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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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...
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 (\textit{Dansk Folkeparti}) – feared was that the ruling would open the flood gates on an influx of non-European immigrants and illegal trafficking.

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 court’s reluctance to make use of the preliminary ruling system. 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. 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

EU had been a legal resident in another EU country prior to being reunited with their family among 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.\textit{Ræson}.


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 research\(^7\) 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 \textit{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.

\section{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

\begin{itemize}
\item \(^7\) See in particular Wind, Martinsen & Rotger (2009) and Wind (2009 forthcoming).
\item \(^8\) H. Koch: ”Dansk Forfatningsret i Transnational belysning” (1999) 6 Juristen, 213-227, J. Hartig Danielsen: \textit{Suverænitetsafgivelse} (København: Djøfs Forlag 1999); but see H. Rasmussen: \textit{European Court of Justice} (København: Gad Jura 2008); Rotger, Martinsen & Wind (2008).
\item \(^9\) 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.
\item \(^10\) Parts of this data analysis have been published in the Danish language journal (2008) 2 Ræson, 108-109.
\end{itemize}
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)\textsuperscript{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:

\textit{Figure 1: Daily developments in defence of and attack on the EU rules}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{Daily development in criticism/defence of EU legislation: From the 25th of July 2008 till the 25th of August 2008}
\end{figure}

\textit{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.

\textsuperscript{11} See appendix for a complete list of Danish parties.
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.

It is obviously not new that an EU member state objects to a ruling from the European Court of Justice. 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. We will turn to this aspect in the following sections.

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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 ‘Folketingstæslutning om EF-domstolens arbejde’.
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.\textsuperscript{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.\textsuperscript{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-perception.\textsuperscript{17} However, as Koopmans\textsuperscript{18} 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”.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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

\begin{footnotesize}
\begin{enumerate}
\item N. Pontoppidan: "Forord" in Festskrift til Ole Due: Liber Amicorum (København: Gad’s Forlag 1994), 11.
\item T. Koopmans: “Sources of Law: the New pluralism” in Festskrift til Ole Due: Liber Amicorum (København: Gads Forlag 1994), 191.
\item 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.
\item Koopmans (1994), 191.
\item Pontoppidan (1994), 11.
\item Koopmans (1994), 194.
\end{enumerate}
\end{footnotesize}
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 T vind case), the constitution is obviously of lesser importance as a source of law. However, for Germany which became a constitutional democracy after the war, and where the constitution is modern, dynamic and perceived as something almost scared, 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. 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. 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,

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22 Koch (1999).
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. 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. 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.

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. 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. In practice, however, the effects of such a course of action are extremely rare,

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30 The acte clair doctrine was clarified in the CLIFT case 1982/3415.
though the Swedish government did experience such a threat from the Commission in 2004.32

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.33 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.34 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.35 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.36 World War II and the Nazi regime clearly demonstrated that unconstrained parliaments and majority rule are no guarantees of a democratic development.37 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.38

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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).


35 Scheinin (2001); Wind (2009 forthcoming).


While constitutional democracy – here understood as democracy with active and frequent judicial review of legislation\textsuperscript{39} – has become the ideal in most European countries, the Nordic states have continued to regard the judicial review of legislation with great suspicion.\textsuperscript{40} Until some very recent amendments to the constitution of Finland in 2000, judicial review of legislation was directly forbidden in that country.\textsuperscript{41} In Denmark and Sweden, judicial review has almost never been practiced.\textsuperscript{42} 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.\textsuperscript{43} 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.\textsuperscript{44} 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 demokratitredningen) from 2003.\textsuperscript{45} In brief, it has been common in the Nordic countries to conflate democracy with majoritarian democracy.\textsuperscript{46}

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.

\section*{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:

\textsuperscript{39} Definition taken from Scheinin (2001).
\textsuperscript{40} Nergelius (2001).
\textsuperscript{41} Nergelius (2001) 85.
\textsuperscript{42} Nergelius (2001) 85.
\textsuperscript{46} Føllesdal (2002); Wind (2009 forthcoming).
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.\textsuperscript{48} 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.\textsuperscript{49} 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.\textsuperscript{50} 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 referrals.\textsuperscript{51} 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:

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\textsuperscript{48} For a much more thorough analysis of the Danish case and attitudes towards EU law among the Danish judges, see; Wind (2009 forthcoming).

\textsuperscript{49} Weiler (1991); Alter (2001); Craig & de Búrca (2008) 344, 480-501.

\textsuperscript{50} Alter (2001).

\textsuperscript{51} See Wind (2009 forthcoming).
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.52

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.53

Counter to the ordinary tale of Denmark as a very decentralized and open democracy,54 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

52 See Lundström (2009).
54 See Hal Koch: Hvorfor Demokrati (København: Nyt Nordisk Forlag 1945)and ‘Magtudredning-en’ 2003 as examples.
root. He explains this by the strong role of absolutism and Danish monarchical rule which in itself was extremely centralized: “There were more pluralism and separation of power in ‘solkongens Frankrig’ than under Danish absolutist rule.” 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”. 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”.

The negotiators of the Danish constitution of 1849 generally spend very little time on the separation of powers. 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.” 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. 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. 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 gov-
ernment the judges had to be regarded as inferior and not superior to the parliament.63 Interestingly, this argument resembles that of Alf Ross who from a more philosophical angle argued that the courts logically had to be considered subordinate \[\text{underlagt}\]64 to the parliament because the parliament always can overrule any court case by legislating against it ex post.65 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.66

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 1921.67 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’68 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 \textit{not a practice} and certainly not part of Denmark’s legal, political and democratic culture.69

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 \textit{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 legitimation. Formally, the courts democratic legitimacy has decreased even more in the past years parallel with an increase in their political power.70

63 Christensen (2003) 12-13; see also Schaumburg-Müller in this special issue.
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.
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.
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’:

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 though 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.71

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.72 According to Toftegaard Nielsen, however, it is a misinterpretation of Montesquieu to suggest that the courts should have any political power at all.73 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.74 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.”75 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 powers.76

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


73 Nielsen argues the following in Danish: “magtdskillelseslæren [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).

75 Nielsen (2003) 155, my translation from Danish.

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 political role as opposed to other European courts like, for instance, the German Constitutional Court.\(^7\) Interestingly, the Danish power study also underlines the strong sense of scepticism in Denmark towards review of national laws constitutionality since the 1849 constitution.\(^8\) 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,\(^9\) argue that the Tivind 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.\(^10\) 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)\(^11\) 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.”\(^12\)

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,\(^13\) but simply because “[w]e would like to help other countries who had problems with their human rights protection”.\(^14\) This could explain why it took 40 years before the convention became part of Danish law and de facto used by the Danish courts!\(^15\)

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\(^8\) Togeby et al (2003).


\(^12\) Togeby et al. (2003) 118.


\(^14\) Nielsen (2001).

I. Conclusion

The worship of majoritarian democracy has always been prominent in the case of Denmark. 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

<table>
<thead>
<tr>
<th>Party</th>
<th>Abbreviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Red-Green Alliance</td>
<td>R/G</td>
</tr>
<tr>
<td>Socialist People’s Party</td>
<td>SF</td>
</tr>
<tr>
<td>The Danish Social Democrats</td>
<td>S</td>
</tr>
<tr>
<td>Danish Social-Liberal Party</td>
<td>SL</td>
</tr>
<tr>
<td>Venstre, Denmark's Liberal Party</td>
<td>V</td>
</tr>
<tr>
<td>The Conservatives</td>
<td>C</td>
</tr>
<tr>
<td>Liberal Alliance</td>
<td>LA</td>
</tr>
<tr>
<td>The Danish People’s Party</td>
<td>DP</td>
</tr>
</tbody>
</table>

86 Motto by a famous Danish writer Viggo Hørup 1875.