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Abstract The Supreme Courts in all the Nordic countries reserve, and exercise, the power to set aside unconstitutional laws. In this way, they protect the rule of law and the human rights that are enshrined in their national constitutions. However, they go about this in different ways and treat different constitutional rights in ways distinct from one another. In this chapter, I discuss the development of the diversified judicial review of legislation in the Nordic countries. I also discuss the independence of their judiciaries in the light of the latest developments in Europe. Finally, I discuss the importance of developing standards for the interpretation of case law on these constitutional issues. Recent development brings with it two consequences for Nordic courts: the task of assessing the independence of judiciaries in other EU states, and questions about how the rule of law and the independence of the judiciary can be strengthened at home.

1 Introduction

According to theories of separation of powers, courts serve an important role in deciding whether legislation falls within the boundaries defined by constitutions, especially as regards the protection of human rights and fundamental freedoms. In the Nordic countries, the role of the courts has been evolving since the early nineteenth century. The courts originally concentrated exclusively on applying law to criminal and civil cases and distributing justice to the citizens. But, at different times in the nineteenth and twentieth centuries, they have also found themselves competent to determine whether state authorities are acting within their constitutional boundaries, and whether legislation has respected human rights and fundamental freedoms. I will discuss this development briefly in this section. I will also discuss the courts' constitutional relationship to international documents such as the European Convention on Human Rights (ECHR), and whether the courts have granted a 'preferred position' to some constitutional rights.

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The roles of Nordic courts have not only changed in terms of the intensity of constitutional review—through a recent, still ongoing change, national courts in one EU member state are called upon to assess the independence of courts in another EU state. This change was effected by threats against the independence of the judiciary in Poland, among other countries. Thus, ample reason exists to discuss the common principles for institutional judicial independence.

As regards this latter development, it is crucial that judgments be well-reasoned and conclusive. Even though the EU institutions have some power to put legal pressure on countries whose governments fail to respect the rule of law and judicial independence, persuasive pressure directly from legal actors is also important. I will therefore discuss the interpretation of precedents, focusing on Nordic constitutional cases.

2 Constitutional Roles of Nordic Courts

There are important differences between the court systems of the Nordic countries. The eastern Nordic countries, Sweden and Finland, have separate systems of administrative courts, leaving only criminal and civil cases to the general courts. In the western Nordic countries, Denmark, Norway and Iceland, administrative cases are brought before the general courts. Conversely, the absence of constitutional courts is a feature common to all the Nordic countries. Thus, the Supreme Courts (and in Sweden and Finland also the Supreme Administrative Courts) are the highest courts deciding cases wherein constitutional issues are at stake.[1]

The development of constitutions in each country has been different. Whereas the modern Norwegian state was established through a constitution (fundamental law, *grunnlov*) adopted during the gap in 1814 between the Danish and Swedish ruling kings of Norway, the Swedish constitution (instrument of government, *regeringsform*) of 1809 and the Danish constitution (fundamental law, *grundlov*) of 1849 were designed to replace largely absolutist rule with a system that distributed powers between king, parliament and courts. In Finland, the old Swedish constitutional acts from 1772 and 1789 remained valid during the period of Russian rule, but a new constitution (instrument of government, *regeringsform*) was adopted in 1919. Further, every Nordic country has instituted several constitutional amendments over the years, most importantly Sweden and Finland, where the constitutions were totally re-written through the instrument of government (*regeringsform*) of 1974 and the fundamental law (*grundlag*) of 1999, respectively.[2]

The constitutional role of the courts, and the courts' role in ensuring that the legislature and the public authorities keep within the bounds of their decision-making

[1] See e.g. Bull (2018) pp. 61–64, Smith (2018) pp. 109 and Nylund and Sunde (2019) pp. 201–213.
[2] See e.g. Suksi (2018) pp. 9–42 and Husa (2019) pp. 41–60.

power, have developed at different times in the Nordic countries.[3] The Norwegian Supreme Court was the first Nordic supreme court to apply the constitution in its decision making. It did this as early as the early nineteenth century, whereas the supreme courts of Denmark, Sweden, and Iceland were very reluctant to apply their own constitutions until the late twentieth century, even though there were cases in the early-twentieth-century where the possibility of constitutional review of statutes was presupposed. This difference is, I believe, explained by the fact that the modern Norwegian state was established through the adoption of the constitution, similar to the way the union of the United States was established through its federal constitution. Indeed, in one 1866 case, Norwegian Supreme Court Chief Justice Lasson used in his judgment phrases reminiscent of Chief Justice Marshall's in the 1803 case *Marbury* v. *Madison*.[4]

In Finland, the historical development has been unique because the courts guarded the old Swedish constitutional laws from the eighteenth century, still valid in Finland after 1809, against pressure from Russian authorities in the late nineteenth and early twentieth century.[5] This development came about because the Finnish state was established through the old constitutions together with the promise by the Russian Emperor, in his capacity as Grand Duke of Finland, to respect them.[6] After the adoption of the constitution in 1919, the Finnish courts became institutions very loyal to the legislative function of the parliament, a characteristic that only began to change with the enactment the new fundamental law of 1999, which paved the way for a more constitutional role for the courts. According to Sect. 106 of Finland's constitution, Finnish courts can set aside statutory provisions which are 'obviously' contrary to the constitution.

The obviousness requirement was taken from the Swedish instrument of government (*regeringsform*), adopted in 1974 but amended in 1980 with a provision that confirmed the right of the courts to set aside unconstitutional statutes but required the unconstitutionality to be obvious (Chap. 11 Sect. 14). In 2010 this requirement was abolished and replaced with a clause reminding the courts that parliament is the premier representative of the people and that constitution is above law.[7]

The important changes, however, came in case law at different times in each country. In Norway, the Supreme Court was rather reluctant to exercise its competence to review legislation in the 1950s and 1960s but did exercise it in a case in 1976.[8] The court's competence in this arena was confirmed in an amendment to the constitution in 2015 (Sect. 89). In the other countries, some cases demonstrate

[3] See, generally, as regards Sect. 2 of this chapter for a much more detailed discussion Sunnqvist (2014a). For a very good overview of the history of constitutionalism and judicial review, see Halpérin (2019). An overview in English over the development in Norway is provided by Kierulf (2018), and a Nordic comparison in English by Smith (2018) pp. 107–132. The development of judicial review in Iceland is analysed by Helgadóttir (2009).

[4] Sunnqvist (2014a) pp. 246–255 with references, esp. Smith (1990) p. 430.

[5] Sundberg (1983).

[6] Sunnqvist (2014a) pp. 1023–1027.

[7] Sunnqvist (2014a) pp. 742–750, 912–914.

[8] Rt. [Retstidende] 1976 p. 1.

extraordinarily clearly that the courts consider themselves competent to act as constitutional courts; examples to that effect occurred in the year 1999 for Denmark,[9] 2013 for Sweden[10] and 2014 for Finland.[11] The judgments from 1976 (Norway) and 1999 (Denmark) were based on the countries' respective national constitutions, but in the judgments from 2013 and 2014, the Swedish and Finnish courts, respectively, invoked instead the EU Charter of Fundamental Rights and the ECHR. This also indicates the Europeanisation of judgments concerning fundamental rights issues.

Thus, each of the Nordic countries' supreme courts safeguard the rule of law and the human rights enshrined in the constitutions. They do so, however, in different ways. Not only do they treat different constitutional rights differently,[12] they also have different ways of understanding the relationship between rights guaranteed in national constitutions and similar rights in international documents such as the ECHR.

3 Variations of Judicial Review

In the aforementioned 1976 case, the Norwegian Supreme Court not only took the lead again among the Nordic countries in the arena of judicial review, it also spearheaded an interesting development regarding different standards of review for different constitutional rights. In so doing, the Court relied on a 1952 case but developed it further.

In the 1952 case, the Supreme Court differentiated between constitutional rights which directly protect individual citizens and constitutional rules that distribute powers between the parliament and the government. If the parliament had delegated powers to the government, the judgment held, courts should show restraint in their judicial review, since parliament could itself act if the government used the delegated powers in a way that infringed the parliament's rights.[13]

In the 1976 case, the Norwegian Supreme Court further developed the reasoning in the case from 1952 by dividing judicial review of legislation into three categories: constitutional rules about freedom and security of the individual, economic rights of the individual and the relationship between the branches of government. The last category is to be supervised the least strictly, while individuals' constitutionally guaranteed freedom and security receive the highest level of protection. The individuals' economic rights should be in an intermediate position. In the event that there are

[9] UfR [Ugeskrift for Retsvæsen] 1999 p. 841.

[10] NJA [Nytt Juridiskt Arkiv] 2013 p. 502 and HFD [Högsta förvaltningsdomstolens årsbok] 2013 ref. 71.

[11] KKO [Korkein Oikeus] 2014:67.

[12] See for a more detailed discussion Sunnqvist (2014a) pp. 1059–1070 and Sunnqvist (2015).

[13] Rt. 1952 p. 1089. See Sunnqvist (2014a) pp. 525–528 for a more detailed discussion.

doubts about whether a rule is in contradiction to the constitution, the courts should interpret it in a way that does conform with the constitution.[14]

This development coincided with writings in Danish legal literature that suggested that the freedom of speech should have a preferred position in relation to other constitutional rights.[15] This perspective has then been further developed in Denmark[16] as well as in Norway.[17]

Following this development in the other Nordic countries, when, in 2010, the Swedish constitution was to be amended, 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.[18]

Despite these parallel developments, there is no commonly accepted view on whether different constitutional rights should be divided into different categories at all, or, if so, how such categories should be organised. I have suggested[19] that cases from, above all, the Norwegian, Danish and Swedish Supreme Courts from the nineteenth and twentieth centuries can form a basis for arranging the issues into seven categories.

Especially noteworthy, I find reason to place one category highly in the hierarchy of the intensity of judicial review: the responsibility of judges to ascertain fair trial and due process of law.[20] Through the case law related to Article 6 of the ECHR, these principles have become understood as fundamental for the protection of human rights and freedoms. This is also why it is paramount to address current threats against judicial independence in some European countries since the protection of human rights is thereby also threatened.

The seven categories I have identified are, ordered from those most rigorously protected by judges to those less so, as follows:

1. The responsibility of a judge for the functioning of the judicial procedure,
2. The responsibility of a judge for access to judicial procedure,
3. The responsibility of a judge for legality,
4. The protection of fundamental rights and freedoms, and the balancing of those rights and freedoms,
5. The protection of economic rights, and the balancing of those rights,
6. The protection of other types of rights,
7. The supervision of the relations between the other two branches of government.

[14] Rt. 1976 p. 1. See Sunnqvist (2014a) pp. 702–707 for a more detailed discussion.

[15] Germer (1973).

[16] Rytter (2001).

[17] Smith (1990), Smith (1993) pp. 328–329.

[18] Proposition to the parliament 2009/10:80 pp. 147–148.

[19] See for a more detailed discussion Sunnqvist (2014a) p. 1059–1070, Sunnqvist (2015), Sunnqvist (2017).

[20] Cf. also Smith (1993) p. 239–242.

Numbers 4, 5 and 7 relate to the Norwegian cases, the discussions in the Danish and Norwegian literature and the *travaux préparatoires* to the latest Swedish constitutional amendments. Numbers 1 through 3 relate to the increasing importance of procedural rights: the right to a fair trial and the legitimacy in judging and in measures taken by the state against individuals. Number 6 relates to the many welfare rights included in the EU Charter of Fundamental Rights and, for example, the Convention on the Rights of the Child; it is still not fully clear exactly how these rights, that are sometimes rather vague, will be interpreted by the Nordic supreme courts.

4 Arrangements Securing the Independence of Courts

Procedural rights and the right to a fair trial relate closely to the institutional independence of courts and the judges. The judicial protection of constitutional rights requires an independent judiciary that can assess whether a statute is in contravention to the constitution or not. It is required for the courts to be independent, i.e. that the judges are irremovable. A further essential characteristic for an independent judiciary, highlighted especially in many eastern European countries after the fall of the Berlin Wall and the dissolution of the Soviet Union, is that the judiciary should be represented by a judicial council.

According to articles 2 and 3 of the Universal Charter of the Judge, adopted by the central council of the International Association of Judges in 1999 and updated in 2017, a judicial council is defined as follows:

> In order to safeguard judicial independence a Council for the Judiciary, or another equivalent body, must be set up, save in countries where this independence is traditionally ensured by other means.
>
> The Council for the Judiciary must be completely independent of other State powers.
>
> It must be composed of a majority of judges elected by their peers, according to procedures ensuring their largest representation.
>
> The Council for the Judiciary can have members who are not judges, in order to represent the variety of civil society. In order to avoid any suspicion, such members cannot be politicians. They must have the same qualifications in terms of integrity, independence, impartiality and skills of judges. No member of the Government or of the Parliament can be at the same time member of the Council for the Judiciary.
>
> The Council for the Judiciary must be endowed with the largest powers in the fields of recruitment, training, appointment, promotion and discipline of judges.
>
> It must be foreseen that the Council can be consulted by the other State powers on all possible questions concerning judicial status and ethics, as well as on all subjects regarding the annual budget of Justice and the allocation of resources to the courts, on the organisation, functioning and public image of judicial institutions.[21]

[21] Universal Charter of the Judge, adopted by the IAJ Central Council in Taiwan on November 17th, 1999, updated in Santiago de Chile on November 14th, 2017; https://www.iaj-uim.org/universal-charter-of-the-judge-2017/

Even though this document was adopted among judges themselves, the concept of a judicial council, and the demand that one should be organised in order to protect judicial independence, has been widely accepted outside of the judiciaries also, especially by different fora within the Council of Europe, such as its parliamentary assembly,[22] the council of ministers[23] and the Venice Commission.[24] The European Network of Councils for the Judiciary (ENCJ), co-funded by the EU, accepts as members only national institutions from EU member states which are independent of the executive and legislative branches, or are autonomous, and which ensure the final responsibility for supporting the judiciary in the independent delivery of justice.[25]

The Nordic country with the best safeguards for the independence of its judiciary is Denmark. The administrative office, *Domstolsstyrelsen*, is accepted as an independent judicial council by the ENCJ. It was organised in 1999 in its current form, for the precise purpose of safeguarding judicial independence.[26] The Danish administrative office was partly used as a model for its Norwegian counterpart, *Domstolsadministrasjonen*, established in 2002.[27] Finland has established its own such administrative office, *Domstolsverket*, in 2020, which has a board consisting of eight members, six of whom are judges.[28] The board appoints the director of the office.[29] In Iceland, similarly, the administration of the courts was transferred to an administrative office, *Dómstólasýslan*, in 2016.

The most problematic of the Nordic countries in this area is Sweden. Swedish courts were originally administered directly by the Ministry of Justice and partly by the courts of appeal, but a national courts administration was set up in the 1970s. At that time, the government believed that the courts were not so different from public administrative agencies and authorities.[30] This led to the present situation, where the administrative office, *Domstolsverket*, has a director general appointed by the government, through whom the government might well exert influence over the judiciary. Happily, the government has refrained from doing so. There were discussions over the years about reforming the office,[31] and in 2018, the parliament took an unanimous legislative initiative to rearrange the administrative office and—as an effect

[22] Resolutions no. 1685 (2009) and 2040 (2015), www.assembly.coe.int.

[23] Recommendations Rec. (1994) 12 and Rec. (2010) 12, www.coe.int.

[24] See e.g. the opinion 16 January 2020 no. 977/2019, Sect. 9, www.venice.coe.int.

[25] Article 6 (1), Statutes, Rules and Regulations of the International Not-For-Profit Association European Network of Councils for the Judiciary (i.n.p.a), https://www.encj.eu/statutes.

[26] Christensen (2003).

[27] NOU [Norges Offentlige Utredninger] 1999:19.

[28] https://valtioneuvosto.fi/sv/artikeln/-/asset_publisher/1410853/uudelle-tuomioistuinvirastolle-johtokunta.

[29] https://oikeus.fi/sv/index/ajankohtaista/tiedotteet/2019/06/tuomioistuinvirastonylijohtajaksirikujaakkola.html.

[30] Proposition to parliament 1973:90 p. 233, see also SOU [Statens Offentliga Utredningar] 1972:15 pp. 190–191.

[31] Sunnqvist (2014a) pp. 856–857.

of events in Poland—to write into the constitution the number of, and retirement age for, supreme court justices.[32] This legislation is currently being prepared.[33]

The establishments of courts by law is an important safeguard. Recently, the new Icelandic court of appeal was scrutinised by the European Court of Human Rights.[34] Since a new court was erected, the judges were to be appointed by the parliament. However, the minister of justice suggested, in part, other judges than had been proposed by the judicial council, without giving the reasons for doing so. The parliament then approved the minister's proposal through one joint vote instead of one vote for each judge. This process failed to follow the established rules, and the European Court of Human Rights did not consider the court of appeal as a court established by law.

5 A 'Rule-Of-Law-Check' of Other Judiciaries

In many countries in eastern Europe, the independence of the judiciaries is currently under threat. Hungary and Poland, for example, are among EU countries where the development of an independent judiciary has gone in the wrong direction,[35] even though the judiciaries of both countries after the fall of the Berlin Wall and the dissolution of the Soviet Union were organised with, among other safeguards, judicial councils.[36] Most relevant to this chapter, however, is that the developments in Poland and Hungary are not simply the problems of our European neighbours to be denounced from afar. Quite the contrary, the national courts of the Nordic EU countries Denmark, Finland and Sweden might be called upon directly to assess the independence of their colleagues, judges in other EU member states.

Before discussing the protection of judicial independence through other national courts, we must examine *Aranyosi & Căldăraru* v. *Generalstaatsanwaltschaft Bremen*.[37] The *Aranyosi* case concerned whether the Hungarian prisons under review had such a low human-rights standard that handing people over to Hungary to serve

[32] Report of the parliamentary constitutional committee 2017/18:KU36, Decision in Parliament 18 April 2018.

[33] Directive 2020:4, *Förstärkt skydd för demokratin och domstolarnas oberoende.*

[34] ECtHR, Judgment [GC] 1 December 2020, Guðmundur Andri Ástráðsson v. Iceland, appl. no. 26374/18.

[35] See e.g. the CCJE 'Report on judicial independence and impartiality in the Council of Europe Member States 2017', CCJE-BU(2017)11 (published in February 2018); as regards Hungary 'Report on the fact-finding mission of the EAJ to Hungary', May 3rd, 2019; https://www.iaj-uim.org/iuw/wp-content/uploads/2019/05/Report-EAJ-Hungary.pdf, and as regards Poland See Marcin Matczak, 'Poland's Constitutional Crisis: Facts and interpretations', 2018; https://www.iaj-uim.org/iuw/wp-content/uploads/2018/07/Polands-Constitutional-Crisis-Facts-and-interpretations.pdf.

[36] Hungary: Országos Bírói Tanács (National Judicial Council), Poland: Krajowa Rada Sądownictwa (National Council of the Judiciary).

[37] CJEU Judgment 5 April 2016, Case C-404/15 and C-659/15 Paul Aranyosi and Robert Câldâraru (ECLI:EU:C:2016:198).

prison sentences according to the European Arrest Warrant (EAW) procedure would violate Art. 4 of the EU Charter—'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The Court of Justice of the European Union (CJEU) stressed the principles of mutual recognition and mutual confidence between member states but also ruled that these principles had limits that could 'in exceptional circumstances' provide protection for citizens, e.g., when there is a real risk that the individual concerned will be exposed to inhuman or degrading treatment. Later, the European Court of Human Rights found that the Hungarian prison conditions had improved,[38] meaning that the factual situation underlying the individual assessments made in the *Aranyosi* judgment had changed.

The present government in Poland has taken measures to weaken the independence of its judiciary and the judicial review of legislation. Poland's Judicial Council and Constitutional Court can no longer work independently, and disciplinary proceedings are instituted against judges who act independently. What was initially brought before the CJEU was a 'reform' aimed at lowering the retirement age for Supreme Court justices, thereby enabling the government to choose which judges could remain on the court and to appoint new ones. This would affect, among others, the first president of the court, Małgorzata Gersdorf.

This question also came before the CJEU in the context of the EAW. In the LM case, the CJEU ruled, just as in *Aranyosi*, that an individual assessment must be done. The executing judicial authority must examine whether, in the circumstances of the case, there are substantial grounds to believe that the individual will be dealt with by a court whose independence and impartiality are compromised.[39]

In this context, it should be noted that the CJEU earlier in 2018 decided a case in which the court stressed certain criteria for the assessment of the independence and impartiality of a court—criteria that were repeated in the LM case and that created an avenue for national courts to ask the CJEU about their own independence.[40] This might be a solution to the problem that Polish courts, for example, are, at the time of this writing, moving increasingly towards losing their independence, which, according to normal CJEU standards, would render inadmissible their questions for preliminary rulings. This consequence would effectively sever the lifeline between the CJEU and those national courts, like Poland's, whose independence is under attack.[41]

The Commission has also brought proceedings before the CJEU, and the court has declared that by lowering the retirement age of the judges appointed to the Polish Supreme Court, by applying that measure to the judges already appointed to that

[38] ECtHR Decision 23 November 2017, Domján v. Hungary, appl. no. 5433/17.

[39] CJEU Judgment 25 July 2018, Case C-216/18 PPU Minister for Justice and Equality [LM] (ECLI:EU:C:2018:586).

[40] CJEU Judgment 27 February 2018, Case C-64/16 Associação Sindical dos Juízes Portugueses (ECLI:EU:C:2018:117).

[41] In this context, have benefitted very much from discussions with Professor Xavier Groussot. Cf. his presentation at the annual meeting 2019 at the Swedish Association of Judges, https://domareforbundet.se/index.php?special=download&hash=e1d3c401a2bcc5a4ca024047da211f90&_benonce=0a794010ee.

court before 3 April 2018, and by granting the President of the Republic discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, Poland has failed to fulfil its obligations under Article 19(1) TEU.[42] At the time of this writing, a case is pending in which the Commission seeks an order declaring that Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) in the Treaty of the European Union and the second and third paragraphs of Article 267 in the Treaty on the Functioning of the European Union. These violations include: allowing the content of judicial decisions to be treated as a disciplinary offence so far as concerns judges of the ordinary courts; having such alleged offences be tried by a court that is not independent; and limiting, by the possibility of the initiation of disciplinary proceedings, the courts' right to refer questions for a preliminary ruling to the CJEU.[43] The marshal of the Polish senate asked the Venice commission to assess Poland's proposed changes to the laws regarding the Supreme Court and the National Council for the Judiciary, and the commission concluded that Poland should re-establish the independence of the National Council for the Judiciary and transform the (non-independent) disciplinary chamber of the Supreme Court to an ordinary chamber of that court.[44]

The CJEU's judgment in the LM case means that EU-member state national courts, including those in the Nordic countries Denmark, Sweden and Finland, may have to assess whether the independence of the judiciary in another member state is endangered, and if so, whether this could affect an individual who is to be surrendered to that state's judicial authority. The national court performing the assessment can request from the issuing judicial authority any supplementary information that it considers necessary in determining whether there is a risk that the individual will be dealt with by a compromised court.

The Supreme Court of Ireland was the first European supreme court to handle these difficult issues. The court criticised the way the CJEU required from it to do the assessment whether surrendering the individual to the Polish courts would put him at risk of not having a fair trial. The court held as follows:

> It should be said that the test posited in the judgment of the C.J.E.U. is not one that is easy to apply. Normally, it might be said that where systemic deficiencies of any kind are identified, it becomes unnecessary to identify the possibility of those deficiencies taking effect in an individual case. This is particularly so where the value concerns one that is essential to the functioning of the system of mutual trust. . . . It is also inescapable in the logic of the judgment of the C.J.E.U. that it is possible that there should be systemic deficiencies apparent at the level of the court before whom the individual is to be tried and, yet, for it to be determined that surrender should not be refused because it has not been established that those deficiencies will operate at the level of the individual case, having regard to the person charged, the offence with which he is charged, and the factual context which forms the basis of the European arrest warrant (para. 75 of the L.M. judgment).[45]

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[42]CJEU Judgment 24 June 2019, Case C-619/18 European Commission v. Republic of Poland (ECLI:EU:C:2019:531).

[43]Case C-791/19 Commission v. Poland. An interim decision was granted April 8, 2020.

[44]Opinion 16 January 2020 no. 977/2019, Sect. 9; https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)002-e.

[45]Minister for Justice & Equality v. Celmer, S:AP:IE:2018:000,181, Sect. 81.

It is, of course, extremely difficult to assess whether general changes in a court system have reached the point that there is a great enough risk that precisely the person to be surrendered will not receive a fair trial. As the Irish Supreme Court mentioned elsewhere in its decision, this is rather an issue to be tried in such cases as *Commission* v. *Poland* however 'extremely serious' and 'troubling'[46] the situation in Poland is. Notwithstanding, a German court, Oberlandesgericht Karlsruhe, has indeed decided against the surrender of a suspect to Poland because of doubts whether a fair trial will be granted there. This decision entailed the German court asking the Polish authorities detailed questions about the independence of their courts.[47] The fact that these issues are being addressed directly in this way, will hopefully persuade the Polish government (and others with similar policies) to respect judicial independence. These examples tend to reinforce the value of judicial independence, and the support thereof, in the Nordic countries.

This brings me to the question about the persuasive power of these judgments. A decision entered by an Irish or a German court is not a binding authority to a Nordic court, but such a decision may provide, thus far, the only available guidance for Danish, Finnish and Swedish courts to themselves try the independence of other national courts, as the Irish and German courts did the courts in Poland. The nature and extent, therefore, of the persuasive authority[48] of the Irish Supreme Court's judgment will be of critical importance going forward.

6 Case Law and Interpretation of Precedents in the Nordic Countries

The growing case law on constitutional matters in the Nordic countries raises the question: how are these cases to be interpreted? The literature has generally been scarce on the interpretation of precedents in the Nordic courts, and the courts have no generally used theories about *ratio decidendi, obiter dicta* or distinguishing. Also entering into this issue is the difference in the length and degree of detail found in Supreme Court judgments; whereas the Danish courts still give very short reasons for their judgments, the Norwegian Supreme Court has a tradition of lengthy opinions in a style more similar to judges' opinions in common-law courts.[49] Meanwhile, the Swedish Supreme Court has over the last decades transitioned from brevity to lengthier discussions on law and facts. This lack of definite standards, and the stylistic dissimilarities among the Nordic courts, has provoked discussions about how judgments should be interpreted.

The importance of court judgments as a source of law, whether and to what extent they are binding or how to understand their persuasive authority, has come

[46] Minister for Justice & Equality v. Celmer, S:AP:IE:2018:000,181, Sect. 87.

[47] Oberlandesgericht Karlsruhe, Beschluss vom 17.2.2020 – 301 AR 156/19.

[48] See Glenn (1987).

[49] Cf. Blume (1989).

under recent discussion, especially in Sweden. The background is that there has been no generally accepted method for interpreting precedents. Professor of private law Christina Ramberg has recently authored discussions on the Swedish Supreme Court's approach to the interpretation of precedents, especially as regards private law. Ramberg prescribed a method to identify and to apply the legal rule that follows from a precedent. In the first step, identifying the rule, she has enumerated three models—the rule model, the result model and the purpose model. These three models can be used for different types of precedents. The rule model identifies rules or principles explicitly used by the Supreme Court, for example, *pacta sunt servanda*. The result model relates to the facts of the case and the practical outcome based on those facts. Finally, the purpose model focuses on the court's balancing the reasons for and against different solutions. The next step, after identifying the legal rule through the method outlined above, and after determining a precedent's relevance or irrelevance, and whether there are reasons to overrule it, is to apply the rule. This entails ascertaining whether the facts in the precedent and the present case are similar or dissimilar, that is, whether the precedent should be followed or can be distinguished.[50]

The model Christina Ramberg suggests has provoked discussions about the interpretation of precedents in both Swedish criminal law and constitutional law. In criminal law, the interest of unity in the application of law has enjoyed particular importance, especially when accounting for the principle of legality. The judgments of the Supreme Court, therefore, are not only considered to have persuasive authority but also to be binding to some degree.[51] In constitutional law, however, many expert observers find the role of precedents to be less clear.[52]

In my view,[53] there is, as regards most precedents, reason to combine Ramberg's rule model and result model. Nordic courts often identify a rule or a principle to be applied to the case, and such rule or principle can sometimes be construed very broadly. I think, therefore, that the power of a precedent often becomes clearer if one keeps in mind the facts present in the case and the outcome. Only then can one see how the Supreme Court actually applied the rule or principle, and one can then analyse whether the present case is similar to or different from the precedent.

I further think that Christina Ramberg does well to single out the precedents where supreme courts engage in balancing the reasons for and against different solutions—what she calls the purpose model. It is my overall impression that this method is much used in Nordic constitutional cases wherein, for example, restrictions to the freedom of expression must be deemed necessary to a democratic society, or restrictions to the right to property must be found to be based on a public interest. These decisions often depend on balancing the reasons for restricting a right against the right itself. The historical basis for this type of reasoning can be found in the configuration of many ECHR articles.

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[50] Ramberg (2017).

[51] Borgeke and Månsson (2019) pp. 19–23.

[52] Nergelius (2017).

[53] Sunnqvist (2016).

Another principle that could be identified is that new obligations for citizens cannot be introduced through case law but instead require legislative support. This is a fundamental principle in Nordic law, embodied in the concept of *hjemmel* in Denmark and Norway and the 'principle of legality' in Sweden and Finland, and also extends beyond criminal law. It is an interesting question in its own right how far the courts' power to develop law through precedent might extend into areas of law which have not been covered by legislation.[54]

7 The Relationship Between the ECHR and National Constitutions in Nordic Case Law

Nordic supreme courts have acted differently regarding the relationship between similar constitutional rights preserved by international bodies like the ECHR and in their own national constitutions. The Norwegian Supreme Court seems not to hesitate to use distinct but nonetheless similar standards in parallel, including standards that are not legally binding.[55] By contrast, Danish lawyers are more keen to maintain a separation between the Danish constitution and the ECHR, apparently because the Danish constitution is extremely difficult to amend, which motivates the courts to avoid effectively amending it by interpreting it in light of the ECHR and the case law of the European Court of Human Rights.[56]

In two cases the Supreme Court of Sweden has tried to distinguish between the role of the ECHR as a treaty, on the one hand, and as incorporated into Swedish law as a statute, on the other.[57] Sweden is bound by the ECHR as a treaty, but that treaty-status does not make the ECHR directly applicable in Swedish courts. Therefore, the ECHR has been adopted verbatim into Swedish statutory law; there is also a section of the Swedish constitution forbidding the legislature to write laws that contravene the ECHR.[58]

The first of these two cases concerned an individual's right to compensation in the form of damages or leniency in punishments when court proceedings lasted too long and the right to a trial within reasonable time had been set aside.[59] The Supreme Court in its decision wrote that the ECHR has a 'double importance'.[60] As a treaty, the ECHR is relevant if the case concerns whether Swedish legislation or case law differs from the ECHR in such a manner that constitutes a breach of the treaty. This could be the case if an entire 'regime in Swedish law',[61] that is an established

[54] Lassahn (2017) pp. 18–32, 241–262.

[55] Skoghøy (2013), Kierulf (2018) pp. 255–257.

[56] Christensen (2011) pp. 254–257.

[57] NJA 2012 p. 1038 and NJA 2013 p. 502.

[58] Chap. 2 Sect. 19 Instrument of Government (*regeringsformen*).

[59] NJA 2012 p. 1038.

[60] NJA 2012 p. 1038 Sects. 13–16.

[61] NJA 2012 p. 1038 Sect. 14 ('*den svenska ordningen*').

set of rules or procedures, is contradictory to the ECHR and must be set aside or modified. If, however, a court is to decide a single case where a provision of the ECHR is relevant and a statute could be interpreted in conformity with the ECHR, it is not controversial that any court makes its own interpretation of the articles in the convention.

Professor of public law Hans-Gunnar Axberger has recently criticised this case law, arguing that it causes unclarity.[62] Indeed, as a judge, I believe that it is virtually impossible to differentiate between judging according to a rule in a treaty and to the same rule in a Swedish statute. But another point comes with the distinction: that the Supreme Court has itself distinguished between single cases wherein the articles in the convention can be brought with little controversy into discussion about the construction of a law and cases wherein an entire 'regime' in Swedish law called into question. Such a 'regime' could involve, for example, whether the Swedish system of tax surcharges is contravening the *ne bis in idem* principle in Article 4 of Protocol 7 to the convention.

The Supreme Court had to address exactly this problem in 2013. The Supreme Court clarified that its discussion about a 'regime', in contrast to a single case, did refer to precisely these more controversial issues of conformity between the ECHR and Swedish law.[63] The Supreme Court then outlined reasons for a certain degree of judicial restraint if a 'regime' of some dignity was to be found in contravention of the ECHR. The Supreme Court introduced four aspects for courts to consider:

1. The importance of the right in question,
2. The type of legislation affected,
3. Legal and practical consequences that will follow if the court sets aside the 'regime', and
4. Whether the legislature has had opportunities to adapt the Swedish law to the ECHR requirements.

The case must be viewed with an understanding that the Swedish 'regime' regarding tax surcharges had been controversial for a long time, and that the Supreme Court in an earlier case had taken a position of judicial restraint.[64] The earlier instance of judicial restraint can be explained by the lack of certainty at that time what the ECHR actually required,[65] though it is rather more difficult to explain the restraint that prevailed in another case in 2010 when the case law of the European Court of Human Rights was clearer.[66]

The Supreme Court found that the Swedish 'regime' of tax surcharges was to be set aside. Its main arguments did not relate in detail to the four aspects above since the CJEU had already set aside the Swedish 'regime' as regards the value-added

[62] Axberger (2018) pp. 771–777.

[63] NJA 2013 p. 502.

[64] NJA 2000 p. 622.

[65] Sunnqvist (2014b) pp. 390–393.

[66] NJA 2010 p. 168. Cf. the ECtHR judgments 10 February 2009 Zolotukhin v. Russia, appl. no. 14939/03, and 16 June 2009 Ruotsalainen v. Finland, appl. no. 13079/93.

tax, but as regards the third and fourth aspects, the court noted that the 'regime' was already partly set aside, which made the consequences of setting aside the rest of the 'regime' less interfering, and that the legislature had known since 2009 of the developing case law of the European Court of Human Rights concerning the *ne bis in idem* principle.[67] The court also noted that the *ne bis in idem* principle was protected both according to the ECHR and the EU Charter of Human Rights, and that the right ought to be equally treated in the two articles.[68] The Supreme Administrative Court reached the same conclusion as did the Supreme Court.[69]

We might better conceive this distinction drawn between a 'regime' and a single case by understanding the Supreme Court's need at the time of a vehicle to free itself from its own earlier restraint. In the 2012 case, the Supreme Court also held that when a court in a single case interprets the ECHR, it might do so in a way that gives wider rights to individuals than what follows from the Convention and the case law of the European Court of Human Rights.[70] Such construction permits courts to expand rights guaranteed under the ECHR, but not to restrict them.

Professor Axberger has criticised the view that influence of the European systems of human rights is always beneficial and instead champions the fundaments of the national legal systems.[71] I would counter that fundamental rules in national procedural law—which have their background in a common European legal culture from the Middle Ages onwards[72]—such as the right to a fair trial, have only gained importance through the case law concerning ECHR Art. 6. A dialogue within the judiciary and between judiciaries, and between courts and legislators, continues to develop these principles to the benefit of individual citizens.

A more nationally oriented body of case law built upon these common European principles can be seen in two recent cases decided by Sweden's Supreme Court. In the first, the Swedish Supreme Court invoked a new rule in the Swedish constitution about the right to a fair trial.[73] In the second, it interpreted the constitutional right to property in a new way.[74] In this latter case, the Supreme Court invoked a theory of proportionality brought into Swedish law through the Supreme Administrative Court[75] and with its origins on the continent, especially in German law. Without the influences from the European Court of Human Rights and the CJEU, this strengthening of our national constitutional rights would have been unlikely to occur.

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[67] NJA 2013 p. 502 Sect. 58.

[68] NJA 2013 p. 502 Sect. 59.

[69] HFD 2013 ref. 71.

[70] NJA 2012 p. 1038 Sect. 15.

[71] Axberger (2018) pp. 782–786.

[72] Brundage (2008).

[73] NJA 2015 p. 374.

[74] NJA 2018 p. 753.

[75] RÅ [Regeringsrättens årsbok] 1999 ref. 76.

8 Concluding Remarks

The legal developments I have summarised here show that the Nordic courts have taken a step forward, no longer simply applying the statutes provided by the legislature, but acting as independent institutions empowered to balance rights and interests according to both their national constitutions and to international charters of rights; they have articulated reasons for their assessments, reasons that can afterwards elicit discussion and interpretation and enter into dialogues on legal matters both in the international sphere and in other countries. What remains—as always, it seems—is to find the way to safeguard the independence of the courts in the future. The recent lessons from Poland and Hungary show, unfortunately, that edifices that might quite recently have been firmly established can with shocking rapidity be torn down.

In the EU, at least, the interaction between national courts and both international courts and courts of other nations shows that the attacks on independence of courts in one country quickly sparks reactions from the other member states. This, comfortingly, shows that the EU system and mutual recognition mean that a country cannot hide behind its national sovereignty, but must continue to respect the principles of rule of law and the *Rechtsstaat,* the independence of the judiciary, and the protection of human rights. We have accumulated enough historical experiences already to show us why we need these principles. Still, it remains unclear whether other countries' reactions will in fact be able to stop the deterioration of the rule of law and the *Rechtsstaat.*

The notion of persuasive authority discussed here gives reason to examine the historical experiences that remind us why protecting human rights, the rule of law and *Rechtsstaat,* and the independence of the judiciary, is necessary. The necessity to discuss these experiences seems to be growing today, and our desire to avoid a repetition of any abuses of these agreed upon ideals means that we lawyers have ahead of us a task that is complex and difficult but vitally important.

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