens’ or political representatives’ deliberation, not courts’ judging. In 1945, when the process of contemporary European integration was approaching but the form still not manifest, the relations between democracy and the international sphere was put this way from a ‘democracy as dialogue’ perspective: Democracy is “en tankegang, en livsform, som man først tilegner sig derved, at man lever den igennem i det allersnævreste private liv, i forhold til familie og naboer, derefter i forholdet udadtil i større kredse, i forholdet til landsmænd, og endelig i forholdet til andre nationer – på hvilket sidste punkt verden endnu ikke har set ret meget til demokratiet”.⁷⁸ Supranational democracy may have been envisaged as a future possibility but hardly as an actual experience. Later, within the folk high school movement, this was even more so – in the 1990s, the nation state was definitely conceived by e.g. authors of the anthology with the significant title *Danish Democracy* as the unit of “political struggles and opinion formation” for ordinary people and, hence, the unit of democracy.⁷⁹

Thus, although parts of the folk high school movement today does not align with the Habermasian *Verfassungspatriotismus* or any post-national form of democracy, Hal Koch himself and the narrative on ‘democracy as dialogue’ becomes a forerunner and on a *par* with the dominant strand in international democratic thinking that for the last decades has been represented by ‘the deliberative turn’ in democratic theory. The state-of-the-art assessment

⁷⁷ T. Fitzpatrick: “In search of a Welfare Democracy” in *Social Policy and Society* (1:1, 2002) 11–20.

⁷⁸ Koch (1945) 13.

⁷⁹ H. Henningsen: “Demokrati”, in Henningsen, H. (ed.), *Dansk demokrati* (Rødding: Rødding Højskole 1994) 25.

within democratic theory is that the “emphasis on ‘deliberative democracy’ is now near-ubiquitous in democratic theory. Deliberative democracy is discussed in a variety of ways in the literature, but fundamentally it stems from dissatisfaction with so-called aggregative models of democracy, which (its opponents argue) involve simply adding together existing preferences of voters or citizens. Deliberative theorists emphasise that these existing preferences are often ignorant, and stress that democracy must be about open, equal and informed discussion of the issues as much as it is about voting”.⁸⁰

D. CONCLUSIONS

In order to answer the questions raised in the introduction on the relations between conceptions of democracy and European integration and supranational judicial review the findings on the different narratives on democracy will first be summarised.

1. ON THE NARRATIVES ON DEMOCRACY

In the narrative on “Nordic democracy”, democracy equals the assembly of “free men” that come together to make decisions and pass judgement for the sake of the “common good”. The assumed political system in the Viking Age did not distinguished between legislative and judicial power, since the central institution, the *ting*, was both parliament and court of justice. The editors and authors who around the Second World War disseminated the narrative on the ancient “Nordic democracy” did so with the intensions of conjuring a picture of democracy in the Nordic countries as based on a community of shared values in order to distinguish *Norden* as a specific democratic European region different from the totalitarian regimes in the neighbouring Communist Soviet Union and Nazi Germany. For these authors ‘democracy’ in their usage meant a combination of rule of law (“rättsstat”) and popular sovereignty (“folkvälde”).⁸¹ Democracy for this group of Scandinavian authors was clearly national, even if it was associated with a common Nordic legacy. Based on the ethnic and cultural homogeneity in the Nordic countries, it was communitarian rather than individualistic. Also, the socio-economic equality in the Nordic countries was conceived as an important basis of democracy.

In the narrative on ‘democracy as separation of powers’, separation of the legislative, executive and judicial power is the central principle, but in practical terms democracy is based on universal suffrage, general elections and representation of the electorate through parliament. After its installation in Denmark in 1849, for the first hundred years or so the parliament was bicameral, and for the first fifty years or so the government was appointed by the king, until the parliamentary principle was introduced *de facto* in 1901. In the constitution, the courts of justice were recognised as independent but without any special provisions in relation to judicial review of the legislative power. The Danish courts themselves stated in the first

⁸⁰ Saward (2007) 11–12.

⁸¹ I. Hedenius: “Filosofiska skäl för demokratin”, in Koch and Ross (1949) 207–222, 208.

decades of the 20th century that they were entitled to judicial review, but in 1921 stated that they would apply a very low level of review.⁸² The protracted fight for further democratisation in the years after the adoption of the Constitutional Act in 1849 had its heydays in the 1870s and 1880s and its centre in the lower house's fight against the king, the government and the upper house of the *Rigsdagen*. The rally cry of Hørup of "no one above and no one next to the *Folketinget*" ("*ingen over og ingen ved siden af Folketinget*") was not directed against the principle of separation of powers, but must be understood in the context of the bicameral parliamentary system as primarily directed against the upper house, *Landstinget*, and as a demand for the abolition of it and the introduction of parliamentarianism on the basis of the lower house, *Folketinget*. Neither was it meant as a principle of the primacy of parliament but, as Hørup made clear himself, the primacy of the people that was best represented by the *Folketinget* due to the different electoral rules for the *Landstinget* and the *Folketinget*. According to the actual working of parliamentarianism in the Nordic countries, which are multiparty systems with proportional representation electoral systems, it is far from the classic majoritarian democracy of e.g. United Kingdom. The row of multiparty or/and minority governments in the Nordic countries has created a tradition of cooperation between government and opposition, aiming at compromise by the broadest possible plurality in parliament in salient policy areas; democracy is not just about establishing a majority however small. This idea of a "cooperative democracy" ("*samarbejdende folkestyre*") with its negotiating working style and compromise oriented spirit has become a token of national unity, an undisputed national value within this narrative and a part of the national political culture.

The conception of democracy inherent in the narrative of 'democracy as dialogue' is likewise one of compromise. It is directly opposed to majority voting and find deliberation to be the very characteristic of democracy. Democracy is seen as a 'life form' or way of living, and not primarily as institutions of a political system. It advocates deliberation as a way of self realisation and the method for finding the best possible solutions for most citizens to common problems. As such, it does not focus on institutions and it is different from the narrative on 'democracy as separation of powers', but it does, as the narrative on "Nordic democracy", focus on democracy as something specific national. The separation of powers and the role of the courts of justice are therefore outside the scope of this narrative. However, the scope of democracy does include other aspects than just the political, since 'genuine' democracy also should include the economic, social and cultural spheres of society. Therefore, the form and the scope of democracy according to this narrative makes democracy to something specific national, to "our Democracy" or "Danish democracy".

To sum up, all of the conceptions of democracy are in different ways national. Apart from "Nordic democracy" that in practice does not include separation of powers, however, none of the narratives are explicitly against the separation of powers or the independence of judicial power. But the separation of powers gives no special rights for the courts of justice *vis à vis* the other "powers". It is only in the case of missing fulfilment by the parliament of its duty in the legislative process, that the courts of justice should intervene. If it does in cases like that it is conceived as fully legitimate. "It could even be considered as part of the "cooperative democ-

⁸² Helgadóttir (2006) 141.

racy” (“samarbejdende folkestyre”). However, it would be considered as a failure of parliament since decisions should be made through negotiation in deliberating assemblies, rather than through courts’ judgement.

2. ON CONCEPTIONS OF DEMOCRACY, EU INTEGRATION AND JUDICIAL REVIEW

When interviewed about the EU and asked whether it could be made more democratic, the chair of the social-democratic party answered that “EU is super democratic. The Lisbon treaty opens for new ways of direct citizen influence and democratic influence on agricultural policy, just to mention two examples. The EU gives Denmark a surplus on the democracy account. In Denmark we will have direct influence in e.g. Polish and German environmental policy”.⁸³ Clear statements as this one about democracy in the EU are unusual in political debate. To determine the inferences of the conceptions of democracy for European integration and judicial review a systematic approach might help to clarify the subtle shades of differences. Using the distinctions between normative desirability and empirical practicability of democracy,⁸⁴ we have in principle four possible positions on democracy in the EU:

	Practicable	Non-practicable
Desirable	1)	2)
Non-desirable	4)	3)

The conception of democracy that was expressed by the chair of the social-democratic party would occupy field 1) since democracy in the EU is considered both normatively desirable and empirical practicable. However, the three narratives depicted in this paper would occupy the other three fields. Field 2) is the typical ‘democratic deficit’ position: Democracy in the EU is normatively desirable but empirically non practicable. The narrative on ‘democracy as dialogue’ would fall into that category, since democracy eventually should be supranational but deliberative politics is hardly practicable at the supranational level. The narrative on ‘democracy as separation of power’ would fall into category 3), since democracy in the EU is neither practically possible because of the institutional set-up, nor normatively desirable, since democracy should be contained within the nation state. Field 4) is a harder case to fill but, arguably, the narrative on “Nordic democracy” would fit in here. The kind of assumed democracy in the Viking Age technically could be supranational. The authors promoting this Viking Age democracy as the roots of modern democracy in the Nordic countries would, however, see it as based on a community of shared values that they would considered nationally embedded. In this way, supranational democracy would be practicable but non-desirable.

⁸³ Helle Thorning-Schmidt interviewed in Anne-Grethe Rasmussen “Interview: Europa er ikke i krise”, *Information*, 20 June 2008, 1. sektion, 4–5.

⁸⁴ Beetham (1992).

⁸⁵ L. Nordskov Nielsen: “Kvalitet i lovgivningen”, in Andersen, O. et al. (eds), *Folketingets festskrift I anledning af grundlovens 150-års-jubilæum den 5. juni 1999* (København: Gyldendal 1999) 167–199, 172.

When it comes to supranational judicial review, the relevant narrative for discussion would be the ‘democracy as separation of powers’ narrative. It would allow for judicial review at the national level. It does consider the parliament as the right institution for making judicial review, in accordance with the “Standing Orders of Parliament” (*Forretningsordenen for Folketinget*) § 16.⁸⁵ But when the parliament does not fulfill its tasks, it is legitimate that the courts of justice does so and even welcomed. With supranational review, however, it is different. Within the “Nordic democracy” narrative, any ruling should be within the community of shared values that is considered national. This also goes for the narrative on ‘democracy as separation of powers’ – the *European* Court of Justice should not overrule *Danish* law. Within the narrative on ‘democracy as dialogue’ it would not be considered institutional feasible through the practice of decision-making through dialogue.

On this basis, the conclusion is that resentments against e.g. the European Court of Justice decisions in what is considered Danish cases has more to do with the very interference “from abroad” with the “Danish” democracy, that is with the distinction between the supranational and the national, than with the judicial vs. the legislative. After all, the consensus culture in the Nordic countries should be more attracted to mutual respect and cooperation between different ‘powers’ than confrontations.

VALUE RELATIVISM, PROCEDURAL
DEMOCRACY AND OPINION REPRESENTATION
– REFLECTIONS ON THREE CONCEPTUAL
UNDERPINNINGS OF SWEDISH ANTI-CONSTITUTIONALISM

By MATS LUNDSTRÖM*

***Abstract:** This article investigates three ideas that have had a hegemonic position during the formative period of the majoritarian model of democracy: (1) Value Relativism of Axel Hägerström, (2) Tingsten's procedural concept of democracy, and (3) Jörgen Westerståhl's popular-will theory of democracy. These three ideas are often believed to give support to a kind of moral subjectivism that is hostile to constitutionalism. An abstract conceptual analysis is combined with a more historical approach focused on the impact of these ideas through different normative interpretations. The conclusion is that neither Value Relativism (and the associated Scandinavian legal realism), nor the procedural concept of democracy has any anti-constitutional implications. The popular-will theory of democracy, on the other hand, has a stronger theoretical link to anti-constitutional ideas.*

***Keywords:** Anti-constitutionalism, democracy, value-relativism, proceduralism, opinion representation.*

A. THE SWEDISH MODEL OF
DEMOCRACY – A BRIEF HISTORICAL REVIEW

The Swedish process of democratization offers an important historical explanation for the anti-constitutionalism that has characterized constitutional policies since the emergence of democracy in Sweden.¹

Democracy and parliamentarism have developed incrementally, with gradual changes in constitutional praxis. The Swedish Constitution has been a “living constitution” whose contents and practical application have been determined by compromises and negotiations between political actors.² The parliamentary breakthrough that occurred in 1917 was the

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¹ The term “constitutionalism” refers here to principles that infringe the space for democratic decision making. See Jon Elster: “Introduction” and Francis Sejersted “Democracy and the rule of law: some historical experiences of contradictions in the striving for good government” in Jon Elster and Rune Slagstad (eds): *Constitutionalism and Democracy* (Cambridge: Cambridge University Press 1988).

result of a power struggle between the king and the right on the one hand, and the liberals and the social democrats on the other.³ However, parliamentarianism was not written into the constitution until 1974, when Sweden got the first written constitution that prescribed a democratic, parliamentary form of government.⁴

An important political explanation for this informal and incremental pace of constitutional development in Sweden was a general striving to avoid potentially dangerous conflicts.⁵ If the "living constitution" had been formally passed as constitutional law, the conflicting interests would have been thrown into sharp relief, making a steady and continued democratization more difficult.⁶

In the constitution of 1974, a majoritarian model of democracy was codified. The new parliament consisted of a single chamber with a large number of seats (349), and the term of government was set to three years only.⁷ Constitutional restraints on popular government were few, and provision was made for the constitution to be altered with relative ease by a majority of parliament.⁸ In general, it can be said that the constitution of 1974 was guided by a strong belief in the principle of popular sovereignty, in the sense that the political decisions should implement the popular will.⁹

An important aspect the Swedish model of democracy, at least in the form it took in 1974, was the strong influence of popular movements and organisations of the labour market — i.e., the sort of arrangement usually called corporatism. The strong element of corporatism and the central importance assigned to the principle of popular sovereignty in the Swedish constitution have been said to constitute a "collectivist" model of democracy.¹⁰

However, some of the changes have made the Swedish democracy diverge from the Swedish model. The corporatist element has receded. The European Convention of Human

² Axel Brusewitz: "Författningens inre utveckling", *Forum* 5/1920, Leif Lewin: *Ideologi och strategi* (Stockholm: Norstedts 1984) Ch. 4.

³ Olle Nyman: *Parlamentarismen i Sverige* (Stockholm: Medborgarskolan 1965) 13–15.

⁴ General suffrage was, however, written in to the Constitution in 1921.

⁵ Sverker Gustavsson: "Författningsomvandling", in Jörgen Hermansson, Barry Holmström, Christer Karlsson och Leif Lewin: Hermansson (eds): *Att hävda en uppfattning. En vänbok till Sverker Gustavsson*. (Göteborg: Santerius Förlag 2008).

⁶ Adam Przeworski: "Democracy as a Contingent Outcome of Conflicts", in Jon Elster and Rune Slagstad (eds) *Constitutionalism and Democracy* (Cambridge: Cambridge University Press 1988).

⁷ The standard term of government was subsequently increased to four years.

⁸ The constitution can be altered by two identical decisions of parliament taken before and after at least one national election (RF 8:15).

⁹ Beng-Ove Birgersson. and Jörgen Westerståhl: *Den svenska folkstyrelsen* (Stockholm: Liber 1979) 20–24. There is, however, an element of power-sharing, in that the public administration was made independent of both the government and the parliament, neither of which may interfere with administrative decisions (Instrument of Government, Ch. 11), The principle of administrative independence is a legacy from the constitution of 1720. The purpose was to safeguard an impartial administrative process and protect citizens from arbitrary political decisions.

¹⁰ Johan P. Olsen: *Demokrati på svenska*. (Stockholm: Carlssons 1990).

¹¹ But they have not the status of Constitutional Law.

Rights has been integrated into the Swedish Constitution.¹¹ The Swedish Central Bank has acquired an independent status in the constitution. Sweden's accession to the European Union involved changes to its form of government.¹² In cases involving conflict between Swedish law and EC law, Swedish courts are required to apply the latter (with the exception of cases involving fundamental rights of citizenship). Thus, another legal system has been imported and adopted.

But the Swedish constitution still has precedence over EEC law, and the Swedish form of government still reflects a majoritarian view of democracy with a strong belief in popular sovereignty.¹³ The following discussion concerns three ideas that are assumed to be related to that view of democracy on a conceptual level.

B. VALUE RELATIVISM

The democratization of Sweden coincided with a reaction against the natural law tradition in legal and moral philosophy. Its objectivist or cognitivist conception of moral principles was challenged by a non-cognitivist notion of morality often referred to as "scientific value relativism".¹⁴

In the history of ideas, value relativism is linked with the logical positivism that developed around the same time, at the start of the twentieth century, around the Cambridge School and Vienna Circle. The basic principle is that all scientific statements must be based on empirical observation, a condition that value statements do not meet. Therefore, moral and legal philosophy cannot lay claim to knowledge of right and wrong.

In Sweden, value relativism is associated with Axel Hägerström and what is known as the Uppsala School. Critics of Hägerström's moral philosophy coined the expression "value nihilism" to describe it.¹⁵

¹² Karl-Göran Algotsson: *Sveriges författning efter EU-anslutningen* (Stockholm: SNS-förlag). Algotsson is incorrect, however, when he states that the principle of popular sovereignty has been set aside in favour of a "vertical distribution of power". Even after Sweden's accession to the European Union, the Swedish parliament remains the country's supreme legislative body. For a discussion on this issue see Mats Lundström, "Eu-inträdet och demokratin i Sverige", in *Demokrati på europeisk nivå*, SOU 1998:124 (Stockholm: Fritzes 1998).

¹³ Joakim Nergelius: *Svensk statsrätt* (Lund: Studentlitteratur. 2006) Ch. 1.

¹⁴ Arnold Brecht: *Political Theory* (Princeton, N.J.: Princeton University Press 1959) Ch. 3. Strictly speaking "scientific value relativism" is an epistemic norm that excludes the question about ultimate values and morals from the domain of scientific enquiry, based on non-cognitivist metaethics.

¹⁵ "Value emotivism" is another common designation. In a strict sense, these designations (value scepticism, value nihilism, value emotivism) refer to three different but related standpoints. Value scepticism (also called "non-cognitivism") holds that it is impossible to establish the truth of value-statements. Value nihilism refers to an ontological viewpoint that denies the existence of values. Value emotivism is a semantic theory which postulates that value statements are expressions of emotion without any value as truth. See Lars Bergström: *Grundbok i värdeteori* (Stockholm: Thales 1990).

Hägerström inspired the Scandinavian legal realism, according to which the study of law is value neutral and based on empirical observations. Laws should be defined in terms regular behaviour of citizens and public officials. The concept of law was thereby divested of all moral content.¹⁶

Alf Ross, one of the most important proponents of Scandinavian legal realism characterized democracy as a "legal" concept, not a moral doctrine.¹⁷ The term "democracy" is defined in terms of three empirical dimensions referring to the rule of the people.¹⁸

From a logical standpoint, neither value relativism nor the related legal realism has any normative implications for morality, constitutional law or politics in general. Value relativism is a meta-ethical idea that can be reconciled with any substantial moral or constitutional principle.¹⁹ Nevertheless, value relativism and legal realism has often been understood as having normative implications.²⁰

Regardless of the logical implications of value relativism and legal realism, these ideas were often combined with certain normative ideas. One such normative idea is the idea that a legal system should be used as a political instrument. Hägerström stated that the law is nothing but "a social machine with human beings as the cogs",²¹

This legal instrumentalism is an important part of the anti-constitutionalist political culture in Sweden.²² But the linkage to value relativism is complex, and far from self-evident.

¹⁶ Ingemar Hedenius, a disciple of Hägerström, later made a distinction between "genuine" and "non-genuine" propositions of rightness. The former are moral statements concerning right and wrong, while the later are descriptive statements about positive law. See Ingemar Hedenius: *Om rätt och moral* (Stockholm: Wahlström och Widstrand 1963).

¹⁷ Alf Ross: *Värför demokrati?* (Göteborg: Santerius förlag 2003) 90.

¹⁸ Ross formulated his definition of "democracy" in terms of three dimensions (see Ross (2003) 101f): "The democratic element, the influence of the citizenry on the exercise of public authority, may vary in accordance with: *Intensity*, i.e. the proportion of the population that is entitled to participate in referenda and elections.

Efficiency, i.e. the extent to which citizens are able to ensure that their views are taken into consideration.

Extensivity, i.e. the degree to which the influence and control of the citizenry extends to the various branches of government."

¹⁹ Bergström (1990) 42, see note 16.

²⁰ A common idea is that if there is no moral truth, then every action or every law is morally permissible (Bergström (1990) 42. But the rejection of a moral truth does not imply the truth of the statement that everything is morally permissible or the truth of the statement that no action is immoral. It implies only that amoral statement cannot be true.

²¹ Svante Nordin: *Från Hägerström till Hedenius* (Lund: Doxa) 119 (my translation). This notion has been interpreted as a defence for a command theory of law that is contrary to the natural law tradition. The legal order should be regarded as an instrument to be used by a political actor to implement political goals – whichever they are. See Friedrich. A. Hayek: *Law, Legislation and Liberty*, Vol. 3 (Chicago: The University of Chicago Press. 1979) 35.

²² See Stig Strömholm: "Uppsalaskolan och konstitutionens normativitet" in Eivind Smith (ed): *Grundlagens makt* (Stockholm: SNS 2001).

Value relativism has influenced different - and opposing - schools of thought, like political realism and the idea of social engineering, and the belief in democracy.

1. VALUE RELATIVISM AND POLITICAL REALISM

The thesis that there are no objective or true moral values has often been interpreted as a pretext for an *amoral* view of politics. According to political realism, power is the ultimate source of legitimacy for political actions. Carl Schmitt's concept of "decisionism" expresses a radical form of realism that was inspired by the same ideas that were championed by the Uppsala School.²³

Schmitt's basic idea was that genuine sovereignty manifests itself in exceptional circumstances when the established constitution becomes irrelevant. Some proponents of Scandinavian legal realism were realists in the spirit of Carl Schmitt. Most renowned was Carl Olivecrona, professor of Law at Lund University, who in 1940 advocated German leadership of "the new Europe".²⁴ Wilhelm Lundstedt, another leading proponent of Scandinavian legal realism, developed a critique of international law within that perspective.²⁵ Unlike Olivecrona, however, Lundstedt was a Social Democrat, as was Alf Ross. Most proponents of Scandinavian legal realism, including Axel Hägerström, were Social Democrats.²⁶

Hägerström's disbelief in moral truths did not prevent him from experiencing strong moral outrage over the political and social injustices of his time.²⁷ Hägerström made a clear distinction between the human significance of morality and its epistemological and ontological status. Even though morality is only an expression of emotions, it is not meaningless - rather the contrary.²⁸

Value relativists often had an instrumental (sometimes functionalist) perspective on the normative ideas of humans, both moral and legal.²⁹ Norms ought to have a beneficial purpose, even if that purpose cannot be objectively validated. Especially with Lundstedt, Scandinavian legal realism underpinned a utilitarian and egalitarian morality in favour of the welfare state.³⁰

This observation leads to another school of thought that is associated with value relativism - social engineering.

²³ Rune Slagstad: *Rett og Politik* (Oslo: Universitetsforlaget 1987) 128.

²⁴ Nordin (1984) 125, see note 22.

²⁵ Nordin (1984) 121-123, see note 22.

²⁶ Nordin (1984) 49, see note 22.

²⁷ Staffan Källström: *Den gode nihilisten* (Stockholm: Rabén och Sjögren 1986).

²⁸ Axel Hägerström: *Moralpsykologi* (Stockholm: Natur och kultur 1952).

²⁹ Slagstad (1987) 128, see note 24. Hägerström formulated functionalist ideas about conceptions of morality which, paradoxically, resemble Hayek's ideas on positive morality. Cf. Axel Hägerström 1952. *Moralpsykologi*. Stockholm: Natur och kultur. 1952) and Friedrich. A. Hayek: *The Fatal Conceit* (London: Routledge, 1988).

2. VALUE RELATIVISM AND SOCIAL ENGINEERING

Value relativism was an important idea in the philosophical outlook of leading Social Democratic intellectuals, like Wilhelm Lundqvist, Arthur Engberg, Nils Karleby, Richard Sandler and, at a later stage, Gunnar and Alva Myrdal. Myrdal's ideas on population policy have been interpreted as having legitimated forced sterilization, linked by critics to the influence of value relativism. It is asserted that forced sterilization was a violation of human rights that resulted from a combination of social engineering and the rejection of the principle of natural rights that ascribes equal value to all human beings.³¹

With social democratic reformism, social engineering was linked to a collectivist welfare philosophy that emphasized the welfare of “the people” and “society”. There are points of connection with the “Government House Utilitarianism” developed in Victorian England.³² The classic utilitarians were legal positivists and reformists. But they were not value relativists – rather, value objectivists who believed that they could empirically verify utilitarianism.³³

Classic utilitarianism demonstrates that value objectivism can be combined with legal positivism and belief in the value of social engineering. It also demonstrates that legal positivism and social engineering can be combined with constitutionalism. Even constitutions are part of the “machinery” that should be used to fulfil the political goals of society. Bentham advocated the constitutional protection of legal rights, including ownership rights, even though he stated that *natural* rights were “nonsense upon stilts”.³⁴

Social engineering is also associated with Karl Popper's critical rationalism and with his idea of “piecemeal social engineering”.³⁵ Here, it is not value relativism that is the important philosophical premise but rather the unavoidable epistemic limitations of politicians. According to Popper, we cannot foresee the consequences of “utopian engineering”. But he was not a value relativist – rather, a moral fallibilist in the spirit of J.S. Mill.³⁶

³⁰ Nordin (1984) 120-122, see note 22.

³¹ Maija Runcis: *Steriliseringar i Folkhemmet*. (Stockholm: Ordfront 1998).

³² Henry Sidgwick: *The Methods of Ethics* (Cambridge: Cambridge University Press 1981/1901).

³³ Felix Oppenheim: *Moral Principles in Political Philosophy* (New York: Random House 1968) 130.

³⁴ Bentham Jeremy: “Anarchical Fallacies” in Waldron, J. (ed.): *Nonsense Upon Stilts* (London: Methuen 1987) 53. See also Jeremy Bentham: *The Principles of Morals and Legislation*. (New York: Hafner Press 1973).

³⁵ Karl R. Popper: *The Poverty of Historicism* (London: Routledge & Kegan Paul 1960).

³⁶ Karl Popper: “Toleration and Intellectual Responsibility”, in Mendus, S. and D. Edwards. (eds): *On Toleration* (Oxford: Clarendon Press). In the Swedish debate, democracy *per se* has been regarded as an expression of critical rationalism. See Olof Petersson: *Makt i det öppna samhället* (Stockholm: Carlssons 1989).

3. VALUE RELATIVISM AND DEMOCRACY

Hans Kelsen, who had a great influence on Scandinavian legal realism, saw in value relativism an argument for democracy.³⁷ His idea was that because there are no objective values, the will of the majority must prevail.³⁸

Tingsten, also a value relativist, argued however that Kelsen's argument for democracy was contradictory. One cannot derive a normative principle from the thesis that value statements cannot be true or false, he maintained.³⁹ Even opponents of democracy can claim support from value relativism, and in fact have done so. Tingsten noted that value relativism has been invoked by totalitarian theorists like Carl Schmitt (see above). Value scepticism has probably been of greater importance to anti-democratic than to democratic theorists.⁴⁰

Tingsten's critique of Kelsen is somewhat misleading, however. It was not the idea of democracy that Kelsen derived from value relativism, but rather *the equal right of freedom*.⁴¹ Kelsen argued that political constraints on freedom cannot be justified, as there is no "extraterrestrial truth". Accordingly, domination and force should be minimized, which is what happens in a democracy. Kelsen thus advances a consequentialistic argument for democracy. The goal is to maximise individual freedom. If his principle of freedom had been more deontological, he would have argued against majoritarian democracy on the same grounds as classical liberals.⁴² A defence of individual freedom might possibly legitimate constitutional constraints on democracy. But the purpose of Kelsen's constitutionalism was limited to preserving democracy. He called for the establishment of a constitutional court to protect the procedural principles of democracy.

It may be asked what significance Kelsen's value relativistic argument for democracy has had in the Swedish debate on constitutional policy. The most influential political scientists at that time – such as Tingsten, Myrdal and Westerståhl – were value relativists. But they did not invoke value relativism as an explicit argument for democracy.

The dominance of value relativism did, however, lead to a general reluctance to discuss democracy's fundamental value. When Ingemar Hedenius raised that question in a conversation with Tingsten, the latter replied that it was meaningless to "go up to the main stairway"; in other words, there would never be any answer to the question of the fundamental value of

³⁷ Hans Kelsen: *Vom Wesen und Wert der Demokratie* (Aalen: Scientia 1981/1929) cited in Herbert Tingsten: *Demokratiens seger och kris* (Stockholm: Bonniers 1933) 28.

³⁸ Kelsen's argument is supported in Leif Lewin: *Upptäckten av framtiden* (Stockholm: Norstedts) 16.

³⁹ Tingsten (1933) 28, see note 36.

⁴⁰ See Mats Lundström: "Demokrati och värderelativism", in Sverker Gustavsson, Jörgen Hermansson and Barry Holmström (eds): *Statsvetare ifrågasätter* (Uppsala: Acta Universitatis Upsaliensis 2008).

⁴¹ Tingsten (1933) 27, see note 38.

⁴² Lundström (2008), see note 41.

democracy.⁴³ This exchange may possibly indicate the most important impact of value relativism – the lack of a moral discourse about democracy.

Value relativism is related to Tingsten's thesis of the "death of ideologies".⁴⁴ This rejection of ideological conflicts is one important aspect of the anti-constitutional ideas that characterized Swedish political culture during the mid-1900s. Democracy was regarded as having been reduced to administering a welfare state, supported by a community of shared values. In such a political climate, there is no need for constitutional restraints on majoritarian democracy.

But the ideas associated with value relativism were also intimately related to the majoritarian model of democracy that gradually developed in Sweden and was codified in the constitution 1974. The strong emphasis on implementing the will of the people is linked to Jörgen Westerståhl's theory of "opinion representation". Even though value relativism was not specifically invoked as an argument for democracy, it underpinned a sort of subjectivism regarding values. Value conflicts can only be resolved by "the valuing subject", which in a democracy is the citizenry.⁴⁵

Westerståhl's view is one of two perspectives that distinguish the Swedish conception of democracy. But before taking a closer look at Westerståhl's analysis, let us consider another important concept in the Swedish discourse on these matters – Herbert Tingsten's concept of procedural democracy.

C. PROCEDURAL DEMOCRACY

In Sweden, the concept of procedural democracy has had a dominant influence in the constitutional debate among political scientists and politicians.⁴⁶ The foremost interpreter of procedural democracy was Herbert Tingsten.

Tingsten, who felt it was not worthwhile to devote much effort to defining democracy, contented himself with the following definition.⁴⁷

Democracy involves a certain organization of government, an organization of which regular and legally non-binding expressions of popular opinion – primarily in the form of elections – form a central element.

⁴³ Ingemar Hedenius: *Herbert Tingsten. Människan och demokraten* (Stockholm: Norstedts 1974) 103.

⁴⁴ Bernt Skovdahl: *Tingsten, totalitarismen och ideologierna* (Stockholm: Brutus Östlings förlag 1992) 357.

⁴⁵ Jörgen Westerståhl: "Om statsvetenskapens förträfflighet", in von Sydow, Björn et al. (eds): *Politikens väsen. En vänbok till Olof Ruin*. (Stockholm: Tiden 1993) 281.

⁴⁶ See Erik Holmberg and Nils Stjernquist: *Vår författning* (Stockholm: Norstedts Juridik 1995) 40 for a procedural account of democracy in their interpretation of the first paragraph of the *Instrument of Government*. See also Jörgen Hermansson: "Att tämja folkmakten" in Erik Amnå (ed.): *Maktodelning*, SOU 199:76 (Stockholm: Fritzes).

⁴⁷ Tingsten (1933) 58, my translation, see note 38.

His definition was decided by an effort to follow the dominant use of language. Like Alf Ross, who made a strong impression on him, Tingsten regarded the definition of democracy as a linguistic question without any normative implications beyond pure semantics.⁴⁸

Tingsten maintained, as did Ross, that democracy is a question of decision-making *procedure*, not of the content of the decisions:

The belief in democracy... is based on a conception of the form of government, on the procedures for making political decisions, not on the nature of government decisions or the structure of society. Democracy may also be regarded as a sort of supra ideology, in the sense that it is common to various political standpoints. One may be a democrat and at the same time a Conservative, Liberal or Socialist.⁴⁹

This thesis of the “supra ideology” has often been interpreted as a normative democratic theory postulating that the value of a democratic procedure is superior to the specific values defended by political parties operating within the framework of democracy. Tingsten argues, it is claimed, that the value of democracy consists of its being a neutral decision-making process, and that this value is ranked above all other political values.⁵⁰

A closer analysis of Tingsten’s texts indicates that this interpretation of Tingsten is based on a misunderstanding.⁵¹ The procedural definition of democracy, defended by Tingsten, does not imply a normative procedural *theory* of democracy.⁵²

Tingsten’s conclusion that the belief in democracy is a supra ideology should be interpreted as a conceptual clarification of what it means to be a democrat. According to Tingsten, to the extent that one advocates democracy, it is necessary to accept the outcome of democratic procedures even if it goes against one’s own ideological convictions; otherwise, one is not a democrat.

In this sense, “belief in democracy” is something that by definition unites democrats. But various justifications for democracy can be invoked by its adherents. They do not need to agree that democracy possesses the supreme political value in terms of a neutral procedure.

⁴⁸ cf. Ross (2003) 92, see note 18. According to the classifications of definitions used by Arne Næss in *Democracy, Ideology and Objectivity* (Oslo: University Press 1956) 27, Tingsten’s definition of “democracy” in terms of procedure is intended to be a descriptive definition, i.e. a definition based on the use of language. It is not a normative definition in the sense of a stipulative definition. Moreover, according to the descriptive definition the term “democracy” is descriptive in the sense that it refers to an empirical state of affairs.

⁴⁹ Herbert Tingsten: *Demokratiens problem* (Stockholm: Norstedts 1945) 57, my translation.

⁵⁰ Jörgen Hermansson: ”Introduktion” in Robert Dahl (et al): *Idéer om demokrati* (Stockholm: Tiden 1991) 200.

⁵¹ Mats Lundström: “Tre demokratibegrepp i svensk statskunskap” in Niklas Berggren, Nils Karlsson and

Joakim Nergelius (eds): *Demokratis konstitutionella val* (Stockholm: City University Press 2001) 165–227.

⁵² Cf. Charles Beitz: *Political Equality* (Princeton, N.J.: Princeton University Press 1989) ch. 4.

Tingsten did not formulate an elaborate normative theory of democracy. He took its value more or less for granted. His writings on the subject were primarily intended to clarify the meaning of democracy and, in polemics against totalitarian ideologies, what it did *not* mean.

As discussed above, this lack of a well-developed normative rationale for democracy can be explained by Tingsten's value relativism. He often invokes practical arguments for democracy, such as peace and social stability.⁵³ But the very last sentence of *Demokratiens problem* [The Problem of Democracy] presents a rather clear and categorical argument for democracy that is very similar to J.S. Mill's:⁵⁴

But in today's circumstances, there is perhaps good reason to emphasize, above all, that democracy requires personal independence, and can only be justified as a means to liberate and develop the human personality.⁵⁵

Thus, his rationale for democracy illustrates that it is possible to combine a procedural definition of democracy with a consequentialist (and liberal) argument for democracy.

There is here a similarity with Brian Barry's strict procedural concept of democracy, and his consequentialist justification of democracy in terms of egalitarian liberalism.⁵⁶ Barry's strict procedural definition of democracy may be regarded as a more elaborate version of Tingsten's:

By a democratic procedure I mean a method of determining the content of laws (and other legally binding decisions) such as that the preferences of the citizens have some formal connection with the outcome in which each counts equally. That is to say, I reject the notion that one should build into 'democracy' any constraints on the content of the outcomes produced, such as substantive equality, respect for human rights, concern for the general welfare, personal liberty, or the rule of law. The only exceptions (and these are significant) are those required by democracy itself as a procedure.⁵⁷

Like Tingsten, Barry asserts the importance of distinguishing between decision-making procedure and the contents of political decisions. The latter are not subsumed within the concept of democracy. However, Barry includes an exception for one type of decisions – those involving constraints on democracy.

On that point Tingsten was not as explicit, although he did point out that certain political

⁵³ Tingsten (1945) 87, see note 50.

⁵⁴ Tingsten (1945) 264, my translation, see note 50.

⁵⁵ In a subsequent article, Tingsten stated that "the principal goal of democracy is to increase the individual's freedom, independence, and ability to conduct what can be called meaningful private activities. That is the great problem." See Herbert Tingsten: *Från Idéer till idyll* (Stockholm: Aldus 1963) 171, my translation.

⁵⁶ See Brian Barry: *Justice as Impartiality* (Oxford: Oxford University Press 1995).

⁵⁷ Brian Barry: *Democracy and Power* (Oxford: Oxford University Press 1991) 2.

rights are essential to democracy. But from that it does not follow that a definition of democracy must necessarily include a prohibition against removing or restricting those rights.⁵⁸

Whether or not rights and freedoms should be regulated by a constitution is, however, a normative issue that cannot be resolved by any definition of “democracy”.⁵⁹

1. PROCEDURAL DEMOCRACY AND LIBERAL CONSTITUTIONALISM

It has been stated that Tingsten advanced a “liberal” conception of democracy.⁶⁰ But, like Ross, Tingsten made a clear distinction between democracy and liberalism in his thesis about the belief in democracy as “supra ideology”.⁶¹ Democracy means sovereign power of the people over a state. But, according to Tingsten, the degree of democracy can be reduced by a liberal constitution, as is the case in the United States with its “balance of powers” and Supreme Court.⁶²

Such an understanding of the *concept* democracy can hardly be described as liberal. But as we have seen, it did not prevent Tingsten from invoking liberal *arguments* for democracy. However, he would not have regarded a non-liberal policy as undemocratic if it is decided within a democratic order.

Ross’s ideal-type definition of democracy, which is an elaborated version of Tingsten’s definition, clearly indicates that, at the conceptual level, the degree of democracy is reduced by liberal constitutionalism. Power-sharing, for example with a constitutional court empowered to review legislation, involves a limitation on democracy, according to Ross.⁶³ The extent of that limitation depends on the extent of the court’s powers of review, and on the extent to which the constitution can be altered by democratic procedure.

⁵⁸ The “classic” question of whether it should be possible, in a democracy, to abolish democracy can be addressed in two ways - as either a conceptual and logical problem or as a moral problem. Conceptually, there is nothing wrong in stating that it can be possible in a democracy to abolish democracy, or that a prohibition against abolishing democracy constitutes a restraint on democracy. But from a moral point of view it can be a problem. See Mats Lundström: “The Moral standing of democracy” in Niklas Berggren, Nils Karlsson and Joakim Nergelius, J (eds): *Constitutions Matters* (New York: Transaction Publishers 2000).

⁵⁹ It should be possible for Barry to remove the prohibition against decisions on restraints of democratic rights and freedoms from his definition of democracy, and instead urge such a prohibition on normative grounds. If one is determined to respect democratic procedures at all costs (which, however, is not Barry’s position), one can insist that it should be forbidden to place any restraint on democratic rights and freedoms. Paradoxically, the German constitution’s enshrinement of democracy in the so-called eternity clause constitutes a restraint on democracy.

⁶⁰ Rune Premfors: *Den starka demokratin* (Stockholm: Atlas) 17.

⁶¹ cf. Ross (2003) 119, see note 18.

⁶² Tingsten (1933) 339, see note 38.

⁶³ Ross (2003) 102, see note 18. Cf. Barry Holmström: *Domstolar och demokrati* (Uppsala: Acta Universitatis Upsaliensis 1998) 454.

As previously noted, Hans Kelsen recommended a constitutional court with the primary function of protecting the fundamental principles of democracy. But if such a court were empowered to review legislation, it would also comprise a limitation on democracy, even if it could be motivated by the intent to *protect* democracy.⁶⁴

The same line of reasoning can be applied to constitutional guarantees for rights and freedoms, to which some resistance has been expressed in the Swedish constitutional debate.⁶⁵ While it is true that democratic rights and freedoms are accorded protection in the Swedish constitution, that protection is not absolute. Rights and Freedoms can be restricted by ordinary law.⁶⁶ The sole exception is the freedom of the press and freedom of expression, which is regulated by separate constitutional law, and cannot be restricted by ordinary law.

Tingsten maintained, in the report of the so-called Tingsten Commission of 1941, that the conflict between democracy and the constitutional principles of the 19th century had diminished.⁶⁷ But Tingsten also stated that democracy requires protection of individual freedom and essential democratic rights. Nevertheless, he was sceptical about giving these rights an absolute constitutional protection. The primary function of a constitution, he argued, was to protect the formal rule of law, for example by prohibiting retroactive legislation. Tingsten wanted to ensure opportunity for political flexibility, especially with regard to the special need for effective political action during the time of war.

2. THE INFLUENCE OF THE PROCEDURAL CONCEPT OF DEMOCRACY

What is the connection between the procedural conception of democracy, that Tingsten so successfully promoted in the Swedish debate, and the resistance to liberal constitutionalism? Even though, logically, the procedural conception of democracy has no normative or political implications, it may indirectly offer support for anti-constitutionalist arguments.

A procedural definition of democracy requires a linguistic usage which implies that if you recommend liberal constitutionalism – e.g., by means of power-sharing or judicial review of legislation – you must argue for a *reduced* level of democracy. In this, perhaps, resides the procedural conception of democracy's most significant influence. It is precisely for this reason that, today, proponents of constitutionalism often define "democracy" in a way that makes constitutionalism democratic, while opponents of constitutionalism prefer to retain the procedural definition.⁶⁸

The constitutional debate between Robert Dahl and Ronald Dworkin illustrates this rhetorical connection between definitions of "democracy" and attitude towards liberal constitutionalism. Dahl has formulated a procedural definition of democracy that is very similar

⁶⁴ Cf. Thomas Christiano: *The Constitution of Equality* (Oxford: Oxford University Press 2008) ch. 7.

⁶⁵ SOU 2008:125: *En reformerad grundlag* (Stockholm: Department of Justice) Ch. 6.

⁶⁶ SOU 2008:125, 392, see note 66.

⁶⁷ Karl-Göran Algotsson: *Medborgarrätten och regeringsformen* (Stockholm: Norstedts 1987) 28–30.

⁶⁸ Holmström (1998) 55, see note 64.

to that of Tingsten.⁶⁹ Dahl is also positive toward the Scandinavian model of democracy, and he regards the US Constitution as undemocratic in important respects.⁷⁰

Ronald Dworkin, on the other hand, defines democracy in terms of substantial moral standards.⁷¹ He is also favourably disposed to a constitutional court with the power to review legislation.

The Swedish constitutional debate also illustrates the connection between semantics and normative reasoning.⁷² Advocates of constitutional reforms for power-sharing and judicial review prefer to define democracy in terms of the reforms they recommend. The Swedish *National Commission on Power* and the *Democratic Audit* by the Centre for Business and Policy Studies argued for liberal constitutionalism from a “pluralistic” concept of democracy that includes liberal constitutionalism, such as division of powers and material principles of rule of law.⁷³ A project on constitutional policy conducted by the City University in Stockholm has also recommended a definition of “democracy” that includes liberal constitutionalism.⁷⁴ Such redefinitions of “democracy” implies that if you argue for liberal constitutional reforms in Sweden, you are simply arguing for more democracy.⁷⁵

These observations suggest that the procedural definition of “democracy”, that have been so influential, has been regarded as a defence for the majoritarian model of democracy in Sweden. A definition of “democracy” have been regarded as a normative *statement* about the best form of constitution.⁷⁶ But Tingsten, who was the strongest proponent of a procedural concept of democracy, did not regard his definition of “democracy” as a constitutional recommendation. Westerståhl, Tingsten’s disciple, did, on the other hand, derive more obvious normative constitutional principles from the conceptual analysis of democracy.

⁶⁹ Robert Dahl: *Democracy and its Critics* (New Haven: Yale University Press 1989) 222.

⁷⁰ Robert Dahl: *How Democratic is the American Constitution?* (New Haven: Yale University Press 2003).

⁷¹ Ronald Dworkin: *Sovereign Virtue* (Cambridge Mass.: Cambridge University Press 2000) 136. Cf. Ronald Dworkin: *Is Democracy Possible Here?* (Princeton, N.J.: Princeton University Press 2006) 131.

⁷² Mats Lundström: “Kan definitioner av ‘demokrati’ vara opartiska?” (2001) *Tidskrift för politisk filosofi* nr 1, 38–80.

⁷³ Olof Petersson: *Demokrati och makt i Sverige*. SOU 1990:44 (Stockholm: Allmänna förlaget 1990), Bo Rothstein (ed.): *Demokrati som dialog* (Stockholm: SNS Förlag 1995)

⁷⁴ Niklas Berggren, Nils Karlsson, och Joakim Nergelius, J.: *Den konstitutionella revolutionen* (Stockholm: Stockholm City University Press 2001).

⁷⁵ See for example Rothstein (1995) 131, see note 74.

⁷⁶ Petersson (1990) 12-17, see note 74.

D. DEMOCRACY AS “OPINION REPRESENTATION”

A Swedish textbook on political science states that a basic principle of the Swedish constitution is that the elected representatives should represent the opinions in the electorate.⁷⁷

This principle of opinion representation reflects a normative view of democracy, according to which political decisions should correspond with the will of the people.⁷⁸ Such a “popular will theory” of democracy goes beyond the principle of popular sovereignty. It is only one of several possible normative theories of how a representative democracy should work.

The concept of “opinion representation” is primarily associated with Jörgen Westerståhl, professor of political science at Gothenburg University from 1952 to 1982. The concept was developed in a major research project on local politics which he launched at the start of the 1970s. Opinion representation also became a fundamental criterion for the evaluation of democracy in the empirical election research that he led.⁷⁹

Westerståhl served as secretary of the national commission that formulated the proposal for the constitutional reform of 1974. His ideas of opinion representation have exerted a major influence on interpretation of the democratic foundations of Swedish government. According to the Instrument of Government,

All public power in Sweden proceeds from the people. Swedish democracy is founded on the free formation of opinion and on universal and equal suffrage.⁸⁰

That formulation serves as the basis of the argument of the book, *Den svenska folkstyrelsen* [Swedish Popular Rule]:

To be able to declare that “All public power in Sweden proceeds from the people”, the will of the people must be realized to a reasonable extent; and to be able to speak of “the people’s will”, the formation of opinion must occur under conditions that satisfy reasonable demands for the free formation of opinion.⁸¹

The assumption is that the outcomes of representative democracy should approximate the hypothetical outcomes of direct democracy.⁸² The principal rationale for this normative thesis was formulated in a report of Westerståhl’s research project on local politics:

... a well-functioning representative government based on popular sovereignty shall lead to the same results as a government of direct democracy would have done, provided all citizens have had the opportunity to participate in decisions and to inform themselves on

⁷⁷ Torbjörn Larsson: *Det svenska statskicket* (Lund: Studentlitteratur 1993) 121.

⁷⁸ Beitz (1989) 49, see note 53.

⁷⁹ See Mikael Giljam and Sören Holmberg: *Väljarnas val* (Stockholm: Norstedts juridik 1995) 138.

⁸⁰ *Instrument of Government*, Ch. 1. 1§.

⁸¹ Bigersson and Westerståhl (1979) 14, my translation, see note 10.

⁸² Cf. Beitz (1989) 56, see note 53.

relevant matters to the same extent that governing councils have been. On this basis, it can be stated that the people govern even in a representative government, and that the realization of the people's will can be retained as the supreme goal.⁸³

It appears that Westerståhl derived the goal of realizing the people's will from the principle of representative democracy. But the idea that representative democracy *means* carrying out the people's will is based on disputed interpretation of the principle that "all public power proceeds from the people".

What appears to be a neutral conceptual derivation is, in fact, a far from self-evident normative statement on the value of representative government.⁸⁴ It is not self-evident whether the ideals of direct democracy should be applied to representative democracy. In the former, it is the citizens who make the political decisions; in the latter, they decide who among them shall make those decisions. An indirect democracy can be regarded as "working", even if the elected representatives do not hold the same opinions as the voters.⁸⁵

Westerståhl commits the error of equating "public power" with opinion representation by the elected. The voters' power should instead be regarded as a relation of domination, in the sense that the voters can replace the elected representatives if they, for whatever reason, want to do that.

Westerståhl appears to include a principle of *mandate representation* in the concept of representative democracy. He takes it for granted that voters cast their votes for candidates whose opinions they approve, and that elected representatives should make decisions that are approved by those who voted for them. But in a representative democracy, both voters and the elected are free to base their actions on whatever motives they wish. Voters can cast their votes according to the principle of *accountability*, which means being guided more by preferences over the *outcomes* of decisions. This has been referred to as "retrospective voting".⁸⁶ Political representatives are accorded the role of trustee.⁸⁷ In this case, opinion representation becomes of secondary importance. Voters can also prefer some kind of group representation, such as gender, ethnicity or class.⁸⁸

⁸³ Jörgen Westerståhl och Folke Johansson: *Medborgarna och kommunen. Rapport kommunaldemokratisforskningsgruppen* (Ds Kn 1981:12 1981) 12, my translation.

⁸⁴ This point is made by Beitz: "To hold that it is true by definition, or by linguistic convention, or by consent, that rule by the people is rule by the popular will in the technical sense of the term associated with the theory of public choice is to assert a normative thesis that needs to be argued for" (Beitz (1989) 56, ref. in note 53).

⁸⁵ Representation of opinion should be equated with responsiveness in relation to the choice of the electorate (see Dahl (1989) 140, ref. in note 70). In a representative democracy responsiveness concerns the members of the elected body, not the opinions of the elected.

⁸⁶ Morris P. Fiorina: *Retrospective Voting in American National Elections* (New Haven: Yale University Press 1981).

⁸⁷ See Bernard Manin, Adam Przeworski and Susan Stokes: "Elections and Representation", in Bernard Manin, Adam Przeworski and Susan Stokes (eds): *Democracy, Accountability and Representation* (Cambridge: Cambridge University Press 1989).

⁸⁸ Cf. Anne Phillips: *The Politics of Presence* (Oxford: Oxford University Press 1995).

The principle of opinion representation expresses a populist ideal of democracy, which in the Swedish debate has been strongly propounded by Torbjörn Tånnsjö.⁸⁹

1. ALTERNATIVE EVALUATION CRITERIA

When evaluating a democratic system of government, one can distinguish between *internal* and *external* criteria.⁹⁰ Internal criteria measure how well a democracy functions on the basis of *analytically* derived requirements.⁹¹ Voting turnout is an example of an internal criterion, because voting is an analytically derived requirement of democracy. The higher turnout, the better a representative democracy works from an internal democratic point of view (*ceteris paribus*).

External evaluation criteria, on the other hand, are derived from normative principles concerning the *value* of a democratic system. A utilitarian, for example, looks at democracy's ability to generate human welfare. A classical liberal is concerned with a democracy's respect for the rule of law. An epistemic democrat is concerned with a democracy's ability to produce knowledge-based decisions.

Westerståhl appears to argue that opinion representation is an *internal* evaluation criterion for representative democracy, because the *meaning* of popular sovereignty over a state is that political decisions shall correspond to the will of the people. But popular sovereignty in a representative democracy refers to the power of the citizenry to determine the composition of decision-making bodies. It is the functioning of popular power in this sense, that is an internal evaluation criterion for representative democracy.

If one assumes decisions in a representative democracy will correspond to the will of the people, one chooses an *external* evaluation criterion that goes beyond the principle of popular sovereignty. Representative democracy can be evaluated on the basis of completely different principles, such as those relating to the epistemic or moral quality of decisions.

In the history of ideas, the principle of representative democracy has been justified as a means of reaching decisions which in some sense are better than the will of the people.⁹²

If one applies external evaluation criteria that are independent of the popular will, constitutional restraints and judicial review may be necessary to ensure morally legitimate decisions.⁹³ Popular sovereignty may still prevail, in terms of ultimate power over the constitution.

But a basic premise of Westerståhl's conception of democracy is that popular sovereignty implies that political decisions implement the will of the people. It is therefore difficult to defend constitutional restraints that impede or complicate agreement between voters' opinions and political decisions.

⁸⁹ Torbjörn Tånnsjö: *Populist Democracy – a Defence*. London (Routledge & Kegan Paul. 1992), cf. William Riker: *Liberalism Against Populism* (San Francisco: W. H. Freeman 1982).

⁹⁰ Cf. Dahl (1989) 167, see note 70.

⁹¹ See Ross's definition of "democracy", note 19 above.

⁹² Bernard Manin: *The Principles of Representative Government* (Cambridge: Cambridge University Press 1997).

⁹³ Cf. Dworkin (2000), see note 72.

When combined with the procedural concept of democracy, the principle of opinion representation can appear to be a strong argument against corrective constitutional restraints on majority rule. But the procedural definition of democracy advocated by Tingsten does not have the same normative connotation as Westerståhl's conception of democracy. In a representative democracy, the rules of the game do not prescribe representation of voters' opinions, rather the democratic selection of decision makers.

E. CONCLUDING REMARKS

In terms of the history of ideas, the background to Swedish anti-constitutionalism is complex. The purpose of this discussion has been to analyse the theoretical relationships between three fundamental ideas of political culture in Sweden during the formative period of Swedish democracy, and the resistance in Sweden to corrective constitutional restraints on majoritarian rule.

With regard to the three fundamental concepts, Westerståhl's popular will theory, with its reference to direct democracy as an ideal, can be invoked as a strong argument against constitutional restraints on majority rule.

On the theoretical level, neither value relativism nor the procedural concept of democracy has any anti-constitutional implications. But a normative interpretation of those ideas tends to support constitutions that provide ample opportunity for the will of the people to influence political decisions.

The most important influence of value relativism is the impediment on a moral philosophical discussion on the basic value of democracy. When Tingsten advocated a procedural concept of democracy, his purpose was to conceptually and linguistically clarify the *meaning* of democracy, not to formulate a procedural normative theory for democracy.

Tingsten's basic argument for democracy is consequentialist and liberal (like J.S. Mill's). Nevertheless, Tingsten's procedural definition of democracy has been subject to normative interpretation, in terms of a "democratism" that assigns democracy a supreme value.⁹⁴ But if Tingsten had devoted more effort to explaining his basic argument for democracy, that sort of misunderstanding could have been avoided, and the anti-constitutional implications of his view of democracy less evident. Tingsten's resistance to constitutionalism was not motivated by the supreme value of democratic procedures, but by pragmatism and consequentialist concerns..

As J.S. Mill, Tingsten emphasised the importance of the nation-state with shared fundamental values, for the moral legitimacy of democracy. When the nation-state is being eroded by globalisation and a increasing cultural diversity, his liberal principles could justify constitutional constraints on majoritarian democracy.

But politics can in effect be non-majoritarian, even if the constitution is formulated in majoritarian terms. It is an open question whether the existing majoritarian constitution of

⁹⁴ Jörgen Hermansson: "Vad är det som är bra med demokrati?" in Mikael Giljam och Jörgen Hermansson (eds); *Demokratins mekanismer* (Stockholm: Liber 2003).

Sweden can be imbued with a more cautious deliberative ideal that inspires voluntary restraints on majoritarian partiality, without the need to write them into the constitution.⁹⁵ A constitutional policy without constitutional restraints fits well within the Swedish constitutional tradition.⁹⁶

⁹⁵ Mats Lundström: "Engagemang och opartiskhet" in Karin Boren and Per Strömblad (eds): *Engagemang, mångfald och integration*. Rapport från Integrationspolitiska maktutredningen, SOU:2004:49 (Stockholm: Fritzes 2004) 290.

⁹⁶ Richard Bellamy: *Political Constitutionalism* (Cambridge: Cambridge University Press 2007).

POLICY VIEWS ON THE INCORPORATION OF HUMAN RIGHTS CONVENTIONS – CEDAW IN NORWEGIAN LAW

By HEGE SKJEIE*

Abstract: *The article discusses legal-political controversies over the implementation of international human rights conventions in Norway, with special attention to claims concerning judicialization and power transfer effects. Insofar as a dynamic interpretation of state obligations by international supervision agencies is said to affect the balance of legislatures to courts, such claims create a platform for critique of governmental initiatives to implement human rights conventions. In a recent controversy over the incorporation of CEDAW into the 1999 Human Rights Act, government lawyers have on this basis argued what I here call a doctrine of “appropriate restraint”. The article recapitulates the CEDAW controversy, and critically evaluates the doctrine’s content in relation to its power transfer claims. On May 8th 2009, the Norwegian Government presented the bill on incorporation of CEDAW into the Human Rights Act.*

Key words: *The Human Rights Act, judicialization, judicial review, the power transfer thesis, CEDAW.*

A. INTRODUCTION

This spring the Norwegian parliament – the Storting – will vote on a governmental proposal to incorporate CEDAW into the Human Rights Act. The Convention on the Elimination of All Forms of Discrimination against Women is the fifth international human rights convention to be incorporated into this law which explicitly states that in case of conflict between convention statutes and other Norwegian law, the former has priority. In popular terms, this is often referred to as the Human Rights Act’s “semi-constitutional” status.

The 1999 Human Rights Act incorporates the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and, since 2003, the Convention on the Rights of the Child (CRC). The decision to incorporate CEDAW was made after a decade’s debate on the proper implementation of international human rights conventions in national law. Varying political majorities have been in favor of an extensive incorporation strategy. Groups of government lawyers, mainly concentrated around the Office of the Attorney-General and the legal section of the Ministry of Justice,¹ have consistently fought to rally

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¹ See *Klassekampen* (<http://www.klassekampen.no/54491/article/item/null>) (accessed 23.03.2009), also *Dagbladet* (<http://www.dagbladet.no/nyheter/2009/05/10/574468.html>) (accessed 09.05.2009).

support for a strategy which I here choose to call a doctrine of “appropriate restraint”. Briefly summarized, this doctrine is about putting on the brakes. The Attorney-General² holds the opinion that the proper line to prioritized incorporation should be drawn after the European Convention on Human Rights and the International Covenant on Civil and Political Rights.³ His advice has not been followed. No other Nordic country has chosen similarly broad forms of implementation at such high levels of formality as Norway. By now, however, it seems that a final line has been drawn. In the proposal to incorporate CEDAW into the Human Rights Act, the Government also states that CEDAW would be the last international convention to enter this law.⁴

Generally stated, the Human Rights Act is meant to secure a national legal practice that is consistent with international human rights practice.⁵ The Office of the Attorney-General is concerned about the consequences of the national human rights regime with regard to the traditional balance between courts and elected political assemblies. But misgivings such as those expressed by this office are not necessarily linked to the particular Norwegian context of prioritized incorporation. They resonate through the critical discourse on international human rights which in more general terms depicts an opposition between court-based human rights protection and democratic majoritarian rule.⁶

The oppositional frame is built through the advocacy of a thesis on judicialization and concurrent/consequent inappropriate power shifts, or transfers. In the human rights context, the thesis then questions the legitimacy of international control over state power and sovereignty through implementation of human rights conventions, and problematizes, in general terms, the possible shifts in legislative power which might be brought about through the dynamic interpretation of state obligations by international supervision agencies, i.e., human rights committees and courts.

While the formal legal implementation of human rights obligations in itself is seen as representing a form of judicialization, the dynamic interpretation style of international human rights bodies is claimed to further skew the balance between international and national powers, in largely unforeseen/unpredictable ways. Internationally driven judicialization is also

² Regeringsadvokaten; the Government’s attorney. The official English translation is “Office of the Attorney-General”, see <http://app.norge.no/styresmakter/liste.asp?n=1&nt=0&nw=1&nw1f=5&nw1v=24&nw1o=8&nw1t=1&nw1l=1&nwc=20&nh=0&nc=3&np=1&ni=2&nvis=detaljer> (accessed 30.01.2009).

³ Letter to the Prime Minister’s Office, 24.06.2004, consultation on the Power and Democracy investigation, cf. NOU 2003:19: *Makt og demokrati*. This letter forms the basis for my outline of the “restraint” doctrine.

⁴ Ot.prp. nr. 93 (2008-2009) *Om lov om endringer i menneskerettsloven mv. (inkorporering av kvinneskreddiskrimineringskonvensjonen)* 22.

⁵ See Inger-Johanne Sand: “Judicial Review in Norway under Recent Conditions of European Law and International Human Rights Law – A Comment” (2009) 27 *Nordic Journal of Human Rights* (this issue).

⁶ See Andreas Føllesdal: “Why the European Court on Human Rights might be Democratically Legitimate – A Modest Defence” (2009) 27 *Nordic Journal of Human Rights* (this issue). Also Jens Vedsted-Hansen: “Menneskerettigheter som politisert ret eller retliggjort politikk?” (2004) 36 *Politica*, 41.

seen to skew the balance between the national courts and the national legislature if/when national courts apply these interpretations in ways that transcend a traditionally restrained role vis-à-vis the legislature.

From this combined “judicialization and power transfer” thesis follows the need for caution in implementing human rights and, thus, the doctrine of “appropriate restraint”. Giving the floor to the Norwegian Attorney-General, only those statutes which are “suitable for enforcement by courts” (“egnet for å håndheves av domstolene”, my translation) should be incorporated into Norwegian law. Statutes must be sufficiently “clear” to be applied by courts, and sufficiently “broad” in balancing different considerations. In the eyes of the Attorney-General, some human rights are seen as more basic (“grunnleggende”) than others, and only the former warrant (prioritized) incorporation.⁷

The present thematic issue on judicial review in the Nordic countries departs from a general observation about a traditional common pattern of hesitant, or restrained, application of judicial review. It is thus important to note that “appropriate restraint” in the human rights context, while cautioning against expansive autonomous interpretation of human rights obligations by the national courts, seems mainly opposed to expansive international influence on national legislation through various indirect forms of review, which then address the state’s adherence to human rights obligations by way of national court interpretation. This way, concerns about sovereignty seem to form the dominant “power transfer” issue here. Jonas Christoffersen has outlined how a more general human rights critical discourse may follow one of two optional axes, a vertical axis which positions the “national” vs. the “international”, and a horizontal axis which poses the “political” vs. the “judicial”.⁸ In the Norwegian context the two themes are intertwined, but still seem most strongly expressed along the vertical axis.

How international human rights influence national political decision making also became important issues in two parallel, large scale research investigations of “power and democracy”, commissioned by, respectively, the Norwegian Government and Danish parliament towards the new millennium (1998-2003). Controversy divided the research group in charge of the Norwegian study over judicialization claims and assessment of the human rights regime and resulted in a majority and dissenting minority report.⁹ In the Danish context, no similar disagreement over human rights regimes arose.¹⁰ As member of the Norwegian commission I

⁷ Letter to the Prime Minister’s Office, 24.06.2004, see note 3.

⁸ Jonas Cristoffersen: ”Den danske debat om den internasjonale menneskeret” (2006) 24 *Nordisk tidsskrift for menneskerettigheter*, 97–114.

⁹ Majority report by Øyvind Østerud, Fredrik Engelstad and Per Selle, minority report by Hege Skjeie, in NOU 2003: 19: *Makt og demokrati*. A second minority report was delivered by Siri Meyer.

¹⁰ Lise Tøgeby, Jørgen Goul Andersen, Peter Munk Christiansen, Torben Beck Jørgensen & Signhild Vallgård: *Magt og demokrati i Danmark. Hovedresultater fra magtutredningen*. (Århus: Århus Universitetsforlag 2003) With regard to the national implementation of human rights conventions, the Danish report paid particular attention to ECHR and the European Human Rights Court, as this is the only convention that is fully incorporated into Danish law, although with no formal priority clause similar to the Norwegian. The limited role that concerns about judicial empowerment played in the report on the Danish state of democracy, has led observers to remark that the importance of the human rights regime in this respect might well be overstated, in particular by lawyers (Cristoffersen (2006) 14, see note 8).

wrote a minority report in opposition to the majority's critique of human rights implementation which it claimed had contributed to undermine popular democratic rule through processes of judicialization. Since the Norwegian Power and Democracy Commission delivered its final report in 2003, I have participated in the public debate on the incorporation of CEDAW into the Human Rights Act, and in hearings initiated by parliament and parliamentary party groups on this issue. Here, I have objected to the manner in which the Power and Democracy report has been strategically used by parts of the legal establishment as evidence of large scale power transfers which in turn support the reasonability of the doctrine on restraint. Nor do I, generally speaking, share the viewpoint that we should accept a different legal status for those human rights conventions which provide special protection to groups and individuals who are particularly vulnerable to discrimination, out of consideration for theoretically assumed, or generally stated, institutional power shifts. In writing this article I thus recapitulate the recent controversy over the national human rights regime from a position as an active participant.

B. THE INCORPORATION DEBATE

Firstly, let me state some rather obvious premises. It is the states' sovereign right to choose to enter into international agreements. The human rights regime thus deals with self-imposed limitations to sovereignty. From the perspective of a state that has ratified a convention, the question is therefore how best to ensure compliance at the national level. When human rights obligations create controversy, it is partly due to how rights and obligations are formulated, and how they are interpreted dynamically. Put simply: When ratifying a convention, the state cannot know in detail what it endorses. The extent of the legal protection of human rights is developed through the practices of the international agencies which monitor the states' compliance with the conventions.¹¹

It is the responsibility of the state to secure compliance with ratified international human rights conventions. But in the Nordic countries the so-called dual principle also regulates the concrete legal obligations. "Dual" means that international and national law are considered as constituting two discrete spheres, and that implementation decisions in the parliaments are necessary in order for the conventions to be applied in national law. Implementation of conventions in national law can be undertaken in many ways. One way is "incorporation", which means, simply stated, that the convention's text is included as law.¹² As already noted, this has become the preferred strategy in Norway, where the 1999 Human Rights Act incorporates four human rights conventions with priority granted the incorporated conventions in cases of conflict with other Norwegian law.

¹¹ Vedsted-Hansen (2004) 43. See note 6.

¹² St.meld. 17 (2004-2005) *Makt og demokrati*, with reference to NOU 1993: 18: *Lovgivning om menneskerettigheter*; and Ot.prp. 3 (1998-1999): *Om lov om styrking av menneskerettighetenes stilling i norsk rett*. Also Ida Elisabeth Koch, Kristine Røberg, Sten Schaumburg-Müller & Jens Vedsted-Hansen: *Menneskerettigheter og maktfordeling. Domstolskontrol med politiske prioriteringer* (Århus: Århus Universitetsforlag 2004).

The recent history – and increasing controversy – of active human rights implementation can be held to date back to a governmental decision in 1989. A governmental committee appointed to prepare for national implementation recommended “incorporation” as the most “suitable” form¹³ and proposed incorporation of what it termed the “main conventions” (hov-edkonvensjoner), ECHR, ICCPR and ICESCR. Incorporation was seen as the most “loyal” form of implementation with the strongest “signal effect” –internally in Norway and with regard to other states and international organizations.¹⁴ When Parliament adopted the Human Rights Act, two UN conventions were added to the list of candidates for incorporation, CRC and CEDAW. In a green paper presenting the Government’s new Action Plan on Human Rights in 2000,¹⁵ the Government reported that preparations to incorporate the two UN conventions were under way, and that it was considering the Convention against Torture and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) as appropriate candidates for incorporation. The definition of “main conventions” was here explicitly expanded to include all of “the six most central UN conventions”/ “the most central global human rights conventions”.¹⁶

CRC was incorporated into the Human Rights Act in august 2003. But August 2003 also marked a turning point with regard to political consensus on these reforms. This same month, the Power and Democracy Commission made its main conclusions public. The majority was highly critical of the national implementation of human rights conventions, which, it said, had accelerated the judicialization of politics.¹⁷ “Judicialization” augments the power of the courts at the expense of political majority rule. In the human rights context, the power of the courts simultaneously moves from national to international legal institutions, thus restricting national autonomy and self-determination. More generally, “judicialization” was depicted as a process whereby an increasing number of areas are regulated through law, and political decision making is handed over to courts and other legal institutions. Interest struggles were portrayed as increasingly pursued as legal struggles by groups and individuals. Courts and other judicial bodies increase their decision-making powers at the expense of politics and public administration, wiping out the separation of legislation and legal implementation. The “fundamental meaning” of democracy is majority based decision-making in elected bodies, whereas rights based claims and politics only provide forms of “supplementary democracy”, the majority report stated.¹⁸

My own dissenting statement rejected this “fundamental-supplementary” split. Generally, the minority report argued that rights build democracy. The rights based regulation of the relationship between state and individuals, and between majority and minorities, can be

¹³ NOU 1993:18, 97. See note 12.

¹⁴ St.meld. 21 (1999-2000) *Menneskeverd i sentrum – Handlingsplan for menneskerettigheter*, cf. Ot.prp.33 (2004-2005) *Om lov om forbud mot diskriminering på grunn av etnisitet, religion mv. (diskrimineringsloven)*.

¹⁵ St.meld. nr. 21 (1999-2000). See note 14.

¹⁶ St.meld.21, 21.

¹⁷ NOU 2003:19, see note 3. Øyvind Østerud, Fredrik Engelstad & Per Selle: *Makten og demokratiet. En sluttbok fra Makt- og demokratiutredningen* (Oslo: Gyldendal Akademisk 2003).

¹⁸ NOU 2003: 19: 61. See note 3.

viewed as fundamental democratic premises.¹⁹ That people are effectively guaranteed fundamental rights is a prerequisite for their free and equal participation in popular democratic processes, and does not, as such, contribute to the disintegration of democracy.²⁰ The minority report both described and criticized political priorities which, in the balancing of competing interests, force “a duty to yield” upon gender equality rights. It described CEDAW as an important point of reference for a global women’s rights movement and numerous networks of local groups and organizations engaging in practical on-the-ground human rights work. In terms of political mobilization against discrimination, it claimed that CEDAW presents a radical mechanism for change, both as a normative statement and as a concrete tool in democratization and development processes.

However, with direct reference to the majority’s “judicialization” warnings, the Norwegian centrist-right coalition Government decided, spring 2004, not to carry through the planned incorporation of CEDAW in the Human Rights Act, choosing instead to give both CEDAW and ICERD a less privileged status, incorporating them in respectively the Gender Equality Act and the new law prohibiting discrimination on grounds of ethnicity, national origin, language and religion (The Discrimination Act of 2005).²¹ To completely disregard international conventions which in particular protect against discrimination of women and ethnic minorities, would undoubtedly place a heavy political burden on the Government. The Government also needed to take into account Parliament’s expressed wish to have CEDAW incorporated in Norwegian law. The new position on human rights implementation was thus shaped by these incorporation proposals, the Government here announcing a broader discussion in a follow-up green paper on the Power and Democracy Commission’s report.

The judicialization claims in this report prompted a lively public debate in which the hierarchical framing of “fundamental” vs “supplementary” meanings, or forms, of democracy was an important point of reference.²² The report was distributed for consultation by the Office of the Prime Minister,²³ before the green paper on Power and Democracy²⁴ was discussed by Parliament in June 2005. The green paper’s approach to judicialization was twofold. First, with a focus on national legislation on welfare rights and corresponding discussions about the relationship between the state and municipal levels, and second – and most comprehensive – with a focus on “specific challenges in relation to international agree-

¹⁹ NOU 2003:19, pkt. 14.2, see note 3.

²⁰ Cf. Cathrine Holst and Hege Skjeie: ”Vikeplikt 2005” (commentary) *Dagbladet*, 23. April 2005.

²¹ While the ban on torture was implemented through a new § 117 a in the Penal Code in 2004.

²² It is beyond the scope of this article to try to summarize this debate. Critical legal perspectives are presented through articles and commentaries in *Lov og Rett* from 2003 onwards, see also no. 5-6 2006, no. 2 2007, relating to the extensive critique formulated in Morten Kinander (ed): *Makt og rett. Om Makt- og Demokratiutredningens konklusjoner om rettsliggjøring av politikken og demokratiets forvitrering* (Oslo, Universitetsforlaget 2005), and Kristian Andenæs, Inger-Johanne Sand & Anne Hellum: *Rettsliggjøring, kvinner, makt og politikk*. (Stensilserien nr. 101, Institutt for kriminologi og rettssosiologi, Universitetet i Oslo 2005). *Makt og rett* (Kinander (red) 2005), cf. also Sand 2005, Andenæs, Sand and Hellum (2005).

²³ See: <http://odin.dep.no/smk/norsk/regjeringen/001001-990268/dok-bn.html>.

²⁴ St. meld. 17 (2004-2005). See note 7.

ments”, the Government set out the general consequences of the EEA (EØS) agreement, which, it said, encouraged judicialization in terms of both expansion and concretization of legal standards. “Viewed with Norwegian eyes” regulations following from the EEA agreement might seem unnecessarily detailed and difficult to grasp.²⁵ However, the costs of this kind of judicialization are balanced by the economic advantages of cooperation.²⁶ The human rights arena poses a set of different challenges. Here it is particularly important to find the proper balance between the national legislature, national courts and the international supervision system.

Based on this declaration, the green paper presented what I regard as the adoption of a slightly modified doctrine on “appropriate restraint”. The modified version does not reject incorporation of new conventions in Norwegian law as such. The modified doctrine mainly distinguishes between prioritized and non-prioritized incorporation. This of course was necessary to recognize as “appropriate” the strategy which already had been applied with regard to the incorporation of CEDAW and ICERD. The Government’s principal view was stated as follows: The priority clause should be reserved for “special instances” (“spesielle tilfeller”). With regard to incorporation, the principal rule should be that the incorporated convention is given the rank of ordinary law, where the general, national, interpretation principles apply. In this way, the Government states, it wishes to increase predictability and clarity in the legal system and thereby avoid an unfortunate development along the lines of transfer of power from legislative to judiciary authority.²⁷

But the green paper referred neither to CEDAW nor ICERD, even though it discussed both “Gender and power” and “A diverse, multicultural population” quite extensively. By this very emission, the Government once more – if implicitly - made it clear that these conventions were regarded as “unsuitable” for incorporation into the Human Rights Act simply due to general considerations about the risk of institutional shifts of power.

But as incorporation of CEDAW and ICERD in the Gender Equality Act and the Discrimination Act provided no priority clause, the issue remained controversial. When the general election in September 2005 resulted in a change of Government, the new centrist-left coalition pledged to reverse the decision and work to incorporate CEDAW in the Human Rights Act. ICERD was now, however, left behind. It still took all of three years for the new Government to draft a proposal for this incorporation. Needless to say, government lawyers fought to maintain the earlier breakthrough for restraint. The Attorney General arranged seminars for the Cabinet on the consequences of expansive human rights regimes, and provided special guiding for cabinet members appointed after the seminars. Here the government lawyers claimed the benefit of a particular insight into the workings of the international supervision bodies.²⁸ The civil servants’ seeming reluctance to proceed in accordance with the Gov-

²⁵ St.meld. 17, pkt. 3.7.4.3.

²⁶ St. meld. 17, pkt. 3.8.

²⁷ St.meld.17, 75.

²⁸ Letter to the Prime Minister’s Office, 24.06.2004, see note 3, claiming “one of the best vantage points (“utsiktspunkter”) from which to gauge the collective effect of international and national rule production, and the law-making function (rettskapende virksomhet)of international and national courts”. (My translation.)

ernment's aims was publicly contested. Others, including feminist organizations, national and international aid organizations, human right agencies, and academics continued to put pressure on the Government.²⁹

In November 2008, a consultation paper on incorporation of CEDAW into the Human Rights Act was finally presented by the Ministry of Justice. Notably, the consultation paper repeated at length the general political forebodings toward judicialization and power shifts. It then moved on to substantive assessments and discussed concrete legal consequences – i.e. the immediate, or probable, consequences of the priority clause to existing legislation, and presents a series of legal regulations where a priority clause might have effect. The evaluations however consistently concluded that there is little reason to assume that conflicts arise. In the following consultation process only one invited party opposed the Government's plan. Not surprisingly, it was the Office of the Attorney-General, who stated the office's general reservations to prioritized incorporation of international conventions which pursue only "special values and interests", and repeated its "often expressed worry" about the strategy of prioritized incorporation. It did not consider the actual evaluations made by the Ministry of Justice on incorporation consequences. Instead the office enclosed the 2004 consultation letter to the Prime Minister's Office on the Power and Democracy investigation.³⁰ In the incorporation proposal, the Government made its priorities clear. Incorporation of central human rights conventions strengthens the rights of individuals vis-à-vis the state, and offers effective protection against infringement. This protection is a basic principle in a law governed state and democracy. The Attorney-General's arguments were important, but with regard to CEDAW other considerations counted more. A prioritized incorporation would increase awareness of gender equality and women's rights nationally, and send a strong signal to the international community. However, while CEDAW "holds a very central place among the human rights conventions", no new political moves would be made to incorporate others. Other conventions are of "a more special character", the Government simply concluded.³¹

C. WHERE DOES THE PROPER DEMARCATION LINE LIE?

The doctrine of "appropriate restraint" rests on the premise that it is not only possible, but also quite reasonable to have different forms of implementation for different human rights protec-

²⁹ From The Norwegian Centre for Human Rights, see for instance Njål Høstmælingen: "Annenrangs menneskerettigheter for kvinner og etniske minoriteter?" (commentary) *Morgenbladet*, 15. April 2005, Geir Ulfstein: "Internasjonale menneskerettigheter: Er det gått for langt?" i (2005) 5-6 *Lov og rett*, 257-258; from the Department for Women's Law at the Institute of Public Law, see for instance Anne Hellum: "Maktutredningens påstander om rettsliggjøring settes ut i livet – en knekk for demokratiet?" Editorial in *Hefte for kritisk juss*. 30, 2, 2004, Anne Hellum: "Konvensjonell sexisme" (commentary) *Dagbladet* 31.03.2009.

³⁰ Letter to the Ministry of Justice, 02.02.2009 (<http://www.regjeringen.no/upload/JD/Høringsuttalelser/LOV/Kvinnediskrimineringskonvensjonen/Regjeringsadvokaten.pdf>) (accessed 23.03.2009).

³¹ Ot.prp. nr. 93 (2008-2009), 22.

tions. Yet all efforts to draw distinctions which establish a system of more or less “basic”, more or less “central” human rights conventions, lend themselves to protests about inherent value preferences, and consequent value hierarchies. The chosen strategy of incorporation of full convention texts represents (as intended) a highly visible form of implementation. But this very visibility also contributes to the construction of built-in winners and losers - winners are the incorporated conventions, losers are the non-incorporated. The same logic applies to the priority clause. Arguments can of course be made that non-incorporated conventions are important “enough” and binding when ratified. But the problem of yielding duties imposed on some conventions is inherent in this recipe for differential treatment, as is the pressure toward equal treatment.

Restrained incorporation does not imply a questioning of judicial review as such. It does not, for instance, raise loud concerns about the democratic foundations, or accountability, of courts as such, when they engage in judicial review of legislation.³² If we stick to the 2005 green paper on the Power and Democracy Report, “judicialization” primarily problematizes the scope enabled by extensive incorporation of international conventions in terms of “possibilities”. The green paper acknowledges that international review foremost is a review of the national courts’ interpretation of human right obligations.³³ At the same time it cautions against national “over-implementation”, referring to the Supreme Court’s guidelines on interpretation of ECHR from 2000.³⁴ But it accepts the premise of the priority clause: In cases of conflict ordinary legislation yields to statutes in “special instances” conventions as these are developed by international courts and committees. This is “as practice has been in Norway”.³⁵

In terms of legal hierarchies, the full implications of this reference to “special instances” are still somewhat difficult to grasp. We understand that in the eyes of the government there are conventions which do not merit incorporation into the Human Rights Act. But exactly why this is so for which conventions, we do not know. While the former government applied the term “special instances” to mark conventions which merit incorporation, the present government, on the other hand, applies the term “special character” to mark conventions which do not merit incorporation. But neither clarify why “special” would signal on the one hand inclusion, on the other hand exclusion.

³²See Richard Bellamy: “The Democratic Constitution: Why Europeans should avoid American style Constitutional Review” (2008) 7 *European Political Science*, 9-20. This is broadly discussed by Andreas Føllesdal (2009), see note 6. See also Marlene Wind: “When Parliament Comes First – The Danish Concept of Democracy Meets the European Union” 27 *Nordic Journal of Human Rights* (this issue).

³³ St.mld 17, pkt. 3.7.4. See note 12.

³⁴ Rt. 2000/996, on double penalties, see Inger-Johanne Sand (2009), note 5. For further debate see for instance Carsten Smith: ”Om Høyesteretts forhold til den europeiske menneskerettighetskonvensjon” (2005) 23 *Nordisk tidsskrift for menneskerettigheter*, 433-440, Inge Lorange Backer: ”Om Høyesteretts forhold til den europeiske menneskerettighetskonvensjon” (2005) 23 *Nordisk tidsskrift for menneskerettigheter*, 425-432.

³⁵ St. meld. 17, pkt. 3.8.

Both the legal section of the Ministry of Justice and the Attorney-General's Office have responded to consultation papers on incorporation acts over the past decade. In a 2003 consultation over incorporation of CEDAW, both agencies were preoccupied with the relationship between judicialization and political room to maneuver. The relevance of this should of course be evaluated on the basis of CEDAW statutes. CEDAW protects women's equal right to personal freedom, to life and health, to self-determination, co-determination and participation in society. It aims to change all cultural, social, economic and legal structures which rely on the notion that women are less worth than men, protects women's equal right to education, paid work and health care and equal rights to participation in political and public life. The convention requires states to include the principle of equality between women and men in national constitutions or other appropriate legislation, to prohibit all discrimination against women and refrain from and prevent every action or practice that discriminates against women – as stated in article 2 of the convention - “to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”.

The Attorney-General's arguments against incorporation of CEDAW might be summarized as follows,³⁶

- An argument about judiciability: CEDAW contains too many unclear and vague requirements, and statements that are not law-like enough.
- An argument about judicialization: Incorporation of CEDAW will thus grant power to the courts to decide what convention rights imply.
- An argument about consequent power transfers: This might change the balance between legislator and court, and increase the influence of courts at the expense of parliament.

These arguments are not, however, made only with regard to CEDAW. Similar arguments were made at the public hearing on incorporation of ICERD, and repeated at a public hearing on the incorporation of the Convention on the Rights of the Child. It seems that a generalized approach is applied where every convention that comes up for public and political consideration has to contend with the same critique: it is too vague, too open, and likely to shift the balance of institutional power by judicializing politics.

To illustrate the problem of this generalized approach we can compare convention assessments by the Norwegian Attorney-General and the Danish governmental Incorporation Committee in the late 1990s. Danish law incorporated the European Convention on Human Rights (but without a comparable priority clause) and the mandate of the committee was to assess whether UN human rights conventions could be similarly incorporated. A unanimous committee recommended the incorporation of ICCPR, ICERD, and of the convention on torture.³⁷

With regard to CEDAW, many of the positive obligations for the member states were

³⁶ Ot.prp.35 (2004-2005), *Om lov om endringer i likestillingsloven mv(Gjennomføring av Europa-parlaments- og rådsdirektiv 2002/73/EF og innarbeiding av FN-konvensjonen om avskaffelse av alle former for diskriminering av kvinner med tilleggsprotokoll i norsk lov)* 76-77.

³⁷ Koch et al. (2004) 44-46. See note 12. This has not been taken up by the Danish government, Vedsted-Hansen (2004) 47, see note 6.

deemed too broad, “relatively vague and generally formulated” for incorporation.³⁸ On the other hand, the Norwegian Attorney-General has dismissed ICERD on largely the same grounds as he dismisses CEDAW.³⁹

Comparing these differing evaluations we are left in the dark as to who made the more “correct” legal assessment. Both seem guided by broad, if different, policy preferences. Somewhat ironically, incorporation controversy thus produces its own sub theme of “judicialization”, i.e. when legal advice actually is general policy advice.

D. SOME FINAL REMARKS

Over the past decade, the Norwegian parliament has adopted a comparatively strong national human rights regime. Parliament has generally been in favor of a comprehensive incorporation of international conventions. It has also been clear about its ambitions for full implementation, compatibility and consistence between international practice and Norwegian law.⁴⁰ In light of this parliamentary priority, it would of course be rather imprecise simply to claim that the adopted human rights regime undermines majority based political decision making. The power transfer claim might be specified as one of unintended consequences. But as such, it has not been substantiated in any systematic way in the documents examined here, or across convention obligations. We are still left with no answers to these important questions: Exactly how do different international human rights agencies influence national political decision making in unwanted and/or unacceptable ways? Does (different kinds of) international supervision harm the national legislative prerogatives? If so, how is this influence to be evaluated as an issue of balancing the state’s interests and the individuals’ rights in various circumstances?

As a general claim, “power transfer” seems to be mainly anxiety driven - that is, related to thinkable, possible, or probable, unfortunate effects. The actual implementation of the ECHR clearly leaves an imprint on national politics. But it is not primarily the ECHR which incites the calls for restraint. In this sense, references to “power transfers” are also somewhat inconsistent. Furthermore, as a succession of public hearings on the incorporation of human rights conventions in Norwegian law have shown, opposition to (the expansion of) this regime has primarily been rooted and maintained within parts of the public administration. In my view the recent incorporation controversy over CEDAW mainly demonstrates how the resistances of centrally placed and powerful civil servants have managed to curb the political will of governments. Civil society actors have mainly been in favor of a comprehensive and radical human rights regime.

The two Power and Democracy studies carried out from 1998 to 2003, differed in their assessment of a range of issues. Overall, the Danes were consistently more upbeat about the general “state of democracy” than the Norwegians.⁴¹ I think that in order to understand the dif-

³⁸ Betænkning nr. 1407, oktober 2001, Justitsministeriet.

³⁹ Ot.prp.no. 33 (2004-2005), 62. See note 14.

⁴⁰ Cf. Sand (2009). See note 5.

⁴¹ Lise Tøgeby: ”Hvorfor den store forskel?” (2005) 46 *Tidsskrift for samfunnsforskning*, 55-60 and Øyvind Østerud: ”Norsk og dansk demokrati” (2005) 46 *Tidsskrift for samfunnsforskning*, 61-62.

ferences between the principal conclusions drawn by the two commissions, it is important to note that the Danish commission made no attempt to build a hierarchical distinction between “fundamental” and “supplementary” forms of democracy, as was the case in the Norwegian majority report. Instead, the Danish Power and Democracy commission directly tied their understanding of “democracy” to notions of citizenship. Citizenship had a “Marshallian” rights’ perspective, comprising not only the classic civil and political rights like freedom of speech, freedom of association and the right to vote, but also includes social rights or the right to live a dignified life in accordance with society’s general standards.⁴² Clearly, I am myself much in sympathy with this way of placing democracy in perspective.

Although the recent incorporation bill on CEDAW programmatically states that incorporation of central human rights conventions strengthen the rights of individuals vis-à-vis the state by granting effective protection against infringement, it seems quite clear that CEDAW will be the last convention to be enjoy the prioritized arrangement provided by the Human Rights Act. In line with several earlier governmental assessments, the incorporation bill is clearly concerned with the likely effect of internationally driven “judicialization”. As I read these expressed concerns, they imply a broader political breakthrough for the idea of applying as much restraint as (still) possible.

Those who fear the power transfer implications of the national human rights regime ought of course to engage in a debate about the main implementation strategy per se - that is, the prioritized incorporation of international human rights conventions. Far more attention should in this respect also be directed at those court decisions which have the clearest impact in Norway - namely, the ECtHR’s. But such specific targeting is probably too politically complicated to be very likely. In this sense, the particular controversy over the status of CEDAW in Norwegian law could perhaps also be read as debate by proxy.

⁴² Togeby (2005) 57.

WHEN PARLIAMENT COMES FIRST – THE DANISH CONCEPT OF DEMOCRACY MEETS THE EUROPEAN UNION

BY MARLENE WIND*

Abstract: *In the Nordic countries, the primacy of parliament stands out as a common defining feature vis-à-vis other branches of government. In Denmark, which is the country in focus in this article, there has historically been a strong vision of parliamentary supremacy which is reflected in the current public debate on the ECJ. In the public sphere and in the Danish concept of democracy courts are regarded as a counter-majoritarian force. Drawing on previous research this paper argues that Denmark's reluctance to collaborate with supranational courts like the ECJ is due to the country's view of the Parliament as elevated above the other branches of government and the unfamiliarity with constitutional democracy.*

Keywords: *Danish Parliament, majoritarian democracy, judicial review, role of courts.*

A. THE LEGAL CLASH

The European Court of Justice should not undermine Danish Law. As responsible Minister I have to question whether the ECJ has acquired too much power at the expense of democracy and wields excessive powers over Danish Immigration law. Courts should not do politics, for that we have elected politicians.¹

The above is a good example of the tone of the current debate in Denmark on the impact of supranational judicial bodies on Danish national law. The political attack on the European Court of Justice was launched in the summer of 2008 with a series of articles in the Danish newspaper *Berlingske Tidende* which revealed how Danish authorities for years had kept information on EU rights of free movement and family reunification to themselves. Danes who had married a foreigner from outside the EU, were forced to flee the country in face of the strict Danish immigration laws.² The Metock ruling,³ handed down July 25, clarified that

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¹ Danish Immigration Minister Birthe Rønn Hornbech in an op-ed (kronik) in *Berlingske Tidende* August 2. 2008. My translation.

² In the op-ed mentioned above the Danish Minister Birthe Rønn Hornbech refers explicitly to a particular ECJ case known as Metock (see footnote 4). Here the ECJ was asked to clarify whether it was in accordance with the directive 2004/38 on residence rights to demand that a spouse from outside the EU had been a legal resident in another EU country prior to being reunited with their family among

according to the residence directive it was not required for a spouse marrying an EU citizen to have been a legal resident in another EU member state. Despite the fact that the Metock ruling had nothing to do with Danish immigration law and simply constituted the Court's interpretation of an internal market directive on residence rights, it was in the Danish context interpreted as yet another example of the way in which supranational law, and in particular the European Court of Justice, has changed from being a purely judicial to a legislative body which sets aside legislation decided by a legitimate majority in the Danish parliament. What the Danish Government – and perhaps not least its parliamentary support the Danish People's Party (*Dansk Folkeparti*) – feared was that the ruling would open the flood gates on an influx of non-European immigrants and illegal trafficking.⁴

The main aim of this article is not to discuss Danish immigration law in detail however. Nor is it to uncover the details of the implementation of the 2004/38 residence directive in Danish law. Rather it is to try to pinpoint the uneasy relationship between national democratic culture and those legal obligations that follow from Danish EU membership. The uneasy relationship will be exemplified by drawing on a recently published study of the Danish courts' reluctance to make use of the preliminary ruling system.⁵ The point is that when a preliminary reference (art. 234) is made to the ECJ by a national court the ECJ comes to exercise de facto judicial review over national EU law implementation. This was also what happened in the Metock case which made it impossible for a majority in the Danish Parliament to uphold the strict Danish immigration policy – at least when EU citizens were involved.⁶ In asking the ECJ for advice in the interpretation of EU law a national court thus invited the direct involvement of a supranational judicial body in national law and policy. The hypothesis launched

whom was an EU citizen. In Denmark this was interpreted as a frontal attack on the current Danish Government's 'fast & fair' immigration policy under which a long list of criteria needed to be satisfied before family reunification could be approved. Due to the EU rules, however, Danes marrying a foreigner from outside the EU can in fact avoid the tough Danish immigration law and return to Denmark. Had the EU rules been followed by the Danish authorities and communicated to the Danish public, Danes would have needed to leave Denmark in order to live together with their non-EU spouse. Being an EU citizen simply makes it possible to avoid the strict Danish immigration laws.

³ Case C-127/08 Metock amo. For more details see www.europakommissionen.dk.

⁴ Marlene Wind: "Hykleri og Dobbeltspil" (2008) 2. *Ræson*.

⁵ See Wind (2008), Marlene Wind: "The Nordics, the EU and the Reluctance Towards Supranational Judicial Review. The Cases of Denmark and Sweden" (2009) *Journal of Common Market Studies* (forthcoming), and Marlene Wind, D.S.Martinsen & G.P.Rotger: "The Uneven legal Push for Europe. Questioning Variation when national courts go to Europe" (2009) 10 *European Union Politics* 1, 63-88.

⁶ In reality what the Metock ruling did to Danish immigration policy was to divide the Danish population into an A team and a B team. Those who are EU citizens (the A team) can marry whomever they wish and move back to Denmark with their non-EU spouse without the Danish immigration authorities being able to do much about it. On the other hand, we have the B-team consisting of non-Danish immigrants. Under the restrictions introduced after Metock by the Government (in collaboration with Danish People's Party), these people face an even tougher situation as it becomes increasingly difficult to acquire Danish citizenship.

here and in my previous research⁷ is that in countries with no tradition of judicial review, it will often be seen as unhelpful interference in national democratic processes. The present Danish case is a very good example of this and the argument is that Danish political culture founded in majoritarian democracy with the lawmaker as the highest legal source is a strong influence on Danish behaviour *vis-à-vis* the EU's judicial bodies. The fact that the EU rests on a clear separation of powers and constitutional democracy may thus explain some of the scepticism in the Nordic countries to the EU. The article starts in section B by looking briefly at Denmark's relationship with the EU. In building on the recent immigration debate, it will be demonstrated how the Danish political parties turned against the EU and the ECJ. We will then proceed in section C to the issue of legal sources and the prominence of the lawmaker in Danish law. Section D looks at judicial review in Europe and the way in which the European Union has challenged the vision of 'no one over or above' the parliament by allowing a supranational court to introduce preliminary rulings. In section E and F we take a closer look at the Nordic and Danish courts behaviour towards the supranational law regime. In section G we offer a deeper legal-political-cultural explanation as to why Danish courts and politicians are reluctant to fully join a system (the EU) that is not only supranational but equally constitutional in character. Section H provides some concluding remarks.

B. DENMARK AND THE EUROPEAN UNION – STRANGE BEDFELLOWS?

Denmark has been a member of the European Community and later Union for more than thirty-six years. However, there has never been a critical discussion of supranational judicial review and the influence of EU law on national law at any fundamental level. Or rather, when it has been debated it has been confined to a few very narrow circles with little contact with the Danish public.⁸

It was the ruling in the *Metock* case that kick-started the debate over the supranational judicial review by the European Court of Justice in the summer of 2008. ECJ cases have of course been debated by the Danish public many times before. However, the *Metock* ruling was the first case law to be debated across the whole of the Danish media and continuously for about a month. With one blow, the whole nation was debating supranational law and the authority of a Union court to set aside national law and legislation, supported by a majority in the Danish Parliament.⁹ As our data show,¹⁰ very few politicians had nice things to say about

⁷ See in particular Wind, Martinsen & Rotger (2009) and Wind (2009 forthcoming).

⁸ H. Koch: "Dansk Forfatningsret i Transnational belysning" (1999) 6 *Juristen*, 213-227, J. Hartig Danielsen: *Suverænitetsafgivelse* (København: Djøfs Forlag 1999); but see H. Rasmussen: *European Court of Justice* (København: Gad Jura 2008); Rotger, Martinsen & Wind (2008).

⁹ In Wind (2008) we selected articles on the *Metock* case in five Danish newspapers. Because the case touched on two main issues with which the Danish People's Party (on whose support the sitting Danish Government relies) is particularly concerned: immigration and the EU, it was headline news for almost a month.

¹⁰ Parts of this data analysis have been published in the Danish language journal (2008) 2 *Ræson*, 108-109.

the EU, the ECJ or the supremacy of EU law over national law. In fact, only one political party defended the EU. This party - Danish Social-Liberal Party (*Det Radikale Venstre*)¹¹ - tried to keep focus on the original issue: that the Danish authorities had diluted the rights of Danish citizens by not informing them of their EU rights to marry and settle in Denmark according to the internal market regulation on free movement (Residence Directive 2004/38). All other parties, including those which normally support Danish EU membership, attacked the EU almost without exception during the 30 days when we conducted our analysis. The focus thus progressed from accusations about the Ministry of Immigration (news coverage starting 10 July 2008) to the Metock case law (25 July 2008).

The focus of the debate can be illustrated in the following manner:

Figure 1: Daily developments in defence of and attack on the EU rules

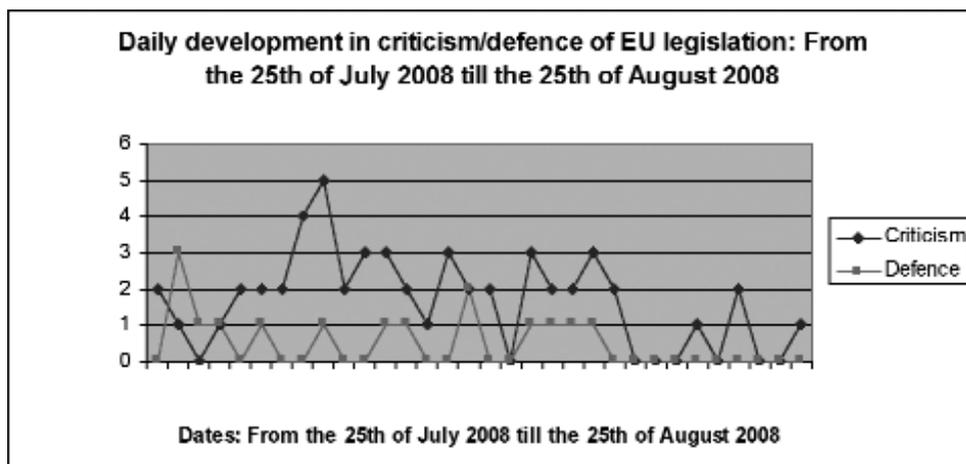


Figure 1 shows on the X-axis the period explored, Y-axis: number of parties defending/attacking the EU rules for each day of the period. The figure does not tell us anything about the general defences/attacks. Nor does it say anything about the number of times each party attacked the EU per day.

Figure 2 shows which parties attacked/defended the EU rules and on how many days.

¹¹ See appendix for a complete list of Danish parties.

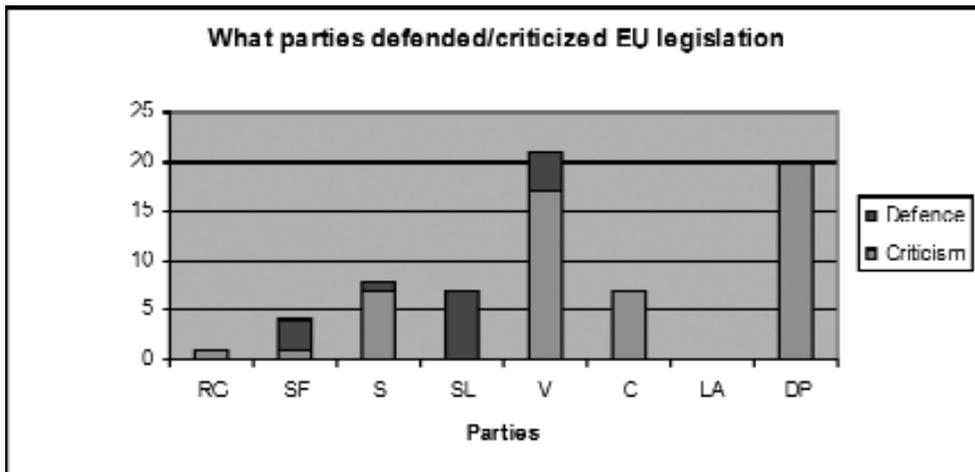


Figure 2 does not show how many attacks were made on each day. For example, while the figure shows that the Danish People's Party attacked the EU on 20 of the days between July 25 and August 25, it does not show how many times the party featured in different Danish news media each day.¹²

It is obviously not new that an EU member state objects to a ruling from the European Court of Justice.¹³ It has happened on several occasions. But looking at the Danish case, it is probably the first time, however, that a debate of the Court's case law and internal market rules reached this level of coverage in the media. It is also the first time the Danish EU-friendly parties expressed themselves so strongly against judicial review by the ECJ. The hypothesis launched in this paper is, as noted above, that some of the criticism of the EU and in particular the ECJ should be located at a deeper cultural level, i.e. with the Danish inexperience of constitutional democracy and judicial review more generally.¹⁴ We will turn to this aspect in the following sections.

¹² A bit about methodology and procedure: The figures were developed on the basis of Danish politicians' (MP's) media interviews in the following Danish newspapers (electronic media were not included): *Berlingske Tidende*, *Jyllands-Posten*, *Politiken* and *Information* from July 15 to August 25. The politicians express their opinions on the Metock case law in 96 articles. The database only includes such articles in which the MPs expressed themselves directly on the EU or ECJ case law but not in those many cases in which the opposition parties criticized the Government for its management of the EU rules. The articles were divided into attack/defence categories respectively in order to give clear picture of the debate.

¹³ See Rasmussen (2008).

¹⁴ A very good and interesting illustration of this is the Danish People's Party's many attempts to propose legislation in Parliament forcing the Government to try to curb the ECJ. The latest of these attempts was the 10 December 2008 B 63: proposal for 'Folketingsbeslutning om EF-domstolens arbejde'.

C. TOWARDS A PLURALISM OF LEGAL SOURCES?

When Denmark entered the EU in 1973 few politicians and legal scholars comprehended the degree to which membership would put new obligations and constraints on Danish sovereignty. Finding out just how different the EU (or then EC) legal system actually worked thus constituted a “wake up call” for most Danish lawyers, to use the words of the former President of the Danish Supreme Court Niels Pontoppidan.¹⁵ What was most surprising - not only to lawyers, but equally politicians and the wider public – was no doubt that this new regime called into question the notion of the ‘sovereign lawgiver’ as the ultimate source of law.¹⁶ To this comes of course the dynamic style of interpretation employed by international courts like the ECJ and the ECHR. The idea of the ‘sovereign lawgiver’ as having ultimate legitimacy in a democratic society had for centuries been commonplace for the Nordics’ self-perception¹⁷. However, as Koopmans puts it, this theory is “often somewhat provincial in the sense that their proponents forget to look across the borders of their own legal culture”.¹⁸ The European integration process, as well as the new human rights regime institutionalized with the European Convention on Human Rights and the ECHR, thus fundamentally challenges the idea of the ‘sovereign’ – here understood as the sovereign parliament – as the ultimate source of law. As Pontoppidan points out: “the development in Europe since the second World War has implied that the strong positivistic emphasis on the lawmaker as the ultimate source and legitimation is no longer a sufficient description of the legal realities.”¹⁹ Both Community law and the new human rights regime after the Second World War were not only more dynamic (referring to so-called ‘present-day-conditions in the case-law’) but equally drew on many different sources of law than was commonplace in the Nordic countries, as Pontoppidan points out.²⁰ Moreover, despite the fact that both the European Community and the European Human Rights regime were adopted by classical treaty law, once adopted they have taken on “an existence of their own”.²¹ What is challenging the ideology of the ‘sovereign law maker’ is not however merely the new sources of law stemming from developing case law in international courts, treaties, directives, regulations, private law and so on, but equally – again in particular since the Second World War – national constitutions. This influence again is most

¹⁵ N. Pontoppidan: “Forord” in *Festskrift til Ole Due: Liber Amicorum* (København: Gad’s Forlag 1994), 11.

¹⁶ T. Koopmans: “Sources of Law: the New pluralism” in *Festskrift til Ole Due: Liber Amicorum* (København: Gads Forlag 1994), 191.

¹⁷ Joachim Nergelius: “North and South: Can the Nordic States and the European Continent Find Each Other in the Constitutional Area – or are They too Different?” in Martin Scheinin (ed.), *The Welfare State and Constitutionalism in the Nordic Countries* (Copenhagen: Nord 2001), 79–95.

¹⁸ Koopmans (1994), 191.

¹⁹ Pontoppidan (1994), 11.

²⁰ See also I.E. Koch, K. Røberg, S. Schaumburg-Müller and J. Vedsted-Hansen: *Menneskerettigheder og Magtfordeling: Domstolskontrol med Politiske Prioriteringer*, (Magtudredningen, Århus: Århus Universitetsforlag 2003).

²¹ Koopmans (1994), 194.

prominent in countries which actually practice judicial review. In a country like Denmark where the courts have been reluctant to question the constitutionality of legislation (and only done so once within the past 160 years, in the Tvind case), the constitution is obviously of lesser importance as a source of law.²² However, for Germany which became a constitutional democracy after the war, and where the constitution is modern, dynamic and perceived as something almost sacred, it has clearly been of increasing importance as a source of law. The German Constitutional Court thus continuously reviews national laws' accordance with the German constitution and does this in a dynamic fashion. In defining the increase in legal sources over the past decades Koopmans has used the term 'the new legal pluralism'. As we are about to see below however, even as we write 2009 not all European states have been equally willing to wave goodbye to the monolithic theory of the lawmaker as representing the highest legal and political authority. It seems moreover that those countries which have hailed Scandinavian realism as a taken-for-granted basis of their legal reasoning have been particularly sceptical of a more open and encompassing view on multiple legal sources.

There are various ways in which one can illustrate the international and European challenge to the Nordic countries in this respect. One option would be to look at the frequency by which the Nordic countries and Denmark in particular have made use of the EU's preliminary reference system. Recent studies have thus pointed out how Nordic member states like Denmark, Sweden and Finland have been much more reluctant to make use of the EU preliminary ruling procedure than the average EU member state.²³ As noted above and as will be demonstrated more in detail below, making a preliminary reference to the ECJ implies a de facto review of the compatibility between European law and national law. In this sense, making a preliminary reference to a foreign *and* supreme European court is then in and by itself a challenge to the entire idea of the legislator as the highest legal source and to the view that a majority in parliament represents the most authentic representative of 'the will of the people'.

D. JUDICIAL REVIEW IN EUROPE

Judicial review of legislation was introduced into the EC system as early as 1958 with Art. 177 of the Rome Treaty (now Art. 234). Few would probably dispute that giving not only national constitutional courts but, in particular, ordinary national courts review power over an international treaty is quite remarkable.²⁴ Some go so far as to see the preliminary ruling procedure as "the jewel in the Crown" of the EU system. As former EU judge Gerhard Bebr has argued,²⁵

²² Koch (1999).

²³ Wind, Martinsen & Rotger (2009); Wind (2009 forthcoming).

²⁴ J.H.H. Weiler: "The Transformation of Europe" (1991) *The Yale Law Journal* 100, 2403-2483, Weiler: "A Quiet Revolution: The European Court of Justice and its Interlocutors" (1994) 26(4) *Comparative Political Studies*, 510-534, and K.J. Alter: *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*. Oxford: Oxford University Press 2001).

²⁵ Cited from a public lecture by Professor Laurence W. Gormley, see "Judicial Review in the EC and EU law – Some Architectural Malfunctions and Design Improvements" www.dur.ac.uk/resources/deli/annuallecture/2000_DELI_Lecture.pdf.

the inconspicuous provision of Article [234], under which the Court rendered some of its most spectacular rulings, is of great, dynamic nature, offering unexpected possibilities for the development of Community law. With great imagination and determination, the Court has boldly seized and exploited them. Without Article [234] and its imaginative use by the Court, the Community legal order would have most likely assumed an entirely different character. Very likely it would have gradually degenerated into a mere traditional international legal order.

Note in particular how judge Bebr characterises traditional international law as ‘degenerated’ law. The preliminary ruling system was designed to ensure a uniform interpretation and application of Community law throughout the whole Community. While the mechanism was to provide the same conditions for legal action in the entire EU, the thresholds have been high – at least in some countries. The system thus builds on mutual trust between the centralised and decentralised Community judiciaries, that is, between the EU Court and its national counterparts. The ECJ depends in other words fundamentally on the national court to send cases and later to effectuate in the national legal order the final judgement coming from the Union’s highest court.²⁶ Without preliminary references no power to the European Court. It has, however, not always been easy for private litigants to persuade a national court to refer their case to the EU.²⁷ Litigants in legal systems where national courts are willing to address a supranational court will more easily have their voices heard. As data from a previous study show, the Nordic courts in particular have not always been cooperative in this regard.²⁸

The problem is that despite of the formal obligation (the Treaty’s Art. 234) to refer a case when in doubt about the compatibility between national law and Community law, it is still up to the national courts to decide *whether* doubt of any kind exists. What has guided those national courts less eager to make preliminary references is formally the *acte claire* doctrine which says that a preliminary references can be denied if the question at issue has already been settled by the ECJ or if the interpretation of Community law is not open to reasonable questioning.²⁹ The *acte claire doctrine* has been frequently used by the Danish courts to avoid sending cases forward.

While the parties to a case can only request a national court to make a reference to the ECJ, it nevertheless constitutes an infringement of the Treaty when a case that should have been referred is held back. In such cases a member state becomes liable to infringement proceedings.³⁰ In practice, however, the effects of such a course of action are extremely rare, though the Swedish government did experience such a threat from the Commission in 2004.³¹

²⁶ A.M. Slaughter, A. Stone Sweet and J. H.H. Weiler (eds): *The European Courts and National Courts* (Oxford: Hart Publishing 1998).

²⁷ Slaughter, Stone Sweet & Weiler (1998).

²⁸ Wind, Martinsen & Rotger (2009).

²⁹ P. Craig and G. de Búrca: *EU Law: Text, Cases and Materials* (Fourth edition, Oxford: Oxford University Press 2008).

³⁰ The *acte clair doctrine* was clarified in the CLIFT case 1982/3415.

³¹ Wind (2009 forthcoming).

When the ECJ responds to a national court in a ruling, its ruling has to be followed and implemented. It is, in other words, important to emphasize that a preliminary ruling is more than just a guide to the national court in question. When presented in court it represents the law of the EU writ large. This was clearly one of the main reasons for the Danish government to make such a fuss over the *Metock* ruling which was a preliminary ruling addressed at an Irish court on the interpretation of directive 2004/38. Over the years the number of preliminary references has grown tremendously. By the end of 2004, 5,292 preliminary references were made to the ECJ, and more than 200 yearly from 1993 onwards.³² As we are to see below, however, not all national courts have been equally eager to ask for clarification at the European Court.

E. THE NORDICS AND THE EU LEGAL SYSTEM

As indicated above, judicial review has traditionally been regarded as incompatible with majoritarian democracy – here to apply Ronald Dworkin’s distinction between majoritarian and constitutional democracies.³³ In majoritarian democracies it is generally argued that judicial review limits the power of the people by putting the protection of the basic rights of individuals before the rights of the majority.³⁴ For centuries most European states saw the power of courts and judges as problematic, even as incompatible with the growing democratic consciousness. In the late eighteenth and nineteenth centuries, the ideal form of democracy in Europe was representative democracy – often in its majority rule version. However, the spread of democracy in Europe gradually implied that constitutional review was accepted not in the Nordic countries but in the rest of Europe.³⁵ World War II and the Nazi regime clearly demonstrated that unconstrained parliaments and majority rule are no guarantees of a democratic development.³⁶ As a result of the horrors of the Second World War the Western part of post-war Europe gradually embraced constitutional courts and judicial review.³⁷

While constitutional democracy – here understood as democracy with active and frequent judicial review of legislation – has become the ideal in most European countries, the Nordic

³² Due to the charge raised by the Commission in 2004 that the Swedish courts make too few preliminary references, the Swedish Parliament adopted a law (502/2006) on 24 May 2006 ensuring that it become obligatory for national courts to announce *when and why* a case has *not* been referred to the European Court when one of the parties to a case has requested it.

³³ Wind (2009 forthcoming).

³⁴ R. Dworkin: *Freedoms Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press 1996).

³⁵ Scheinin (2001); Wind (2009 forthcoming).

³⁶ A. Stone Sweet: “Constitutional Courts and Parliamentary Democracy” (2002) 25 (1) *West European Politics*, 77-100.

³⁷ S. Kenney, W.M. Reisinger and J.C. Reitz (eds): *Constitutional Dialogues in Comparative Perspective* (London: Macmillan 1999).

states have continued to regard the judicial review of legislation with great suspicion.³⁸ Until some very recent amendments to the constitution of Finland in 2000, judicial review of legislation was directly forbidden in that country.³⁹ In Denmark and Sweden, judicial review has almost never been practiced.⁴⁰ As indicted above, Danish courts have set aside legislation only once in the past 160 years, in the so-called Tvind case, and the Danish constitution is silent on the issue of judicial review. In Sweden the picture is the same.⁴¹ Norway, which is not part of the EU, has long been considered the odd man out in a Nordic context, being one of the first countries in Europe to accept judicial review.⁴² Even here, however, judicial review has come under pressure in recent years, and ‘court empowerment’ was in fact the main point of concern in a huge Government-sponsored ‘power study’ (Makt- og demokratiutredningen) from 2003.⁴³ In brief, it has been common in the Nordic countries to conflate democracy with majoritarian democracy.⁴⁴

When seen in this light, it is perhaps less surprising that Scandinavian member states have been reticent when it comes to making use of the preliminary ruling procedure. Below we will take a brief look at Denmark and the reluctance of Danish courts to send cases forward.

F. DENMARK AND THE EU LEGAL SYSTEM

Like the other Nordic countries, the Danish courts have been rather reluctant when it comes to making references to the ECJ. The figure below shows the sum of Danish references compared to the rest of the EU:

³⁸ T.Ginsburg: *Judicial Review in New Democracies* (Cambridge: Cambridge University Press 2003); M. Shapiro and A. Stone Sweet: *On Law, Politics and Juridicalization* (Oxford: Oxford University Press 2002).

³⁹ Definition taken from Scheinin (2001).

⁴⁰ Nergelius (2001).

⁴¹ Nergelius (2001) 85.

⁴² Nergelius (2001) 85.

⁴³ K-G. Algotsson: “From Majoritarian Democracy to Vertical Separation of Powers: Sweden and the European Union” (2001) 24(1) *Scandinavian Political Studies*, 51-65.

⁴⁴ Andreas Føllesdal: “Rawls in the Nordic Countries” (2002) 1(2) *European Journal of Political Theory* 181-198, 183.

Article 234 references by Danish courts relative to the other EU countries

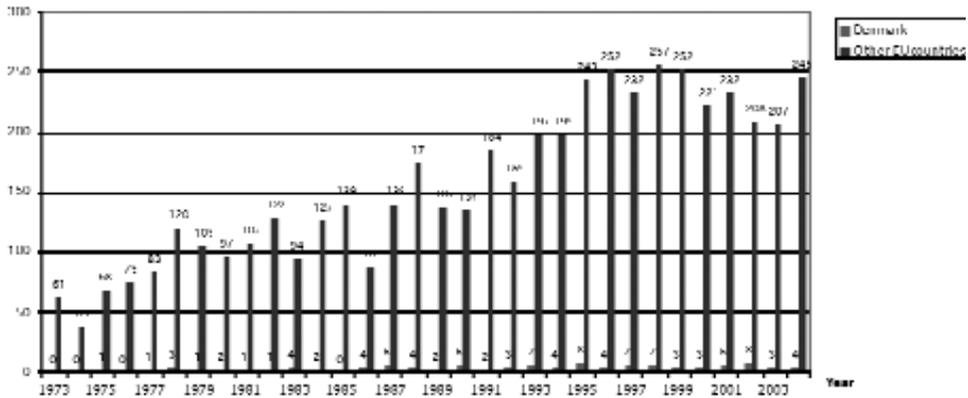


Figure 345: Article 234 references by Danish courts relative to the other EU countries. In total Denmark has asked for only 104 preliminary rulings since it joined the Community/Union.

Despite having greater experience with EU membership (and thereby also EU law), Denmark performs only marginally better in some years than its Nordic counterparts even though these countries have only been members since 1995 and thus in need of accommodation to the new system.⁴⁶ In the literature it is often argued that the highest courts (and constitutional courts in general) are expected to be least eager to subject themselves to an authority outside of the national legal order.⁴⁷ The lower courts, on the other hand, have always been expected to refer most cases as a means of revolting against the often strict national legal hierarchy.⁴⁸ Interestingly, this prediction holds for many EU member states but not the Nordic states, where the lower courts leave it to the appellate courts and the supreme court to make almost all references.⁴⁹ In a study building on a survey of 380 Danish judges, their reluctance towards sending cases forward is quite clear. Some of the main results from this study can be summarized as follows:

⁴⁵ Øyvind Østerud and Per Selle: "Power and democracy in Norway: The transformation of Norwegian politics" (2006) 29 *Scandinavian Political Studies*, 25-46.

⁴⁶ Føllesdal (2002); Wind (2009 forthcoming).

⁴⁷ Source: The Court of Justice of the European Communities (2004), The Annual Report 2004, 184-185.

⁴⁸ For a much more thorough analysis of the Danish case and attitudes towards EU law among the Danish judges, see; Wind (2009 forthcoming).

⁴⁹ Weiler (1991); Alter (2001); Craig & de Búrca (2008) 344, 480-501.

What was the attitude (in 2006) of Danish judges towards making use of the preliminary reference system in the EU?	
It is not our duty but the duty of the parties to case to figure out whether there is a potential conflict between national law and EU law.	60 %
Danish law is still the primary source of law and Danish judges are able to solve most cases without making use of EU law.	30 %
Danish judges have only scarce knowledge of EU law.	21 %
A main reason for not sending cases to the ECJ is the advice of the Danish State attorney ("Kammeradvokaten").	69 %
Lower courts: The Danish Supreme Court should decide whether a preliminary ruling should be made or not.	36 %
<i>Acte Claire</i> – if we consider EU law to be sufficiently clear we do not make a reference.	57 %
Too long waiting time at the ECJ.	38 %

But what is it then that worries the Danish judges? The argument of this paper was that we need a much deeper explanation based on legal and/or democratic culture in order to make sense of the Danish scepticism towards supranational judicial review. It is not just because Denmark is a small Eurosceptic member state with a dualist legal system we have had a hard time coming to terms with supranational judicial review. Rather we might benefit from taking a brief look at the way in which Denmark turned into a democracy and much later established itself – not as a constitutional democracy with a strong emphasis on separation of powers – but as a majoritarian democracy. A Nordic state with centralized powers and a vision of democracy as stemming from the people represented first and foremost by the lawmakers in parliament. To this comes of course the enormous influence of positivist legal thinking in all of the Nordic countries.⁵⁰

G. WHEN PARLIAMENT COMES FIRST

In former times all legal researchers supported [Alf] Ross in despising natural law. Now, they are turning in the opposite direction, which is even easier to sell because it places the lawyers on a pedestal above the ordinary people, who – so they are told – are better off with lawyers to protect them.⁵¹

Counter to the ordinary tale of Denmark as a very decentralized and open democracy,⁵² the Danish historian, professor Gunner Lind, has characterized Denmark as one of the most centralized states in Europe where democracy as a division of powers has never fully found root.⁵³ He explains this by the strong role of absolutism and Danish monarchical rule which

⁵⁰ Alter (2001).

⁵¹ See Wind (2009 forthcoming).

⁵² See Lundström (2009).

⁵³ G.T.Nielsen: "Domstolene som den tredje statsmagt" in G.T. Nielsen (ed.) *Parlamentarismen – Hvem tog magten?* (Aarhus: Aarhus University Press 2001), 177.

in itself was extremely centralized: “There were more pluralism and separation of power in ‘solkongens Frankrig’ than under Danish absolutist rule.”⁵⁴ As Lind argues, because Denmark made a peaceful transition from absolutist state to democracy, it never really challenged the idea of one body as the ultimate symbol of power in society. When Denmark introduced democracy and rule by the people it simply replaced the king with the parliament (Rigsdag). As law professor Henning Koch has pointed out, the Danish Supreme Court curiously emphasized its support for the supremacy of the parliament in the same ruling where it for the first time (in 1921) formally spelled out that it considers itself competent to try the constitutionality of legislative acts, as Koch noted: “The Supreme Court equally resolved that in principle there were: no one over or above the Rigsdag”.⁵⁵ When the Rigsdag was demolished in 1953, the Folketing was immediately regarded as the most authentic representative of the ‘the people’. The United Kingdom, which in many ways resembles Denmark in this respect, phrases it “the Crown in Parliament”.⁵⁶

The negotiators of the Danish constitution of 1849 generally spend very little time on the separation of powers.⁵⁷ However, § 2 reads in the following way: “The legislative power rests with the King and the Rigsdag in unison. The executive Power rests with the King. The judicial power rests with the courts.”⁵⁸ But the separation and balancing of powers is something entirely different. The Danish constitution is in other words silent on the courts’ power to exercise judicial review of legislation.⁵⁹ Moreover as Christensen points out, the courts were intended to be ‘les bouches de la loi’, not to play an independent role in the law interpretation.⁶⁰ When the first Danish constitution was negotiated a majority in the Danish parliament explicitly warned against any kind of judicial review by courts, and several prominent lawyers as well as politicians emphasized that since the judges were appointed by the king and the government they could clearly not be either above these instances or even on an equal footing (and thereby in a capacity to exercise judicial review). By being authorized by the king and the government the judges had to be regarded as inferior and not superior to the parliament.⁶¹ Inter-

⁵⁴ See Hal Koch: *Hvorfor Demokrati* (København: Nyt Nordisk Forlag 1945) and ‘Magtudredningen’ 2003 as examples.

⁵⁵ See also T. Knudsen: *Dansk Statsbygning* (København: Djøfs Forlag 1995) 181 and Knudsen: *Fra Enevælde til Folkestyre* (København: Akademisk Forlag 2006) 122.

⁵⁶ Lind cited in Knudsen (1995) 181.

⁵⁷ Koch (1999) 216. My translation from the Danish, which reads in its full text: “Thi med UFR 1921. 644 H fastlog den danske Højesteret ikke alene domstolenes prøvelsesret, som det normalt påpeges, men anerkendte også parlamentets overhøjhed, idet Højesteret brugte vendingen: ‘...den Sikkerhed, som maatte kræves ... for at tilsidesætte en lov som grundlovsstridig’. Højesteret resolverede i samme åndedrag, at som udgangspunkt var der: Ingen over eller ved siden af Rigsdagen” (Koch 1999, 126).

⁵⁸ P. Craig: “Report on the United Kingdom” in Slaughter, Stone Sweet and Weiler (eds), *The European Courts and National Courts* (Oxford: Hart Publishing 1998), 195–196.

⁵⁹ Knudsen (2006) 122.

⁶⁰ In the 1953 Constitution § 2 became §3 but there were no changes in wording except *Folketing* replacing *Rigsdag*.

⁶¹ J.P. Christensen: “Domstolene – den tredje statsmagt” in *The Danish Democracy and Power Study* (Aarhus: Aarhus University Press 2003), 11-13.

estingly, this argument resembles that of Alf Ross who from a more philosophical angle argued that the courts logically had to be considered subordinate [underlagt]⁶² to the parliament because the parliament always can overrule any court case by legislating against it ex post.⁶³ This clearly counters the US justice Marshall's famous ruling in the 1803 Marbury v. Madison case, to which all American lawyers cling and which most theorists coming from an constitutional democracy background have in their baggage:

If then the courts are to regard the constitution; and the constitution is superior to an ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.⁶⁴

Do Danish courts then have a right to try legislative acts? Most constitutional lawyers in Denmark argues yes, in theory at least. The matter was in principle settled already in 1921⁶⁵. However, it is important to note that it is not something that is established in the constitution but has grown very gradually and resulted in the direct 'judicial overturning'⁶⁶ of a legislative act only once in 160 years, and that was in 1998. It would thus be correct to say that judicial review is a theoretical possibility in Denmark but *not a practice* and certainly not part of Denmark's legal, political and democratic culture.⁶⁷

One of the most ardent critics of judicial review alive today in Denmark is probably law professor Gorm Toftegaard Nielsen. When he set out to describe the most important changes in the transformation from pure monarchical rule to democracy in Denmark in *The Danish Power and Democracy study*, 2001, he used the following words:

With parliamentarism ... the government acquired a clear democratic legitimation. The government and the civil servants could not rule without the parliament. Only the courts preserved their independence and thereby lack of democratic legitimacy. Formally, the courts democratic legitimacy has decreased even more in the past years parallel with an increase in their political power.⁶⁸

Though probably not agreeing entirely with Toftegaard Nielsen. the Danish constitutional lawyer Jens Elo Rytter has also linked legitimacy and democracy with the question of being 'elected':

⁶² Christensen (2003) 11-13. In § 64 of the Danish Constitution it reads that "The Judges are only to obey the law" (my translation). In Danish: "Dommerne har I deres kald alene at rette sig efter loven".

⁶³ Christensen (2003) 12-13; see also Schaumburg-Müller in this special issue.

⁶⁴ See H. Palmer Olsen's discussion of Ross in: *Magtfordeling: En analyse af magtfordelingslæren med særligt henblik på den lovgivende magt* (København: Djøfs Forlag 2005) 296.

⁶⁵ Palmer Olsen (2005) 296.

⁶⁶ Here cited from Eivind Smith: *Høyesterett og Folkestyret* (Oslo: Universitetsforlaget 1993), 306.

⁶⁷ See Koch (1999) and the discussion above.

⁶⁸ There is a great difference between officially endorsing the institution of judicial review and implicitly accepting the institution in principle. It is also useful to distinguish the right of judicial review with actual judicial setting aside of national legislation.

Common to the constitutional tradition of the Nordic countries ... there is an emphasis on the preferred position of Parliament in the constitutional power structure, based on its democratic mandate through elections. The courts have no similar democratic mandate and, therefore, the judicial review of legislation is either problematic in principle or should at least be kept within rather narrow limits.⁶⁹

The logic here, however is puzzling. To put it differently, it is true that judges are not subject to popular ballots - but who would honestly recommend that they were? It is precisely that they are shielded from elections and other popularity contests that traditionally has given courts and judges their legitimacy and their mandate as protectors of the basic rights.

Toftegaard Nielsen has also expressed severe criticism of the common understanding of the 'separation of powers' doctrine. By emphasising the word 'powers' it indirectly suggests that the courts - like the parliament and the executive - should have *power* in the political understanding of the term.⁷⁰ According to Toftegaard Nielsen, however, it is a misinterpretation of Montesquieu to suggest that the courts should have any political power at all.⁷¹ The courts should rather stick to their pre-programmed role as 'bouches de la loi' and to the written pretexts settled in the preparatory work by the majority.⁷² The parliamentary majority in this understanding is the only legitimate body in a democracy. Toftegaard Nielsen even argues that "it is against common sense if the people should want to transfer power from the political sphere to the courts. In particular if the people have no influence on who is appointed as judge."⁷³ It is unclear whether Toftegaard Nielsen would prefer an American system with politically appointed judges. Most other theorists, however, put much less emphasis on the original intent of Montesquieu's terminology than on his theory's broader understanding in the literature on democracy and separation of powers⁷⁴.

As opposed to Norway there has been very little focus on the role of national courts in the Danish public debate in recent years. In the Danish 'Power and Democracy study' of 2003 the fear of juridicalisation - that is, transferring power and influence from the political organs to the courts - did not play a major role as it did in the Norwegian case. In fact, in the concluding report *Magt og Demokrati i Danmark - hovedresultater fra Magtudredningen* it is emphasized very briefly - taking only half a page - that in Denmark national courts have played a modest

⁶⁹ Christensen (2005); Palmer Olsen (2005); Knudsen (2006); Wind (2009 forthcoming). This does not mean, however, that the ordinary courts (Denmark has no administrative courts) do not review administrative acts. They do. However, setting aside legislation is an entirely different matter.

⁷⁰ Nielsen (2003) 147. My translation from Danish.

⁷¹ J.E. Rytter: "Judicial review of legislation - Sustainable Strategy on the Enforcement of Basic Rights" in M. Scheinin (ed.) *The Welfare State and Constitutionalism in the Nordic Countries* (Nord: Nordic Council of Ministers 2001) 138.

⁷² Nielsen (2003) 147. Nielsen distinguishes between the Danish words 'magtfordeling' and 'magtadskillelse'.

⁷³ Nielsen argues the following in Danish: "magtadskillelærelsen [er] ikke et udtryk for hverken en tredeling af statsmagten eller en fordeling af den politiske magt i samfundet" (Nielsen 2003, 151).

⁷⁴ Nielsen (2003); see also Ross (1966).

political role as opposed to other European courts like, for instance, the German Constitutional Court⁷⁵. Interestingly, the Danish power study also underlines the strong sense of scepticism in Denmark towards review of national laws constitutionality since the 1849 constitution.⁷⁶ When the 1953 constitution was adopted in Denmark both the Danish social democrats as well as the liberals (Radikale Venstre) were extremely suspicious of any kind of judicial review by courts. Some authors, like J.P. Christensen,⁷⁷ argue that the Tvind case might change this state of affairs, though there is little agreement and no empirical evidence from the preceding ten years to support such a suggestion.⁷⁸ This also implies, of course, that Denmark has been pretty insulated from international developments if we consider them to be also normative with increasing emphasis on courts and human rights. The whole Metock affair (as well as the preceding years' public criticism of the case law from the ECHR)⁷⁹ illustrates nicely that to the degree that international courts and juridicalisation have been debated at all, it has been from a highly critical angle, calling into question the increasing role and power of international courts and their excessive influence on national policymaking. The Danish Power and Democracy study thus suggested that were the courts to play a greater role in the coming years "national parliaments will have to give up power as lawmakers and ... the continuous judicial activism [by international courts would] create greater uncertainty... [with] ... important political decisions ... left to judges at international courts."⁸⁰

In Denmark's view, however, Denmark does not need international courts to tell it what to do. As Toftegaard Nielsen points out in his study, when Denmark adopted the European Human Rights Convention in 1953 it was not because Denmark had any problems with human rights, unlike other European countries,⁸¹ but simply because "[w]e would like to help other countries who had problems with their human rights protection".⁸² This could explain why it took 40 years before the convention became part of Danish law and de facto used by the Danish courts!⁸³

I. CONCLUSION

The worship of *majoritarian* democracy has always been prominent in the case of Denmark.

⁷⁵ Nielsen (2003) 155, my translation from Danish.

⁷⁶ Nergelius (2001); Koch (1999) 217.

⁷⁷ L. Togeby, J.G. Andersen, P.Munk Christiansen, T.Beck Jørgensen and S. Vallgård (eds), *Magt og Demokrati i Danmark: Hovedresultater fra Magtudredningen*, Magtudredningen (Århus: Århus Universitetsforlag 2003) 118.

⁷⁸ Togeby et al (2003).

⁷⁹ Christensen (2003) 16.

⁸⁰ O. Krarup: "Fra Gyldighed til Virkelighed: Om Alf Ross og Torstein Eckhoff" (1995) *Lov og Ret*, 87-99; Palmer Olsen (2005); Wind (2009 forthcoming).

⁸¹ See for instance the debate raised by professor Mads Bryde Andersen in "Kronik: Opgør med menneskerettstænkningen", *Berlingske Tidende*, 12 March 2008.

⁸² Togeby et al. (2003) 118.

⁸³ Nielsen (2001) 170.

The Nordic democratic ideal is thus built on the motto: *no one over or beside the parliament*. Politicians and the general public alike continue to subscribe to the notion that the parliament ought to be more or less unconstrained. In Denmark, the *Folketing* represents the people, and the people are sovereign. Courts should stick to concrete dispute settlement and stay out of politics, i.e. show reticence when it comes to rebutting legislation enjoying the support of the majority of the population. The Metock case and the entire debate on Danish immigration law and a much better EU protection of citizen rights is a very good example of this. The Danish/Nordic sense of scepticism towards the EU seems in other words to be grounded in a strong majoritarian democratic culture. To this comes a fundamental suspicion of (supranational) courts sticking their nose into national policymaking. As the Danish case has demonstrated, even when international law regimes do a better job of protecting citizen rights, a majoritarian political culture will chose the rule of politics to the rule of law.

Figure IIA: Name of party and abbreviation used in figure IIB

Party	Abbreviation
The Red-Green Alliance	R/G
Socialist People's Party	SF
The Danish Social Democrats	S
Danish Social-Liberal Party	SL
Venstre, Denmark's Liberal Party	V
The Conservatives	C
Liberal Alliance	LA
The Danish People's Party	DP

⁸⁴ Nielsen (2001).

⁸⁵ Togeby et al (2003) 119; see also Koch, Røberg, Schaumburg-Müller & Vedsted-Hansen (2004).

⁸⁶ Motto by a famous Danish writer Viggo Hørup 1875.

WHY THE EUROPEAN COURT OF HUMAN RIGHTS MIGHT BE DEMOCRATICALLY LEGITIMATE – A MODEST DEFENSE

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Abstract: *According to critics in some of the Nordic countries the bodies that monitor and adjudicate international human rights courts are undermining their own legitimacy by adhering to undemocratic practices.*

The strongest normative case against the judicial review that such bodies perform could be directed at the European Court on Human Rights (ECtHR), which monitors many well-functioning democracies. Section 1 lists normative objections to judicial review in general. Section 2 sketches a normative defense this practice, and Section 3 presents some relevant aspects of the ECtHR. Section 4 returns to consider the various objections. The mandate, composition, institutional environment and mode of operation of the ECtHR renders it immune to several of these criticisms. The conclusion identifies some objections that merit further attention, both for empirical research and for normative analysis.

Keywords: *Human Rights, International judicial review, legitimacy, democracy, European Court on Human Rights, European Convention on Human Rights.*

A. INTRODUCTION

According to critics in some of the Nordic countries the bodies that monitor and adjudicate international human rights courts are undermining their own legitimacy by adhering to undemocratic practices.¹

The strongest normative case to be made against the institution of international judicial review appears to be directed at the European Court on Human Rights (ECtHR), which enjoys substantial powers, especially when it intervenes in the affairs of well-functioning democracies like those of the Nordic countries. The latter do exceptionally well across a wide range of indicators of democracy, such as Freedom House's.² The present article therefore considers several normative worries against international judicial review of human rights per se and the practice of the ECtHR.

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¹ NOU 2003: 19; Marlene Wind: "Hykleri Og Dobbeltspill I Dansk Utlændingepolitik" (2008) *Ræson* 108.

² Freedom House. Freedom in the World 2008 <http://www.freedomhouse.org/template.cfm?page=15&year=2008>.

Section 1 lists normative objections to judicial review in general. They take issue both with the review's conceptual and philosophical underpinnings and its effect. Throughout, I am concerned with what is sometimes called 'weak' review. Weak review is where a court only concludes that there is a conflict between a piece of legislation and the treaty obligations. The court does not strike the piece of legislation invalid, nor is it replaced by another piece of legislation, which would happen in the case of the 'strong' review.³ Section 2 sketches a normative defense of international bodies that monitor human rights compliance by democratic legislatures. Section 3 presents some relevant aspects of the ECtHR, while section 4 returns to consider the various objections. The upshot is that several criticisms target less credible philosophical theories alleged to be 'the' justification for judicial review of human rights, while other criticisms do not apply to the ECtHR. This is partly due to its mandate, composition, institutional environment and mode of operation. The conclusion, in Section 5, identifies some objections that merit further attention, both for empirical research and for normative analysis.

B. THE CONCERNS

There are several philosophical and empirical reasons to be wary of judicial review in principle. Note that the authors mentioned might agree with the findings in section 4, that these objections do not apply to the ECHR and its court in particular. The main concern of this section, and of the paper as a whole, is not to challenge these objections on grounds of democratic theory, but rather consider how they apply to the ECHR.

Some authors claim that judicial review must rest on contested 'liberal' assumptions. They may be skeptical of the focus on 'negative' social and political rights found in many human rights conventions – including the ECHR. Such a priority is thought to flow from flawed premises, and leads to skewed policies: it assumes a fundamentally adversarial relationship between the individual and her state, and conveys that the paramount tasks of the state are thus limited.⁴

Another range of criticisms concerns the unfortunate impact of judicial review on domestic, democratic processes and outcomes. To entrench certain rights skews both the processes of decision making and the policy outcomes. Some believe such entrenchment aims to deflect conflicts about rights and certain policies away from the political arena. But such insulation is ill advised if not impossible.⁵ On the contrary, the political institutions should allow unbiased

³ Jeremy Waldron: "The Core of the Case against Judicial Review" (2006) 115 *The Yale Law Journal* 1346, 1362.

⁴ Richard Bellamy: "Constitutive Citizenship Versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act", in Tom Campbell, K.D. Ewing and Adam Tomkins (eds.): *Skeptical Essays on Human Rights* (Oxford: Oxford University Press 2001) 15.

⁵ Richard Bellamy: *Liberalism and Pluralism* (London: Routledge 1999) 166; Richard Bellamy *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy* (Cambridge: Cambridge University Press 2007).

perpetual contestation about interests, rights and policies, within institutions that foster civic virtues.⁶ Bellamy thus fears that judicial review will lead to an unfortunate focus on rights and adversarial mechanisms of conflict resolution, at the expense of ‘ordinary’ democratic contestation, civility and “fair and reciprocal compromise, in which all give and take”.⁷ A bias toward civil and political rights is aggravated further by such entrenchment, at a cost to social, economic and cultural rights.

In addition to these qualms about the diagnosis which makes judicial review desired, and its efficacy, a third concern is that it adds new risks because it gives power to non-accountable judges. In cases of international courts, such as the ECtHR, further risks arise because the judges are foreign and unfamiliar with domestic circumstances and expectations. Several critics warn that the deliberation of courts are of no better quality than the legislative debates. Some make the point by comparing cases, such as the abortion debate in the U.S. Supreme Court and British House of Commons.⁸ Others argue on principle: Mark Tushnet holds that “Democratic faith in the people’s judgment means that the arguments liberals deploy in court should be just as good in the political arena”.⁹ Other arguments are empirical generalization, such as doubts, against Dworkin¹⁰ that courts more effectively than legislatures secure social reform and justice.¹¹ Many also fear solutions rendered by judges. This is because judges are drawn from a narrow segment of society and their decisions are therefore likely to be worse than those of legislatures and bureaucracies. The latter know more about the situation on the ground.¹² Judges who are insulated from political pressure may well enjoy greater freedom to stand up to power, but they are also politically unaccountable and hence more likely to ignore citizens’ legitimate claims.

These risks are even larger for *international* courts, which might be thought problematic also by those who otherwise endorse a domestic division of power. These risks would seem to be compounded by several features of the ECHR and its Court:

- Judges on international courts are less subject to peer pressure and less steeped in a domestic judicial culture; and their selection is not always based on merit but sometimes seem to stem from an opaque mix of nepotism and diplomatic strategy.
- Abuse of judicial power is more likely when legislation is more indeterminate, as are many parts of treaties such as the ECHR. The judges are left with too much discretion. In addition, the ECtHR is known for its judicial activism in the form of ‘dynamic’ interpretation, reading far more into the ECHR than what the signatories could plausibly have intended in the 1950s.

⁶ Bellamy (1999) 135; Bellamy (2007).

⁷ Bellamy (1999) 208.

⁸ Jeremy Waldron: “On Judicial Review” (2005) *Dissent* (<http://www.dissentmagazine.org/article/?article=219>) (5 May 2009).

⁹ Mark Tushnet: “Democracy Versus Judicial Review: Is It Time to Amend the Constitution?” (2005) *Dissent* (<http://www.dissentmagazine.org/article/?article=248>) (5 May 2009).

¹⁰ Ronald Dworkin: *Law’s Empire* (Cambridge, Massachusetts: Harvard University Press 1986) 375.

¹¹ Tushnet (2005) 176.

C. A BRIEF DEFENSE

As mentioned, the main concern of this contribution is not to argue the philosophical issues concerning the normative legitimacy of judicial review. Valuable contributions contest whether the best interpretations of ‘democracy’ and ‘legitimacy’ in fact *support* judicial review; arguments that have been challenged by skeptics of judicial review.¹³ The aim here is not to advance that debate. Rather, the objective is mainly to take the critics’ position as granted, and check whether their concerns also apply to the ECHR.

This delimitation notwithstanding, a brief sketch of a normative argument in favor of the practice of international judicial human rights review is necessary to assess what follows. Such review is often deemed highly undemocratic and normatively illegitimate. A defense of (parts of) the practice denies that it is *objectionably* undemocratic, either because it is undemocratic yet still legitimate; or that the practice *is* democratic and legitimate. The following sketch of a liberal contractualist defense is compatible with both of these strategies,¹⁴ since it regards judicial review as a required component of a stable, trust-building democratic order.

Liberal contractualism holds that the inescapable use of public force by institutions and other public practices must be defensible to all those required to uphold them, as political equals. Note that it is not a single practice but the whole package of decision-making institutions that must be jointly assessed and defended, and that this must be done by comparison with the best alternative institutions for binding collective action.¹⁵ In our case, the comparison would be between two democratic modes of governance – they would both have legislatures, rules of voting, freedom of speech and regulation of political parties. They may also have several modes of restraints on parliaments such as a parliamentary committee that assesses legislative proposals *ex ante* and in the abstract. The salient difference is that only one of them would provide for international judicial review of human rights.

Familiar ways to specify the vague requirement of ‘defensibility’ take the form of social contracts: Social institutions must satisfy principles of legitimacy that no subjects would have good reason to reject, *given* that they have a ‘sense of justice’.¹⁶ The persons we seek to defend

¹² Cass R. Sunstein: *Legal Reasoning and Political Conflict* (Oxford: Oxford University Press 1996).

¹³ John Hart Ely: *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Massachusetts: Harvard University Press 1980); Ronald Dworkin (1986) 356; Samuel Freeman: “Constitutional Democracy and the Legitimacy of Judicial Review” (1990) 9 *Law and Philosophy* 327; Cécile Fabre: “A Philosophical Argument for a Bill of Rights” (2000) 30 *Political Science* 77; Brian Z. Tamanaha: *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press 2004).

¹⁴ Cf. Philip Pettit: “Democracy: Electoral and Contestatory”, in Ian Shapiro and Stephen Macedo (eds.): *Designing Democratic Institutions* (New York: New York University Press 2000); Cécile Fabre (2000) 83.

¹⁵ Ian Shapiro: “The State of Democratic Theory”, in Ira Katznelson and Helen Milner (eds.): *Political Science: The State of the Discipline* (New York: Norton for APSA 2001) 235.

¹⁶ John Rawls: *A Theory of Justice* (Cambridge Massachusetts: Harvard University Press 1971); T.M. Scanlon: *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998), Brian Barry: *Theories of Justice, A Treatise on Social Justice*. (Berkeley: University of California Press, 1989.)

the practices to be ‘contingent compliers,’ motivated by a ‘duty of justice’ to “comply with fair practices that exist and apply to them when they believe that the relevant others likewise do their part”.¹⁷

The limited role of *consent* in liberal contractualism requires mention. Appeals to ‘hypothetical’ consent hones the vague requirement of defensibility to bear, as a reminder that assessment of standards of legitimacy and institutions must only be based on their impact on individuals’ interests, be it for instance in terms of basic capabilities, social primary goods, or non-domination. Consent has no further fundamental normative role on this account. Liberal contractualism does not hold that institutions should incorporate actual consent or actual deliberative procedures as much as possible.¹⁸ For instance, democratic rule is not legitimate simply because elections express ‘consent by the governed,’ or because it best approximates an ideal deliberative procedure. Instead it remains an open, largely empirical question which institutions should rely on actual, deliberated consent among some parties. Thus the case for democracy is more complex. Equal influence on the selection of accountable representatives to parliaments on the basis of public deliberation and scrutiny is one important mechanism to ensure the protection and furtherance of the best interests of citizens, including the interest in affecting common institutions. In particular, such electoral arrangements are more reliably responsive to the best interests of citizens over time than any other arrangement we are aware of. But there is no presumption that such parliaments should be unrestrained in authority. For instance, they cannot claim a privileged role as the repository of individuals’ legislative authority transferred unrestrained from a state of nature. On the contrary: a complete specification of a democratic legislature must also delimit the domain over which it may render legal and morally binding decisions by majority rule.

The case for judicial review rests on the need to justify majoritarian decision making toward citizens who are contingent compliers, who face particular assurance problems. Two conditions must be satisfied if they are to have a political obligation to obey the institutions and authorities. Firstly, the institutions must be normatively legitimate by some defensible set of principles of legitimacy and fairness. Secondly, citizens must have reason to trust other citizens and authorities to do their share within such fair institutions in the future. So the set of social institutions as a whole must protect and further the best interests of the public according to normative principles of legitimacy, but the citizenry must also have good reason to trust the institutions and authorities to carry out this task. The latter condition requires institutions that promote trustworthiness. I submit that democratic rule with active opposition parties and freedom of the press, with constraints on legislatures in the form of judicial review, provide several important forms of such assurance. Crucially, compared to other modes of governance, democratic arrangements not only have better mechanisms to ensure that authorities reliably govern fairly and effectively, but also: they help provide public assurance that so is the

¹⁷ John Rawls (1971).

¹⁸ Joshua Cohen: “Deliberation and Democratic Legitimacy” in James Bohman and William Rehg (eds.): *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Massachusetts: MIT Press 1997) 67.

case.¹⁹ Party contestation and media scrutiny help align the interests of the subjects to those of their rulers, and contribute to make the institutions trustworthy.²⁰ Bodies that review alleged human rights violations may also provide much needed assurance. Constitutionally entrenched human rights with international courts limit the scope of decisions available to governments. Those who regularly find themselves in the minority can therefore trust that the majority will not be able to ignore their interests completely, be it because of unfortunate deliberations, ill will or incompetence.

For liberal contractualism, the major normative issue is whether the benefits of such review bodies provide important benefits to some without imposing burdens of similar weight or urgency on others. Two notes on such assessments are in order. First, the stakes are contested. Consider that even when judicial review works as it should in stopping a legislative act, some will regret what they see as a loss to the *democratic* quality of the decision, since a majority decision is overturned. Some regard these losses as high – and question the likely gains.²¹ On the other hand, I submit that such limitations on the scope of legislatures' authority are not necessarily *nondemocratic*. All institutions must have a specified scope of authority, and a legislature which is corrected when it oversteps its authority is not thereby overruled in a non-democratic way.

Secondly, we should keep in mind that the gains and risks of judicial review by a court are different from those of a legislature. Recall that I am here concerned only with weak judicial review, where a court observes that there is a conflict between a piece of legislation and treaty obligations, but does not find the law invalid, and does not replace it. Instead, the court warns of a conflict among norms, and returns the dilemma to the democratically accountable legislature. The possible risks are also different than the risks a legislature faces. A court that performs judicial review may suffer two types of malfunction. 1) 'False negatives,' where a court stops normatively unobjectionable legislative acts. The legislature must then unnecessarily revise its legislation to avoid the problems mistakenly identified by the court; and 2) 'false positives,' which occur when a court fails to prevent normatively unacceptable legislative acts. Here the vital interests of some segment of the population are violated, the existence of judicial review notwithstanding.

We now turn to consider some features of how the ECtHR works, in light of this sketch of a liberal contractualist defense.

D. THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights is an institution of the Council of Europe (CoE), set up in 1959 on the basis of the 1950 European Convention on Human Rights. The Preamble states

¹⁹ Cf. Adam Przeworski, "Minimalist Conception of Democracy: A Defense, in Ian Shapiro and Casiano Hacker-Cordon (eds.): *Democracy's Value* (Cambridge: Cambridge University Press 1999) 23; Ian Shapiro (2001); Philip Pettit (2000).

²⁰ Fabre (2000) 83.

²¹ Cf. Bellamy (2007).

that the convention is a first step toward collective European enforcement of certain rights of the UN Declaration. This early warning system should help prevent lapses into totalitarianism by means of a court that hold states to account for human rights violations.²² These are mainly civil and political rights, but also rights concerning education, anti-discrimination etc. The objective of the Convention slowly changed to fine-tune “well-functioning democracies,” but the court has recently again focused on unstable democracies. Thus, Woolf notes that in 2005 more than 50 percent of applications pending were from four states: Russian Federation (17 percent), Turkey (13 percent), Romania (12 percent), and Poland (11 percent).

The ECtHR has the right to receive applications from individuals claiming to be victims of violations by a member State, and the Member States undertake to abide by the final judgment of the ECtHR (Art 46). The ECtHR exercises *weak* judicial review. ‘Strong’ judicial review occurs when a court can decide that a piece of legislation shall not be applied.²³ The legal force of a judgment by the ECtHR is more limited: it can find that a domestic statute is incompatible with the ECHR, but this does not directly affect the validity and applicability of the law in the internal legal order.²⁴ While its power is less than some domestic constitutional courts, Shapiro and Stone Sweet conclude that

the ECtHR has rendered enough judgments that have caused enough changes in State practices so that it can be counted to a rather high degree as a constitutional judicial review court in the light of the realities as opposed to the technicalities.²⁵

The room for intervention by the ECtHR into domestic affairs is more limited than often thought, as witnessed by the fact that 95 percent of all submitted cases are found inadmissible. In particular, the ECtHR only considers cases once domestic recourses to justice are exhausted; and it of course only considers alleged violations of the fairly narrow set of human rights of the ECHR.

Partly in order to reduce its immense caseload, the ECtHR has long cooperated with national ombudsmen, and encourages alternative dispute resolution mechanisms and ‘friendly settlements’ without a court decision.²⁶

With regard to procedure, a Chamber of seven members hears most cases, while a Grand Chamber of seventeen judges hears cases found to be of great importance. A judge from the accused Member State is always *ex officio* member of the Chamber and the Grand Chamber, to ensure relevant background information about national specifics.

²² Lord Woolf: *Review of the Working Methods of the European Court of Human Rights* (2005).

²³ Waldron (2006).

²⁴ Rudolf Bernhardt: “Human Rights and Judicial Review: The European Court of Human Rights”, in David M. Beatty (eds.): *Human Rights and Judicial Review: A Comparative Perspective* (Dordrecht: Martinus Nijhoff 1994) 297, 297.

²⁵ Martin Shapiro and Alex Stone Sweet: *On Law, Politics and Judicialization* (New York: Oxford University Press 2002) 154.

²⁶ Woolf (2005).

The judgments against a Member State may include reparations to the particular individuals, as well as more ‘general measures’ necessary to avoid recurrence of violations. States have some freedom with regard to which such measures to take, though subject to monitoring by the Committee of Ministers composed of the foreign ministers of all Member States.²⁷ The state may amend or add to its constitution, laws, regulations, or its administrative or judicial practices. The Committee of Ministers can employ a range of sanctions, ranging from modes of bringing pressure on the noncompliant state to suspension of voting rights in the Committee of Ministers, or even expulsion from the Council of Europe.

With regard to the background and selection of judges, each Member State has the right to nominate one judge to the ECtHR. The state nominates three persons, from which the Parliamentary Assembly selects one by majority vote after a brief interview by a sub-committee (Art 22 § 1). This procedure has been challenged on several grounds, including its lack of transparency at both stages. Some national nominations are rumored to reflect political nepotism rather than merit. Members of the sub-committee often lack training in human rights law, and their decision sometimes seems influenced by party considerations.²⁸ A yet-to-be implemented Protocol 14 may provide more political independence, with judges sitting for nine years at most, and with no opportunity for renewal, rather than the current practice of a renewable six-year term (Art 23 §1). Some recommend that State nominees be identified by independent national bodies staffed by independent representatives knowledgeable in international law and human rights. The Parliamentary Assembly recommends that governments nominate candidates that were either practitioners in the field of human rights law or activists in NGOs. Currently, the members of the ECtHR have a background as academics (27.4 percent), as judges (15.3 percent), from government administration (15.3 percent), as lawyers (13.7%) – or a combination (21.7 percent).²⁹

Rudolf Bernhardt, former President of the ECtHR, could see no different ‘schools’ in the ECtHR.³⁰ Yet their background does seem to affect the judges’ decisions. Those with government or bench experience are somewhat more likely to favor national authorities, while a pre-history as a human rights lawyer favors the applicants somewhat more.³¹ There is also evidence of patterns of a national bias among the national judges in these cases.³²

As with other treaties it is cumbersome to amend the ECHR: unanimity is required, as compared with qualified majority for various EU regulations. Partly for this reason, the principles of interpretation allow a certain flexibility. Three general principles are of particular interest.

The ECtHR applies a *Principle of Effectiveness*: The choice of interpretation should not be one which limits the obligations of the parties to the greatest degree, but must rather be

²⁷ EMD Scozzari and Giunta v. Italy, Reports 2000-VIII (Grand Chamber) (§ 249).

²⁸ Jutta Limbach et al: *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (London: Interrights 2004).

²⁹ Fred J. Bruinsma: “Judicial Identities in the European Court of Human rights”, in A. van Hoek (eds.): *Multilevel Governance in Enforcement and Adjudication* (Intersentia 2006).

³⁰ Bernhardt (1994) 302.

³¹ Bruinsma (2006).

³² Bruinsma (2006).

appropriate to the aim and object of the treaty: to secure the aims of the Universal Declaration of Human Rights.³³

A Principle of *Dynamic Interpretation* tends to promote judicial activism. The ECtHR has declared that “the Convention is a living instrument which must be interpreted in the light of present-day conditions”,³⁴ “in a manner which renders its rights practical and effective, not theoretical and illusory.”³⁵

This activism is restrained by a third principle of interpretation. The court grants a *Margin of Appreciation* to the states: they are allowed some discretion in how to best secure the rights of their citizens, apparently on the basis of an assumption of subsidiarity. The national authorities are thought better placed than an international court to evaluate local needs and conditions.³⁶ This rationale is sometimes at odds with the practice of the ECtHR to grant a *wider* margin where it discerns no common European standards or values that apply.³⁷ Some observe that this margin seems to be shrinking. Insofar as this is correct, it may be due to the harmonization of European laws, which would lead to clearer and more broadly shared European standards. At the same time, critics may suspect that the ECtHR carefully picks its fights to maintain its own legitimacy. It may thus grant powerful states a greater margin of discretion than other states.

E. CONCERNS ADDRESSED

Against this background of political theory and about the ECtHR, we now reconsider the general objections against international judicial review of human rights.

1. “THE ECHR RESTS ON AN IMPLAUSIBLE POLITICAL THEORY”

Some might worry that the bias of the ECHR toward civil and political rights is inextricably based on a highly contested ‘liberal’ political theory.³⁸ In response, while I agree that a political theory which grants primacy to only such rights is flawed, I deny that the ECHR must be justified on such a flawed basis. Firstly, the scope of rights is broader – the treaty protects individuals against a wide range of discrimination, for instance for social assistance programs. Secondly, the narrower set of legal rights arguably stems from the particular function

³³ EMD *Airey v Ireland* Series A 32 (1979) (Chamber) (dissent 5-2); EMD *Artico v Italy* Series A 37 (1980) (Chamber).

³⁴ EMD *Tyler v. United Kingdom* Series A 26 (1978) (Chamber) (dissent 6-1).

³⁵ EMD *Goodwin v. UK*, Reports 2002-VI (Grand Chamber) §§ 74-5 [striking down discrimination of children born out of wedlock in Belgium cf. EMD *Marckx v Belgium* Series A 31(1979) (Plenary)].

³⁶ EMD *Fretté v. France*, Reports 2002-I (Third Section) (dissent 4-3).

³⁷ Cf. EMD *Handyside v. United Kingdom*, Series A 24 (1976) (Plenary); EMD *Müller and Others v. Switzerland*, Series A 133 (1988) (Chamber) (dissent 5-2) [against obscene paintings]; EMD *Rees v. United Kingdom*, Series A 106 (1986) (Plenary) (dissent 12-3) [on transsexuals], cf. Bernhardt (1994).

³⁸ Bellamy (2001).

of the ECHR and its Court, to provide international oversight and hence assurance to citizens, that their government pursues normatively legitimate policies. One reason for the limited scope of rights may simply be that international judicial review of other rights provides little benefit, and some further risks, once domestic democratic arrangements are in place and protected by the ECtHR.

Nor does the existence of judicial review imply that the relationship between the individual and her state is or should be problematically adversarial. On the contrary, I submit, judicial review serves as an assurance mechanism among contingent compliers, to remove any lingering suspicion that power is abused. Waldron makes a similar point about the limited role and value of rights:

[T]he structure of rights is not constitutive of social life, but instead [is] to be understood as a position of fallback and security in case other constituent elements of social relations ever come apart.³⁹

Nor does a defense of the ECtHR assume that the aim of a human rights courts is to remove all political conflicts, be it about rights or policies more generally.⁴⁰ On the contrary, the role of human rights in general, and those of the ECHR in particular, is not to specify the good or just society, nor to exhaust all conflicts. Judicial resolution will not *replace* other means of democratic contestation etc.⁴¹ After all, judicial review is a *review* of democratic contestations, not their substitute. And weak review returns the issue for democratic resolution.

2. “PROBLEMATIC IMPACT ON DOMESTIC PROCESSES AND OUTCOMES”

Some fear that judicial review removes contestations about human rights from the democratic arena, while these rights should “remain open to perpetual contestation”.⁴² Three comments are in order. Firstly, I challenge the value of perpetual contestation. Public knowledge that some political and civil rights – even when hotly debated in the media - are protected from daily majoritarian decision making, and instead monitored by international courts, provides a valuable form of assurance for minorities who have reason to fear perpetual contestation and domination by a simple majority in their parliament. Secondly, my disagreement is not about the better social order: I would agree with Bellamy in aiming for “a non-dominating environment where citizens can lead secure lives, plan ahead, and live on a basis of mutual respect – conditions which may require intervention”.⁴³ And it surely is important to “foster the civic

³⁹ Jeremy Waldron: “When Justice Replaces Affection: The Need for Rights” (1988) 11 *Harvard Journal of Law and Public Policy* 625, 636.

⁴⁰ Bellamy (1999) 166; Maleiha Malik: “Minority Protection and Human Rights”, in Tom Campbell, K. D. Ewing and Adam Tomkins (eds.): *Skeptical Essays on Human Rights* (Oxford: Oxford University Press 2001) 277.

⁴¹ Pace Malik (2001).

⁴² Bellamy (1999) 166; Bellamy (2007).

⁴³ Bellamy (1999) 120.

⁴⁴ Bellamy (1999) 135.

virtues rather than economising on them”.⁴⁴ The question is rather what sorts of assurance and socializing institutions citizens need, and can be provided without unacceptable costs. Especially until we hear more about institutions that secure an alternative ‘republican’ political order, I submit that ECtHR and other international courts may provide precisely some of these socializing functions. Thirdly, the objective of the ECHR is hardly to remove all forms of political contestation, but rather to ensure democratic contestation both remains respectful of the equal dignity of all citizens – including those who lose votes in legislatures – and provides assurance that this is indeed the case. In particular, I submit, there is little reason to fear that the ECtHR detracts from, or strangles, non-judicial modes of conflict resolution – especially since it welcomes alternative dispute resolution, national ombudsmen, and efforts to come to “Friendly Settlements”.

Moreover, we should note the pre-emptive role of the ECtHR’s decisions: they serve to shape, frame, and re-invite, rather than stifle, the political debates in parliaments.

Finally, the process of weak judicial review should also diminish this worry. States have wide discretion in finding the requisite means, which may include new or revised legislation, constitutional changes, policy changes or new administrative routines. These opportunities will require renewed public and parliamentary discussions about how to respond to local circumstances, legitimate expectations, and culture – but with more attention to the legally protected needs of particular groups whose concerns, the ECtHR claims, have previously been overlooked or overheard.

Defenders of the ECtHR and the ECHR may thus, with Robert Burt, hold that “such judicial review does not extinguish conflict, but helps protect against domination within them – and helps ensure the political participation of all”.⁴⁵

3. “THE RISKS OF UNACCOUNTABLE JUDGES OF THE ECtHR”

Some, but not all worries about unaccountable international judges seem overdrawn when it comes to the ECtHR. A central concern is whether the deliberation of courts is better than that of legislatures, with regard to the range of arguments or their deliberative quality.

The tendencies of actual debates in the ECtHR and in legislatures are indeed a crucial empirical issue. I submit that the relevant empirical data must go beyond one particular case, even one as important as the abortion debate in the U.S. and the UK.⁴⁶ The normative theory I laid out in section 2 is committed to empirically informed assessments, but must presumably consider the general tendencies of institutions and mechanisms, rather than worst or best cases. So a broader range of data should be explored. Furthermore, we may want to consider how different rules affect the deliberations of parliaments, e.g., as Steiner et al. explore.⁴⁷

⁴⁵ Robert A. Burt: *The Constitution in Conflict* (Cambridge, Massachusetts: Belknap Press 1992); “The Right to Judicial Review” (http://www.law.columbia.edu/center_program/legal_theory/papers/fall05?exclusive=filemgr.download&file_id=941341&rtcontentdisposition=filename%3Djr200.doc) (10 May 2009).

⁴⁶ Pace Waldron (2005).

⁴⁷ Jürg Steiner et al: *Deliberative Politics in Action: Crossnational Study of Parliamentary Debates* (Cambridge: Cambridge University Press 2005).

Tushnet has suggested on more principled grounds that a ‘true democrat’ should have at least as much trust in the impact of arguments in the political arena as in courts.⁴⁸ There are at least two reasons to doubt his reasoning. Firstly, there are institutional factors – mandate, rules, culture – that legitimately lead the two kinds of bodies to pursue and weigh different reasons and considerations differently. Surely, some policy choices a legislature must make should reflect the comprehensive set of preferences of representatives – both self interested and other regarding. Majority rule may then be a plausible decision rule to maximize preferences over time. Judges’ discretion, on the other hand, is largely limited to interpretation of legal texts, while there is clearly leeway in such interpretation. It would seem that peer pressure and professional socialization does, and should, serve to constrain such interpretations in quite other ways than we should expect among democratically accountable representatives. Thus the appropriate, responsible consideration of reasons may well be different, and the trustworthiness of legislators and judges in these regards may well be enhanced by insulation from, versus responsiveness to, citizens’ express preferences, respectively.⁴⁹ This is not a rebuttal of Tushnet’s concern, but rather indicates that quite other sorts of arguments seem appropriate, also among ‘true democrats,’ on behalf of the reasoning of judges in general, and of the ECtHR in particular. Secondly, recall that judicial review is a safety mechanism, not a replacement for democratic deliberation. Thus Waldron grants the value of weak judicial review as a safety mechanism, since legislators might not be able to see the issues of rights embedded in the proposal and its future applications.⁵⁰

I also submit that the risks are different for such safety mechanism, as compared to legislation. So it is not appropriate simply to compare the failure rates of courts and legislatures. We must assess the losses imposed on those whose human rights are overruled against the interests of a majority that cannot be pursued in the ways originally thought.

A different source of worry about international judicial review is that judicial solutions will likely be worse than those of legislatures and bureaucracies, because the latter know more about the situation on the ground. In response, note there are several features of the ECtHR that renders this worry less weighty. Firstly, the doctrine of the Margin of Appreciation explicitly recognizes and seeks to respond to this concern. Secondly, a judge from the accused country is always *ex officio* member of the ECtHR, precisely to provide some such relevant information. Thirdly, the judges’ background varies to some extent, so that the ECtHR as a whole has members with experience of government administration and human rights activism – as well as academia and service on the bench.

These responses should not lead us to conclude that this concern is completely without merit. In particular, it remains to be determined whether the ‘Margin of Appreciation’ respects the domestic democratic process appropriately, and the vital interests of individuals. There is no obvious reason to believe this Margin overlaps precisely with the scope of the normatively permissible. In particular, there is no obvious reason to believe a broad consensus among

⁴⁸ Tushnet (2005).

⁴⁹ Cf. Michael Moore: “Justifying the Natural Law Theory of Constitutional Interpretation” (2001) 69 *Fordham Law Review* 2087; John Ferejohn: “Judicializing Politics, Politicizing Law” (2002) 65 *Law and Contemporary Problems* 41.

⁵⁰ Waldron (2006) 1370.

European legal systems will tend to converge on the normatively legitimate. There is a real risk that ECtHR will seek to avoid taking controversial decisions against a state, and instead grant that the issue falls within the margin of appreciation. Finally, the risk of political appointees raise the specter that judges will be affected by foreign policy concerns, rather than the best interests of individuals.

There is also the reverse worry, that judges – especially on international courts – are insulated from political pressure to such an extent that they are unaccountable to those whose cases they decide. This central, classical worry of ‘countermajoritarianism’ is even greater for international courts, and especially due to certain aspects of the selection of judges and interpretive practices of the ECtHR. I submit that these worries remain of concern. Optimists will point to some findings where judges enjoy a measure of insulation from national pressures, at least in many cases: some of them occasionally vote against the interests of their own national authorities. Indeed, in six Grand Chamber decisions the *national* judge even disagreed with the majority which did not find the state in violation of the ECHR.⁵¹ Elected judges also appear more independent than judges who are appointed ‘ad hoc’ by their government to sit on a particular cases.⁵² Moreover, there are reports of a common judicial culture within the ECtHR.⁵³

Furthermore, some judges report – though such reports must be checked for bias – that they see themselves as putting the reputation of the ECtHR itself at risk if they fail to maintain a particular balance.⁵⁴ Thus, at least some judges regard themselves subject to some informal forms of accountability.

The concerns about bias and independence should indeed, I maintain, be taken seriously and merit sustained legal sociological research.

It is not, however, clear whether the issue raises many philosophical concerns for international judicial review, beyond that of ‘countermajoritarianism’ in particular. One reason is of course that the function of the ECtHR is precisely to intervene in cases where the national authorities – including legislative, accountable majorities - seem to run counter to the central interests of particular individuals. Certain aspects of the ECtHR’s interpretive tradition might be thought to exacerbate the problem and require greater attention. The treaty is very difficult to change, and is quite indeterminate. It thus forces more discretion onto the unaccountable judges than in domestic cases. Citizens are thus vulnerable to domination by the unchecked values and biases of a few judges who apply ‘dynamic’ interpretations.

In response, I submit, these concerns do merit attention, but should not be overstressed for several reasons. Firstly, if we want international judicial review based on treaties in order to secure effective human rights on the ground, the alternatives may be even worse: judges applying outdated norms or ‘original intent’ to current circumstances. It is not at all clear whether such interpretive practices can provide effective protection. Secondly, the area of intervention is mainly limited to civil and political rights, and equal treatment by public

⁵¹ Bruinsma (2006) 29.

⁵² Bruinsma (2006) 29.

⁵³ Bruinsma (2006) 26.

⁵⁴ Bruinsma (2006) 11.

authorities. Thirdly, the ECtHR does apply a Margin of Appreciation, especially on issues where they perceive no broad European overlap of values. Fourthly, this is a weak judicial review, in that the ECtHR leaves it the national authorities to decide how to adjust domestic policies, legislation or constitution to avoid future violations. It is for the Committee of Ministers – which is democratically responsible, albeit not to a unified ‘demos’, rather than the ECtHR, to decide whether these changes suffice.

F. CONCLUSION

This paper has sought to identify and address several objections against the particular form of international judicial review performed by the European Court of Human Rights. The discussion relied on a brief sketch of a normative defense of human rights constraints of democratic legislatures, and an overview of the ECtHR, with mention of some of the aspects most pertinent for the criticisms considered. Section 4 brought these normative and legal accounts to bear on a variety of objections raised in the literature.

Among the criticisms that I do think merit further attention are the following: Notwithstanding the contributions of the ECtHR to foster public, political debates about the proper content and weight of citizens’ civil and political rights, we should ask:

1. whether there are institutional mechanisms that are better at fostering the requisite public, political debate about the proper content of citizens’ civil and political rights – and provide sufficient protection for these rights. Leaving aside worries about any division of power, we may ask whether there are *domestic* mechanisms such as parliamentary committees, ombudsmen etc., which may combine to provide equivalent protection, without the added risks, whatever they might be, of international bodies.
2. While the machinery of the ECHR does promote public debate about certain rights, there is a real risk that the agenda and focus remains skewed against the less privileged citizens. This is centrally an issue of the sociology of law.
3. Does the ‘deliberative quality of debate’ by the ECtHR, especially compared to domestic legislatures and courts, merit scrutiny, even though the judgments of the ECtHR have less impact than in legislatures, and even though this is not ‘strong’ judicial review?
4. While a straightforward comparison of ‘quality’ is not appropriate, the power to force reconsideration of policies and reconsideration still merits scrutiny. What are the risks of ‘false positives’ and ‘false negatives’ by the ECtHR – i.e., failures to stop bad laws, and success in stopping unobjectionable laws – compared to national parliaments and courts in the ECtHR’s absence? Is it plausible to believe that the restricted focus on civil and political rights is justified on this ground?
5. Are there better ways to institutionalize the proper insulation from parties to the conflict, while maintaining sufficient responsiveness to the ECHR, to the – changing – circumstances of the case, and to the common European standards or values? And are there better ways of providing public assurance of this? The current divide between the power of law and of politics is surely debatable. For instance, could the Council of Europe make statements that lay out what must now be regarded as common European values and understandings, and

thus regulate the 'Margin of Appreciation' and the extent of 'dynamic interpretation'? This might help reduce citizens' subjection to judges' discretion and domination.

If the normative political theory sketched above is correct, the ECtHR does provide an important social function within the European political order as a whole: to both treat individuals as political equals, and to provide assurance that the authorities in charge of public power do in fact act accordingly. However, there is no reason to believe that the role of the Court can be enhanced.

NEW LITERATURE

We shall be listing and summarizing in this column recent additions to the libraries of the Nordic institutes for human rights. For more information about the publications please visit the homepages of the libraries/institutes.

Edited by EVA HÖGLUND with contributions from BETTY HAUGEN, LENA OLSSON and KAREN LISE THYLSTRUP*

Amnéus, Diana. *The Responsibility to protect by military means: emerging norms on humanitarian intervention?* Stockholm: Department of Law, Stockholm University 2008. Doctoral thesis, Stockholm University. xii, 589 p. ISBN 978-91-7155-735-3

When states fail to protect their population against genocide, crimes against humanity or war crimes, the Security Council has an external 'responsibility to protect'. When the situation is considered to pose a threat to peace, international law recognizes a right for the Council to approve of the use of military intervention when peaceful means are inadequate. This is also what Diana Amnéus aims to show in her doctoral thesis.

The decisions of the Security Council regarding humanitarian intervention since the end of the Cold War in particular in Bosnia, Somalia and Rwanda support such an extended right to respond to gross violations of human rights and humanitarian law. UN Member States have also recognized a new principle, the "Responsibility to Protect", at the UN Summit in New York in 2005.

Each individual state bears the internal primary 'obligation to protect» its population against serious abuse under international law. A military intervention is a last resort, and can be used only when the diplomatic, political and economic measures do not work.

The regional organizations could also have a legal right to carry out humanitarian interventions to stop genocide and other serious viola-

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E-mail: Lena.Olsson@rwi.lu.se Institute homepage: <http://www.rwi.lu.se/>

tions of international law, without a mandate from the Security Council, in the future. There needs to be more cases of humanitarian intervention, as in Kosovo (1999) and Liberia (1991), before states give their consent to such a right, and it gets more recognition as a genuine right.

In the case of Darfur, Sudan, as well as the UN Security Council and African Union (AU) failed to protect the public against the serious abuses. This despite a Security Council decision in the summer of 2007 on the creation of the UN and AU's joint forces UNAMID. Too often a lacking political will and lack of sufficient state resources hinders making the principle of 'Responsibility to Protect' a reality. Diana Amnéus argues that we also need to uphold the prohibition of use of force in international law through the UN, and not through regional organizations.

Bibliography and links to documents published on the internet. **Io**

Arold, Nina-Louisa. *The Legal culture of the European Court of Human Rights*. Leiden: Martinus Nijhoff 2008. ix, 214 p. (The Raoul Wallenberg Institute Human Rights Library, 29) ISBN 978-90-04-16067-5

The author teaches law at the Faculty of Law at Lund University and is a researcher at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law. The book presents the results of a study on the legal culture of the European Court of Human Rights (ECtHR). The author emphasizes that very little is known about the judges and clerks working at the Court. To what extent do their backgrounds affect their thinking and the judgments in the cases of the Court? Does the fact that the judges are educated in different legal traditions – common law, civil law and socialist law (former) – and that they are brought up and educated in different political systems affect their views on human rights, and even more importantly, their opinion in the judgments? Do

the judges from Eastern Europe consider human rights less important than the judges from Western Europe? Through interviews with judges (37 in all), and an analysis of the judgments, Arold has managed to find answers to these important questions. The results show that the legal culture brings judges together and that any previous misgivings regarding differences of opinions and cultures turned out to be unjustified.

The author states that further research needs to be done on the impact of the new trans-national and alien legal cultures in the domestic law to further explain this new culture. Human rights have a growing importance and they affect all areas of domestic law.

This is a book, which is important to everybody working with human rights in the European context, and should be compulsory readings for the judges at the Court.

*The author has also published an article in the Nordic Journal of International Law vol. 76, 2007, titled 'The European Court of Human Rights as an Example of Convergence' and the article gives an introduction to the book and an analysis of the outcomes of the study. **Io***

Ersbøll, Eva. *Dansk indfødsret i international og historisk belysning*. København: Jurist- og Økonomforbundets Forlag 2008. Ph.D. thesis, Aarhus University. 798 p. ISBN 978 87 574 1886 6

Eva Ersbøll has studied legal practice in the area of Danish citizenship rights from 1776 to today.

*Comparing Danish practice with international standards of human rights and EU legislation, she finds the 1950 Danish reform of citizenship law quite out of step with Denmark anno 2009. The law, she contends, is ripe for another reform. **klt***

Faye Jacobsen, Anette (ed.). *Human rights monitoring: a field mission manual*. Leiden and Boston: Martinus Nijhoff Publishers 2008. xxvi, 628 p. ISBN 978 90 04 16517 5.

Contents

Preface;

Chapter 1. Human Rights Monitoring / Anette Faye Jacobsen;

Chapter 2. Human Rights Law – An Introduction / Anette Faye Jacobsen;

Chapter 3. Part A. The Right to Life; Part B. The Death Penalty / Fergus Kerrigan;

Chapter 4. Prohibition of Torture / Paul Dalton;

Chapter 5. Right to Liberty and Security of Person / Paul Dalton;

Chapter 6. A. The Right to a Fair Trial; Part B. Right to an Effective Remedy / Fergus Kerrigan;

Chapter 7. Freedom of Expression / Thomas Trier Hansen;

Chapter 8. The Right to Freedom of Thought, Conscience and Religion / Stéphanie Lagoutte;

Chapter 9. The Right to Freedom of Association and Assembly / Rita Roca;

Chapter 10. The Right to Property / Thomas Trier Hansen;

Chapter 11. Part A. The Right to Family Life and Privacy / Stéphanie Lagoutte ;

Chapter 11. Part B. The Right to Respect for Privacy, Home and Correspondence / Birgitte Kofod Olsen and Rikke Frank Jørgensen;

Chapter 12. Rights of Refugees and Asylum Seekers / Erik Roxström;

Chapter 13. Rights of Minorities / Ditte Goldschmidt;

Chapter 14. The Right to Non-discrimination / Katrine Thomasen;

Chapter 15. Equality between Men and Women / Dace Kavasa;

Chapter 16. Glossary.

Index.

*The manual, which is a co-production between Council of Europe, the Organization for Security and Co-operation (OSCE) in Europe, the Office for Democratic Institutions and Human Rights (ODIHR) and the Danish Institute for Human Rights, provides information on basic monitoring techniques as well as focused overviews of current human rights law and practice in selected areas of importance for most practitioners working with human rights monitoring. It contains checklists for monitors, as well as references to literature and relevant links, and annotated lists of instrument provision relevant to each theme. The manual is intended for people of various backgrounds, including field officers, human rights trainers and other human rights defenders with no specific legal training. **klt***

Faye Jacobsen, Anette. *Menneskerettigheder, demokrati og retssamfund*. København: Gyldendal 2008. 173 p., ill. ISBN 978 87 02 04590 1

This book is intended for human rights education in social studies in upper secondary schools.

The first chapter gives a general introduction to civil and political and economic, social and cultural rights as well as an introduction to both universal and regional human rights protection systems. Chapter two deals with the role human rights play in a globalized world, and in Chapter three the author explains about the role of a constitution in a democracy. Chapter four is dedicated to the topics: the principles of rule of law, and the role of courts in society. And the final and fifth chapter is about human rights and democracy in the multicultural Danish society.

Throughout the book the author refers to a Danish context.

*In connection with the book there is a website www.temabogsamfundsfag.gyldendal.dk with exercises, relevant links and suggestions for further reading. **klt***

Halme, Miia. *Human rights in action*. Helsinki: Helsinki University Print 2008. Doctoral dissertation, University of Helsinki. xi, 244 p. (Research series in anthropology) ISBN 978-952-10-4481-6
Full text: <http://urn.fi/URN:ISBN:978-952-10-4482-3>

This publication constitutes an Academic Dissertation at the Faculty of Social and Cultural Anthropology of the University of Helsinki. The study explores human rights in action in the Scandinavian Network of Human Rights Experts, SCANET, a loose network of human rights experts and scholars from the Nordic and Scandinavian region. The study explores who in the network are assigned the status of expert and student and thus investigates what relation the patterns of knowledge flow, established by the network, hold to global and local societal structures. The author combines anthropological insights with critical legal theory and explores the conceptions of knowledge, expertise and learning embedded in the educational activities of SCANET. If education in human rights is vital for empowering individuals to become free and equal members of their societies then how are these goals met in practice the author questions. Do human rights in action realize the ideals of emancipation and equality of the abstract discourse? eh

Hedlund, Mary-Ann & Brit Djupvik Semner. *Likestillings- og diskrimineringslovene : med kommentarer*. Bergen: Fagbokforlag 2008. Vol. 1, 666 p. ISBN 978-82-450-0280-5

This commentary to the Norwegian laws on equality and discrimination will, when completed, consist of two volumes. The first covers the Gender Equality Act of 1978 and the Anti-discrimination Ombud Act of 2005. Tracing the development of these laws the authors analyze national and international legal sources. EU and EEA regulations concerning gender equality are given special

attention. The commentary provides a thorough coverage of rulings delivered by the complaints boards for gender equality and discrimination, particularly those of recent date. The book includes the Norwegian text of the relevant EU and EEA regulations, a select bibliography, subject index and case law index. bjh

Hellum, Anne & Kirsten Ketscher (eds). *Diskriminerings- og likestillingsrett*. Oslo : Universitetsforl. 2008. 432 p. ISBN 978-82-15-01262-9

This volume provides a comprehensive and systematic grounding in Norwegian anti-discrimination and equality law. Intended for academics and practicing lawyers, the editors are concerned to raise the status of anti-discrimination law in legal studies and research. In addition to pieces by the editors, contributions are signed Helga Aune, Hege Brækhus, Ronald Craig, Mary-Ann Hedlund, Gudrun Holgersen, Marianne Jennum Hotvedt, Henning Jakhelln, Kirsten Sandberg, Vibeke Blaker Strand, Aslak Syse, & Elisabeth Vigerust. A select bibliography, subject index and case law index are included. bjh

Kaila, Heidi, Elina Pirjatanniemi & Markku Suksi (eds). *Yksilön oikeusasema Euroopan unionissa = Individens rättsställning inom Europeiska unionen : juhla kirja Allan Rosas = festskrift Allan Rosas*. Turku/Åbo: Institutet för mänskliga rättigheter vid Åbo Akademi 2008. xxx, 770 p. ISBN 978-952-12-2051-7

The publication is a Festschrift for Allan Rosas' sixtieth birthday and the title in English would be "The legal status of the individual in the European Union". Allan Rosas is Judge at the European Court of Justice and former Director of the Institute for Human Rights and Professor of Constitutional and International Law at Åbo Akademi University. The publication consists of articles written

by among others Finnish professors, politicians, judges and researchers. The articles deal with the fundamental rights in the European Union, the rights of the individuals, democracy, participation and public relations, and the possibilities of individuals to utilize their rights. The final chapter discusses the impact of the Lisbon treaty on the status of individuals in the European Union. Among other topics, the following are dealt with in the publication: equality and non-discrimination, rights concerning religion and languages, environmental protection, the European Union Agency for Fundamental Rights, the position of victims of crime and the rights of special population groups like students and retired people. The articles are written in Finnish and Swedish. **eh**

Kofod Olsen, Birgitte, Christoffer Ulrik Badse og Martin Ole Futtrup (eds). *Menneskeret i Danmark : status 2008*. København: Institut for Menneskerettigheder 2009. 193 p. ISBN 87 91836 26 3

The report is also available as a pdf-document on www.menneskeret.dk.

The annual status report on the human rights situation in Denmark 2008. In the preface the editors express concern about the negative impact the anti-terrorism laws have on the rule of law and the citizens' legal rights.

*The status report will be published on www.humanrights.dk in an English translation later this year. **kl***

Koivurova, Timo. *The Draft Nordic Saami Convention: nations working together*. Article in *International Community Law Review*, vol. 10, no. 3 (2008), pp. 279-293. Leiden: Martinus Nijhoff Publishers 2008. ISSN 1871-9740

The article is based on a presentation in the seminar "Equity and Mutual Sharing - Indigenous Tradition in Contemporary World" in Queen Mary,

*University of London in May 2007. The article studies the underlying ideas of the Draft Nordic Saami Convention, especially on how the Draft Convention tries to ensure a position as equal as possible for the Saami in relation to the Nordic states. It was the Saami who first took up the idea of drafting a Saami Convention and the Draft Convention was produced by an Expert Committee and submitted to the Nordic governments and the Saami Parliaments in 2005. The Draft Convention is a pioneering attempt to implement what is being encouraged also in the UN Declaration on the Rights of Indigenous Peoples. According to the author the Draft Convention represents an innovative possibility to grow beyond the state-centred paradigm in international relations in a realistic way and it will likely have a lasting inspirational impact on indigenous peoples all over the world. **eh***

Pentikäinen, Merja. *Creating an integrated society and recognising differences : the role and limits of human rights, with special reference to Europe*. Rovaniemi: Lapland University Press 2008. Doctoral dissertation, University of Lapland. x, 415 p. (Acta Universitatis Lapponiensis, 140) ISBN 978-952-484-220-4

The publication constitutes an Academic Dissertation at the Faculty of Law of the University of Lapland. The issue of integration and creating an integrated society has become an extremely topical one in Europe and it has been pointed out that the integration of migrants must become a national priority for the European states. The study examines the role of international human rights norms in the efforts to address the challenges of maintaining diverse yet integrated societies. The focus is on the human rights documents which are applicable in Europe. The author presents a survey of norms pertaining to various groups, such as minorities, indigenous peoples, refugees and migrants. This is followed by an assessment of the

norms adopted to address questions like racial discrimination and other forms of intolerance. The author performs a comprehensive analysis of these international human rights norms and combines this with practically oriented views on integration put forward by three international bodies, i.e. the Advisory Committee of the CoE Framework Convention, the European Commission against Racism and Intolerance and the OSCE High Commissioner on National Minorities. She concludes by stating that there is a need for further clarification of the concept of integration as well as redefining the human rights regime. *eh*

Scheinin, Martin. *Våra mänskliga rättigheter*. Uppdaterad och bearbetad till förhållanden i Sverige av Jonas Grimheden, Raoul Wallenberg institutet. Lund: Raoul Wallenberg institutet för mänskliga rättigheter och humanitär rätt i samarbete med Institutet för mänskliga rättigheter vid Åbo Akademi 2008. 69 p. ISBN: 91-86910-27-2

This booklet is published to celebrate the 60th anniversary of the Universal Declaration of Human Rights. It is a revised and updated edition of a book by Professor Martin Scheinin at Åbo Akademi University to celebrate the 50th anniversary of UDHR.

The booklet fills a gap, because Sweden is missing a short comprehensive book that can serve as an introduction to basic human rights in Swedish. Human rights are violated all over the world, including Sweden. Knowledge and awareness of the rights are crucial in order to identify a violation of these rights. The booklet is meant for a broader public that would like to have a basic understanding of human rights and it gives a list to instances where the citizens can take their complaints.

From the headings we get an understanding of the contents: Human Rights – What Is It? What is Included in the Human Rights? The Protection of Human Rights.

In the publication questions are included, which can serve as a starting point for further discussions.

*References to webpages and to additional readings are included and a Swedish-English dictionary of common terms in the field ends the publication. **lo***

Skåre, Siri, Ingvild Burkey & Hege Mørk (eds). *Manual on human rights monitoring : an introduction for human rights field officers*. [3rd ed.]. [Oslo] : University of Oslo, Norwegian Centre for Human Rights 2008. 1 vol. (loose-leaf binder with 12 pamphlets). ISBN 978-82-8158-059-6

This manual was put together by the Norwegian Resource Bank for Democracy and Human Rights (NORDEM) at the request of the United Nations High Commissioner for Human Rights. The first edition was published in 1997. A primary source of reference for human rights field work, it introduces the theoretical basis of human rights and offers practical advice on putting theory into practice in the field. The first part is general in nature, an introduction to the international and regional human rights systems and non-governmental organizations. The second part begins with a general introduction to human rights monitoring and methodology for human rights fact-finding; then a methodology for monitoring the administration of justice; an introduction to trial observation; and finally a manual on election observation. The new edition includes a new chapter (“Human rights professionals and the criminal investigation and prosecution of core international crimes” / Morten Bergsmo & William H. Wiley). Three of the original chapters have been thoroughly revised (“The international human rights system” / William G. O’Neill & Annette Lyth ; “How to recognise human rights issues in practice” / William G. O’Neill ; “Health, safety and security” / Miles Martin). The remainder are updated with events and developments in the field of human

rights since the second edition came out in 2001. The manual is available for downloading free of charge from the Norwegian Centre for Human Rights' website: www.humanrights.uio.no/programmes/nordem/publications/manual/bjh

Suksi, Markku. *Personal autonomy as institutional form – focus on Europe against the background of Article 27 of the ICCPR*. Article in *International Journal on Minority and Group Rights*, vol. 15, no. 2-3 (2008), pp. 157-178. Leiden: Martinus Nijhoff Publishers 2008. ISSN 1385-4879

The author examines the institutional content for personal autonomy against the background of Article 27 of the ICCPR. Persons belonging to minorities shall have the complete freedom to organize themselves in associations and the right to, in community with other members of their group, enjoy their own culture, profess and practice their own religion, or use their own language. According to the author the reference to 'community' adds on a collective dimension through Article 27 to the individual rights established in other articles of the ICCPR. The author then discusses certain legal issues and problems with a view to personal autonomy, e.g. which forms of associations does personal autonomy encompass and what aims of such associations are permissible? He examines support in international legal documents for private forms of organization and discusses legal interpretations by the European Court of Human Rights in support of personal autonomy. He concludes by stating that while there exists no general right to autonomy, it is possible to argue that there exists a right to personal autonomy and personal autonomy should be understood as one of the forms of autonomy. eh

Vogt, Kari, Lena Larsen and Christian Moe. *New directions in Islamic thought : exploring reform and Muslim tradition*. London : I.B. Tauris 2009. viii, 276 p. ISBN 1-84511-739-5, 978-1-84511-739-9

How should Muslims reconcile their beliefs with the modern world? Adherents of the Islamic faith and practice feel torn between their role as private citizen and their religious affiliations and identities. This book shows how prominent Muslim intellectuals attempted to bridge the gap by reformulating traditional Islamic ideas in a way that is consistent with contemporary ideas of equality, justice and pluralism. In addition to the editors, the following authors have contributed: Khaled Abou El Fadl, Kecia Ali, Abdullahi An-Na'im, Zainah Anwar, Asma Barlas, Aïcha El Hajjami, Mohsen Kadivar, Mohammad Hashim Kamali, Muhammad Khalid Masud, Ziba Mir-Hosseini, Tariq Ramadan, Nazife i man & Abdolkarim Soroush. The book includes a subject index. bjh

Westerstrand, Jenny. *Mellan mäns händer: kvinnors rättssubjektivitet, internationell rätt och diskurser om prostitution och trafficking*. Uppsala: Uppsala universitet 2008. Doctoral dissertation, Uppsala University. 414 p. ISBN 978-91-506-2033-7

Full text: <http://urn.kb.se/resolve?urn=urn:nbn:se:uu:diva-9362>

[Between Men's Hands: Women's legal subjectivity, international law and discourses on prostitution and trafficking. In Swedish with an English conclusion]

The title "Between Men's Hands" can be assumed to refer to the very point Westerstrand wants to emphasize regarding occurrences such as prostitution and trafficking: the invisible participants – the buyers and the men. The cover of the book is a manipulated picture of Michelangelo's paintings in the Sistine Chapel, which serves as a metaphor for the point that the intimacy of women passes

between the hands of men. An important point in the book is that the people participating in prostitution and trafficking should not be forgotten.

This is a legal dissertation, which combines legal research with, among others, sociological research methods. Westerstrand's research contributes to the illumination of the world of thought that is the basis of our ideas of what prostitution and trafficking is, and the different legal solutions to the problem. The dissertation also highlights the different religious and cultural conceptions and the power this conception of the availability of women to men has in the minds of people.

The dissertation especially emphasizes three central aspects of the question of how the trade of women for sexual exploitation should be handled legally: The question of the importance of 'consent', the question of whether trafficking should be seen as a 'process' or as a 'result', and finally the question whether trafficking should be seen as

having 'sexual exploitation' or 'forced labour' as its aim. According to Westerstrand, the discourse of prostitution is important in the way prostitution laws are written, and the discourses also influence the way international law deals with the questions of trafficking to a large degree.

The dissertation includes empirical materials and legal provisions from the UN, ILO, Council of Europe and the EU.

Westerstrand is critical of the one-sidedness that the debate about prostitution shows, which, according to the author has been dominated by a conflict between two positions, one which to some extent has been deliberately simplified, and advocates a normalization of prostitution, and another, which is a radical feminist prostitution critique.

The literature list covers the area of research and also includes valuable links to homepages containing information about trafficking, among other things. lo