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The Norwegian Constitution – 200 years and still alive

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1. Thank you so much for inviting us to this seminar, dedicated to the fascinating fact that the South African Constitution at the age of 20 is one of the youngest and currently most remarkable in the world, while the Norwegian Constitution that was adopted in 1814, at the age of 200 is one of the oldest constitutions in the world still in function.

2. The Norwegian Constitution 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 branches of the State. The old ideas of unrestricted sovereign powers where overthrown under the mantra of "Liberté, égalité, fraternité" – "Liberty, equality, brotherhood".

3. The Norwegian Constitution was indeed inspired by these revolutionary ideals flowing in from Europa towards the end of the 18th century, and by the philosophical ideas often referred to as the Age of Enlightenment.

4. However, we have never had any revolution in Norway. And the Norwegians did not decapitate the King in order to establish a new way of governing. In a rather pragmatic manner, the Norwegian Constitution prescribes for a constitutional monarchy, with the King positioned as the head of the executive power, however, not supposed to use his powers in opposition to his own council as headed by the prime minister.

5. And the King was, of course, also to be ruled by law, as given by the Constitution and by the elected Parliament, and as interpreted and applied by independent Courts.

6. Accordingly, the Constitution established the three branches of the State – the legislative (Parliament), the executive (King in council) and the judicial (with the Supreme Court having the final saying) – and prescribed the basic rules for the exercise and of their corresponding powers. To this end one can say that the Norwegian Constitution adopted *Montesquieu's* prescription of checks and balances thought the division of power.

7. Moreover, the Constitution even entailed a small *Bill of rights*, 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 protection of property-rights.

8. Compared to other Constitutions – old, or as modern as the South-African – the text of the Norwegian Constitution is, however, 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.

9. The text complied of just more than 100 paragraphs organised somewhat arbitrarily, most of them rather short, and several relatively poorly drafted.

10. The 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.

11. 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 has been celebrated accordingly.

12. How can it be that a 200 years old Constitution is still alive an operative, taking into consideration the fundamental and overall changes that have taken place in Norway, in Europe and all over the world?

13. I am sure this might be answered in many ways, depending on who you ask and the approach and context where the answer is given. However, I am also certain that everyone would agree that this is definitely not due to some kind of prophetic brilliance among the founding fathers, making them able – once and for all – to design the optimal and definitive Constitution.

14. The Constitution as it was designed in 1814 had undoubtedly qualities, and it was probably quite clever constructed, taking the circumstances into consideration. But it was surely not commandments handed down from the gods and written in stone: The Norwegian Constitution was a true child of its contemporary environment

and has in principle been as exposed to the forces of time as any other constitution.

15. However, relatively speaking, Norway has always been a homogeneous society, with the benefit of not experiencing major internal conflicts. So the call for paramount changes in the constitutive structures of the Norwegian society has never been overwhelmingly strong. Neither have there been controversies of for example a political, ethnical or religious nature of such depths and dimensions as to really challenge the Constitution as such, its basic structure or essential features.

16. Moreover, with the help from our allies, we have managed to keep external threats away. The World War II represents also in this respect one of history's darkest periods, as the German occupants effectively sat the Norwegian Constitution aside, leaving the justices of the Supreme Court with no other choice than to withdraw from the Court in the years from 1941 to 1945. By doing that, the justices actually also defended the Constitution by not contributing to any legal justification of the occupant's ambitions as to undermine the Constitution. And once back on duty after the liberation in 1945, the Court declared that the Constitution was again in force, and that the Court was prepared to protect it.

17. So the Constitution has, generally speaking, not been defeated though the use of internal or external force. But this is not sufficient as to securing that the Constitution is not erupted – slowly loosing its relevance as an operative part of the legal and political system.

18. A couple of weeks ago former justice of the Constitutional Court of South-Africa, *Albie Sachs* held a lecture at the University of Oslo on his experiences with the work of constructing the new South African Constitution – it had the title "Why Norway gave us so little, and so much".

19. As part of the preparatory work more than 20 years ago, he visited Norway – hoping to find what he described as "the holy grale" of democratic constitutional *texts*, more or less ready for transformation into the new South-African legal system, or at least a text that could inspire. He got indeed disappointed – "I found nothing", he said, "in the text, that could be used in the new Constitution of South-Africa".

20. However, what he did experience was the importance of a constitution that is actually based on a deeper *culture of constitutionalism* – the very concept of a limited government under a higher law, and the need to approach any constitutional issue with this particular feature in mind.

21. This connects with my thoughts as to why the Norwegian Constitution has survived, as they are based on the very same fundamental perception of the Constitution as being something completely different from the text: The Constitution conveys the basic and defining legal rules and principles governing the State, and must – accordingly – be understood within the context of that mixture of history, politics, culture, ethics and ideology that defines the State as a nation.

22. Moreover, these elements are not settled once and for all. Thus, in order to survive, a Constitution must not only be true to origin, it must be considered and dealt with as a *living instrument*, and kept alive through necessary developments, changes and adaptations. This is, to my mind, the true spirit of a *sustainable constitutionalism*.

23. The need for such an approach was actually crucial even for the founding fathers: They appreciated the obvious truth that nothing can last forever, and that the only way of surviving is to develop – to keep be bike running.

24. So they took into the Constitution itself a provision allowing the Parliament to change and amend the Constitution, limited only by the Constitutions own basic "spirit" and "principles". However, in order so secure that it should not be too easy, a two-third majority in the Parliament is needed, and no proposal as to altering the text of the Constitution can be accepted before a general election to the Parliament has been held after the proposal being made.

25. In 1841 the Norwegian author *Henrik Wergeland* described this provision as the "elastic panzer" of the Constitution, allowing the Constitution "to develop and to steadily rise its heart and its bewinged shoulders higher and higher …"

26. Since 1814 the Norwegian Constitution has been amended more than 300 times, affecting directly or indirectly almost all of the provisions.

27. The most important one in recent times, is – of course – the expansion of the Bill of rights within the Constitution carried out in may 2014, so that the Constitution now includes the basic civil and political rights prescribed for in the general international Human Rights conventions, along with certain social, economical and cultural rights and the basic rights of the child.

28. And it is now expressly stated in the Constitution text that every governmental branch has a constitutional duty to respect and secure the Bill of rights, as prescribed by the Constitutions own provisions and by any human rights treaty by which Norway is a party.

29. So, the text in 2014 is not at all comparable to that of 1814. Moreover, the actual content of the Constitution has been developed through 200 years of interpretation and application, and even through the development of *customary* Constitutional law.

30. One such basic constitutional principle established by customary law, is the system of *parliamentarism*, meaning that the government – the King's council – must resign if it has no longer the confidence of the Parliament. The Constitution as is stood in 1814 said nothing to that end. But through constitutional practice this principle was established not only as a political practice, but also as a legal principle at constitutional level.

31. There are several other examples that I will not go into now. But the overall constitutional currents has – of course very roughly speaking – probably been comparable to the major trends elsewhere in Europe: The 19th century was a century where the executive took hold of the state; the 20th century saw Parliament exert control over the executive; and the 21th century are expected to be the century that saw the judiciary ensure that both the executive and the parliament acts within constitutional limits and in accordance with the Bill of Rights.

32. The main point is that ultimately, the Constitution as it appears now in 2014, as to substance, is not at all the same as the Constitution of 1814. And this is, to my mind, paradoxically enough, why it is still alive – because it is continuously developing.

33. I will elucidate the significance of *constitutional development* with the example of judicial review and the role of the Norwegian Supreme Court as a Constitutional Court.

34. A fundamental question in constitutional law, both in Norway and in other countries, is whether the courts of law can review a statute 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?

35. The Norwegian Constitution of 1814 is silent on that point. The question was therefore left to the Supreme Court to answer. The ground breaking case is *Grev Wedel Jarlsberg v. Marinedepartementet* from 1866. The particularities of the case are of little bearing. However, in that judgment The Supreme Court – without any particular references in the written Constitution itself – declared that the Court would not apply any law found to be in conflict with the Constitution.

36. The judgment established the Norwegian Supreme Court to be the first *constitutional* court apart from the US Supreme Court. It has been characterised as a major breakthrough for Nordic and European judicial formation.

37. The Norwegian Supreme Court's *motivation* for its approach 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 were familiar with it.

38. This development was backed by the legal doctrine. The Supreme Court's role even as a constitutional court became, moreover, gradually fully accepted by both the Parliament and the Government, as an operative – and important – part of The Norwegian Constitution. Today the Supreme Court's duty to review legislation is deemed to have the status of *customary constitutional law,* and, as such, may only be revoked or limited by an amendment to the Constitution. What is being discussed currently is whether the Supreme Court's role as a constitutional court – as established though more than 150 years of case law – should be incorporated into the text of the Constitution.

39. It is established that the Supreme Court, when interpreting and applying the Constitution must adopt its own view based on an updated and 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 leading justices in the US Supreme Court – often referred to as *originalism* – has little bearing within the Norwegian Supreme Court.

40. 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 represents as to a too dynamic or subjective approach to the Constitution.

41. Hence, there is a crucial connection between the Court's contemporary, purpose-orientated and pragmatic approach to the interpretation and application of the Constitution and the Court's function as to support a living Constitution.

42. Traditionally, when the constitutionality of a statute is in question, the Supreme Court will to some extent take into account whether the Parliament has considered whether the provision or statute is in harmony with the Constitution – at least if this consideration is carefully carried out and the Parliament's conclusion is clear.

43. However, the *intensity* of the control differs in relation to the subject matter of the statute. In the Kløfta-case from 1976 (cited in Rt. 1976 page 1) – the Norwegian Supreme Court transplanted the doctrine of the *preferred position principle* – developed by the US Supreme Court from the late 1930's onwards – into Norwegian constitutional review.

44. In short, the doctrine implies that the Court's scrutiny of legislation towards the Constitution will be more intense as to constitutional

provisions protecting individual freedom and security than those protection economic positions. The doctrine has been referred to as recently as in a plenary judgment from 2010 (cited in Rt. 2010 page 143 – rederiskatt – paragraph 138).

45. The current case law of the Norwegian Supreme Court demonstrates to my mind that the Supreme Court today 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. Of course, a workable and sustainable democracy must be based on the general principle that whether policy is wise or stupid, is something for the public opinion and the electorate to decide, not for the judges. But the Supreme Court's duties as a Constitutional court, implies inevitably some elements of judicial policy-making.

46. Recent judgments also forecast a slightly rougher climate between the Supreme Court and the legislator, as the latter seems to challenge the limits of the Constitution to a greater extent than before. At the same time the Constitutional reform in 2014 implies a boost for constitutionalism, partly by expanding the number of individual rights and partly by emphasising the Supreme Court's role as a Constitutional Court.

47. My concluding remarks must, I am afraid, be somewhat oracular: The real challenge for any constitutional democracy, and for any court performing the difficult task of judicial review, is to find the equilibrium of law and politics and of stability and change. It goes without saying that there are no universal answers here – the balancing will depend on so many factors, and will inevitably even be shifting according to the changing domestic and international environment.