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The Nordic Supreme Courts as Constitutional Courts; main features as seen from the Norwegian perspective

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1. The Nordic countries do not have particular constitutional courts reviewing proposed legislation, deciding in conflicts of competence between different levels of government, determining election disputes, emitting *responsa* in constitutional issues or dealing with constitutional complaints. However, the Nordic Supreme Courts have *features* denoting that they in certain respects should be considered as constitutional courts, or as Supreme Courts with certain functions similar to those of constitutional courts. The core is the obligation to *set aside* or to *interpret narrowly* a law provision that proves to be contrary to the Constitution, in particular as to the constitutionally protected fundamental rights and freedoms of individuals.

2. Within the framework of this "Nordic model", we are not talking of quashing the law or the particular provision, declaring it null and void in any formal or technical manner. By setting the provision aside, the Nordic Supreme Courts limit themselves to cutting of the provision's normative power *in the particular case before the court*. Due to the Supreme Courts' judgments' function as precedents, the poor provision will, however, loose its authority also in any other case. Accordingly, at this point the Supreme Courts' functions as constitutional courts and as courts of precedents are two sides of the same coin.

3. The Norwegian Constitution was adopted in 1814. Accordingly, it is one of the oldest constitutions in the world still in function. It came into being in the aftermaths of the French revolution, a period of time characterised by a strong belief in declining the royal and clerical powers, and of establishing democracy through a written constitution that prescribes the allocation of powers to several braches of the State, and a Bill of Rights – in Norway's case in particular connected to guarantees against arbitrary arrest, torture, conviction without the foundation in law, certain fair trial guarantees in criminal cases, a ban on retroactive legislation, free-speech guarantees and the protection of property rights. Compared to other constitutions, the text of the Norwegian Constitution from 1814 is, relatively brief and down-to-earth, in line with a Norwegian mentality that is more concerned with the practical implications than the ideologies as such. The text complied of just more than 100 articles, that were organised somewhat arbitrarily, most of them rather short, and many of them quite poorly drafted.

4. The Norwegian Constitution had of course a strong *symbolic* function, founding the Norwegian State after 400 years as the underdog in a union with the Kingdom of Denmark. Although Norway in the following years, from 1814 until 1905, shared the King and the foreign policy with Sweden, the Constitution of 1814 paved the way for Norwegian sovereignty and independence. It is even today deeply connected to Norway's position as a sovereign State, its identity as a nation, and with core democratic and humanitarian values that can be traced through Norwegian history, culture and politics. The bicentennial anniversary for the Constitution in 2014 was celebrated accordingly – a point to which I will return.

5. A fundamental question in constitutional law is whether the courts of law can review a statute or a particular provision within it, in order to decide whether or not it is in conflict with the Constitution. Shall the elected representatives have the final say as to how the Constitution is to be interpreted, or are the courts empowered to review the Parliament's opinion on the matter? The Norwegian Constitution of 1814 was silent on that point. The question was therefore left to the Supreme Court to answer.

6. The ground breaking judgment in Norwegian constitutional law is *Grev Wedel Jarlsberg v. Marinedepartementet* from 1866. The particularities of the case are of little bearing. However, in that judgment the Norwegian Supreme Court for the first time publicly – and without any particular references in the written Constitution itself – declared that the Court would not apply any law as far as the law was found to be in conflict with the Constitution. One perceived the Constitution's provisions as legally operative norms with a binding effect also on the other branches of government. Moreover, the Constitution was – and still is – *lex superior* – with precedence over any other governmental decisions. In effect, the judgment established the Norwegian Supreme Court to be the first constitutional court apart from the US Supreme Court. The ruling has been characterised as a major breakthrough for Nordic and European judicial formation.

7. The Norwegian Supreme Court's *motivation* for its approach in the judgment from 1866 is amazingly parallel to that given by the US Supreme Court some 60 years previously, in the landmark case of *Marbury v. Madison* from 1803, forming the legal basis for the US Supreme Court's position as a constitutional court. The Norwegian Supreme Court made no explicit reference to *Marbury v. Madison*. But it is beyond doubt that at least some of the justices in the Norwegian Supreme Court were familiar with it.

8. The development initiated by the Supreme Court was backed by the legal doctrine and followed up in subsequent case law, so that the Supreme Court's role even as a constitutional court gradually became accepted by both the Parliament and the Government, as an operative – and important – part of the Norwegian Constitution. However, it goes without saying that there have always been critical voices, partly connected to the very idea that the Supreme Court should carry out a constitutional review, and – of course – partly connected to how this has been carried out in particular cases. In the 1920's and early 1930's, the question of abandoning the Supreme Court's powers was discussed in the Parliament on several occasions. In the 1960's and 1970's many perceived the Supreme Court's power to set aside parliamentary legislation as "a stick willingly thrown into the wheels of democracy".

9. Also in Denmark and in Iceland the Supreme Courts themselves developed their function as constitutional courts through their own case law. In Sweden and Finland, on the other hand, this was introduced through a constitutional amendment. Over time the actual impact of this function has, indeed, varied largely among the Nordic countries. My impression is that the Supreme Court's role as constitutional courts is the strongest in Norway, on to Iceland and Sweden, and the weakest in Denmark and Finland. I shall not try to explain why – there are obviously a multitude of historic, societal, systemic and legal causes.

10. I will now make a large step forward in the Norwegian history of constitutional review of legislation, from the judgment in the case *Wedel-Jarlsberg* in 1866 to the judgment in the *Kløfta case* in 1976 (reported in Rt. 1976 page 1), which indeed confirmed and revitalized the Norwegian Supreme Court as a constitutional court. The judgment concerned the level of compensation to be paid to a landowner in the case of expropriation of his land, in particular whether the level of compensation prescribed for by the legislation could be considered to provide "full compensation", as required my Article 105 to the Constitution. In 1976 the Supreme Court had not used its power to set a law aside for many years. Several leading commentators had at that point concluded that constitutional review by the Supreme Court was more of a theory than a practical reality. However, the Supreme Court saw it differently. The majority stated:

> "… if the application of a law leads to results which are contrary to the Constitution, the courts will have to base its decision on the rule imposed by the Constitution, not on the provision in the law ... This principle is part of customary constitutional law ... Moreover, it must be assumed that this power is also a duty, so that the courts, when the question arises, will have to decide whether the Constitution is passed too close."

11. The core in this ruling is the same as in the case of *Wedel-Jarlsberg* from 1866. Moreover, what was said in the *Kløfta case* in 1976 has later been confirmed through the Supreme Courts' own case law, apparently even with an increased clarity and confidence. The year of 2010 is particularly striking. That year the Supreme Court set aside the contested legislation in three cases, which was all time high for one year, apart from the year of 1910. Thus, it became very clear to everybody, and indeed to Government and the Parliament, that the Norwegian Supreme Court's powers and duties as to performing constitutional review, represent a legal reality that must be taken into account.

12. The first case in 2010 was about the taxation of ship owners – a highly tensed political issue that also involved tremendous economical values (reported in Rt. 2010 page 143): By an amendment to the tonnage tax scheme that was introduced in 1996, shipping income was "exempt from tax", in order to make the ship owners stay in Norway. Untaxed profits were, however, taxed upon distribution to shareholders or exit of the company from the special tax system. By transitional rules given in 2007 – as a result of an intense political battle – the shipping income was, however, taxed even if not distributed to the shareholders or taken out from the special tax system. The Supreme Court held – by a majority of six to five – that the transitional rules violated the prohibition against retroactive legislation in Article 97 of the Norwegian Constitution. The Court emphasised that there were no strong public policy reasons why the legislation should be given retroactive effect – and the legislation could thus not be accepted as within the framework of Article 97. The Supreme Court did not attach decisive weight to the fact that both the Government and the Parliament had concluded otherwise – as both had misinterpreted Article 97 of the Constitution. Two lessons may be learned. *Firstly*: The protection against retroactive legislation was given a wide effect, even regarding economic positions established by public law. *Secondly*: The legislators own appreciation of the law's constitutionality has even on highly political areas rather limited impact, in particular if the legislator – according to the Supreme Court – has misinterpreted the Constitution.

13. The second case is concerned with retroactive law on crimes against humanity and on war crimes (reported in Rt. 2010 page 1445). The question was whether provisions on such acts in the Norwegian Penal Code from 2005, which entered into force in 2008, could be applied to acts that took place in Bosnia-Herzegovina (former Yugoslavia) in 1992. The crucial constitutional issue was whether the application of the new provisions to these acts would represent a violation of Article 97 of the Constitution, which prohibits laws being given retroactive effect. The Supreme Court – a majority of eleven against six justices – held that the application of these new provisions on prior crimes would violate Article 97 of the Constitution, even if the acts as such were punishable under ordinary criminal provisions at the time they where committed, and even if the courts could not impose any heavier penalty than what could have been imposed at the time the crimes were committed: The labels "crimes against humanity" and "war crimes" were new, and indicated criminal activity of a more severe character than the labels

under the former provisions. The developments in International law, and Norway's interest in assisting international criminal courts, could not – according to the majority of the Supreme Court – undermine the fundamental requirement that a criminal conviction must have an authority in Norwegian law. This was so, even if the decision to give these provisions retroactive effect was taken by a unanimous vote in the Parliament, and despite the fact that the Parliament found that the Constitution allowed such retroactivity. The accused was, however, found guilty according to other articles in the criminal code and in the end also sentenced to 8 years imprisonment for those offences. The judgment overturned a much-criticised ruling from 1946 (reported in Rt. 1946 page 198), where the Supreme Court accepted the death penalty for war crimes, albeit the Norwegian legislation at the time when the crimes were committed did not allow such a penalty.

14. Later the same year the Supreme Court had the third case. It concerned land and property taken over from the church in connection with the reformation 500 years ago. We have a special rule for this property in the Constitution, stating that this clerical property should only be used to the benefit of the church or for educational purposes. A law made it possible for people renting clerical land as ground for their houses to pay a yearly fee for the land far below market price for renting such property. So, parts of the properties' economical value were actually transferred to the renters. The Supreme Court set the act aside as not being in conformity to the Constitution's limitations on the possible uses of the clerical property.

15. As I emphasised initially, the Supreme Courts power to set aside a legislative provision that is not in conformity with the Constitution, does not go so far as to allowing the Court to quash the law or the contested provision. Technically speaking it will be up to the Parliament to make the necessary alterations. Moreover, the Norwegian Supreme Court must perform constitutional review within the general procedural framework in which the court operates as a general court of last resort. Accordingly, the question of constitutionality will not be a case as such – it will always have to be connected to a specific case that is already before the Court – penal, civil or administrative. And the Court's review is limited accordingly, to the particularities of the concrete case before the court. It is not concerned with the law's constitutionality in the abstract.

16. Leave to appeal will be granted by the Supreme Court's appeal selection committee if the case involves a substantiated question of constitutionality that needs to be solved. The committee may limit the permission to the question of constitutionality only, in order to concentrate the case before the Supreme Court. In cases where the outcome might be that the law has to be set aside for being unconstitutional, the Supreme Court shall hear the case in a plenary session with all 20 justices present. This composition of the court – as opposed to the ordinary composition of five – secures that the decision of setting a law aside has as solid a base as possible in he court as such.

17. It is established that the Supreme Court, when interpreting and applying the Constitution, must adopt its own view based on a contemporary perspective on the Constitution, in accordance with the present day situation. So the textual, historic approach to Constitutional law advanced, inter alia by some of the justices in the US Supreme Court – often referred to as *originalism* – has little bearing within the Norwegian Supreme Court. On the other hand, the Supreme Court is indeed aware of the need for stability and the importance of making democracy work, and the limits these factors represent as to a dynamic approach to the Constitution.

18. Moreover, when the constitutionality of a statute is in question, the Supreme Court will take into account the Parliament's own considerations as to the provisions constitutionality. Hence, there is a *margin of appreciation*. Moreover, the *intensity* of the review varies according to what kind of constitutional right that is challenged. When a provision of the Constitution deals with *personal freedom and security* of individuals, the review will be more far reaching and thorough, while the Parliament's view will be given some weight when the provision of the Constitution deals with the safeguarding of *economic interests,* and even more so if it relates to the *allocation of powers* between the Parliament and the Government. This is basically the Norwegian edition of the *preferred position principle*, which was developed by the US Supreme Court from the late 1930's and onwards.

19. Currently, the Supreme Court attaches great weight to constitutional rights, even in cases where the legislation is a result of a political battle, or expresses a clear and strong political will. The more recent development of the Norwegian Supreme Court as a rather strong defender of the rule of law is connected to a general development within European law, in particular as to the increased impact of the European Convention on Human Rights, through the case law of the European Court of Human Rights.

20. The former Article 110c of the Norwegian Constitution as amended in 1994, said that all governmental bodies should respect and secure human rights, and that the provisions as to the implementation of human rights treaties should be prescribed for by parliamentary legislation. An imperative step in this regard was taken when the Norwegian Parliament in May 1999 adopted the Human Rights Act, thereby giving certain conventions the position of Norwegian statutory law. These are:

    - The European Convention on Human Rights (1950)
    - The UN Covenant on Civil and Political Rights (1966)
    - The UN Covenant on Economic, Social and Cultural Rights (1966)
    - The UN Convention on the elimination of all forms of discrimination against women (1979)
    - The UN Convention on the Rights of the Child (1989)

    Article 3 of the Human Rights act establishes that if there is a conflict between a provision in one of the enumerated conventions and any statutory provision adopted by Parliament or any other domestic law, the treaty provision shall prevail.

21. More than anything else, the human rights conventions and the international legal material attached to them, has characterized the Norwegian Supreme Court's work – and the evolution of the Norwegian Supreme Court's constitutional function – in the first 15 years of our millennium. The international legal development has in itself been powerful, with, in particular, the European Court of Human Rights as a strong guardian of the European Convention on Human Rights as a living instrument.

22. The Norwegian Supreme Court has followed up, in an extensive case law regarding, inter alia detention, fair trial, the presumption of innocence, legality, the right to private and family life, home and correspondence, freedom of religion and freedom of conscience, freedom of expression, the protection of private property, the right to appeal in criminal matters and the prohibition against repeated prosecutions, to mention the most important issues. In particular after 2009 there is also a clear tendency that the UN Convention on the Rights of the Child is being invoked by the parties more often than before and discussed more frequently by the Norwegian Supreme Court in its rulings, by the majority or by one or more dissenting justices. The Supreme Court's deliberations related to "the best interests" of the child in conflicts with other rights and interests, is nowadays regularly quite thorough – demonstrating that the Norwegian Supreme Court carries out at rather strict scrutiny, in order to secure that the best interests of a child are actually given due weight.

23. From the outset in 1814 the Norwegian Constitution contained only selected human rights provisions. Few later amendments were made. Accordingly, the Norwegian constitutional human rights protection fell more and more short of the international development. As part of the Norwegian Constitution's bicentennial anniversary in May 2014 the Constitution went through a considerable modernisation and expansion as to the protection of fundamental rights. Numerous of the classic civil and political rights as prescribed by the major human rights conventions where taken into the Constitution itself in a new Part E, in addition to certain economic, social and cultural rights and the core rights of the child as prescribed in the UN Convention on the rights of the child (Article 93 to Article 113). Moreover, the new Article 92 prescribes that every governmental body, including of course the Norwegian Supreme Court, is obliged to respect and ensure both the new constitutional rights and the rights and freedoms enshrined in human right treaties to which Norway is a party.

24. The constitutional and the international context for these rights and freedoms run more or less parallel and can hardly be separated. Accordingly, the Norwegian Supreme Court has, in its case law after the reform, stressed that the new constitutional rights and freedoms are to be understood "in the light of" their international background and parallels. Obviously, this is not an original approach. But it is, nonetheless, an important clarification as to the nature and function of these constitutional rights and as to the interpretation an application of the Constitution.

25. The method followed by the Supreme Court is in line with the Parliament's view when it amended the Constitution; the level of protection according to the Constitution shall not run short to that of the parallel convention rights. So, as to the interpretation and application of these new constitutional provisions, any applicable case law from the relevant international courts or tribunals should – according to the Parliament – be taken into account. Case law from the European Court of Human Rights will have a key position, but also material on any other relevant human rights treaty is relevant. Although not formally bound by the international case law when interpreting the Norwegian Constitution, the Supreme Court should not deviate from it without good cause.

26. The Norwegian Supreme Court has, so far, not had the opportunity to deal extensively with every recommendation given by the Parliament as to the methodological approach to the new constitutional provisions. But there can be no doubt that the Supreme Court has followed the transnational avenue recommended by the Parliament, to the extent that established case law from the European Court of Human Rights has been applied in a similar manner when interpreting the Constitution as it would have been in the parallel interpretation of the European Convention on Human Rights. Although the technical approach may vary slightly from case to case, there is no doubt that a goal is to achieve coherence: When a judge is faced with the dynamic forces of legal fragmentation and of overlapping jurisdictions, maintaining coherency within the law is of the very essence of judicial duty.

27. Expanding the Constitution's catalogue of protected rights and freedoms have inevitably also broadened the Supreme Court's repertoire as a constitutional court and as a partner in the European dialogue of courts. It represents a boost for Norwegian constitutionalism. This brings me back on track as to the legal status of constitutional review in the Norwegian Constitution – and also to my short final: As I have said, the Supreme Court' power and duty to perform constitutional review achieved at some point in time the status of customary constitutional law. Connected to the constitutional reform in 2014 and the Supreme Court's 200 years anniversary in 2015, the Parliament decided on the 1st of June 2015 to make an amendment to the Constitution. The new Article 89 states:

> "In cases brought before the courts, the courts have the power and the duty to review whether laws and other decisions by the State authorities are contrary to the Constitution."

28. During the preparation of this amendment, the Parliament emphasised that this provision refers to what was already established through customary constitutional law, no more and no less. Accordingly, Article 89 is a pure *codification*. However, this new Article expresses – for the first time ever through a constitutional provision, based on 160 years of experience, including the Supreme Court's more intense constitutional scrutiny in recent cases – the Parliament's solemn recognition of the Norwegian Supreme Court's functioning as a constitutional court, and an up-to-date acceptance of the court's role as a guardian of the rule of law. In this respect, the codification is indeed important.