CONSTITUTIONAL COURTS AS “POSITIVE LEGISLATORS” –  

NORWAY

by

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1. ON THE ORIGINES AND CHARACTER OF THE 
NORWEGIAN SYSTEM ORF JUDICIAL REVIEW

The Norwegian system of judicial review of the constitutionnality of legislative norms is the second oldest in the World. With no explicit basis in the Constitution of 1814 (still in existence and hence the second oldest still in existence in the World as well),¹ it grew by court practice since around 1820, the final decisions – mainly those of the Supreme Court – were systematically respected by the other constituted powers. Immediately after the Supreme Court judges were forced (by a 1863 statute) to vote individually while stating their reasons in public, the first case came (1866) where the reasons clearly expose the doctrinal basis of judicial review on which the activity of the judiciary (namely the Supreme Court itself) were based.

¹ The updated text may be found at http://www.stortinget.no/en/In-English/About-the-Storting/The-Constiution/The-Constitution/
In this way, the then President of the Court (Peder Lasson) could be regarded as a kind of Norwegian “John Marshall” – referring of course to the opinion of the Chief Justice in the famous 1803 case of the U.S. Supreme Court. But the 1866 verdict in the Wedel Jarlsberg case could not properly be qualified as Norway’s “Marbury v Madison”: Quite simply, judicial review had already been exercised during some 45 years ahead of 1866. The fact that this development took place under the coverage of professional secrecy (except, of course, for the formal conclusion) did not stand in the way for the outburst of sometimes vivid public debate over the issue – during the 1840s for instance.

A have written extensively on these issues in Norwegian, see i.a. my Høyesterett og folkestyret. Prøvingsretten overfor lover [The Supreme Court and the Democracy. Judicial review of legislation] (Oslo: Universitetsforlaget, 1993).


In French, more information and food for thought may be found i.a. in a number of my contributions in Annuaire International de Justice Constitutionnel (Paris: Economica).

Norway has a judiciary headed by a single supreme court. However, this has nothing to do with transplanting a one-headed judicial system from countries of common law inspiration (like the United States). To the contrary, National history suffices for explaining this part of the legal system: Quite simply, it was inherited from the system that developed under the – at least formally – absolute Danish-Norwegian monarchy that the 1814 Constitution brought to an end (as far as Norway is concerned). Later on, questions about adding a system of administrative courts and/or even a specialised constitutional court have never really managed to getting high on the agenda.

Why did the Norwegian judiciary – led by the new Supreme Court – start using the Constitution as positive law (from around 1820 already)? No single explanation seems at offer. A combination of factual elements may help us further, including:

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2 5 U.S. (1 Cranch) 137 (1803).
3 Judgment of 1 November 1866, reported in UfL VI (1866) p. 165 (Wedel Jarlsberg).
- the Constitution’s character as the founding document of the modern State of Norway (thus to some extent similar to the character of the US constitution),
- the existence of a clause (art. 94) maintaining “the currently applicable laws of the State” (from the times of the absolute monarchy) in force insofar as “they do not conflict with this Constitution”, thus inviting the judiciary to exercise a kind of judicial review,
- the title given to the Constitution (“Grunnlov”) inviting to regard it simply as a “law” (a statute, a gesetz), albeit with a higher dignity than ordinary statutes,
- unlike in so many other European countries, there has never been a formal “career system” for judges in Norway: Throughout history, most members of the Supreme Court have not come from a previous career in lower instances, but have rather been appointed directly to sit on that Court, and until quite recently, the presence of former (or sometimes even active) politicians was quite frequent,
- and (altogether) the high symbolic status that the Constitution soon gained as a prominent instrument in the struggle for complete independence.

In any case, the systemic outcome may be summarised the following way:

a) the Norwegian system of judicial review belongs to the family of “American” systems as opposed to the “European” model characterised by the existence of specialised constitutional courts,

b) review takes place in any case where constitutional norms intervene and need to being addressed in order to determine the legal answer to be given,

c) the review system is “decentralized” or “diffuse” in the sense that every court (and every judge) asked to decide upon a cause where constitutional issues are involved, will have to act as a “constitutional judge”,

d) review may take place in cases of any kind (civil, administrative, penal),

e) review operates only in individual cases (in concreto),

f) review takes places only ex post, that is to say after the contested provision has been set in force and has given rise to problems of a constitutional kind,
g) verdicts have formal effect only *inter partes*, for instance by not applying unconstitutional norms to the parties in the case, or – in other words –
h) the contested provision cannot be declared nul and void with *erga omnes* effect.

To (some of) these elements, modifications ought to be added:
a) of course, belonging to a “family” does not necessarily imply that the family members behave (functions) the same way,
b) meaning that the courts have the power and the obligation to take even the Constitution into account as positive law,
c) constitutional questions of some importance or complexity will normally be decided by the Supreme Court in the last instance by way of appeal (see art. 88 of the Constitution),
d) (no supplement needed),
e) it goes without saying that more than one part may act together,
f) of course, *ex post* verdicts may functions as *precedents* thus contributing to the determination of the outcome of future cases. More importantly in our context, however, the opinions of the court may give guidance regarding the appreciation of constitutional questions that it is still not necessary to decide upon,
g) even if the formal effect is limited to the parties to the case, the effectiveness of declarations of unconstitutionality (or application of the subconstitutional norm as construed in order not to enter into conflict with the constitution) in the Norwegian system is likely to come close to that following decisions with formal effect *erga omnes*; as a matter of fact, Norwegian public authorities have always conformed to court verdicts (even) when based upon constitutional norms,
h) (no supplement needed to the remarks *ad g*).

Read together, the former remarks explain why the Norwegian system of judicial review emerged so early in modern constitutional history and why it remains, by far, the most active and prominent among those nowadays operating (at least in principle) in the Scandinavian countries.
At the same time however, the “American” character of the system of judicial review, in combination with the “civil law” character of the Norwegian legal system, tends to limit the possibilities for (namely) the Supreme Court to act as a “positive legislator”, a question to which we will now turn.

II. THE SUPREME COURT OF NORWAY AS “POSITIVE LEGISLATOR”?

As already pointed out, the Norwegian system of judicial review of the constitutionality of legislative norms has no explicit basis in the text of the Constitution. Its existence as part of the constitutional system is nevertheless accepted på all (it goes without saying that some does not like it and that the way it is used sometimes opens up for criticism). It may quite simply be explained as the outcome of a most reasonable interpretation of art. 88 of the Constitution (stating that the Supreme Courts judges in the last instance) read in the light of nearly two Centuries of jurisprudence – accepted by the other constituted powers – making it clear that the constitutionality of legislative enactments makes part of the field in which the last word is left to the judiciary.4

From what has just been said, it follows that the Constitution contains no clauses on the specific powers of the judiciary in constitutional matters. As a matter of fact, the same goes for ordinary legislation.

Together, these two observations entail a third one: In Norway, the judiciary’s role as a constitutional judge must be exercised according to the ordinary mechanisme of procedural law, of which the norms regarding civil procedure are of the greatest practical importance. By the same token, it becomes clear that the possibilities of the Supreme Court to act as “positive legislator” are most limited indeed.

As already pointed out, the basic structure of the system imply that the judiciary will have to limit itself to reviewing the law applicable in individual cases. Under certain conditions, this cannot possibly be done without reviewing the relevant legal norm as such; that would be the situation when the party (or parties) to the case can claim to be in a legal

or factual situation considerably different to the “typical” situation for which the contested norm has been adopted. In this way, the conclusion would have some sort of *erga omnes* effect, not in theory but in practice as it appears in the biesecular tradition of Norway.

But this does not really mean that the judiciary departs from its main role as “negative legislator” (in the sense of Kelsen). Having recourse to one or the other of the different techniques available under ordinary procedural law, it may stop or redirect the course of the contested legal norm due to unconstitutionality (or in order to avoid having to conclude in such a way). In this way, it would even contribute to forming the future legal system by specifying certain limits that cannot be overcome without constitutional amendment (or – more practically – by choosing a different legislative road to a similar goal). But this is hardly different from any other function as a negative legislator.

To the concrete character of judicial review in the Norwegian system within a civil law system, the tradition of relatively modest (or “legal positivist” or – in the positive sense – “moderately activist”) style of constitutional interpretation of the Supreme Court of Norway contributes in the same direction. In the next turn, the underlying pattern regarding the prevailing Scandinavian concept of “democracy” tends to inducing a somewhat exaggerated “respect” not only for Parliament as an institution, but even for individual pieces of legislation. By the way, don’t forget that Norway is a unitary state in a way that forces the Supreme Court to oppose not first and foremost the “legislation” of federated entities (like mainly in the United States, for instance), but the legislative branch of government at National level itself.

In recent years only, this respect may appear as being challenged (even) from within the judiciary itself – probably not the least under the influences of international human rights as quite actively applied by the Norwegian Supreme Court. We may now be heading a phase where judicial review of the constitutionality of legislation regains a degree of unashamedness, on behalf of the judiciary, that has already been achieved in the field of review against international treaty-based human rights standards.

But there is little that makes us believe that the basic character of the review as one of “negative legislation” will disappear. The main exception seems to be the presence, since a number of years already, of a number of cases where the opinions of (members of) the Supreme Court engage into questions about the constitutionality of given legislative
provisions should that issue later be raised in court proceedings. Insofar as such statements are shared by the (majority of) the Court, we are faced with a kind of “positive legislation” – saying that “if the law is framed like x, it might not pass the text of constitutionality”.

By far the most well-known instance in this category in the jurisprudence of the Supreme Court of Norway, is the judgment reported in Norsk Retstidende (Rt.) 1980 p. 455 (Hoaas): In a case directly regarding other issues, the Court (in the words of the first voting judge, speaking for a unanimous Court) took the opportunity to state that if a case regarding the constitutionality of a legislative provision making the specialised “Labour Court” the last instance in a broad category of labour law affairs, that provision “might contradict Article 88 of the Constitution” (my translation). However, the Supreme Court never got an opportunity to decide upon that issue: Quite simply, the “signal” was understood and the statute changed correspondingly.

More than as an example of the Supreme Court acting as “positive legislator”, the 1980 Hoaas case represents a (rather tiny) category of cases where the Supreme Court has exercised a kind of *de facto* review *ex ante* within a system formally allowing review *ex post* only.

As an example of “positive legislation”, is is admittedly modest. But as an element of appreciation of the system of judicial review in existence in Norway it may nevertheless be worthwhile mentioning: Even if boasting of being one of the World’s two most ancient systems of judicial review, many newcomers have decidedly established themselves as more wide-reaching – and, in a certain sense, more daring – than the Norwegian as it appears close to two Centuries later.

By the same token, we may easily leave aside some of the most acute elements of the likely follow-up discussions about the phenomena referred to, at least since Edouard Lambert’s famous book of the 1920s – as a “gouvernement des juges”.