

The Nordic Constitutions and judicial review¹

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First of all, let me on behalf of the Norwegian Supreme Court congratulate the Republic of Moldova with the fact that it now for 20 years has had a functioning constitution and the Constitutional Court of the Republic of Moldova with its 20 years of existence as a court with a most important role in the establishment of constitutionality and rule of law in Moldova.

The constitutions of the five Nordic countries

Seen from the outside the five Nordic Countries may look rather homogenous. All five countries are small and affluent. Furthermore they are all well-functioning and situated in the northernmost corner of Europe. They are predominantly Lutheran and have a high work ethic. All countries are free and open. We have stable democracies and the rule of law is paramount to the courts in all five states. Changes of power are peaceful and the political opposition as well as civil rights are effectively protected.

You would therefore presume that the constitutional traditions and the constitutions themselves of these countries are rather similar. But no, you will soon find out that the constitutions are rather dissimilar when you start to study them and that the same is the case with the traditions of constitutional law that you find in these countries.

First of all there are differences between them with respect to **age**. The Norwegian constitution was adopted in 1814 and is 200 years old, while the Finish – adopted I 1999 is the youngest. The present constitutions of Iceland, Denmark and Sweden were adopted in 1944, 1953and 1974 respectively. This gives a span from the world's second oldest constitution to one of the youngest and most modern ones.

The differences in **length** of those five constitutions are almost as striking. If you go by the number of words the Icelandic is the shortest, just a little more than 4 000 words, while the Norwegian and the Danish both contain about 6 000 words. The Swedish and Finish constitutions both contain about the twice as many words. The differences in length reflect variations in drafting techniques used in the five constitutions; short abstract provisions or long, detailed ones. And there are also differences with regard to how much that the constitutions regulate.

¹ This paper has been written on the basis of a lecture held by professor Fredrik Sejersted on August 21st 2014 at the opening ceremony of the 40th Nordic conference of lawyers.

In addition there are differences with regard to the **style** and **format** used. In spite of the revision adopted in 2014 by the Norwegian Parliament of the language used in the constitution it is still possible to see that it was written in the 19.th century.

I'm not going to describe the differences in quality of the constitutions as quality is difficult concept to measure. But if they were to be measured against the yardstick of best European practice with regard to content I think you would have to say that the five texts are of rather varying quality. The highest score will definitely be given to the Finish Constitution, and the lowest to the Norwegian. At the same time the Norwegian Constitution has undoubtedly the highest symbolic function. Even though only a limited number of Norwegians have ever read their Constitution they attach a very high value to it.

One additional observation: Norway, Finland and Iceland were all reborn as independent states in connexion with the adoption of their constitutions (in 1814, 1919 and 1944).

There also exist large differences between constitutional culture and tradition in the Nordic countries. There are two different tendencies – one in the two easternmost countries and another in the three other countries. But there are also differences between the countries that belong to these main groups.

In addition there are differences with respect to the legal role of the constitutions, and how legally operative they are – to what extent they actually regulate the activities of the powers of state, and how binding the constitutions are considered to be. There are also differences with regard to the extent that they give the people rights that can be tried by the courts.

Generally speaking the legal function of the constitution is strongest in Finland and Norway.

Furthermore there are differences in how the constitutions are interpreted in the five countries. There exists no joint Nordic tradition on the method of interpretation of constitutional law. Even more interesting is that there are differences with respect to the relationship between law and politics in the five countries.

The interpretability of the constitutional texts varies. In order to understand the Norwegian and Danish constitutions you need constitutional schooling to understand what the text is all about.

As to **contents** there are also differences between the five. Of course they all regulate the three powers of state – the lawmakers, the executive power and the courts and the distribution of powers between them, elections, citizens' rights, international cooperation, how to change the constitutions and some other matters. But also here there are many differences between them that I'm not going to use my time to mention. I'll just point to the fact that the rules on change of the constitutions are very different and that is virtually impossible to change the text of the Danish Constitution.

Judicial review

None of the five constitutions provides for the establishment of a Constitutional Court. The opinion and praxis has varied in the five countries with respect to whether the ordinary courts may invalidate legislation adopted by the parliament as contrary to the constitution.

Rules, as well as reality, vary between the Nordic countries with respect to judicial review. On the one side you have Norway where the courts were among the first in the world to practice judicial review (without any support in the constitution); starting as early as in the middle of the 19th century – inspired by the US Supreme Court.² On the other side you have Finland where the Constitution expressly prohibited courts from performing judicial review until 1999 and where a court must find that the *conflict is evident* before it is allowed to set aside a statute/statutory provision as being in conflict with the constitution.³ The differences are no longer so large and in all five countries the courts now perform judicial review, but there still remain differences with respect to whether this phenomenon is regulated, and how it is practiced.

The Swedish and Finish constitutions both allow expressly for judicial review, but differently. On the other hand you will presently not find anything about this in the constitutions of Denmark, Iceland and Norway. However, judicial review is considered as an unwritten constitutional principle, in Norway even as part of the constitutional customary law.(There is a proposal, however, to regulate it in the constitution).

As to actual use of the principle of judicial review, the courts of Denmark, Finland and Sweden have been reluctant to perform this of statutes/statutory provisions. In Denmark the principle has only been used in one – rather special – judgment handed down in 1999 by the Supreme Court.

2. Judicial review is performed by all ordinary courts, i.e. at all levels.

³ You earlier found the same restriction in the Swedish Constitution.

In Finland and Sweden, where the courts have only have been permitted to perform judicial review in more recent times, you will find a limited number of judgements where judicial review has been performed and few where statutory provisions have been set aside as contrary to the constitution. When the Swedish Constitutions was revised in order to allow courts to set legislation aside as contrary to the constitution not only when it was evident that it was “evident” that there was a conflict, the number of cases increased.

Icelandic courts have practised judicial review since 1944, but the number of cases has increased since 1995 when a human rights catalogue was included in the constitution.

Norway is the Nordic country with the longest tradition of judicial review; starting in the 1850ies. Between 1918 and 1975, however, you will not find clear examples of judicial review performed by the courts. In a well-known judgment from 1976 the Norwegian Supreme Court formulated criteria for the intensity of the control to be performed with respect to different categories of legislation. These criteria were honed in later judgments. During the last ten years there has been an increase in judicial review judgments, many of them very important. In most cases there was a split in the parliament in connexion with the adoption of the statutes in question. The cases are heard by the entire Supreme Court in plenary sessions and in many of the judgements the court has been divided – in some cases almost 50-50. The judgments themselves have also been seen as controversial –politically as well as by other lawyers.

Present trends in the development of the Nordic Constitutions

Let me however end this presentation of the Nordic constitutions on a somewhat different note. All five constitutions are presently experiencing changes due to the European integration through law process presently taking place.

From a legal point of view the most important occurrence on the legal front is the impact of European law, especially the European Convention on Human Rights and EU/EEA-law. Seen from a Nordic perspective what we now see is the largest reception of foreign law since the reception of church law in the Middle Ages, and it has happened very quickly – during the last twenty years. This has an impact on the functioning of the constitutions. – One of these is that the courts in all five countries are now empowered to review national statutes/legislation not only in relation to the

constitution but also in relation to the European standards and to do this in harmony with the judgments of the courts in Strasbourg and Luxembourg.⁴

The European judicial review has also resulted in a more intensified constitutional review in all five countries, especially perhaps in Sweden.

The impact of European law has also had the effect that many questions previously solved politically or administratively are now reformulated as citizens' legal rights that are to be guaranteed by the courts. Of course giving rise to more litigation and more "review".

Thank you.

⁴ The difference that you find in the way that the countries are attached to the European union, is not of great importance here.