Anine Kierulf. **Judicial Review in Norway – A Bicentennial Debate**. Cambridge University Press, 2018 (hardback). Pp. xxiii+298. £ 85.00. ISBN: 9781108426688

Judicial review is one of the classical issues in constitutional law.[1] It is not practiced in every system and even in the systems where it is practiced, there are different variations. For a long time it has been recognised that, whatever the differences might be, it is certainly not a uniquely American institution.[2] Anine Kierulf's book tells the story of judicial review in Norway. She has penned a dense narrative that is rich with detail on how this Nordic system has balanced democracy and judicial oversight for two hundred years.

Kierulf is a Norwegian lawyer who presently functions as a director at the Norwegian National Human Rights Institution. Previously she was a researcher at the Norwegian Institute of Human Rights at the University of Oslo. This book is thematically very close to Kierulf's PhD dissertation, which was titled as *Taking judicial review seriously: the case of Norway* (2014). Kierulf is not pure legal scholar but someone who has first practiced law as a professional lawyer. This background shows in the book's use of sources and discussions which is both a boon and a bane. On the one hand, it gives clarity for the book that is structured chronologically and centers on key cases decided by the Norwegian Supreme Court. On the other hand, her manner of using sources is very scarce, almost minimalistic, and scholarly readers might be less enthusiastic about the fact that she, mostly, omits detailed page references throughout the book. However, what is possibly lost with scholarly details is certainly gained when it comes to readability.

In essence, this book is about the countermajoritan difficulty that is most often discussed against the backdrop of the US system.[3] Kierulf successfully combines the classical judicial review debate with the much later emergence of supranational courts; she focuses in particular on the effects of the European Convention on Human Rights and the case law by the European Court of Human Rights. Although she does not promote her own position strongly, she defends judicial review as it has been practiced in Norway. In this sense, the historical narrative of this book is designed to justify judicial

[1] *See* Doreen Lustig and J H H Weiler, *Judicial review in the contemporary world—Retrospective and prospective*, 16 INT'L J. CONST. L. 315 (2018) (Discusses global waves of judicial review within constitutional orders.)
[2] *See* Mauro Cappelletti, *Judicial Review in Comparative Perspective*, 58 CALIF. L. REV. 1017 (1970).
[3] What is meant with countermajoritan difficulty in the book follows the mainstream. Accordingly, it is a problem concerning the legitimacy of constitutional judicial review. In short, when unelected judges use the power of judicial review to nullify the actions of legislator, they seem to act contrary to "the will of the majority" as representative institutions express it. For the basic formulation, see ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-18 (1986).

review and counter those arguments that would regard judicial review as undemocratic or illegitimate. It is no small feat to be able to present an interesting, detailed, and yet very readable story of 200 years of constitutional history of a country in less than three hundred pages. I doubt that someone with a purely academic background would have been able to do this in such a short space.

The book is structured chronologically. After the first two introductory chapters, Kierulf explains in Chapter 3 how judicial review took place and how it was shaped in 1800s. For comparatists it is interesting to note that although Norway is basically a civil law country, it does not have separate courts for administrative matters, i.e. courts have general jurisdiction and the doctrine of stare decisis (in its Norwegian version) is practiced. Moreover, one may also be surprised to learn how significant the role of American constitutional doctrine has always been in Norway.

In many ways, Norway's constitutional law and legal culture differ somewhat from those of other Nordic systems. However, in some places comparison with other Nordic countries would have been beneficial because Kierulf seems to think that certain features are Norwegian specialties although they are typically common Nordic features. Two such issues are the discussion on the necessity of clear breach as a requirement for judicial review and courts' characteristic reliance on preparatory materials (*travaux préparatoires*).[4] It is a bit problematic that the author knows *Marbury v. Madison* (1803) better than she knows the other Nordic systems, which do have, despite certain differences, also significant similarities. In any case, readers learn how Norwegian judicial review was practiced first very early after the enactment of the Constitution in 1814. The other striking feature of Norwegian judicial review is the significance of the liberal arguments or the significance of constitutional rights from early on.

The following chapter (Chapter 4) tells the story of how the regulatory state emerges in Norway and how judicial review related constitutional arguments lose some of their weight and pertinence during the early 1900s. This century starts with a period of fairly active judicial review which ends with the *Waterfall* case in 1918. This case caused a debate, in which proposals to abolish judicial review were put forward because some legislators felt that the court interfered with the legislative power. In the debate, however, the argument for the Constitution as the *lex superior* became central. Accordingly, judicial review persisted. Yet, the tension between popular sovereignty based

[4] *See* Jaakko Husa, *A Constitutional Mentality*, in NORDIC LAW IN EUROPEAN CONTEXT 41 (Letto-Vanamo et al. eds., 2019).

political constitutionalism arguments and courts practicing judicial review (legal constitutionalism) was made explicit in this case and has been underlying Norwegian debates ever since. Kierulf's own bottom line is clear: 'The mere fact that the Supreme Court at times decides cases based on a different interpretation of the Constitution than that of Parliament does not itself make review outcomes "bad"' (p. 106). For a reader, this passage is very informative concerning both the subject and how the author positions herself in the debate.

In Chapter 5, concentrating on the period of Post-World War II, the narrative is bound around the most important Norwegian case of judicial review: the *Kløfta* case decided in 1976. This case became later a kind of a central point of reference concerning modern Norwegian constitutional review.[5] Kierulf does not waste time on wartime happenings but transports her readers relatively speedily to 1960s and 1970s. After World War II there were very few cases of constitutional review and in the 1960s it started to look like judicial review was perhaps a thing of the past that had no place in the emerging welfare state. Nevertheless, Kløfta changed all that and has anchored constitutional review firmly in Norwegian constitutional doctrine until today. By a narrow 9-8 majority the Supreme Court signalled its willingness to return to a more strict form of constitutional review especially in the area of civil rights.

This case was a typical Norwegian constitutional judicial review case, most of the cases deal with the right to property or right to own property, because it was about right to property and expropriation. Now, even though the court was divided on other issues, both the majority and minority held the principle of judicial review itself to be undisputable. Although it took eight years for the government to react to the judgment and change the statute, it ultimately did react. This is not an important case only for Norway; the reader feels that it is an important case for the author, too. So, the reader is not surprised when Kierulf, somewhat ironically, quotes Torstein Eckhoff's dramatically failed prediction (from 1975) according to which 'I doubt these powers will ever be used again in any way worth mentioning' (at 135).

Chapter 6 brings in Kierulf's second key dimension, which is the ECHR and how it gradually becomes an elemental part of the Norwegian constitutional system. Norway ratified the Convention in 1951 and accepted the competence of the ECtHR in 1964. This chapter explains how the ECHR

[5] For an interesting comparison between Norway and Finland, that takes Kløfta into account, *see* Veli-Pekka Hautamäki, *Authoritative Interpretation of the Constitution: A Comparison of Argumentation in Finland and Norway*, 6 ELECTR. J. COMP. L. (October 2002) <http://www.ejcl.org/63/art63-1.html>.

was adopted and provides an overview of the constitutional debates among politicians and scholars regarding Norway's accession to the Convention and its potential impact on the national constitutional system. In essence, the narrative highlights the road towards the adoption of the Human Rights Act of 1999 (HRA). Constitutionally, the key provision of the HRA is § 3, which states that the Convention takes precedence in cases of conflict with other legislative provisions. Interestingly, the HRA thus resembles the equivalent instrument in the UK; it brought about a debate on the significance of national parliament whose legislative power was feared to be overshadowed by supranational judicial bodies. Unfortunately, Kierulf does not draw comparisons to the UK because her focus is so heavily on the national scene. Nevertheless, the reader gets a balanced and well thought out picture of how the ECHR intertwines with the Norwegian Constitution when it comes to Norwegian courts and in particular the Supreme Court:

> 'The way in which Norwegian courts have employed rights review under the Constitution in many respects resembles the way they engage the ECHR as a constitutional minimum standard or rights guarantee. In very few cases has the Supreme Court disregarded a Norwegian provision because it conflicts with the ECHR; the usual way of resolving conflicts in meetings between a ECHR norm and a national norm is through interpreting the Norwegian provision in light of the ECHR, and harmonizing it so as to avoid conflict.' (at 160)

Chapter 7 discusses the problems and issues concerning the dual review (national review alongside international) during 2000-2010 by concentrating on two cases and their ramifications. Both of the cases deal with the freedom of expression, clearly a key area of interest for the author. The first case deals with personal reputation and the second with political advertising. Kierulf concentrates on the constitutional and human rights implications rather than explaining every single detail – an approach that by and large, serves readers well; however, it is difficult to avoid a feeling that much of this chapter perhaps stretches too far away from the main theme of the book. Nevertheless, the discussion displays clearly the expertise of the author and her mastery of the substantive constitutional issues in these cases.

Next, Chapter 8 tells a story of the year 2010 that sparked a renewed general interest in judicial review. The background of the debate is formed by three cases decided by the Supreme Court in different areas of law. The *Shipping Tax*, *Church Endowment Foundation*, and *War Crimes* cases bring judicial review and the ECHR to the forefront once again. Even though there were some doubts concerning the role of courts in a democratic society, overall, the debate stirred by these cases seem to confirm how deeply judicial review is embedded in the Norwegian constitutional

system. Moreover, the story, as it is told by Kierulf, underlines and confirms the key argument of the book:

> 'The cases make clear the established position of constitutional review. The Kløfta case may have represented the start of review renaissance, and was formative in elucidating the Constitution and judicial review still being a reality.' (at 226)

One thing that raises questions is how the lack of a Nordic comparative dimension affects the way in which Norway is presented in the book. Nordicness is a part of the Norwegian system even though judicial review has a more prominent role to play there than in the other Nordic countries. The author does not make this point, but from a Nordic comparative perspective, one of her key findings seems typical: Parliament's views on constitutionality are taken into account and they have significance, in particular when courts are in doubt about the constitutional question.[6]

Chapter 9 is rather short and it addresses rights reform and the constitutionalisation of judicial review. It explains how and why the Constitution was amended with several new provisions in 2014 containing many new rights, not previously codified in the constitutional document. It also shows how judicial review finally found its way into the written text of the Constitution in 2015. Kierulf also registers how these reforms increased instances of courts citing or mentioning the Constitution. Furthermore, the chapter contains an interesting sub-narrative explaining how the Norwegian Labour party eventually changed its critical view on judicial review, which made it possible to amend the Constitution and include the doctrine of judicial review formally into the text of the Constitution. However, as she writes in the concluding Chapter 10, it is to be expected that discussions on the legitimacy of review will persist and that 'disagreements over how review is practiced from case to case will continue to spark debate' (p. 260). Her point on this continued debate is, however, very enlightening because she separates result-based critiques (frequent and unavoidable) from critiques that go deeper and concern the system of constitutional review (less frequent).

Perhaps the most intriguing dimension of the book is how Kierulf is able to tell a story not only about constitutional law, but also about how judicial review is entangled with politics and legal culture. She shows how judicial review evolves as a part of the system from something that is at first a conservative bulwark against progressive political forces, but later transforms into a central

[6] *See* Jaakko Husa, *Guarding the Constitutionality of Law in the Nordic Countries: A Comparative Perspective*, 48 AM. J. COMP. L. 345 (2000) (outdated but explains the basic similarities and differences).

feature of a democratically legitimate constitutional system. In the last pages of the book, the author discusses the possibility of a constitutional advisory board working in the parliament. That makes sense; however, the lack of comparative viewpoints makes this discussion somewhat thin.[7] In the end, the book defends the legitimacy of judicial review and its natural role in Norwegian democracy.

Although this is a case study of a one system, it shows how generally recognised constitutional arguments apply to most systems of judicial review in one form or another: the counter-majoritarian difficulty is not only a Norwegian issue but is recognised around the world. Kierulf's solution to construct her story around essentially two landmark cases (*Waterfall* and *Kløfta*) helps to keep the plot together throughout the book.[8] For this reviewer, it was a surprise to learn how constitutional review has been so consistently doubted and debated in Norway; in my own scholarship, I had thought that judicial review was accepted as a more standard part of Norwegian constitutionalism even before it was finally codified. Accordingly, it is easy to recommend this book to anyone interested in constitutional review in general and not just to those who have a special interest in Norway or the Nordic systems. Kierulf manages to show that the Norwegian version of judicial review provides a useful perspective on the dichotomy of American and European forms of constitutional review. It also shows how political and legal forms of constitutionalism are necessarily intertwined.

Jaakko Husa
University of Helsinki
jaakko.husa@helsinki.fi

[7] About division of powers in the Nordic constitutional systems, *see* Thomas Bull, *Institutions and Divisions of Power*, in THE NORDIC CONSTITUTIONS: A COMPARATIVE AND CONTEXTUAL STUDY 43 (Krunke and Thorarensen eds., 2018).
[8] She deals, of course and as mentioned in this review, with many other cases too. However, for her narrative these two are the most important ones, as they seem to define some kind of Norwegian constitutional review moments beyond the adoption of the Constitution in May 1814.