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Ordinary judges as constitutional judges: Norway

von

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Since 1986, Prof. Dr. Eivind Smith has been a Professor of Law at the Faculty of Law, University of Oslo. He is a member of the Norwegian Academy of Science and Letters. Smith was awarded an honorary doctorate degree by the University of Copenhagen, the University of Uppsala and the Aix-Marseille Université. Furthermore, Smith is Officer of the Ordre des Palmes Académiques. In 2012 he was anointed Knight of the Legion of Honour.

Der Beitrag beruht auf dem an der Universität Trier am 21. Januar 2019 im Rahmen eines Rechtspolitischen Kolloquiums frei gehaltenen Vortrag. Das Kolloquium war Teil der vierteiligen Ringvorlesung „Rechtsstaatsprinzip vs. Demokratie“.

Thanks a lot for the invitation to Trier and for your nice words of welcome to this talk about certain aspects of ordinary judges as constitutional judges. I will pay particular attention to Norway, but within the framework of a more general approach.

The lecture makes part of a series on “Rechtsstaatsprinzip versus Demokratie”. Both words refer to complex notions to which we adhere without necessarily agreeing about any possible aspect. At this occasion, I have no ambition to contribute substantially to the discussion on any of them. At the same time, I believe that they may provide useful lighthouses on our way to more particular issues and hope that you will find some traces of that if what follows.

In this series, you have heard a lecture about Greece, a country with no separate constitutional court, but with a specialised institution at the crossroads between the two “ordinary” supreme judicial instances. Other speakers have presented the full-fledged specialised constitutional courts of the Czech Republic and Spain. The last few years, the Spanish one has been particularly visible regarding its role on the way to the ongoing Catalonian crisis.

In Norway, there is a single-tired judicial system with a single supreme instance on its top and no constitutional court. The Supreme Court of Norway serves as the final instance in all fields of law. Insofar as a case gives raise to questions where norms of a constitutional rank are part of the arsenal needed for providing an answer, its powers include matters related to constitutional law. In such cases, its members act as constitutional judges. As we shall see, however, this does not make the Supreme Court itself a “constitutional court”.

The absence of a specialised constitutional court is common for the Scandinavian countries. For Sweden (and Finland), with two-tired judicial systems, this holds true even if a single final instance might be needed in cases where the two supreme

courts come to irreconcilable conclusions in matters of constitutional interest. Interestingly enough, however, no such situation has yet surfaced in practice.

In Norway, Denmark and Iceland, the presence of just one Supreme Court makes the situation in this respect somewhat simpler.

As a contribution to understanding why the absence of separate constitutional courts is not generally considered a problem, the distinction between a “Rechtsstaat” and a “Gesetzstaat” may prove useful. As Norway is a unitary state, we leave the complexities raising from federal systems of law aside.

In a hierarchal system of legal norms, you have the constitution on top (or at the basis, as rightly suggested by the word “Grundgesetz”, in Scandinavian: “grunnlov”). One of the characteristics of a genuine “Rechtsstaat” would be that the constitution counts as positive law in the sense of being applicable even by judges.

Simplifying a bit, the next level in the hierarchy consists of ordinary statutes. In a pure “Gesetzstaat”, statutory law would be at the highest level among those within the cognizance of the judiciary, provided – of course – that they are adopted according to the institutional and procedural norms laid down by the constitution. By the way, such a system corresponds perfectly with the overall comparative pattern before World War II.

A “Gesetzstaat” may well provide for a good society. In many respects, this fits to the Scandinavian states, that are best understood as political orders run by ordinary majorities by means of statutory law (and money). Norway and its neighbours regularly appear on the top of international rankings regarding welfare, human rights, freedom of expression and the like. In the sense that good societies require good institutions, it is

understood that such relative successes are built on the relevant constitutions. When it comes to substantive solutions, however, the present quality of these societies is not primarily due to constitutional norms or court action. Instead, it primarily stems from the political culture as manifested through a series of majority decisions coined by statutory law.

The judiciary may certainly provide useful supplements in the struggle for ensuring social stability, etc. within a system fulfilling basic requirements of the kind often referred to as “rettssikkerhet” or the rule of law. However, it is far from being the main actor when it comes to creating the substantive elements of a good society.

In this sense, Norway is primarily a “Gesetzstaat” patiently built by political will and political cultures. A high level of social trust provides one of its prime conditions: We tend to trust each other. To an extent that is far from evident in every part of the world, we even tend to trust the government.

However, the preceding observations do not completely elucidate the “Rechtsstaat” understood as a system where the constitution counts as positive law applicable even by courts. All three Scandinavian states now have systems of judicial review handled by ordinary courts with one Supreme Court as the last instance, as in Denmark and Norway (and Iceland), or with two supreme courts, as in Sweden (and Finland). However, the Norwegian “Rechtsstaat” has been around for 200 years. By contrast, judicial review of legislation was introduced in Denmark by jurisprudence a century later (in the early part of the 20th century), whereas the Swedish system emanates from constitutional amendment in the late 20th century.

When adopted in 1814, the Constitution actually constituted the modern state of Norway as opposed to the state that enjoyed its high tides in the Medieval Age. Unlike hundreds of constitutions adopted towards the end of the 18th and in the

early 19th century, it actually managed to establish a lasting state. Its key political institutions – the Supreme Court of Norway included – functioned throughout the period of 90 years within a kind of personal union with Sweden. In political terms, however, the split between the "united" kingdoms was considerable and steadily growing.

The constitution did not mention judicial review of the constitutionality of statutory law. The silence did not stay in the way, however, for the Supreme Court to behave as if such a power existed. In fact, it started to refer to the constitution in a way testifying about its status as positive law, a few years only after the adoption of the Constitution (around 1820). Some early cases even show that the Court actually used the constitution as a ground for not applying statutory law against private people. We may thus count the Norwegian system of judicial review of legislation as Europe's oldest.

Historically, the bourgeois constitutions of the 19th century were considered as political instruments regulating the relevant state apparatus, but not counting as positive law within the cognizance of judges. You could not call upon a judge for saying that a statute was inapplicable because it was against the constitution.

At the national level at least, the only counter-example before Norway was the Marbury v. Madison 1803 decision by the US Supreme Court. However, the verdict did not produce any significant practical effect before the system started to unfold after the Dred Scott case (1855) that, by upholding slavery, contributed to paving the way for the U.S. civil war.

In the meantime, the Norwegian system of judicial review emerged. The development in case law is even reflected in successive waves of public discussion over the Supreme Court's activity in the field of constitutional law, namely in the 1840s and 1860s. One of the consequences was the final

adoption, in the early 1860s, of a statute by which Parliament literally imposed that the members of the Supreme Court provide and make available the reasoning underpinning their decisions, dissenting opinions included. The purpose was to achieve more transparency (as we would now coin it) allowing increased possibilities for public control of the judicial institution.

A few years later (1866), the Supreme Court for the first time publicly exposed the existence of judicial review of legislation as a part of the Norwegian legal system. In essence, the majority of the judges, with the Court president as their principal spokesman, declared that insofar as they knew their constitutional law and former court practice, the constitutional norm should be preferred if both the Constitution and a irreconcilable statutory provision applied to the resolution of a case. Of course, the invocation of a hierarchy of legal norms comes close to the argument used by U.S. Chief Justice Marshall in the Marbury case. What both really did, however, was primarily to establish the constitution as positive law within legal systems where its text provided no support for a similar solution. Only when this step is accomplished, the hierarchical superiority of the constitution provides a decisive argument.

The state authorities' relative passivity in most of the 19th century heavily conditioned the further development of judicial review. In fact, they were far from adopting the kind of interventionist approach that most Europeans later have come to know. This created few opportunities for the judiciary to deal with cases featuring the constitutionality of statutory law. Little by little, however, the practice nevertheless developed, thus providing solid ground for what was to happen after Norway's unilateral break-up of the personal union with Sweden by a sort of coup in 1905 (luckily, the separation was consumed without warfare by virtue of a treaty concluded in the autumn of the same year).

Once the “union question” finally buried, Norwegian politics could fully turn to other matters. Questions about regulating old and new kinds of economic life (working conditions, the influx of foreign capital created by new possibilities of exploiting Norway’s extensive hydropower resources, etc.) came to the forefront. Of course, this stirred resistance and gave rise to a series of cases in which the Supreme Court frequently found the application of the relevant pieces of legislation unconstitutional. In the next turn, the judgments stirred political reactions. The kind of constitutional “activism” deployed in these cases contributed to shaping the outcome of a famous 1918 case where the majority in the Supreme Court concluded on the constitutionality of a statutory provision considered as particularly important. In its aftermath, the Supreme Court gradually showed less appetite for setting legislation aside on constitutional grounds.

In sum, thus, it is possible to see the some 15 years after 1905 as the Norwegian version of the admittedly more famous “New Deal fight” between U.S. President Roosevelt and the Supreme Court twenty years later.

Then came (as you know) the German occupation. After its end (1945), Norway entered a high tide of social democratic politics, influenced by a wide-reaching determination to reconstruct the society. During the first two or three decenniums of this period, the Supreme Court never intervened against a statute, not even in a few cases where quite a few of us think that an opposite conclusion would have be preferable.

To some extent at least, we may explain this rather reluctant attitude by the widespread adherence to an idea of democracy understood as majority rule with little leeway for the judiciary to call upon the constitution against statutory provisions adopted precisely by the majority in Parliament. Instead, the Court

sometimes preferred to let contested provisions pass by interpreting the constitution reductively.

In the beginning of the 1970s, however, a slight majority in Parliament adopted a statute with the aim of reducing the amount of compensation in cases of expropriation of private property. The key provision gave rise to a series of court cases concerning the question whether applying it would contradict the requirement of “full compensation” according to Article 105 of the constitution.

In the landmark 1976 judgment, the Supreme Court sitting in plenary found itself split in two opposing blocks of almost equal size. In essence, the majority said that making use of the limitation envisaged by the statutory reform would be unconstitutional. However, the contested provision was not formally set aside. Instead, the majority said that application would not raise constitutional problems insofar as the statute be understood and applied in the particular way indicated by the Supreme Court.

The interpretation was hard to defend in light of the wording and purpose of the statute, but necessary for defending the constitutionality of the statutory provision.

Recurring to constitution-conform interpretation allowed the Court to avoid a kind of open conflict to Parliament. Given the history of judicial review after 1918 (and 1945), we may sensibly suppose that this was the very purpose of this choice. The members of the Supreme Court of Norway were – and remain – ordinary judges appointed because they are considered skilful in penal law, civil procedure or other branches of “ordinary” law, not because they possess any particular knowledge of constitutional law or experience from the political arena. This particular case appeared in a climate still impregnated by the idea of democracy as majority rule. Why not suppose that it was

decided by judges that were still in some doubt about their own legitimacy to overturn majority decisions by Parliament?

We nevertheless tend to regard the 1976 decision as the starting point for the subsequent development of jurisprudence; after all, it ended by turning the key statutory provision down by substance. Later on, the climate has gradually but manifestly changed in a way making Norwegian judges more self-confident when exercising judicial review.

International influences provide one reasonable explanation. During many years, judges were generally reluctant to intervene against acts of Parliament on behalf of the constitution of Norway, even if that constitution is quite flexible in the sense of not too difficult to amend. At the same time, they were the more and more ready to intervene against national legislation on behalf of the European Convention on Human Rights. That combination gradually appeared as a paradox, however: If you have ideological concerns about calling upon your own constitution, how do you defend intervening on behalf of a treaty that Norway could not unilaterally change?

Next, the idea about fundamental rights grew steadily stronger even in a Scandinavia that had tended to think that human rights protection was more for “the others” than for these inherently good societies in North-Western Europe. Sometimes, the argument even went that favouring human rights provisions at home is not important in itself but worthwhile to establish examples for the world.

Concomitantly with national judges getting more and more familiarised with Strasbourg and Luxembourg based judges that review domestic legislation with no exorbitant concern for the “democratic legitimacy” of their action, such kinds of reasoning have pretty much faded away. Together, direct or indirect international influences have contributed to raise the self-confidence of Norwegian judges in general towards politics and

to re-familiarise them with the task of reviewing statutory law in the light of the constitution.

Three “big” cases decided in 2010 by the Supreme Court in plenary sittings largely contribute to comforting a similar impression. All of them built on the general non-retroactivity clause in Article 97 of the constitution. Two of them carried on statutory provisions adopted with only slight majorities in Parliament after harsh debates on their constitutionality, a rather uncommon feature in Norway. In the third case, an almost unanimous Parliament had adopted the relevant statutory provision.

The three cases have in common, however, explicit declarations that Parliament’s thorough consideration of the constitutional questions at stake did not suffice for making the statute constitutional. Acting under sharp dissent, the relevant majorities among the judges went on by saying that the contested provisions were clearly in violation of the Constitution. They did not, as in 1976, hide behind some form of constitution-conform interpretation of the statute. This happened even if the relevant cases were of considerable financial (the first and the second case) and/or principal importance.

The second case may reasonably be qualified as particular. It carried on one of the few parts of the constitution that stays un-amended since 1814, a provision establishing that what remains of the medieval church property (farms, forests, money …) should only be used to the benefit of the clergy and for education. In the course of the two centuries that had passed, however, a regime of state payment for clerics has taken over and an extensive system of public schools and universities is established. As the *raison d’être* of the constitutional clause had faded away, the government argued that parts of the landed property could be sold out to people that

had built their houses on rented ground on more beneficial conditions than what would otherwise have been the case. In the Supreme Court, a small minority accepted this argument and voted for a “creative” interpretation according to which the clause could no longer be applied. In essence, however, the huge majority said that beneficial selling out was against the constitution insofar as Parliament itself had not succeeded in amending the relevant clause accordingly.

The third case regarded non-retroactivity in a case about crimes of war and against humanity. As the parliament of Norway is very much against both, the legislative reform was politically uncontroversial. It nevertheless raised legal concern because the statutory amendment that introduced the above-mentioned qualifications in the penal code had been adopted with the intent of making itself applicable even on acts committed before the statute entered in force. In practice, the question appeared during the trial of a person who had taken part in given atrocities in the war in Yugoslavia in 1993 on behalf of the new penal clause. The Supreme Court found it clear that applying the clause in a similar situation would violate the ban on retroactivity.

In the ensuing debate, no one suggested that the Supreme Court acted in defence of war crimes and the like. The fact that the principal spokesperson for the majority enjoyed a high degree of legitimacy in the field of human rights probably helped at least some observers understand that the legal point was not about crimes of war, but about defending the constitution at a point crucial for the rule of law. A well noted author in the field, he had actually served several years as the president of the Rwanda tribunal (and later became a member of the Strasbourg Court for Norway).

Before moving further, a few words about the technical character of the Norwegian system of judicial review may be

useful. A comparison with patterns typical for specialised constitutional courts may be of some help: In Norway, the judiciary exercises review only *ex post,* in cases where the application of a statute already adopted opens some space for argument about the constitutionality of the relevant provisions. The review is of a concrete nature with no right to bring disputes over the constitutionality of statutory provisions as such to court (abstract review). It follows that formally, the verdict has binding effect only for the parties to the case, not *erga omnes.* If needed, it is for the law-making authorities to draw the necessary conclusions from the verdict by amending or abolishing the clause.

In Norway, however, Parliament will always accept a verdict by the Supreme Court and give the meaning of the relevant part of the constitution as spelled out by the Court, full effect by changing the law in accordance. In that sense, we could say that in practice, the judiciary in fact decides on constitutional matters with *erga omnes* effects.

The three above-mentioned 2010 decisions have contributed to confirming the Supreme Court as a much more open political actor than before. At the same time, the Court shows a growing willingness to cultivate its role as a court of precedent much more than as a mere appellate instance. If we understand the word as indicating landmark decisions the main legal message of which should be followed in subsequent, reasonably similar cases, establishing precedents is a common task for supreme judicial instances. However, the line sometimes is thin towards decisions in which the reasoning provides statements about general norms clearly beyond the needs had the Court satisfied itself with resolving the particular issue at stake.

Recurring to lengthy reasons intended to “solve” questions that do not really appear in the individual case, the Court inevitably enters the field of general law making. However, general law

making is a core political function. This qualification holds if the "law" developed by the judiciary belongs to the level of ordinary statute, i.e. norms that the majority in Parliament is free to amend. It becomes even more evident if the judge-made norms belong to the field of constitutional law: If taken seriously, such norms bind the successive majorities in Parliament in their ordinary law-making activity. They can be amended or quashed only by amending the constitution.

Who are these judges that use their status as members of the Supreme Court to undertake a more political role? As already indicated, ordinary judges in Norway act with powers that encompass any possible field of law. There is almost no intra-court specialisation; for instance, the system does not regard certain judges better suited for dealing with administrative law cases than other judges. The judiciary is simply organized on three different levels (local, appellate and supreme). Within each tribunal, the Supreme Court not exempted, the members circulate between different types of cases according to time priority or other methods with no bearing on the individual case.

Most cases never pass the two first levels. The Supreme Court has managed to bring its caseload down to less than 100 per year (of course the workload is higher for the formation charged with petitions and certain types of procedural questions).

Like any other permanent judge, its members are appointed by the King in council, an institution that now – politically speaking – means the government, whereas the king accepts and signs the government's proposals. The appointments take place upon advice from a consultative body dominated by judges and other legally trained members, advice that the government follows in nearly every case. In contrast to a current pattern during the system's formative period in the 19th century, contemporary members of the Supreme Court have no political experience whatsoever and intimate knowledge of constitutional law is not

required. The last former minister left the Supreme Court some 40 years ago, and the relevant circles now seem eagerly to cultivate the idea that the best Supreme Court judges would be those with no marked political opinion or affiliation.

This brings us back to the question about legitimacy: How may we defend a political role for a court staffed with legal-technical experts? In a country where most lawyers are happy with having other lawyers in the Supreme Court and tend to think that law has nothing to do with politics, while the political branches tend to leave the judicial system to the lawyers, that question is not easily raised.

To the extent that the Court takes upon itself at least some of the functions typical for specialised constitutional courts, like the German *Bundesverfassungsgericht*, it is nevertheless important to recall that such institutions have been constructed with a particular eye on decision-making in constitutional matters. For that reason, they are characterised by the presence of a strong proportion of members that have been openly political appointed. Unlike the all too famous system for appointing members of the U.S. Supreme Court, their design supposedly ensures a reasonable degree of political balance. The German system provides just one prominent example.

Such systems rest on the idea that if we want courts to intervene in politics, the task should be conferred upon people that enjoy a minimum of legitimacy from a political point of view. As every judge, they should enjoy complete independence, not acting as representatives of political parties. At the same time, however, their background should ensure a minimum of legitimacy as a (in the broad sense) political actor. If the combination might appear hard to achieve, experience nevertheless shows that a number of leading democracies have succeeded. In the next run, this is likely to enhance the court's latitude for decision-making in sensitive matters of a politico-constitutional

character, compared to the space legitimately enjoyed by ordinary judges.

As already mentioned, the government – i.e. an institution of an evidently political character – appoints all permanent members of the Norwegian judiciary. The appointment of the president of the Supreme Court takes place with no previous advice from the lawyer-dominated independent body. By contrast, that body will have preselected literally all the other members of the Court.

Leading members of the Norwegian judiciary nevertheless argue that this is insufficient for ensuring judicial independence. Instead, an independent body, preferably dominated by judges, ought to select the candidates in a way that completely determines the outcome. Among other things, they call upon resolution 12 (2010) of the Committee of Ministers of the Council of Europe on the independence of the judiciary. Insisting on its own applicability for any kind of judges, including judges with constitutional functions, it precisely recommends that a body dominated by judges should have the final word in matters of appointment. Should a political body, by virtue of the constitution, nevertheless possess the last word, its role should be a mere formality with no influence whatsoever on whom to appoint.

In essence, thus, the argument is about ensuring a sufficient level of independence of the judiciary by closing the appointment system even more into the world of jurists. Its proponents act at a time when nobody actually argues that the independence of the Norwegian judiciary is under threat. Instead, they rather tend to point to recent events in Poland or Hungary, insisting that we have to set the guards before similar things happen at home.

To the extent that we endorse such claims, we accept that the uncontested quest for judicial independence can only be

satisfied if the legal community has the last word about who should become judge.

I honestly think that this would not be a good system in general: Lawyers are human beings with personal and – more importantly – professional opinions about what is “good” or “bad” and about the proper role of the judiciary in a democratic society. Any system of co-optation tends to produce unhealthy sub-cultures badly suited for staffing institutions for authoritative decision-making in the society.

The claim for sheltering the judicial appointment system from political influences is further weakened if applied on courts and/or judges with important constitutional functions, as the Council of Europe would like us to do. In a situation where the Supreme Court shows growing appetite for taking upon a genuine political function like general law making, we cannot leave that argument unanswered.

We may highlight the point by asking if Germany should take the appointments to the Bundesverfassungsgericht away from the Bundestag and hand it over to a collegium of (other) jurists (or to the Court itself). To me, the very idea appears as ridiculous in many ways. It is certainly not by hazard that no country with constitutional courts seems to have followed the Council of Europe recommendation about isolating the appointment of constitutional judges from any kind of political influence.

Is leaving the control over the appointments to lawyers really a requirement for the independence of the judiciary? I firmly believe that the best answer is negative. Another example may enlighten the point: Late Justice Nino Scalia of the U.S. Supreme Court, a man that I happened to know, was controversial in many ways. As a person, he was a genuine conservative, a man I was far from agreeing with at any point. The pertinent point, however, is elsewhere: Did his appointment

by republican President Reagan and his confirmation by the U.S. Senate hamper his independence on the bench? To me, the answer seems evident: He was genuinely independent. His insistence on certain theoretical positions regarding legal interpretation, etc., was certainly not due to any feeling of debt to Reagan or gratitude to the political actors that allowed him to reach the judicial top.

A famous quotation from James Madison in the Federalist Papers claims that "the permanent tenure by which the appointments are held must soon destroy all sense of independence of the authority conferring them", may help further clarifying our thoughts. The dictum fits well with the idea that if you want to measure a person's independence, it is far less important to know from where you come than where you sit.

Most of us are disposed for doing the best in the position we currently occupy. A much more relevant question for those who – legitimately – are concerned with ensuring judicial independence would rather be which guarantees to provide for keeping judicial positions, a reasonable amount of money before and after retirement, etc. whatever the relevant judges decide.

Summing up, any judge with the ambition of intervening in the genuine political task of general law making should be selected with more than the need for legal-technical skills in mind. This idea has commanded the construction of numerous constitutional courts. The requirement applies even to constitutional judges in systems with no specialisation at this point.

The increasingly active approach to constitutional issues adopted by the Supreme Court of Norway thus creates a particular dilemma: How to combine the need for staffing an ordinary court with people charged with solving typical legal

intricacies with the kind of political legitimacy that political experience, preferably combined with some expertise in constitutional law, may provide. Several options are on the table. Complete isolation of the selection procedure from any kind of political influences is not among them.

Thank you for your attention.