

Seven Categories of Constitutional Critical Judging: An Interpretation of Nordic Case-Law

MARTIN SUNNQVIST

Introduction: The origins of judicial review of legislation in the Nordic countries

This article is based on my dissertation *Constitutional Critical Judging. The Change in the Attitudes of Nordic Judges During Two Centuries*¹, published in Swedish in 2014. In the dissertation, I give a broad overview of the change in attitudes of Nordic judges, and the difference in attitudes between the Nordic countries, towards constitutional critical judging – i.e. judicial review of legislation, and interpretation of legislation in conformity with constitutional and other superior norms. In the Nordic countries, there are no constitutional courts, so all judges can engage in constitutional issues. The dissertation employs a comparative legal historical method and relates the Nordic legal development, as regards Denmark, Finland, Norway and Sweden, to European and American legal cultures and contexts. In this article, which is mainly limited to Sweden, Denmark and Norway², I take a

more narrow view on whether different constitutional rights have been and should be divided into different categories, and, if so, how these different categories of constitutional norms should be organised.

New constitutions were adopted in Sweden in 1809, in Norway in 1814 and in Denmark in 1849³. In Sweden, the constitutional change was a result of a *coup d'état* against Gustavus IV Adolphus, and the constitution (*regeringsform*) of 1809 could be described as a mix between historical experiences and the idea of separation of powers⁴. In Norway, a popular assembly was convened in the power vacuum between Danish and Swedish rule, and the constitution (*grundlov*) was based on the idea of separation of powers and specified fundamental rights of the citizen⁵. In Denmark, the absolute King Christian VIII convened a constitutional assembly, and also this constitution (*grundlov*) was based on the idea of separation of powers and specified fundamental rights of the citizen⁶.

An important commonality between the Nordic constitutions of 1809, 1814 and 1849 was that there was no explicit rule about judicial review of legislation. An important difference between them was that two of the new constitutions (the Swedish and Danish) regulated existing states, while one (the Norwegian) became an important symbol of a newly created state. A difference between the Norwegian and the Danish constitutions on the one hand and the Swedish on the other was that rights and freedoms were made much clearer, as was the division of powers into the legislative, executive and judicial branches, in Norway and Denmark.

In Norway, there was a series of seven judgments by the Supreme Court handed down over the period from 1822 to 1866 which, in summary, protected established positions on the basis of non-retroactivity, protection of property rights and – where appropriate – the protection of state officials. In the 1866 case⁷, the Chief Justice of the Supreme Court, P. C. Lasson, made clear in his opinion that the courts in a case of conflict between norms had to prefer the constitution before statute laws. The argument resembles that of Chief Justice Marshall in the famous *Marbury v. Madison* judgment⁸. There were no similar judgments in Sweden and Denmark at the time, but judicial review and the superiority of the constitution over statutes was discussed in all three countries.

It can be said that, at this time, American legal thinking through the writings of Tocqueville and Joseph Story was influential in all three countries. This influence, however, was much stronger in Norway than in Sweden and Denmark. In Sweden and Denmark, the German way of seeing

the state as an organism according to the monarchical principle and then as a juristic person (*der staatsrechtliche Positivismus*)⁹ attracted more attention. The branches of government were united in the king and the constitution was not for the courts of law to apply. This indicates that separation of powers and supremacy of the constitution were much more important in Norway than in the other two countries. Norway thus differed from Denmark and Sweden in respect of the interaction of legal doctrine, case-law, and the legitimization of judicial review through references to American law.

An important Norwegian proponent for judicial review was professor T. H. Aschehoug. Even if professor Henning Matzen was an important Danish proponent for judicial review at the same time, and professor Hugo Blomberg had a somewhat similar role in Sweden, judicial review did not gain acceptance in those two countries as in Norway. In a case decided in 1890, the justices of the Norwegian Supreme Court let their interpretation of the prohibition of ex post facto legislation prevail over that of the legislator and thus exercised judicial review¹⁰. Even if there were other cases, in which the Norwegian justices showed more restraint, they had indicated that they did not refrain from interpreting and applying the Constitution when that was required. In a case in 1918, the Norwegian Supreme Court reaffirmed its right to set aside unconstitutional statutes but gave more room for the legislator to interpret the constitution¹¹.

In the 1920s and 1930s the approaches in the Nordic countries showed signs of convergence: In Sweden, the Supreme Court declared that it could review the constitutionality of ordinances, but did so with

great restraint¹². In Denmark, the Supreme Court declared that it could try the constitutionality of statutes, but did so with great restraint. The Danish Supreme Court found that it was not established, "with the certainty, which is to be required"¹³, that a statute was contrary to the constitution. Thus, even though Swedish and Danish courts (which started to show a greater interest for constitutional matters) and Norwegian courts (which started to give more room for the legislator to interpret the constitution) moved in opposite directions, they met in the middle in the common position that they could exercise constitutional critical judging but only with great restraint. It took until 1964, before the Swedish Supreme Court declared that it could review the constitutionality of statutes, not only ordinances (and it did so with great restraint)¹⁴. Both the existence of judicial review and the restraint with which it was to be applied were codified in the Swedish constitution in 1980: A court, and also other state authorities, should not apply a norm that was contrary to the constitution. If the norm was a statute law enacted by parliament or an ordinance enacted by the government, it should be set aside only if the contradiction was obvious¹⁵.

This situation from the 1920s and 1930s remained stable until the 1970s, with one exception: the right of the Norwegian Supreme Court to exercise judicial review was questioned by the Nazi occupation regime in Norway during the Second World War, and that moved the court to resist the occupation. Apart from that, the Norwegian Supreme Court just like the Swedish and Danish counterparts held a low profile. In the landmark "Kløfta" case Rt. 1976 p. 1, however, the Norwegian Supreme Court re-es-

tablished judicial review of legislation. In the 1990s and the 2000s, the Norwegian Supreme Court has taken more and more steps towards reserving the final interpretation of the constitution for the judiciary. The Norwegian Supreme Court has also, earlier than the Supreme Courts in the other Nordic countries, positioned itself on an international legal arena through application of the ECHR¹⁶ and the UN Convention of Human Rights¹⁷. There is a link in the Norwegian judicial culture from the adoption of the constitution and from the early cases of the nineteenth century through the cases of 1866, 1890 and 1918 and through the resistance under the Second World War up to Rt. 1976 p. 1 and the case law of the 1990s and 2000s.

In Denmark and Sweden, the development towards constitutional critical judging took more time. However, in the case UfR 1999 p. 841, the Danish Supreme Court found that a statute enacted by parliament in reality was to be seen as a judgment, since it settled a legal dispute, and declared it void since it was in conflict with the separation of powers and the right to access to court. In two cases in 2005, the Swedish Supreme Court set aside a partially unconstitutional ordinance¹⁸ and interpreted a statute so that it would be in conformity with how the Supreme Court predicted that the European Court of Human Rights would decide the case¹⁹. These cases have been followed by more, in which the supreme courts have elaborated constitutional judging. In the following, I will discuss some of these cases further.

The development of differentiated standards of review

In an article in 1921, Danish Supreme Court Justice Eyvind Olrik discussed what the Supreme Court had meant when it had declared that it could review the constitutionality of statutes but had required that the unconstitutionality could be established with "certainty"²⁰. According to Olrik, it was important to note that the case had dealt with the question whether an individual had got full compensation according to the constitution in a case of expropriation. In a case regarding other constitutional rights than the right to property, such as the freedom of religion, press, association and the protection against detention and searches of the house, the court had reason to be more active in its constitutional control. The precision of the wording of the constitution was one aspect, but also the attitudes of judges to the importance of different constitutional rules²¹.

Olrik's view was not discussed or developed further. Fifty years later, however, the discussion was brought up in Denmark again. Then Peter Germer drew the attention to the fact that the freedom of expression had a "preferred position" according to U.S. constitutional thinking. He argued, in a similar way as Olrik, that such a view in Denmark would be compatible with the less active judicial review in expropriation cases. A more active judicial review in cases regarding the protection of fundamental political rights, securing democratic decision-making, could be more legitimate²². It took time before Peter Germer's view started to be accepted in Denmark²³. At the same time as Germer wrote, a similar discussion started in Norway, where Carsten

Smith put forward the same arguments as Germer²⁴.

In the already mentioned case from the Norwegian Supreme Court Rt. 1976 p. 1, judicial review of the constitutionality of legislation was divided into three categories. (1) Constitutional rules about the freedom and security of the individual should be supervised most strictly by the courts. In such cases, the constitution should be brought to effect. (2) The economic rights of the individual should be in an intermediate position. The courts should in such cases show restraint with setting statutes aside. (3) The relationship between the other branches of government should be supervised least strictly. The courts should in such cases respect delegations made by parliament to the government and the authorities. The restrained attitude in category (3) had been established already in a case from 1952²⁵. This categorization has since been reaffirmed on different occasions²⁶.

When the Swedish constitution was amended again in 2010, the rule that a statute law or an ordinance should be set aside only if the contradiction was obvious, was replaced by a new rule. Instead, the constitution requires judges to consider that parliament is the premier representation of the people and that the constitution precedes statutes²⁷. The second is a classic argument for judicial review, the first is an argument for judicial restraint, at least if one does not consider that parliament is stronger as a representation of the people when it gives constitutional laws than statutes. It was suggested in the *travaux préparatoires* that central parts of the constitutionally guaranteed rights and freedoms should be supervised more strictly by the courts than other constitutional norms, such as rules about

the internal affairs of the other branches of government. On the other hand, it was also said that judicial review should not differ as regarded degree and extent depending on which constitutional norm that was at stake²⁸. These statements leave the issue unsettled.

Although each of these examples is primarily relevant for only the jurisdiction in which it occurred, the way of reasoning could be transferred to the others. Most importantly, similar ways of reasoning have been suggested in all three jurisdictions, and they can be developed. The case Rt. 1976 p. 1 is a useful point of departure, and it is echoed in the Swedish statement in 2010 that constitutional rights and freedoms should be supervised more strictly by the courts than other constitutional norms. The focus, however, is on material rather than procedural rights, but the procedural rights are important since they give the means of acquiring the material rights. Thus, an increased focus on procedural rights can be noticed²⁹. In the following, I suggest that *three categories of procedural rights* take precedence over the three categories of material rights of the case Rt. 1976 p. 1. The three categories of that case should, in my view, be divided further into *four categories of material rights*. I will in the following give some examples of cases which show the differences between these seven categories.

1. *The responsibility of the judge for the functioning of the judicial procedure*

The right to a fair trial has a long history in the Nordic countries. However, this right

has not had the form of a constitutional guarantee, but has been a part of the judicial oaths, judicial rules and procedural legislation. Thus, Swedish judges have since the middle ages as a part of their oaths sworn that they should not consider several enumerated irrelevant circumstances but act independently and impartially³⁰. The oaths of Danish and Norwegian judges were similar. In Norway, the oath is replaced by a written affirmation, but in Denmark the oath is abolished.

In connection with art. 6 ECHR, the European Court of Human Rights has repeatedly stressed that justice must not only be done, it must also be seen to be done³¹. The Danish lawyer Carl Ussing argued in 1899 that the appearance of justice was important, since it influenced the judging of the judge³². This is a thought that, under the influence of art. 6 ECHR, has affected Nordic courts. To give some examples: The right to cross-examine witnesses³³, the right to an oral hearing³⁴, the right to get reasons for decisions³⁵, the right to get all relevant issues tried even if it was outside the normal scope of the type of proceedings³⁶, are all issues where the higher courts during the last three decades have tightened the constitutional control of the lower courts and of themselves.

Norwegian and Danish courts have in some cases made clear that the use of temporary judges should be made with care, so that the independence of the judiciary could not be questioned³⁷. The Finnish Supreme Court has in a recent case opened a possibility for a judge to appeal a dismissal, because of the independence of the judiciary³⁸. The Norwegian and Danish courts have made similar strict assessments as regards the impartiality of judges³⁹. In 2014,



Norwegian Constitutional Assembly, 1814

the Swedish Supreme Court finally settled a much debated issue and found that a prosecutor on leave from the Prosecution Authority cannot sit as a judge in a criminal case. This is because the prosecutor in his or her office represents an interest opposed to the defendant, and then justice is not seen to be done⁴⁰.

The Nordic Supreme Courts have in the last decades repeatedly scrutinized the independence and impartiality of the judiciary. They have done so – under the influence of the case law of the European Court of Human Rights – more and more strictly. This indicates that the responsibility of the judge for the functioning of the judicial procedure is the category of cases where the Supreme Courts act with the least degree of

restraint. The old principles of impartial and independent judging have, through the influence of art. 6 ECHR, been constitutionalised.

2. The responsibility of the judge for access to judicial procedure

The Nordic countries differ in the way appeals against decisions of state authorities are handled. In Sweden, there is an organisation of administrative courts, but in Denmark and Norway such cases are brought before the general courts. In Sweden, there was until quite recently a complicated system where some types of decisions from the

state authorities could not be appealed, and other could be appealed to the government. The system was confusing, and had been so for considerable time. Professor Nils Herlitz wrote in 1941 that there was "a confusing variety of special rules", not based on any general principles; in sum, law had not developed on a principled level in this area since 1809⁴¹. In a case in 1994, the Supreme Court found that an individual had the right to access to court in a case regarding payment of state subsidies but that it would be more suitable for the Supreme Administrative Court to try the case⁴². When the case came to the Supreme Administrative Court, it found that there was no right to access to court in the type of case⁴³. At this time, the types of cases that the administrative courts should try were enumerated in statute law. Some years later, however, the Supreme Administrative Court accepted the model that the Supreme Court had invented and accepted appeals in administrative cases beyond the ones enumerated in law, if art. 6 ECHR so required⁴⁴.

In the landmark "Tvind" case, UfR 1999 p. 841, the Danish Supreme Court set aside a statute which was in reality a judgment by parliament in a dispute between the state and a private subject. Such a statute was contrary to the separation of powers and the right to access to court.

The Norwegian courts have on an earlier stage been more inclined to control that appeals could be made and the constitutionality of laws tried⁴⁵. The Danish Supreme Court has accepted to hear cases about the constitutionality of the Danish accession to the Maastricht and Lisbon treaties⁴⁶. These, however rather different types of cases, suggest that the courts exercise a considerable review of the access to court.

The Swedish Supreme Court did, however, not accept to hear a case about the constitutionality of a law in advance; the remaining option for the party was to break the law and later in a criminal trial get an assessment of the issue whether a statute was contrary to EU law⁴⁷.

Another aspect relevant here is the opposite to access to court: the right to get only one trial in which all relevant issues are tried. The principles of *res judicata* (*ne bis in idem*) and *lis pendens* are established in law and mean that a settled case cannot be begun again and that two cases about the same legal matter cannot be brought at the same time. What is new is that the definition of the same legal matter has changed. What was in Sweden and Norway understood as different legal matters, one criminal and one administrative, have in some contexts come to be considered as the same legal matter. After the Zolotukhin and Routsalainen judgments of the European Court of Human Rights⁴⁸, the Swedish system with a tax surcharge in administrative proceedings and a punishment in criminal proceedings was seriously in question. The Supreme Court and the Supreme Administrative Court upheld the system, however⁴⁹. After the judgment of the EU Court in the Åkerberg Fransson case⁵⁰, the Supreme Court and the Supreme Administrative Court overruled their earlier judgments and accepted that a final tax surcharge or a pending case about a tax surcharge stopped criminal proceedings and vice versa⁵¹. This standpoint got retroactive effect back to the Zolotuhkin judgment⁵².

The latest development in Sweden suggests that the issues about not allowing several proceedings in the same legal matter are also supervised strictly by the courts.

3. *The responsibility of the judge for legality*

According to the case Rt. 1976 p. 1, in which the Norwegian Supreme Court defined the three categories, the relationship between the other branches of government should be supervised least strictly and took place in the third group. This type of cases, however, can be further divided into two sub-groups. There is a difference between the relationship between the other branches of government as such, and the relationship between the other branches of government when it affects the legal certainty of an individual. Delegated legislation can affect the freedom and security of the individual, and then the constitutionality should be supervised more strictly.

One important issue has, thus, been whether a norm has been issued by a competent authority and on the correct level in the hierarchy of norms. In such cases, there are examples from Denmark and Sweden of a strict exercise of judicial review⁵³. There have also been cases where infringements in the rights of an individual have not been accepted because necessary legislation has been missing⁵⁴. In the important Swedish case NJA 2005 p. 33, an imprecise way of writing a statute was corrected in conformity with the constitution, which meant that an individual did not have to pay a type of fee. In Norway, there have been many cases about the general constitutional prohibition of *ex post facto* legislation. In such cases, a statute is valid for the future but cannot be applied before its entry into force, even if the legislator wanted so. In such cases, the Norwegian Supreme Court has exercised judicial review strictly⁵⁵. There are also such examples from Sweden⁵⁶. In times of crisis, the courts have accepted norms is-

sued on a level which would not have been accepted under normal circumstances⁵⁷.

This is another type of judicial review than the ordinary, in which the question is whether a statute is materially compatible with or contrary to the constitution. In the cases relevant now, the courts ask whether the statute has enough formal support in the constitution.

4. *The protection of the judge for fundamental rights and freedoms, and the balancing of these rights and freedoms*

In the case Rt. 1976 p. 1, the Norwegian Supreme Court placed the freedom and security of the individual in the first category, where the constitutionality of statutes should be supervised most strictly by the courts. The court did not specify what rights and freedoms it considered, even though the wording seems to refer to art. 5 ECHR. Also the freedom of movement, speech, religion and assembly and the protection of the home and private life come to mind. In 1973, Peter Germer had in Denmark referred to the freedom of expression and other freedoms necessary in a democratic society as having a preferred position⁵⁸. Discussing judicial review of legislation as a "counter-majoritarian force"⁵⁹ is not fully accurate in this context, since judicial review protects the possibility of forming new majorities. Freedom of assembly, expression, and association were discussed in terms of necessary prerequisites for democracy in a Danish case from 1999⁶⁰. Freedom of religion was protected in one Danish case as early as 1899⁶¹.

The freedom of expression was originally a freedom towards the state, and it has become wider and wider during the twentieth century⁶². The state is in the Nordic countries no longer sensitive in these matters for its own sake, but it has to go to action when other individuals are affected severely. One example is the prohibition of utterances disparaging ethnic and other groups. In a series of cases beginning with NJA 2005 p. 805, the Swedish Supreme Court widened the freedom of expression and limited the prohibition of utterances disparaging ethnic and other groups so that it is now restricted to 'hate speech'⁶³. This is a type of cases that has also occurred in Norwegian and Danish courts⁶⁴.

The strongly protected rights and freedoms in this category also meet other interests that have to be taken into account. The protection of privacy limits the freedom of expression, not only in the case-law of the European Court of Human Rights⁶⁵, but also in older and newer Nordic cases⁶⁶. The protection of family life must be weighed against the principle of the best interest of the child⁶⁷. In this type of cases, where assessments of proportionality and/or balancing must be done⁶⁸, there is a need for clarifying case-law from both the European Court of Human Rights and the national supreme courts.

5. *The protection of the judge for economic rights, and the balancing of these rights*

In the case Rt. 1976 p. 1, the Norwegian Supreme Court placed the economic rights in the second category, where the courts should show restraint with setting statutes



Declaration of the Norwegian constitution

aside as unconstitutional. In this type of cases, a general interest of planning or using land is often in opposition to the right of an individual to the protection of ownership of property.

Controversial cases in Denmark in the early 1920s concerned a land reform⁶⁹, and the last of these cases was the one in which the Supreme Court required "certainty" for finding that a law was unconstitutional⁷⁰. Also in Norway cases that have been controversial have dealt with issues regarding private ownership and the access of public interests to land⁷¹. There are not so many examples in Swedish case-law⁷² but the type of issue has been politically controversial and also led to the case in which Swedish authorities first realised the impact of the ECHR⁷³. The main issue in these cases has been whether the compensation offered by

the state for expropriation or similar measures has met the full market value and/or all the costs and inconveniences caused.

If the protection for fundamental rights and freedoms in category 4 above secures that the political process can function, the rights in this category relate to the outcome of that process. In Norway, the constitutional prohibition of *ex post facto* legislation has often been related to economic rights in the sense that established economic positions under certain circumstances have been protected against infringements⁷⁴. Something similar can be said about some Swedish cases, even if the prohibition of *ex post facto* legislation was a legal principle not taken into the constitution and could be set aside through statute law but not through lower types of norms⁷⁵.

6. *The protection of the judge for other types of rights*

There are two Norwegian cases, in which the rights to certain welfare benefits, such as pensions, were invoked as rights that could not be withdrawn. The Supreme Court meant that there was an element of promise as regarded future benefits, but also the reservation that the benefits depended on the availability of means to pay them⁷⁶. A difference has to be made between contractual relationships, e.g. insurances, and state benefits. In these two cases, the Supreme Court accepted the view of the government.

Another case where the Norwegian Supreme Court accepted the view of the government regarded the cultural rights of the Sami population⁷⁷. There is reason to be-

lieve, that the rights in the two types of cases mentioned in this category are vague and lack strong constitutional support, and the effect of that is that constitutional critical judging is less strict.

7. *The supervision of the judge of the relations between the other two branches of government*

In the case Rt. 1976 p. 1, the Norwegian Supreme Court placed the relationship between the other branches of government in the third and last category, and the court should supervise such issues least strictly. This goes back to a case from 1952⁷⁸. I have referred the relationship between the other branches of government, when it affects the legal certainty of an individual, to the third category above. What remains is, however, the relationship between the other branches of government when it does not affect the legal certainty of an individual. Such are cases where the power to make norms or decisions or distribute money is delegated from parliament to the government, an authority, or an international organisation, and the rights of individuals are not affected directly enough.

The Danish Supreme Court accepted to hear the cases about the constitutionality of the Danish accession to the Maastricht and Lisbon treaties and thus gave access to court⁷⁹. The reason for this was that the accession of the treaties meant that legislative power would be transferred in many areas to European institutions, and therefore representatives of the general public had a legitimate interest in getting the constitutionality of the transfers tried. When the Supreme Court tried the transfers as such, it

found that the government had acceded the treaties in a constitutionally correct way⁸⁰. It seems that the court did not make a very strict review in the determination of this issue. The difference in attitudes is made even clearer if one considers a statement of the Supreme Court that it would not accept EU law which was outside the scope of the sovereign powers that were transferred and thus unconstitutional⁸¹, something which refers to situations where the EU institutions clearly act *ultra vires* or against fundamental rights according to especially categories 1-4 above.

Concluding remarks

In a short article like this, I have not been able to deal in detail with the historical development and the relevant cases. I hope, however, that I have been able to show that constitutional critical judging has roots far back in the nineteenth century in Norway and that it developed more slowly in Denmark and Sweden. I also hope that I have been able to show that the supreme courts in all three countries during the last decades have dealt extensively with constitutional questions. Even if the picture is not fully clear, there is reason to believe that the structure of seven categories that I have developed gives a fairly accurate overview of the state of the law.

What is also interesting in a European context is two further peculiarities. In Norway, Sweden and Denmark, there are no constitutional courts. This means that the constitutional issues are decided in close connection to the other legal issues in the case. The supreme courts have also

been rather inclined to see similar rights and freedoms in the national constitution and the ECHR in a unifying context. In NJA 2005 p. 805, the Swedish Supreme Court assessed the compatibility of statute law with first the Swedish constitution, then the ECHR and then the case-law of the European Court of Human Rights. Soon afterwards, the Supreme Court started to read the freedom of expression in the constitution and the ECHR together⁸². In Denmark, however, there is certain reluctance in doing so, since the constitution is exceptionally difficult to amend, and therefore it is more important there to interpret the constitution and the ECHR separately⁸³.

What we will see in the near future is undoubtedly that the ECHR and the national courts – and the ECJ as regards the European Charter of Human Rights – continue developing case-law on this area. There is a need for further clarifications about the interpretation of these documents and about how opposing rights, freedoms and principles should be balanced.

- ¹ M. Sunnqvist, *Konstitutionellt kritiskt dömande. Förändringen av nordiska domares attityder under två sekel*, Stockholm, Institutet för rättshistorisk forskning, 2014. In this article, I refer to the most important sources used in the dissertation, but many more references can be found there.
- ² Finland is excluded, since – although Finnish judges were independent and resisted the attempts of Russia to legislate in unconstitutional ways at the very beginning of the twentieth century – judicial review of legislation has not been applied in Finland during most of the twentieth century.
- ³ Finland, hitherto a part of Sweden, was established as a Grand Duchy under Russian rule in 1809 and kept the Swedish constitutional laws: the instrument of government (regeringsform) of 1772 and the union and security act (förenings- och säkerhetsakt) of 1789.
- ⁴ E. Rönström, *Forskardebatten kring 1809 års regeringsform. Till frågan om grundlagens härkomst i Statsvetenskaplig tidskrift*, 1997, pp. 448–467 and S. Björklund (edited by), *Kring 1809. Om regeringsformens tillkomst*, Stockholm, W&W, 1965.
- ⁵ E. Holmøyvik, *Maktfordeling og 1814*, Bergen, Fagbokforlaget, 2012.
- ⁶ P. Engelstoft, *Den grundlovgivende rigsforsamling in Den danske riksdag 1849–1949*, vol. 1, Copenhagen, J. H. Schultz Forlag, 1949.
- ⁷ Judgment 1st November 1866 in *Ugeblad for Lovkyndighed*, vol. VI, pp. 165–173.
- ⁸ E. Smith, *Høyesterett og Folketstyret*, Oslo, Universitetsforlaget, 1993, pp. 148–150.
- ⁹ M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 1800–1914, München, Beck, 1992, vol. 2, pp. 102–109, 276–278; N. Herrmann, *Entstehung, Legitimation und Zukunft der konkreten Normenkontrolle im modernen Verfassungsstaat*, Berlin, Duncker & Humblot, 2001.
- ¹⁰ Rt. [Retstidende] 1890, p. 455.
- ¹¹ Rt. 1918 I, p. 401.
- ¹² NJA [Nytt juridisk arkiv] 1934, p. 515. Cf. also NJA 1928, p. 88 and p. 125.
- ¹³ Ufr [Ugeskrift for Retsvæsen] 1921, p. 644. Cf. also Ufr 1921, p. 148, p. 153 and p. 168.
- ¹⁴ NJA 1964, p. 471.
- ¹⁵ Ch. 11 § 14 Instrument of government (regeringsform) of 1974 as amended in 1980.
- ¹⁶ Rt. 1984 p. 1175. The ECHR was incorporated into Danish law in 1992, into Swedish law in 1995 and into Norwegian law in 1999, but the states had acceded the treaty in the 1950s.
- ¹⁷ Rt. 2008 p. 1764 and 2009, p. 1118.
- ¹⁸ NJA 2005 s. 33.
- ¹⁹ NJA 2005, p. 805.
- ²⁰ Ufr 1921, p. 644.
- ²¹ E. Olrik, *Domstolene og Loves Grundlovsmæssighed*, in «Tidsskrift for Retsvidenskab», 1921, pp. 217–228.
- ²² P. Germer, *Ytringsfrihedens væsen*, Copenhagen, Juristforbundet, 1973.
- ²³ R. Helgadóttir, *The Influence of American Theories on Judicial Review in Nordic Constitutional Law*, Leiden–Boston, Martinus Nijhoff, 2006, pp. 179–181.
- ²⁴ C. Smith, *Domstolene og rettsutviklingen, i Lov og Rett*, 1975, pp. 300–302.
- ²⁵ Rt. 1952, p. 1089.
- ²⁶ Rt. 1992, p. 1401, 1996, p. 1415, 2007, p. 1281, 2010, p. 143 and 2010, p. 535.
- ²⁷ Ch. 11 § 14 Instrument of government of 1974 as amended in 2010.
- ²⁸ Proposition to the parliament 2009/10:80, pp. 147–148.
- ²⁹ See, as regards the beginning of this tendency 20 years ago, Smith, *Høyesterett* cit., p. 241.
- ³⁰ See now Ch. 4 § 11 Code of Judicial Procedure.
- ³¹ See e.g. judgments 17th January 1970 in case 2689/65 Delcourt v. Belgium and 24th May 1989 in case 10486/83 Hauschildt v. Denmark.
- ³² C. Ussing, *Domstolene og den offentlige Mening*, in *Tilskueren*, 1899. See also J.P. Christensen, *Domstolene – den tredje statsmagt*, Copenhagen, Magtutredningen, 2003, p. 71.
- ³³ Ufr 1985, p. 1080, Rt. 1990, p. 312, NJA 1992, p. 532.
- ³⁴ NJA 1988, p. 572.
- ³⁵ Rt. 2008, p. 1764, 2009, p. 750, 2009, p. 1118.
- ³⁶ NJA 1991, p. 188 (cf. as regards earlier case-law NJA 1964, p. 471 and Ufr 1956, p. 211), RÅ [Regeringsrättens årsbok] 1993 ref. 10, Ufr 2008, p. 2394, 2012, p. 2874; and Rt. 1980, p. 52, 1983, p. 1004, 1984, p. 1175, 1991, p. 973.
- ³⁷ Rt. 1995, p. 861, 1997, p. 1987; Ufr 1994, p. 536. Cf. as regards earlier, less strict, case-law Ufr 1935, p. 1.
- ³⁸ HD/KKO [Högsta domstolen/Korkein oikeus] 2004:110.
- ³⁹ Ufr 1990, p. 13 and p. 181; Rt. 1996, p. 261, 2000, p. 1891, 2008, p. 1466.
- ⁴⁰ NJA 2014, p. 482.
- ⁴¹ N. Herlitz, *Allmän domstol och administrativ myndighet*, in «Svensk Juristidning», 1941, p. 167.
- ⁴² NJA 1994, p. 657.
- ⁴³ RÅ 1995, ref. 58.
- ⁴⁴ RÅ 1997, ref. 65.
- ⁴⁵ Rt. 1958, p. 1290, 1980, p. 52, 1984, p. 1175, 2009, p. 1118.
- ⁴⁶ Ufr 1996, p. 1300, 2011, p. 984. As regards the outcome of these cases, see section 7 below.
- ⁴⁷ NJA 2007, p. 718.
- ⁴⁸ Judgments 10th February 2009 in case 14939/03 Zolotukhin v. Russia and 16th June 2009 in case 13079/03 Ruotsalainen v. Finland.
- ⁴⁹ NJA 2010 p. 168 I–II. See as regards the Norwegian development Rt. 2000, p. 996, 2002, p. 557, 2006, p. 1409, 2010, p. 1121 and the Finnish HD/KKO 2013:59.
- ⁵⁰ Judgment 26th February 2013 in case C-617/10 Åkerberg Fransson.
- ⁵¹ NJA 2013, p. 502, HFD [Högsta förvaltningsdomstolens årsbok] 2013 ref. 71.

- ⁵² NJA 2013, p. 746.
- ⁵³ JU [Juridisk ugeskrift] 1855, p. 819, NJA 1885, p. 381, 1996, p. 370.
- ⁵⁴ UfR 1925, p. 277, 1952, p. 11, NJA 1996, p. 370; on the other hand UfR 1952, p. 538, NJA 1961, p. 253 and 1977, p. 288.
- ⁵⁵ Rt. 1841, p. 274, 1952, p. 932, 2010, p. 143.
- ⁵⁶ RÅ 1972 ref. 37 and 1982 ref. 1:74, NJA 2000, p. 132; on the other hand NJA 1986, p. 428.
- ⁵⁷ UfR 1886, p. 1136, 1887, p. 142, 1945, p. 570, Rt. 1945, p. 13, 1945, p. 109, 1946, p. 196.
- ⁵⁸ Germer, *Ytringsfrihedens væsen* cit.
- ⁵⁹ A.M. Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, 2 ed., New Haven, Yale University Press, 1986.
- ⁶⁰ UfR 1999, p. 1798.
- ⁶¹ UfR 1899, p. 46.
- ⁶² Rt. 1958, p. 479, 1990, p. 257, 2007, p. 1807, NJA 1901, p. 280, 1975, p. 589, AD [Arbetsdomstolens domar] 1981 nr 124, UfR 1977 p. 872.
- ⁶³ NJA 2005, p. 833 followed by 2006 p. 467, 2007 p. 805. See M. Sunnqvist, *I gränslandet mellan lagprövning och lagtolkning*, in «Svensk Juristtidning», 2008, s. 645-656.
- ⁶⁴ UfR 1980, p. 1037, 2000, p. 2234; Rt. 1977, p. 114, 1978, p. 1072, 1997, p. 1821, 2012, p. 536.
- ⁶⁵ Judgments 24th June 2004 in case 59320/00 von Hannover v. Germany, and 12th November 2013 in case 5786/08 Söderman v. Sverige.
- ⁶⁶ Rt. 1952, p. 1217, 1990, p. 257, UfR 1997, p. 259 and 2003, p. 2044, NJA 1985, p. 893, 2001, p. 409.
- ⁶⁷ Judgment 26.2.2004 in case 74969/01 Görgülü v. Germany.
- ⁶⁸ See M. Cohen-Eliya, I. Porat, *Proportionality and Constitutional Culture*, Cambridge, Cambridge University Press, 2013.
- ⁶⁹ UfR 1921, p. 148, p. 153 and p. 168.
- ⁷⁰ UfR 1921, p. 644.
- ⁷¹ Rt. 1918 I, p. 401, 1970, p. 67, 1973, p. 705.
- ⁷² See however NJA 1992, p. 337.
- ⁷³ Judgment 23rd September 1982 in case 7151-7152/75 Sporrang and Lönnroth v. Sweden.
- ⁷⁴ Judgments 10th December 1822 in Brandt, *Samling*, 1855, pp. 132-134, Judgment 1 November 1866 in *Ugeblad for Lovkyndighed*, vol. VI, pp. 165-173, Rt. 1854, p. 97, 1890, p. 455.
- ⁷⁵ NJA 1907, p. 188, 1910, p. 277, 1954, p. 532; RÅ 1943, ref. 30.
- ⁷⁶ Rt. 1996, p. 1415 and 1440.
- ⁷⁷ Rt. 1982, p. 241, similarly in Sweden, NJA 1981, p. 1.
- ⁷⁸ Rt. 1952, p. 1089.
- ⁷⁹ UfR 1996, p. 1300, 2011, p. 984.
- ⁸⁰ UfR 1998, p. 800, 2013, p. 1451.
- ⁸¹ Cf. BVerfGE vol. 73, p. 339 (Solange II). See to similar Swedish law Ch. 10 § 6 instrument of government and Th. Bull, F. Sterzel, *Regeringsformen. En kommentar*, Stockholm, SNS, 2010, p. 253.
- ⁸² See Sunnqvist, *I gränslandet* cit.
- ⁸³ UfR 1999, p. 1798, J.P. Christensen, *Højesteret og statsmagten*, in *Højesteret – 350 år*, Copenhagen, Gyldendal, 2011, pp. 254-257. Cf. also as regards Norway Rt. 2000, p. 996, 2004, p. 1888.