CHAPTER 3

Constitutional Mentality*

1. Introduction

If we focus on constitutional law, the macro-conceptualisations of mainstream comparative law have very little to say. In other words, the general characterisations of comparative law are virtually useless in terms of constitutional law. If and when Nordic systems are viewed from a comparative constitutional perspective, however, certain commonalities are discernible. But there are also differences. The following analysis in this chapter is not doctrinal but, rather, reflects legal-cultural and historical dimensions of living Nordic constitutions.[1]

The underlying idea of this chapter is to offer a thematic overview of the Nordic constitutions for a non-Nordic reader. Because of limited space there is no point in trying to describe constitutions descriptively in such a manner that would be easy to replace by internet searches or reading English translations of constitutional documents. Instead, this chapter briefly explains the context and generalities of four Nordic constitutions comparatively and then quickly moves to thematically highlight and characterise chosen key features of each constitution. Crucially, the stress in this paper is placed on distinctive features; the observations are general and should thus be treated with some caution. In the case of Finland the focus is on the role of the parliament's Constitutional Committee as the guardian of constitutionality. As for Sweden, the focus is on the exceptionally central position of its parliament. As for Norway, this paper discusses the central role of the

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[1] This is a rational choice in the comparative constitutional approach because written constitutional documents are not really power maps. Instead, they may be inaccurate or, as Mark Tushnet puts it, "The realities of power may not be fully reflected in a constitution", Tushnet (2015), p. 11.

Supreme Court. In the case of Denmark, discussion centres on national sovereignty. When it comes to Iceland, the new creative manner of reforming constitution is highlighted. Moreover, this chapter shortly addresses the protection of human rights in the Nordic systems, especially in relation to the European Convention on Human Rights (ECHR). However, before individual country discussions, the following section offers a general comparative overview of the Nordic constitutional landscape.

2. The Nordic Constitutional Landscape

2.1 Constitutional Mentality

Even while the abovementioned classifications offered by comparative lawyers are not especially fruitful in the case of Nordic constitutional law, certain useful comparative notions may be utilised in this context. To begin with, Nordic legal systems clearly possess some features of the continental legal tradition.[2] These features are, however, not completely identical: legal systematics is – basically – continental in upholding the division between private and public law. Key constitutional documents (constitutional or equivalent acts) in the Nordic countries are written or codified even though they are supplemented in various ways by other formal acts, amendments, constitutional conventions or customary constitutional rules and praxis. Crucially, Nordic systems favour a specific idea of the constitutional act with *lex superior* status, where constitutional acts are located at the peak of the national hierarchy of legal norms. This feature separates Nordic constitutions from such common law constitutional systems as the UK and New Zealand.

In comparative overview, the question of safeguarding constitutionality holds an important position. Nordic systems employ some kind of mechanisms for reviewing the constitutionality of legislation.[3] Accordingly, these systems presuppose some form of separation of powers. Nevertheless, there are different constitutional arrangements as to how judicial review is organised. Denmark does not have an explicit constitutional provision concerning judicial review. However, it hesitantly recognises judicial review as part of its systems. Finland and Sweden have explicit written constitutional provisions concerning judicial review, although in practice judicial review is resorted to cautiously. Norway added judicial review by an amendment to its

[2] This part of the article draws on the author's book *Nordic Reflections on Constitutional Law: a Comparative Nordic Perspective*, see especially Chapter 6.
[3] See also Hautamäki (2007).

Constitution Act in 2014. A significant general difference nevertheless exists between levels of judicial activism. Sweden, Finland, Denmark and Iceland all accommodate *de facto* judicial self-restraint, whereas Norway's judicial self-restraint is clearly less cautious. Differences in judicial review are also reflected elsewhere: Sweden and Finland do not strictly follow the principle of separation of powers, whereas Norway and Denmark are perhaps inclined more towards separation of powers, although in a parliamentary form.

Given these points, we may speak of a Nordic *constitutional mentality* which is visible, among other things, in the ways that supreme courts take into account the will of the legislator. The Nordic *conception of democracy* is of utmost importance in this context. In effect, Nordic judicial systems hold great respect for their national parliaments as democratically chosen legislators. This is reflected in the use of preparatory legislative works as a recognised source of law. Even though the Norwegian Supreme Court has been the most active, it prefers to seek to avoid open power conflicts with the Norwegian parliament.

Some common law-type features can also be found in the Nordic systems. For instance, all Nordic systems have room for norms or doctrines that are unwritten but still hold a notable constitutional position. To illustrate, in Norway the case law of its Supreme Court occupies a focal position[4]. Additionally, certain parts of the constitutional act that deal with the monarch are *de facto* in a state of *desuetudo*, especially in Norway. Likewise, the Finnish system contains some customary elements such as the *de facto* binding force of opinions of the Constitutional Committee of Parliament and the position that (external academic) constitutional specialists enjoy in the *a priori* form of control.

Consequently, all this provides a view to a legal thinking that is more pragmatic (lacking formalism, and with the deductive and scholarly nature of German-style *Juristenrecht*) than in the civil law legal family. However, the distinction between public and private law stemming from Roman law is clearly a common feature with civil law, although the distinction is not sharp in the Nordic systems as, for example, may be seen by the fact that Denmark, Norway and Iceland have no separate administrative courts, which is regarded as one of the hallmarks of the continental notion of law. Besides, all

[4] According to Svein Eng, the Norwegian Supreme Court may become closer to the "discursive English style" in the future, Eng (1997), p. 214.

the Nordic systems are parliamentary. Denmark, Norway, Iceland and Sweden are plainly parliamentary systems, as indeed is Finland, especially after the total reform of its Constitution in 2000. Notably, in Finland the president's role was diminished when the position of the parliament and the cabinet was strengthened, so that Finland moved closer to other Nordic systems in this respect. Correspondingly, the fact that the Nordic parliaments play such a crucial role is one of the reasons for the cautiousness of Nordic forms of judicial review (with the possible exception of Norway): not much room is available for courts to quarrel with a highly legitimate national parliament. Moreover, the contextual constitutional landscapes are generally quite close to each other: relatively small Evangelical-Lutheran populations, multiparty systems, a high standard of living, an ideology of gender equality, a high level of development, and generally shared ideas about the modern welfare state.[5]

2.2 The Key Position of the Parliament

As already noted above, the parliament holds a central position in the Nordic systems as the legislative organ representing the people. However, respect for the will of the legislator does not take the same form as, for example, in France, where the judicial style of the courts is less argumentative than in the Nordic systems; Nordic forms of judicial decision-making do not stick so closely to the written statutory text but seek a rather more general argumentative base for justificatory purposes. Similarly, a certain general Nordic doctrinal openness of argumentation is discernible; in this way it differs from sparse French and German lengthy pedantic style. Furthermore, none of the Nordic supreme courts plays such a clearly political role as do continental constitutional courts. With this in mind, the implicit doctrine of the 'political question' is to be found in all Nordic systems; the politicisation of courts is not applauded in the Nordic systems since it is the national parliaments that perform the role of legislator. Accordingly, none of the supreme courts or other controlling organs possesses the competence to formally nullify parliamentary acts.

Under these circumstances, Nordic supreme courts and other constitutional control organs have traditionally played a stabilising and mediating role between various branches of state public power. In short, "[i]n Nordic countries, it is universally accepted that it is elected politicians who should

[5] For more detailed, though slightly outdated, analysis of Nordic constitutionalism see Scheinin (2001).

take the most important decisions in the public sphere".[6] For these reasons, courts generally speaking fulfil only a minor role as constitutional players; courts perform their judicial functions but that is mostly all that there is to it.

On the whole, constitutional law in the Nordic sphere is not all about codified or written rules. For instance, in Norway and Denmark, constitutional acts are held as important national symbols, not merely a collection of written rules. However, in Finland, Sweden and Iceland, constitutional acts do not perform equally strong symbolic functions, so that interpretation of the constitution is slightly more pragmatic. All in all, the Nordic version of constitutionalism contains a few common macro-elements, including legal, cultural and political elements. These can be listed as follows: a parliamentary system with a mixture of separation of powers as political meta-ideology; consensual democracy (avoidance of open conflict, multi-party system); cautious systems of judicial review (judicial self-restraint, no strong culture of rights); respect for the will of the legislator (avoidance of conflict between the parliament and supreme courts; significance of preparatory works as a source of law); the political question doctrine in use by the courts[7]; no separate constitutional courts; a combination of written and unwritten rules and principles (constitutions also contain customary material); a spirit of constitutionalism and rule of law (general respect for the rules of the constitution within parliamentary frames; effective hierarchy of rules, i.e. constitutional acts are not political manifestos; doctrine of separation of powers); and a pragmatic and practical legal style. Finally, we may also note that Nordic constitutions seem to maintain a certain degree of flexibility: although constitutional acts are written, alteration takes place in various forms, i.e. by formal amendment, custom, convention, and case law.[8]

The greatest differences appear between the eastern and western members of Nordic law; by extending the family metaphor one might say that Sweden and Finland are the eastern brothers of Denmark, Norway and Iceland in the west. Sweden and Finland are (or at least have been) closer to each other than the country-pair of Denmark and Norway. Denmark, Norway and Iceland are NATO members whereas Finland and Sweden are militarily neutral countries, although this neutrality should be seen in a different light than before due to membership of the EU and more recently a loose partnership

[6] Cameron (2009), p. 72.
[7] Cf. Elo Rytter (2000), 46-47.
[8] See also the conclusions drawn by Italian constitutional comparatist Duranti (2009), 243-245.

with NATO. Furthermore, the level of political isolationism varies from Norway's relatively high level of isolationism to (present-day) Finland's relatively high level of internationalism.

What is more, parliamentarism is reflected on the protection of fundamental rights. Essentially, the Nordic countries have three dimensions in their systems: domestic constitutions, European conventions, and global conventions. Constitutional protection varies from country to country, but a common feature is that the ECHR is the most important human rights instrument. All the Nordic countries have incorporated the ECHR into their domestic legal systems. The brief analyses in this chapter focuses in particular on the dialogue between the European Court of Human Rights (ECtHR) and national courts because this sheds light on the special quality of each Nordic constitution.[9]

Altogether, it seems that significant doctrinal, functional, political, cultural and historical similarities can be pointed out even though there are institutional differences. Moreover, Nordic constitutions may be characterised as socially and politically successful constitutions because they have provided a stable framework for democratic governance. In summary, Nordic constitutions appear to be systems operating with similar foundational values, although differences exist in constitutional rules, institutions, and cultures.[10] As a result, we may speak of "Nordicness" in terms of constitutional law. In the following sections we will highlight and discuss the distinctive constitutional-cultural dimensions of the Nordic constitutions which are not similar.

3. Constitutional Variations on a Nordic Theme

3.1 Finland's Constitution

The Finnish Constitution is technically enshrined in a single act, i.e. the Finnish Constitution, which entered into force in 2000.[11] Before the present Constitution Act there were four separate constitutional acts – following the

[9] The discussion on fundamental rights in this chapter benefited from the paper provided by Jonas Christoffersen, Director, The Danish Institute for Human Rights – Denmark's National Human Rights Institution.

[10] And yet we may see that Norway and Denmark (west-Nordic) are closer to each other than Sweden and Finland (east-Nordic).

[11] This section is based on Husa (2011).

Swedish tradition – which were: the Form of Government Act (1919), the Procedure of Parliament Act (1922), the Ministerial Responsibility Act (1922), and the Act on the High Court of Impeachment (1922). In essence, the Constitution Act provides a catalogue of constitutional rights and provisions about the principles for the exercise of public power by government, the organisation of the government and the relationships between the highest organs of the state. In 2012 the Constitution Act was amended. These amendments clarified the division of powers between the President of the Republic and the government. Moreover, provisions were added on membership in the EU – Finland has been a member of the EU since 1995 – and on the citizens' initiative.

Generally speaking, Finland is a parliamentary democracy with certain semi-presidential elements i.e. it has a president as the head of state and with certain competences which are listed in the Constitution Act. On a day-to-day basis the Finnish system functions as a parliamentary system and the president stays in the background. As a general remark we can say that Finnish governance normally works so that it seeks consensus rather than partisan solutions backed by a temporary majority, i.e. the constitutional culture strives towards consensus. This produces a certain rigidity, i.e. the Constitution changes relatively slowly, both in a legal and in a political sense.

The Finnish system is based on core principles according to which power is vested in the people, who are represented by deputies assembled in the parliament. Crucially, legislative power is exercised by the parliament whereas the President of the Republic plays a minor role. According to the Constitution Act, the top level of governance is the Council of State (i.e. the government) which is headed by a prime minister and a requisite number of other ministers. Following the principle of parliamentary systems, the government and its individual members must enjoy the confidence of the parliamentary majority. Another key point is that judicial power is vested in independent courts of law, at the highest level in the Supreme Court and the Supreme Administrative Court.

In comparative constitutional analysis the most distinctive feature of the Finnish system is the manner in which it guards the constitutionality of statutory laws. Even in a global comparison this feature stands out as a unique quasi-judicial arrangement.

As already mentioned above, Finland has no constitutional court but courts are allowed to perform judicial review of legislation to a certain limited extent. After the total reform of the Constitution Act in 2000, it became possible for courts to perform judicial review of legislation. The idea of constitutionality, however, is not limited to judicial review only because, in addition to the courts, other public authorities are also obliged to interpret legislation in such a manner that adheres to the Constitution and to respect constitutional and human rights. According to the Constitution Act (Article 106), the courts must give preference to the Constitution when they decide a case if the application of a parliamentary act would be in manifest conflict (in Finnish "*ilmeinen ristiriita*") with the Constitution Act.[12] In a handful of cases, starting from 2004, the courts have applied Article 106 but in the overall picture judicial review by the courts plays a minor role in terms of guarding the constitutionality of parliamentary acts.[13] However, certain signs are discernible of the gradually growing constitutional role of the judiciary.[14]

In practice, the constitutionality of laws is examined in advance i.e. before an act enters into force. Review mainly takes place in the parliament's influential Constitutional Law Committee (*Perustuslakivaliokunta*). The function of this parliamentary-bound control is advance prevention of laws conflicting with the Constitution being enacted in the ordinary legislative procedure. From the constitutional point of view, the Committee's key function is to issue statements on bills sent to it for consideration and on the constitutionality of other legislative matters and their bearing on international human rights. Even while the Committee's members are ordinary members of the parliament, the Committee calls experts (on the basis of constitutional convention) to give evidence, and the Committee itself operates in a non-party-political manner in reporting to the parliament. These reports are official statements and are respected by the government, which seeks to amend the provisions of a bill that the Committee has found to be unconstitutional before the bill is passed. If the unconstitutionality is significant it means, in practice, that the bill is withdrawn and the government has to think of another way to proceed because in a multiparty-system governments do not have the required qualified majority to change the Constitution Act.

[12] This Article was adopted as an alternative to establishing a Constitutional Court, Government Proposal (Hallituksen esitys 1/1998) 53-54.
[13] See Husa (2011), 186-187.
[14] See Ojanen (2009).

From a comparative point of view the fact that the Constitutional Committee functions in a non-political quasi-judicial manner (e.g. statements are based on the evidence given by constitutional experts, the Committee follows its own "precedents", there is no party-political discipline) is particularly significant. All this results in a unique system of controlling the constitutionality of legislation in which an abstract *ex ante* and concrete case-bound review mechanism are combined. Importantly, the significance of the *Perustuslakivaliokunta* is reflected in the whole legal system and its statements hold a special status as a source of law as *de facto* precedents.[15] Only with slight exaggeration one may characterise the weight of these statements as *de facto* "constitutional precedents".

During the last five years, Finland has been found by the ECtHR to have violated the ECHR in fourteen instances. The main issue in Finland, based on the findings from the last five years, is observance of the principle of *ne bis in idem*. In five cases the Finnish courts have been found by the ECtHR to have convicted the applicants of the same matter in two different sets of proceedings: Finland had thereby violated Article 4 of Protocol no. 7.[16] Another main challenge appears to be striking a balance between freedom of expression and protection of other interests. Thus in four cases the ECtHR found that Finland had violated Article 10.[17]

In three cases, the ECtHR found a violation of Article 8 concerning private and family life.[18] Two of these cases concerned the application of transitional provisions implementing the Finnish Paternity Act of 1976.[19] In the third case, which is much more rare case type for Finland, the Court additionally found a violation of Article 5 concerning freedom of liberty in a case regarding enforced confinement in a mental institution and forced administration of drugs, as safeguards against arbitrariness had been inadequate.[20]

[15] See Husa (2011), 78-88.
[16] *Nykänen v Finland,* no. 11828/11, ECHR 2014; *Glantz v Finland,* no. 37394/11, ECHR 2014; *Kiiveri v. Finland,* no. 53753/12, ECHR 2015; *Rinas v. Finland,* no. 17039/13; *Österlund v. Finland,* no. 53179/13, ECHR 2015.
[17] *Lahtonen v. Finland,* no. 29576/09, ECHR 2012; *Ristamäki and Korvola v. Finland*, no 66456/09, ECHR 2013; *Niskasaari and Otavamedia Oy v. Finland,* no. 32297/10, ECHR 2015; *M.P. v. Finland,* no. 36487/12, ECHR 2016.
[18] *X v. Finland,* no. 34806/04, ECHR 2012; *Laakso v. Finland,* no. 7361/05, ECHR 2013; *Röman v. Finland,* no. 13072/05, ECHR 2013.
[19] *Laakso,* 2013; *Röman*, 2013.
[20] *X,* 2012.

3.2 Sweden's Constitution

Sweden has five key constitutional documents. These are the Instrument of Government (1974), the Act of Succession (1810), the Freedom of the Press Act (1949), the Fundamental Law on Freedom of Expression (1991), and the *Riksdag* (i.e. Swedish parliament) Act (1974). Alongside these constitutional documents, EU laws hold significant constitutional weight in the Swedish system, as in Finland and Denmark. In constitutional essence, Sweden is a constitutional monarchy with a parliamentary system. Like Finland, Sweden has been an EU member since 1995.[21] And, again like Finland, Swedish constitutional practice tends strongly to strive towards consensus, which produces significant constitutional stability.[22]

The Instrument of Government contains the written basic principles of the form of government, dealing with such issues as how the government functions, fundamental freedoms and rights, and how elections to the *Riksdag* are to be implemented. When the Instrument of Government came into force it reduced the powers of the monarch. For this reason, the monarch remains as the head of state but with stripped political powers. The Act of Succession stipulates who is to inherit the throne. Until 1979 the succession was through the male bloodline but two years after the birth of Princess Victoria the *Riksdag* decided that a female could also inherit the throne. The Freedom of the Press Act was adopted in 1949, although the freedom of the press was already established by law in 1766. This act provides the right to disseminate information in printed form but it also concerns the principle of public access to official documents. The Law on Freedom of Expression contains provisions on free dissemination of information and prohibits censorship. These abovementioned acts are constitutional acts, which means they are more difficult to amend or repeal than other acts. Similarly, according to the hierarchy of norms, no other acts or ordinances may – in principle – conflict with these constitutional laws.

Alongside the abovementioned documents, also of constitutional importance is the *Riksdag* Act, which contains detailed provisions on the parliament and its workings. This act enjoys a curious status between a constitutional act and an ordinary act. To amend this act requires only one *Riksdag* decision but it must be adopted by a qualified majority of at least three-quarters of votes and

[21] For a general informative overview see Nergelius (2011).
[22] Cf. Bull (2014), p. 12.

the support of more than half the members. Now, in comparative constitutional analysis one of the most striking general features of the Swedish system is the central position of the *Riksdag*.[23] Notwithstanding, this is not to suggest that parliaments in other Nordic countries would not be in a central position. However, centrality seems to be legally-culturally emblematic in terms of the Swedish Constitution.

So, we must be cautious when underlining the role of the *Riksdag* because all Nordic constitutions rely on the foundational idea and doctrine of parliamentary democracy and a representative form of government. Be that as it may, the Swedish system in particular seems to grant *de facto* a distinctly focal constitutional weight to its parliament. To be sure, the Instrument of Government provides (Article 4.1) that "the *Riksdag* is the foremost representative of the people". However, as a written constitutional provision this article is in line with the rest of the Nordic constitutions. From a comparative point of view, the actual highlighted constitutional position of the *Riksdag* can be seen in the doctrine of sources of law. In practice, Swedish lawyers routinely use *travaux préparatoires* when they try to obtain more information about a law i.e. they seldom use the text of the law alone. This is not only a Swedish legal cultural feature but applies to all Nordic systems, although there are clear national variations. Basically, the underlying idea of this kind of source-of-law doctrine is to be found from the constitution in the broad sense of the word i.e. not only does the text of the constitutional document play a significant role but also constitutional practices and conventions have a strong foothold in moulding the legal mentality of Swedish lawyers.

Notably, the final justification for giving so much weight to *travaux* is the understanding of constitutional democracy itself; as Peczenik and Bergholz say "*travaux préparatoires* should be taken into account because they form a part of a democratic and rationally justifiable legislative procedure."[24] At the same time, one might perhaps sometimes claim that the heightened role of the *Riksdag* shadows the legal function of the constitution. One telling indication of the role of the *Riksdag* is the cautious tradition of judicial review, which is the constitutional flipside of the coin; the great respect for

[23] As Ola Zetterquist says "The traditional position in Swedish constitutional law is that courts are not to exercise any political power of significance since such a position is atypical of the Swedish constitution where political power should rest with the Riksdag", Zetterquist (2008), p. 98. See also Bull (2014), p. 16, holding basically a similar view.
[24] Peczenik and Bergholz (1991), p. 328.

the parliament – as in Finland – seems to hinder the courts from taking a more active role in controlling the constitutionality of parliamentary acts.

In any case, in 1979 the Instrument of Government was reformed and a cautious form of judicial review was taken as a part of the written Constitution. The provision on judicial review (in Swedish "*lagprövningsrätt*") stated that a court could declare a parliamentary act to be in violation of the Constitution or a government decree and, thus, inapplicable but only if the error was of manifest/evident nature. This provision – which was worded similarly to the Finnish model – has had very little practical effect on the behaviour of the courts. Since 2011 provisions no longer need to be in evident conflict with a constitutional rule in order to be set aside by a court or other public body. However, this reform did not mean a startling break from the centrality of the *Riksdag* because the provision in question also contains a second part which states that: "In the case of review of an act of law under paragraph one, particular attention must be paid to the fact that the Parliament is the foremost representative of the people and that fundamental law takes precedence over other law." In other words, even while giving in to pressure for stronger judicial review, the Swedish system in fact sought to fuse together the old *Riksdag*-centred thinking and more recent separation of powers with a stronger judicial review doctrine.[25] As shown above, the strong position of the *Riksdag* is still a fundamental key feature of the Swedish Constitution, especially if placed in a comparative analytical framework.

Sweden has been found by the ECtHR to have committed violations of the ECHR in fourteen cases during the latest five-year period. Five of these cases concerned violations of Article 3 in relation to expulsion of asylum-seekers.[26] Four cases concerned Article 6[27] and three cases Article 8 of the convention.[28]

[25] In Government's proposal (Regeringens proposition 2009/10:80, 145-147) it is explained that reform strengthens the constitutional control after the legislative phase and this, in turn, actually secures the key position of the *Riksdag*. The risk that this would politicize the courts is expressly deemed as ungrounded.

[26] *F.N. and others v. Sweden*, no. 28774/09, ECHR 2012; *S.F. and others v. Sweden*, no. 52077/10, ECHR 2012; *I v. Sweden*, no. 61204/09, ECHR 2013; *J.K. and others v. Sweden*, no. 59166/12, ECHR 2016; *F.G. v. Sweden*, no. 43611/11, ECHR 2016.

[27] *Olsby v. Sweden*, no. 36124/06, ECHR 2012; *Karin Andersson and others v. Sweden*, no. 29878/09, ECHR 2014; *Naku v. Lithuania and Sweden*, no. 26126/07, ECHR 02016; *Arlewin v. Sweden*, no. 22302/10, ECHR 2016.

[28] *Strömblad v. Sweden*, no. 3684/07, ECHR 2012; *Rousk v. Sweden*, no. 27183/04, ECHR 2013; *Söderman v. Sweden* [GC], no. 5786/08, ECHR 2013.

The last three cases dealt with violations of Article 4 of Protocol no. 7,[29] Article 1 of Protocol no. 1,[30] and the right to an effective remedy under Article 13.[31]

3.3 Norway's Constitution

The Norwegian Constitution Act was adopted in 1814. This means that it is the second oldest written constitutional document in the world still in force. Although technically it is like any constitution act, its characteristic significance seems to be more central than in other Nordic countries because for Norwegians it symbolizes freedom, independence and democracy. In addition, because of the considerable age of the constitutional document the role of customary constitutional law is greater than in the other Nordic systems.[32] The constitutional system of Norway is, like Sweden and Denmark, a constitutional monarchy with a parliamentary democratic system of governance. According to the constitutional provision, the king is the country's head of state and can select his council. But, according to constitutional practice the government may govern only with the confidence of the *Storting* (i.e. the parliament). In fact, the king has very little actual political power. However, the king still seems to hold a crucial symbolic function as the head of state and official representative of Norway. According to a constitutional provision, public power is distributed between three institutions: the parliament, holding the legislative power; the government, holding executive power; and independent courts holding judicial power. In 2014 the parliament passed some significant amendments by including provisions on human rights. In contrast to Denmark, Finland and Sweden, Norway is not an EU member.

In a comparative Nordic view, Norway's individual constitutional characteristic can be seen linked to the fact that it actively exercises an *ex post* system of judicial review of the constitutionality of legislation. This fact is closely connected to the central role of the Supreme Court (*Høyesterett*) and also appears to reflect the symbolically central role of the constitution and the

[29] *Lucky Dev v. Sweden*, no. 7356/10, ECHR 2014.
[30] *Rousk v. Sweden*, no. 27183/04, ECHR 2013.
[31] *Lindstrand Partners Advokatbyrå AB v Sweden*, no. 18700/09, ECHR 2016.
[32] According to the leading classic book about Norway's constitutional law, the role of customary law is characterised as follows: "Not in any other area of law has customary law greater significance than in the area of constitutional law", Andenæs and Fliflet (2006), p. 40.

Supreme Court as its final guardian. With this in mind, to become a justice of the Supreme Court seems to be a more significant factor in Norway than in the other three systems.

Of all the Nordic countries Norway maintains the strongest tradition of judicial review of statutory laws. In effect, although decentralised, this control function or power is exercised by the Supreme Court, which reviews whether a statute is in conflict with the Constitution. As in the US, in Norway, too, this competence was originally not expressly vested in a written constitutional document before 2015. But this is certainly not a novelty in Norwegian constitutional law. Judicial review of constitutionality emerged as long ago as the 19th century.[33] However, today's living tradition can be traced to 1976 and the famous *Kløfta* judgment.[34] In this case, which concerned compensation for expropriation of property, one can see clearly the effect of US constitutional law and ideas which are more alien to other Nordic systems. However, even the Norwegian system does not fully follow the American model but has instead formulated its own approach, which combines strong American judicial review and the Nordic tradition of a softer or parliamentary-friendly approach.

In other words, the effects of the Nordic approach can be seen in the fact that the Supreme Court does not quash an act or a particular provision of that act, i.e. it does not declare an act null and void but, rather, merely sets aside the provision in question. Moreover, there is very little similarity with the continental European approach, relying on constitutional courts, because the *Høyesterett* eliminates the legal-normative power of a provision only in the actual concrete case before the Court. But, of course, because of the *de facto* precedential power of the *Høyesterett*, its decision actually means that its case-bound elimination leads to a situation in which the provision loses its *de facto* authority in other cases too. By the same token, the *Høyesterett* does not seem to seek to replace or challenge the democratically-chosen legislator, although it may set legal limits on its legislative competence.

[33] See Slagstad (1995).

[34] *Kløfta*. Norsk Retstidende, 1976, p. 1. The precedential outcome of this case is that when the courts are asked to decide on the constitutionality of an act, the parliament's view of the matter inevitably plays a crucial role. However, if any doubt arises as to how a statutory provision should be interpreted, the courts have a right and a duty to apply the act in the manner which best accords with the Constitution.

In comparison to other Nordic supreme courts, we can argue that Norway's Supreme Court holds the most prestigious position in its own legal context and constitutional culture. From a comparative point of view, this means that in this particular regard Norway's Constitution is actually quite close to the US Constitution, where the constitutional document and the highest court guarding it perform not only a legal function but also a strong symbolic function. And, curiously, the relevant old constitutional documents in the US and in Norway were both silent (the US Constitution is, of course, still silent) on whether the courts can review an act, or a particular provision in an act, in regard to its constitutionality. However, in the reform of 2015 a novel provision was added. This provides that "[i]n cases brought before the courts, the courts have the power and obligation to review whether Acts and other decisions by the state authorities are contrary to the Constitution".[35] Basically, from a comparative point of view we can see that the heightened role of the *Høyesterett* is also connected to the Norwegian mentality of constitutional conservatism.[36] In practice, this means that the constitutional act also performs an important symbolic function, so that, as a result, the *Høyesterett* gains a special position as the guardian of the nationally-enshrined symbol of the statehood – and ultimately the sovereignty – of Norway.

During the last five years, Norway has in seven instances been found by the ECtHR to have committed violations of the ECHR. Two cases related to expulsion of criminals in violation of Article 8 regarding private and family life,[37] three cases involved violations of Article 6 regarding fair trial[38] and the last case involved violation of the right to property protected by Article 1 of Protocol no. 1.[39] Of the cases in which a violation of Article 6 was found, two

[35] This looks like a significant amendment but, in fact, it merely confirmed an established customary constitutional rule allowing – and expecting – judicial review. Preparatory materials underline the importance of constitutionality by stressing the priority of human rights (Rapport fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven, avgitt 19. desember 2011, 79-81). Preparatory materials also explain that constitutional judicial review has been part of the Norwegian Constitution for 150 years (Innst. 263 S, Innstilling til Stortinget fra kontroll- og konstitusjonskomiteen 2014-2015, 6).

[36] For a more detailed analysis see, e.g., Smith (2011).

[37] *Butt v. Norway,* no. 47017/09, ECHR 2012; *Kaplan and others v. Norway,* no. 32504/11, ECHR 2014.

[38] *Kristiansen and Tyvik As v. Norway,* no. 25498/08, ECHR 2013; *Hansen v. Norway*, no. 15319/09, ECHR 2014; *Kristiansen v. Norway*, no. 1176/10, ECHR 2015.

[39] *Lindheim and others v. Norway*, nos. 12331/08 and 2139/10, ECHR 2012.

cases concerned civil proceedings,[40] while one case was on criminal proceedings.[41]

3.4 Denmark's Constitution

By and large, Denmark's constitutional law is based on the Constitutional Act of the Kingdom of Denmark in 1849. Although still the basis of the system, this old act has been amended many times, most recently in 1953. Like other Nordic constitutional acts it enjoys heightened legal status, i.e. it stands at the top of the hierarchy of laws. Now, the Act provides for the supreme institutions of the state. These are the *Folketing* (i.e. Danish parliament) holding legislative power; the government, holding executive power; and the independent courts, holding judicial power. Besides, like so many other modern constitutional documents, the Act contains provisions on a number of fundamental freedoms and human rights. Like Sweden and Norway, Denmark is also a constitutional monarchy that relies on the parliamentary system, which in turn means that the power of the monarch is limited by the Constitutional Act and customary rules. Generally speaking, the Danish system "reflects a legal system and a separation of powers model with a strong Parliament" and it has "very few constitutional constraints on the content of legislation".[42] In fact, parliamentary precedence has been a feature of the Danish legal mentality and legal practice for quite some time.[43] It is also noteworthy that Denmark has been a member of the EU since 1973 (EEC at that time) which means that it took part in European integration 22 years before the other two Nordic countries joined the Union.

In a comparative Nordic view, Denmark's distinctive constitutional characteristic has been its almost paradoxical will – despite taking part in European integration – to guard its national sovereignty, and later its constitutional identity, in relation to the EU. In comparison to Sweden and Finland, this feature (i.e. constitutionally motivated reluctance) seems to some extent to distinguish the Danish constitutional mindset from the other two Nordic EU member states. On the other hand, this fact means that Denmark and Norway are close to each other in this particular respect.

[40] *Kristiansen and Tyvik As*, 2013*; Hansen*, 2014.
[41] *Kristiansen*, 2015.
[42] Krunke (2014), p. 29.
[43] See Schaumburg-Müller (2009).

The Danish constitutional conception of sovereignty seems to be more distinct and outspoken than is the case with the two other Nordic EU member states. This is by no means to say that sovereignty and, especially, transfer of national competence outside the country would be a walk in the park in Sweden and Finland. However, one can grasp the profound extent of the Danish conception when this specific feature is highlighted in the context of the EU. Now, from a narrow constitutional point of view the Danish approach seems in certain respects similar to that in Finland. So, Denmark can basically transfer sovereignty to international organisations in two distinct ways. First, powers vested in the authorities of the realm may be delegated "to such extent as shall be provided by statute" (Article 20). This is a challenging path because it requires a five-sixths majority of all members of the parliament. In practice it means that at least 150 of the 179 members of the parliament need be present and vote in favour of delegation. But, if delegation of powers is not provided by statute, or if they are not vested in the authorities of the state, sovereignty can only be transferred by amending the Constitution itself. Yet, the Constitution Act still has Article 19, allowing the Government to sign international treaties that do not transfer sovereignty. This kind of signature requires the consent of the parliament by an ordinary majority.

Notwithstanding – and here is the main point – Danish reluctance to transfer national competences outside the country does not stem from written constitutional provisions but, rather, from the Danish constitutional mentality. It is important to realise that this reluctant form of constitutionalism seems to be rooted in the constitutional culture of the country but is not an outcome of specific constitutional provisions. In practice, the Danish courts are sometimes reluctant to refer questions of EU law to the ECJ but probably not more than the national courts of other EU countries. However, a comparatist may see a slight difference between the Danish approach to the ECHR and to the case law of the ECJ, even if the difference should not be exaggerated. The Danish courts may, generally speaking, have been more open to implementing ECtHR decisions, whereas the attitude towards the ECJ can be seen as somewhat more cautious. This difference may be connected to the fact that the EU goes further – regarding sovereignty – than the ECHR, which is basically an international treaty. Moreover, this can be seen as a consequence of the lack of a modern catalogue of human rights in the Danish Constitution.[44]

[44] Cf. Elo Rytter et al. (2011).

Clearly, the Nordic constitutional systems place a high value on the primacy of parliament. However, Denmark's uneasy relation with the EU seems to indicate an ingrained constitutional vision of a strong national parliament, at least in relation to external "competing powers". This is also reflected in the fact that in "the Danish constitutional context with strong Parliaments, courts do not play…an active role".[45] It has been pointed out, by a Danish scholar, that the underlying idea is that "the *Folketing* represents the people, and the people are sovereign".[46] Although this may be true, we need to be cautious about jumping to conclusions; in comparison to Finland and Sweden, the difference is certainly not dramatic, but at the same time it seems to characterise the Danish constitutional mentality, in particular because it sets Denmark in a different position in the European context from the other Nordic member states.

During the latest five-year period, only one case brought against Denmark before the ECtHR has resulted in a finding of violation. This was found in the case of Biao v. Denmark, in which the court found that an exception to Danish rules on family reunification – the so-called 28-year rule – violated Article 14 of the Convention taken in conjunction with Article 8.47

3.5 Iceland's Constitution

Iceland was part of Norway until 1814 and after that part of the Kingdom of Denmark. The present Constitution (*Stjórnarskrá lýðveldisins Ísland*) was adopted in 1944, when Iceland decided not to continue the union with Denmark established in 1918. The Constitution is based on Iceland's first Constitution, given to Iceland in 1874 by the Danish king. This constitution again was based on the Danish Constitution of 1849.

The 1944 Constitution was amended several times but still it was felt by many that Iceland should have a modern constitution of its own. In an attempt to establish a new constitution, a very interesting experiment was undertaken: a major part of the Icelandic population would be involved in the constitutional work. In 2009, a coalition government opened a debate on a new constitution. A privately organized national assembly of 1,500 members, partly chosen at random and partly representing different institutions and groups, started out

[45] Krunke (2014), p. 35.
[46] Wind (2009), p. 288.
[47] *Biao v. Denmark*, no. 38590/10, ECHR 2016.

with a discussion of the basic principles of a new constitution. A year later, the Government followed up by passing an act on a constituent assembly of 25 delegates elected directly to discuss, among other things, the organization of the government and the legislator, the role of the president, judicial control, the democratic process and elections, and the use of natural resources.[48]

However, the election of this body was ruled void by the Supreme Court and instead a Constitutional Council (*Stjórnlagaráð*) was appointed by the Icelandic parliament (*Althing*) in 2011. A draft Constitution was finished on 29 July 2011 and presented to the parliament. A non-binding constitutional referendum was held in October 2012 with a positive result from around 2/3 of the voters. This reform, however, has so far come to a halt, as the later government of the country has not moved the proposal further forward.[49]

In judicial review Iceland seems to have its own specific approach. Courts have been applying judicial review since 1944; however, the volume of cases has increased since 1995, when a human rights catalogue was included in the constitution. Basically, the Icelandic courts may disregard an Act but not formally invalidate it. Essentially, there seems to be relatively little hesitation by the courts, politicians, and constitutional theorists to accept the basic idea of constitutional judicial review. This can be seen, for instance, in the fact that acts are more frequently held to be unconstitutional than in the other Nordic countries. Moreover, unlike in the other Nordic countries, there is relatively little doctrinal or theoretical discussion that would be genuinely critical concerning the role of the courts and there is hardly any political opposition to judicial review.[50] Be that as it may, generally speaking the Icelandic constitutional mentality fits reasonably well within the general Nordic framework i.e. there is a lack of judicial activism even though judicial review forms part and parcel of the Icelandic constitution.

Iceland has been found at fault in five cases of violations of the ECHR during the last five years.[51] All five cases concern Article 10 of the convention on freedom of expression and were brought against the state by journalists who

[48] See Árnason (2011).

[49] Comparison between Icelandic and Irish experiences, see Suteu (2015).

[50] See Helgadóttir (2011).

[51] *Björk Eiðsdóttir v. Iceland*, no. 46443/09, ECHR 2012; *Erla Hlynsdóttir v. Iceland*, no. 43380/10, ECHR 2012; *Erla Hlynsdóttir v. Iceland*, no. 54125/10, ECHR 2014; *Erla Hlynsdóttir v. Iceland*, no. 54145/10, ECHR 2015; *Ólafsson v. Iceland*, no. 58493/13, ECHR 2017.

had been convicted by the national courts in defamation proceedings brought against them because of their journalistic work. Three of the cases were brought before the ECtHR by the same journalist.

4. Conclusion

This brief comparative discussion started from the assumption that, despite striking similarities between the Nordic constitutions, there are also peculiarities in terms of living constitutions. However, the question is: are these peculiarities so different after all? No doubt a deeper comparative analysis would reveal commonalities. Finland's peculiar doctrine on controlling constitutionality can be derived from the fact that constitutional practice involves a special role for the national parliament. At the same time, Finland has caved in concerning the European dimension in terms of the EU as well as with the ECHR and the case law of the ECtHR.[52] Sweden has also had its doubts both with the EU and with the ECHR. Even while Sweden today is relatively open to the European dimension, it still guards its Nordic-style understanding of the sources of law and assigns a particularly distinct role for legislative preparatory works. Moreover, it seems quite evident that this can be explained by Sweden's constitutional self-understanding, holding the *Riksdag* in a key position and shadowing the constitutional role of rights.

Comparatively speaking, Nordic constitutions are curious; they encompass both the idea of popular sovereignty (as a legitimate form of political democracy) and the idea of separation of powers. This probably partially explains the seemingly low political profile of their supreme courts – they do not willingly challenge the legitimacy of parliamentary acts, although they are very much legally independent of direct (political) influence by legislators. On the whole, the highest Nordic courts seem to feel a great deal of loyalty toward their respective parliaments but they do so without direct parliamentary guidance (except statutory law, of course), so this is an outcome of a Nordic constitutional mentality growing from a certain notion of democracy and appreciation of the rule of law. As a result, Nordic constitutions are more governance-oriented than rule-oriented; more weight

[52] As pointed out by Markku Suksi, Nordic constitutional identity is under pressure both from the European Court of Justice and the ECtHR. See Suksi (2014), pp. 83-84.

seems to be given to institutions than to rights. However, the growing significance of fundamental rights is slowly changing the overall picture.

More generally, the Nordic experience – or "Nordicness" – seems to imply that constitutional law is both "law" and "politics", i.e. written constitutional documents are insulated against "politics" because constitutions are themselves so deeply and profoundly of a political nature.[53] Moreover, the Nordic experience seems to be pragmatic in its tendency to admit that constitutions are about law and politics; written rules are interpreted, applied and *de facto* amended by constitutional practices and interpretations. Yet it is beyond doubt that the Nordic countries take their constitutions seriously even while their constitutional styles are not identical. Even so, today many scholars and lawyers are seeking a stronger rights-based culture and a stronger position for judicial review in the Nordic countries. However, only time will tell how these pressures will transform the parliament-oriented Nordic constitutions. In a broad sense, it is clear that Nordic constitutions and "Nordicness" in constitutional laws are not isolated because they are affected by global and European legal developments – rights are also gaining more weight within the Nordic constitutional sphere. The rise of fundamental rights and especially the ECHR have grown in constitutional gravity.

Constitutional protection of fundamental rights varies significantly between the Nordic countries. Yet, from a comparative point of view it is easy to see that all Nordic systems take fundamental rights seriously. When the Court decides against a Nordic country, these countries take measures to deal with the problem through legislation or, at least, through interpretation by the national judicial organs. The judicial dialogue they have had with the ECtHR reflects, however, the domestic special features of each system as the cases decided by the ECtHR clearly indicate.

To conclude, the recent Nordic expansion of judicial review may bring about a novel challenge to the traditional Nordic notion of democracy. It would seem that these systems are slowly gliding towards rule by judges instead of rule by parliamentarians. Moreover, if the ECtHR type of judicial activism extends to the traditional Nordic understanding of democracy (popular

[53] However, it would be a mistake to assume that this connection would be openly admitted: indeed, quite the contrary. As Bull (2014, p. 17) says about Sweden, there is "difficulty to acknowledge the close connections between law and politics…many participants and observers of the system still cling to the idea that law and politics is and should be sharply divided". Yet, in constitutional comparison this connection looks evident.

sovereignty in an important position) it may become difficult to avoid transformation of constitutional cultures favouring parliaments.[54] But, then again, resilience has always been an underlying feature of Nordic constitutions. It is safe to assume that parliamentary focus will not concede with haste.

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[54] It is a general comparative finding that "judicial activism tends to erode both the parliamentary system and majoritarian democracy", Holland (1991), p. 5.

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