

New Trends in Scandinavian Constitutional Review

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1 Introduction

There are various ways of controlling the lawfulness of a legislative norm, in order to supervise and guarantee the effective implementation of superior norms. The process of selecting an institutional model for the enforcement of superior norms requires choosing between several conceptual distinctions, thus entailing different normative implications.² This article will focus on judicial control (as opposed to a political one)³ – and, more precisely, on judicial review of legislative acts in Scandinavia. Indeed, as Mauro Cappelletti put it, “[f]ew institutions reveal the temper of our times as clearly as judicial review of legislation”.⁴ Who gets to exercise it and, more importantly, how, to which effects and to what end, gives a good indication of a country’s conception of the separation of powers, the status of the Constitution and statutory law, as well as of *zeitgeist* permeating (the functioning of) a specific legal system.

A restrictive definition of judicial review of legislation will be favoured. The article will mainly focus on the control of constitutionality of legislation exercised by the Scandinavian courts, not on the control of conventionality. Indeed, both types of control were developed separately and are not necessarily concordant, even if they now seem to be following a path that might eventually result in a certain convergence. Constitutionality control or constitutional

2 Tusseau, Guillaume, *Les causes du choix d’un modèle de contrôle de constitutionnalité*, Jus politicum vol. 12, 2014.

3 See, e.g., Cappelletti, Mauro, *The Judicial Process in Comparative Perspective*, Clarendon Press, Oxford 1989.

4 Cappelletti, Mauro, *Judicial Review in Comparative Perspective*, California Law Review, vol. 58 (5), 1970, p. 1017.

(judicial) review may, in this article, be defined as the power exercised by a court to set aside or strike down a legislative act for incompatibility with the Constitution, while the conventionality review would have referred to the compatibility control of domestic legislation with conventional norms.⁵

One usually refers to the three Western Nordic “sisters” (Denmark, Norway and Iceland) and to the two Eastern Nordic “brothers” (Sweden and Finland). This article mainly covers the recent developments and trends affecting judicial review of legislation in Scandinavia, *a.k.a.* Denmark, Sweden and Norway,⁶ and will mainly be illustrated by the Scandinavian Supreme courts’ decisions.

The comparative method will provide an indispensable tool in the identification and analysis of the evolution patterns of judicial review of legislation in Scandinavia. In comparative constitutional law, one traditionally distinguishes between systems of concentrated (or centralised) judicial review and systems of diffuse (or decentralised) judicial review,⁷ putting the emphasis on who exercises judicial review. But Harvard Law professor Mark Tushnet prefers to distinguish systems of strong-form judicial review and systems of weak-form judicial review,⁸ thus putting the emphasis both on the way judicial review of legislation is performed and on its effects. All three Scandinavian countries provide an example of decentralised systems of constitutional justice, enabling the courts at all level to perform judicial review. And they all seem to share a *de jure* weak judicial review. These dichotomies will serve as a starting point for our analysis.

In a series of articles published in 2009 in a special issue of the Nordic Journal of Human Rights and focusing mainly (but not only) on the evolution of European judicial review, Nordic academics observed that the traditional “Nordic reluctance” towards judicial review was “under siege”.⁹ The purpose of this article is to assess whether, five years and several landmark judicial decisions and constitutional reforms later, some of the detected trends have been infirmed, confirmed or even supplemented by new ones in the three Scandinavian countries, whether they all follow, at their own pace, a similar evolutionary pattern for constitutional and European judicial review.

In order to understand whether there is nowadays an evolution – or even a “revolution” – in judicial attitudes towards constitutional review in

5 When exceptionally referring to conventionality review, the article will be limited to one of its subcategories: European judicial review, *i.e.* review of domestic legislative acts on the basis of the European Union (EU) Treaties and on the European Convention on Human Rights (ECHR), on the basis of judgments by, respectively, the European Court of the Justice (ECJ) and the European Court of Human Rights (ECtHR).

6 Although the cases of Iceland and Finland are extremely interesting and relevant, the barrier of language, *i.e.* the access to primary documentation, forces me to exclude them from my analysis.

7 Cappelletti, Mauro, *Judicial Review in Comparative Perspective*, California Law Review, vol. 58 (5), 1970, pp. 1017-10, p. 1033.

8 Tushnet, Mark, *Alternative Forms of Judicial Review*, 101 Michigan Law Review 2003, pp. 2781-2802.

9 Wind, Marlene, Andreas Føllesdal, *Nordic Reluctance towards Judicial Review under Siege*, Nordic Journal of Human Rights vol. 2, 2009, pp. 131-141.

Scandinavia, one has first to understand what the characteristics of the judicial review system in these countries initially are, and what factors explain the traditional reluctance to set a legislative norm aside. Such a point of departure will help identifying the deviances and the vectors of rupture, evolution or constraint triggering change, before one can conclude on the state of judicial review of legislation in Scandinavia per January 2015.

2 Some Short Remarks on the “Scandinavian” Tradition for Constitutional Review

To understand whether a change occurred and what direction it takes, one has to be aware of what the main characteristics of the Scandinavian system of judicial review traditionally are.

2.1 *Selected Similarities and Differences Between the Judicial Review Systems in the three Scandinavian Countries*

Norway has the longest tradition for judicial review amongst the countries studied. It was actually the second country worldwide, after the USA, to establish such a constitutional arrangement at the beginning of the nineteenth century. This system of judicial review belongs to the family of the “American” model, as opposed to the “European” one, characterised by the existence of specialised constitutional courts.¹⁰ Arguably, the Norwegian courts have exercised judicial review since the 1820s,¹¹ while the Danish courts have done so from the 1910s. In the 1920s, the Danish Supreme Court came close (by one vote) to declare a land reform law unconstitutional,¹² but it was not until 1999, with the *Tvind* judgment¹³, that the Court ruled for the first time on the unconstitutionality of a legislative provision. In Sweden, judicial review has scarcely been performed during the two thirds of the 20th century, even though it was constitutionalised in 1979.¹⁴ But the recently reformed Instrument of Government (IG) will probably change the game.

10 *See infra*.

11 It has been debated when the Norwegian Supreme court held, for the first time, that a law was unconstitutional because the premises were held secret until 1863. While the first case is that of “Wedel Jarlsberg” in 1866 (UfL. VI, p. 165), it is now assumed that there were already such cases in the 1820s and 1840s, not so long after the US Supreme court’s *Marbury v. Madison* in 1803. *See* Smith, Eivind, *Høyesterett og folkestyret. Prøvingsretten overfor lover*, Universitetsforlaget, Oslo 1993; Slagstad, Rune, *The Breakthrough of Judicial Review in the Norwegian System*, in *Constitutional Justice under Old Constitutions*, Eivind Smith (ed.), Kluwer Law International, The Hague 1995, pp. 81-111.

12 U. 1921.148 H (11 December 1920).

13 U. 1999.841 H (19 February 1999).

14 Prop. 1978/79: 195. *See* Åhman, Karin, *Normprövning. Domstols kontroll av svensk lags förenlighet med regeringsformen och europarätten 2000-2010*, Norstedts Juridik, Stockholm 2011, pp. 34-49.

2.1.1 The issue of the Legal Basis for Judicial Review in Scandinavia

Denmark and Norway have in common that their constitutional documents are silent on constitutional judicial review.¹⁵ There is no explicit legal basis for judicial review in both countries, but judicial review was developed by the courts themselves and in legal writings and is considered as firmly established constitutional customary law.

Whether the courts have the task to determine that the Storting has acted within constitutional bounds has been the source of some controversy in Norway. The principle of judicial review in Norway is said to have been established by “constitutional customary law” (a customary law that is supposed to have the same status as the Constitution itself, *i.e.* it can only be eliminated by a highly improbable amendment to the Constitution). The Constitution’s symbolic status, its character as founding document of the modern State Norway, the formal distinction between the Constitution (*grunnloven*, “basic law”) and the laws passed by the Storting,¹⁶ as well as the combined interpretation of articles 88 (“The Supreme Court pronounces judgments in the final instance. (...)”), 90 (“The judgments of the Supreme Court may in no case be appealed.”), and even the second sentence in the formerly § 94¹⁷ of the Constitution, read in the light of nearly two centuries of jurisprudence and public acceptance, could be understood as forming the implicit legal basis for judicial review in Norway.¹⁸ A constitutional proposal is currently pending in Norway that would enshrine, in the Constitution, the power and duty of the courts to review the constitutionality of legislative and administrative acts.¹⁹

As the Danish constitution does not mention whether the courts can overturn legislative acts, it has been debated in Danish legal theory whether the courts are able to do so.²⁰ However, by clearly setting aside a piece of legislation, the

15 However according to article 63 of the Danish Constitution, the courts can review all administrative decisions.

16 Smith, Eivind, *Constitutional courts as positive legislators*, in Brewer-Carias, Allan R. (ed.), *Constitutional Courts as Positive Legislators. A Comparative Law Study*, Cambridge University Press, New York 2011, p. 693-700.

17 “(...) the currently applicable laws of the State shall remain in force, provided they do not conflict with this Constitution or with such provisional ordinances as may be issued in the meantime (...)” (“(...) *Imidlertid blive Statens nu gjældende Love i Kraft, forsaavidt de ei stride imod denne Grundlov eller de provisoriske Anordninger, som imidlertid maatte udgives. (...)*”) – This provision (removed in 2014) seemed to invite the judiciary to perform some kind of judicial review. See Innst. 186 S (2013-2014) for the standing committee’s recommendations to the Storting *inter alia* on that subject matter.

18 Smith, Eivind, *Konstitusjonelt demokrati*, Fagbokforlaget, Bergen 2012, p. 192.

19 See the proposal for a new article 114, Dokument 12:30 (2011-2012), “www.stortinget.no/Global/pdf/Grunnlovsforslag/2011-2012/dok12-201112-030.pdf”. See also our developments *infra*.

20 Christensen, Jens Peter, Jørgen Albæk Jensen, Michael Hansen Jensen, *Dansk Statsret*, Jurist- og Økonomforbundets Forlag, København 2012, p. 233.

courts have assumed this right²¹ which has been accepted by the government as well as parliament, and is usually presented as a constitutional customary law.²²

By contrast, since the second wave of constitutional reforms in 1979,²³ the Swedish Instrument of Government contains an explicit provision on constitutional judicial review, amended in 2010: “If a court finds that a provision conflicts with a rule of fundamental law or other superior statute, the provision shall not be applied. The same applies if a procedure laid down in law has been disregarded in any important respect when the provision was made.” (Chap. 11, § 14).

2.1.2 The Mechanics of Judicial Review in Scandinavia

The mechanics of judicial review in Scandinavia are more or less identical.

The Scandinavian 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.

There are no constitutional courts in Scandinavia.²⁴ A diffuse system of judicial review has developed in Norway, Denmark, Sweden and Finland, where the judicial institutions are empowered to perform constitutional adjudicatory functions.²⁵ It is assumed that all ordinary courts in Scandinavia (every court and every judge) can review the constitutionality of a legislative act, with the supreme courts of each judicial system usually having the last word.

In Norway and Denmark, the control power is *de facto* concentrated in the Supreme Courts.²⁶ In Norway, constitutional issues of some importance or complexity will normally be decided by the Supreme Court in the last instance by way of appeal (see article 88 of the Constitution).

Since the constitutional reform of 2010 in Sweden, the task of performing constitutional review is now reserved solely to the courts (both general courts

21 See the implicit recognition by the Supreme Court of its judicial review power in two judgments of 11 December 1920 (U 1921. 148 H and U 1921. 153 H).

22 Christensen, Jens Peter, Jørgen Albæk Jensen, Michael Hansen Jensen, *Dansk Statsret*, Jurist- og Økonomforbundets Forlag, København 2012, p. 234.

23 Nergelius, Joakim, *Constitutional Law in Sweden*, Kluwer Law International, Alfen aan den Rijn 2011, § 295.

24 The article does not take into account “special institutions” such as the Norwegian “Constitutional court of the Realm”, also known as “Court of Impeachment” (*riksrett*).

25 Interestingly, a diffuse control is also the kind of control that the ECJ requires for monitoring the domestic compliance to EU law. See case 106/77 (*Simmenthal*), §§ 21-23.

26 Husa, Jaakko, *Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective*, *American Journal of Comparative Law* vol. 48, 2000, pp. 345-381, p. 377.

and general administrative courts) – and not to the “other public bodies” as was the case between 1979 and 2010.²⁷

Judicial review of legislation is performed *ex post facto, a posteriori*, in Scandinavia, i.e. when only after the legislative act has been set into force, and after its concrete application has given rise to problems of a constitutional kind. The obvious advantage of such a system is that “[t]he coherence of the legal order and, in particular, the norm hierarchy is hence preserved through control afterwards”.²⁸

Theoretically, there is no abstract judicial review in Scandinavia. The control occurs exclusively where there is a concrete, specific legal case or dispute pending where the legislative provision may be applied, e.g. where the decision taken will have a direct influence on the concrete case at hand and benefits one of the parties involved while it is disadvantageous for the other. “Allegations that a particular statute infringes the constitution are raised and resolved in the course of ongoing litigation, in other words, in the context of an ordinary lawsuit between two parties.”²⁹ Review may take place *in concreto* in individual cases of any kind, be they administrative, civil or penal, i.e. in connection with disputes between the private and the public sphere or between private parties, or criminal. Only then have the courts grounds to become involved. It is not possible to go to the courts on a general basis to determine whether a law is unconstitutional or how a specific constitutional provision is to be interpreted.

When, in the course of legal proceedings, a legislative norm is deemed unconstitutional, it is “set aside” or left unapplied in the case at hand.³⁰ The contested provision cannot be declared null and void with *erga omnes* effect, since the effects of a declaration of unconstitutionality are theoretically only *inter partes* (between the parties). The legal provision remains *de jure* valid

27 See the former version of Chapter 11, § 14 IG: “If a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision may not be applied. If the provision has been approved by the Riksdag or by the Government, however, it shall be waived only if the error is manifest”.

28 Husa, Jaakko, *Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective*, *American Journal of Comparative Law* vol. 48, 2000, pp. 345-381, p. 349. The article will not consider the other forms for control performed at earlier stages of the decisional process, *ex ante*, such as the so-called “judicial preview” performed by the Swedish Law Council (Council of Legislation, *lagrådet*) in relation to law proposals since 1909 (*cf.* Chapter 8, article 20 IG) or the fact that according to article 83 of the Norwegian Constitution, the Storting may obtain the opinion of the Supreme Court on legal issues, points of law (but it rarely takes advantage of this opportunity). In Denmark, as in Norway, there are two controls of the constitutionality of draft legislation (before it is voted by Parliament), made by the Ministry of Justice and the Folketing itself (See, e.g., § 16, stk. 3 of the Standing orders of the Danish Parliament (*Folketingets forretningsorden*): “*Lovforslag eller ændringsforslag, der strider mod grundloven, skal afvises.*”).

29 De Visser, Maartje, *Constitutional Review in Europe*, Hart Publishing, Oxford 2014, p. 94.

30 Alternatively, it has to be interpreted restrictively so as not to conflict with the Constitution.

law. None of the Scandinavian courts possesses the competency to invalidate laws enacted by parliament.

However, in Norway for example, the system of judicial review grew out by court practice and the final decisions (mainly those of the Supreme Court in this kind of cases) have systematically been respected by the Norwegian public authorities (even) when based upon constitutional norms. Moreover, since a Supreme Court's ruling acts as a precedent, and even though its decision formally applies only to a specific case, it will in reality have a general effect on all similar cases, the law will be amended if necessary and all the courts will have to follow the interpretation of the law affirmed or established by the Supreme Court's decision.

2.2 *A Tradition for Judicial Restraint*

Judicial review is a power seized by the courts but it has traditionally been exercised with great moderation, if not reticence, in Scandinavia. Andreas Føllesdal and Marlene Wind have described the Scandinavian courts' behaviour as "judicial reluctance".³¹ This observation is only partially true for Norway. Moreover, to be more exact, one should distinguish between the courts' attitude when performing judicial review on the basis of the Constitution, EU/EEA-law or ECHR.

2.2.1 *A Power Seized by the Courts*

The silence of the nineteenth century constitutions is quite in conformity with the European constitutional thinking of that period. In Norway and Denmark, judicial review has been seized by the courts, *i.e.* exercised without any explicit legal basis. And they have shown no particular reluctance in acknowledging the principle of judicial review – but its exercise is another story.

Norway has been described as the "European pioneer"³² of judicial review of legislation. Judicial review arose from the practice of the Norwegian Supreme Court, the *Høyesterett*.

In the (deliberate) silence of the Constitution,³³ and because of the peculiarity of two features of Danish constitutional law (the high rigidity of the Constitution and the low number of constitutional provisions³⁴ on the rights

31 Føllesdal, Andreas, Wind, Marlene, *Nordic Reluctance towards Judicial Review under Siege*, *Nordic Journal of Human Rights* vol. 27, 2009, p. 131.

32 Smith, Carsten, *Judicial review of parliamentary legislation: Norway as a European pioneer*, *Amicus Curiae*, issue 32, November 2000, pp. 11-13.

33 The concept of judicial review was so controversial that it had been considered, but eventually deliberately rejected, by the fathers of the Constitution in 1849.

34 Rytter, Jens Elo, Cedervall Lauta, Kristian, *Denmark. The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, FIDE report 2012, "www.fide2012.eu/index.php?doc_id=95".

and freedoms of the Danish citizens), the Danish courts assumed that they had the power to review the constitutionality of Denmark.

In Sweden, judicial review began to be considered as a power of the courts in the 1930s, but there still was suspicion and incertitude regarding this ability, especially as concerns review of legislation.³⁵ Judicial review of legislation was practiced without any explicit legal basis until it was constitutionalised (with several restrictions and after years of political jockeying), in Chapter 11, article 14 IG, when the Instrument of Government was amended in 1979.³⁶

2.2.2 A Traditional Judicial Reluctance to Perform Judicial Review of Legislation

That the existence of judicial review is acknowledged does not mean that it will be effectively exercised. With the exception of Norway between 1885 and 1935, the Scandinavian countries have shown strong judicial restraint and have only in rare occasions set a piece of legislation aside as a result of its unconstitutionality.³⁷ There are several common factors participating in explaining the Scandinavian judicial deference, even though there are also some “country-specific” reasons.

A crucial factor for understanding the traditional dynamics of Scandinavian judicial review is the parliament-centred conception of democracy in Scandinavia. Their strong, now all unicameral,³⁸ parliaments enjoy a central position in the countries’ constitutional system. As they are the supreme popularly elected bodies in their respective countries, parliaments are constitutionally preeminent, and are even presented as “sovereign” parliaments

35 According to professor Nergelius, it was not until 1964 (NJA 1964 p. 471) that judicial review of legislation was “accepted as a fact” by the courts (although the law was actually considered constitutional in the case at stake). - Nergelius, Joakim, *Constitutional Law in Sweden*, Kluwer Law International, Alfen aan den Rijn 2011, p. 117. See also Åhman, Karin, *Normprövning. Domstols kontroll av svensk lags förenlighet med regeringsformen och europarätten 2000-2010*, Norstedts Juridik, Stockholm 2011, p. 38. Judicial review of administrative action has been inherently acknowledged since 1909 when the Supreme Administrative Court was created.

36 The wording of the amendment reflects the court ruling in a 1951 judgment (NJA 1951 p. 39), which stated that judicial review should only be used in cases where “manifest error” has been demonstrated.

37 It should be kept in mind that the number of cases resulting into a legislative provision being set aside can be misleading: one should not forget that the judges can interpret the legislative provision in order to avoid a conflict of norms, and also that the existence of judicial review can have a preventive effect, in that the legislator will usually try to avoid a direct violation of the Constitution. See Smith, Eivind, *Pays scandinaves*, in *Le contrôle juridictionnel des lois*, Louis Favoreu, J.-A. Jolowicz (ed.), Economica, Paris 1986, p. 231.

38 The Danish Folketing became unicameral in 1953, the Swedish Riksdag, in 1971, and the Storting, in 2007 (with effect in 2009). But the Norwegian parliament was quasi-unicameral (“qualified unicameralism”) from the start, even though it was formally divided into two chambers, the Lagting and the Odelsting when dealing with legislative matters. See Nguyễn-Duy, Iris, *L’abolition du bicamérisme norvégien*, *Revue de droit public* vol. 3, 2008 (mai-juin), pp. 921-936.

in the Westminster-style, at least in the case of Norway.³⁹ The Scandinavian countries seem to have managed to embrace both the concept of separation of powers and of legislative supremacy, where parliament as sovereign, legitimate, law maker is considered as the ultimate source of law.⁴⁰ With such a legal-positivist statutory law system committed to majoritarian democracy, the exercise of constitutional review may be regarded as a counter-majoritarian difficulty. Judicial reluctance towards judicial review may indeed be explained by judicial activism being considered undemocratic.⁴¹

Partly because of the lack of constitutional provision on judicial review of legislation (until 1979 in the case of Sweden), the Scandinavian courts have, in practice, shown a great degree of restraint when reviewing legislation.

There is, moreover, no tradition of “going to court” and, in welfare states such as the Scandinavian ones, “faith in the state as a protective institution has been predominant.”⁴² This socio-political factor is common to the relatively homogenous Scandinavian countries: the welfare politics and measures should not be overlooked, the individual rights might be considered as less important than the common good for the whole community.

Another explanation, of the psychological kind, is that the judges try to avoid conflicts. The Danish judges hold such an attitude.⁴³ As professor

39 Kaare Strøm, Hanne Marthe Narud, Henry Valen, *A More Fragile Chain of Governance in Norway*, in *Norway in Transition*, Øyvind Østerud (ed.), Routledge, London 2007, pp. 77-102, p. 81; see also Eivind Smith, *Fra Eidsvold til Westminster? Om synet på grunnloven som politisk redskap*, in *Fakler om vitenskap om samfunn. Til Den polytekniske forenings 150-årsjubileum*, Trond Berg Eriksen, Eirik Newth, Stein Ringen, Eivind Smith (eds.), Gyldendal akademisk, Oslo 2002, pp. 146-207.

40 One should also recall the Danish politician and newspaper redactor Viggo Hørup’s famous rally cry in 1878 “no one above and no one next to the Folketing” (“*ingen over og ingen ved siden af Folketinget*”). It is explicit in the Swedish Instrument of Government that the Riksdag is considered as the “foremost representative of the people” (Chap. 1, article 4 IG) and enjoys a special legitimacy. Under article 49 of the Norwegian constitution of 1814, all legislative authority is exercised by the people through parliament, the Storting (with the participation of the Executive power, cf. §§ 77 fl. of the Constitution). Johan Sverdrup’s exclamation from 1872 “All power will be gathered in this hall” (“*all makt i denne sal*” / “*al Magt og Kraft samles her i denne Sal*”) is usually quoted to express the constitutional superiority of the Storting over the other powers.

41 Jens Elo Rytter summarizes it quite well: “Common to the constitutional tradition of the Nordic countries (...) there is an emphasis on the preferred position of Parliament in the constitutional power structure, based on its democratic mandate through elections. The courts have no similar democratic mandate and, therefore, the judicial review of legislation is either problematic in principle or should at least be kept within rather narrow limits.” – Rytter, Jens Elo, *Judicial review of legislation – Sustainable Strategy on the Enforcement of Basic Rights*, in *The Welfare State and Constitutionalism in the Nordic Countries*, M. Scheinin (ed.), Nordic Council of Ministers, Nord 2001, p. 138.

42 Rytter, Jens Elo, Marlene Wind, *In need of juristocracy? The silence of Denmark in the development of European legal norms*, I•CON vol. 9, 2011, pp. 470-504, p. 498.

43 As Mogen Munch explained: “It is rather in the nature of judges (...) to prefer a quiet life in the shade of trees to the exposed existence under the square sail on the foredeck of a frigate sailing through the sun, the rain and the storm - and perhaps even to the cannonade” (our translation). - Munch, Mogens, *Grænser for domstolenes virksomhed i civile sager*, Juristen vol. 71 (2), 1989, pp. 43-47, p. 45.

Marlene Wind puts it: “It would thus be correct to say that judicial review is a theoretical possibility in Denmark but not a practice and certainly not part of Denmark’s legal, political and democratic culture”.⁴⁴

More specifically, judicial restraint in Sweden is a fact, and it may be explained by multiple factors, such as the low public esteem enjoyed by the judiciary (traditionally not considered as a third branch of government). According to Per Henrik Lindblom, the fact that the Swedish courts have historically played a modest, if not marginal and “constrained” role, can be explained by “a mixture of political arguments for democracy, political principles about equality, a firm belief in state supervision and control instead of court actions, the existence of a great variety of alternative mechanisms for dispute resolution and behaviour modification, and, at least in the first half of this century, a well-grounded suspicion regarding the willingness of the courts and the judges to take an active part in the building of the social-democratic model of a welfare state. All this and probably much more (such as a strict positivistic attitude with only limited room for judicial law-making and, in East Scandinavia, political control) (...)”.⁴⁵

Moreover, the judiciary has traditionally not been considered as a real third power, because of the centralisation of the power of the State around the Monarch, the government and the ministries. The Swedish administrative authorities also enjoy a far greater autonomy than is granted to state bodies below the level of the ministries in the rest of Europe. The special place the parliament enjoys in the Swedish constitutional system also protects it in terms of control or judicial review.

One can also add to this list the explicit limitations that followed the (now former) requirement of “manifest error” in Chapter 11, article 14 IG,⁴⁶ the influential political statements made in some *travaux préparatoires* by, *inter alia*, the Constitutional Committee, on the necessity of judicial restraint in order to prevent the gradual undermining of the Swedish popular sovereignty and democracy, as well as the existence of judicial preview since 1909. Indeed, the existence of judicial preview – and the fact that it reduces the role of the courts to an advisory one (not binding) – is a factor diminishing the need for judicial review. As the judge at the Swedish Supreme Court of Administrative Law, Thomas Bull, explains: “A law that has passed the Law Council without any criticism on constitutional or human rights grounds, will rarely (if ever) be found unconstitutional in the case of judicial review.”⁴⁷ Furthermore, the threat of judicial review has proved more dissuasive than the actual use of it.

44 Wind, Marlene, *When Parliament Comes First – The Danish Concept of Democracy Meets the European Union*, Nordisk tidsskrift for menneskerettigheter vol. 27 (2), 2009, pp. 272-288, p. 285.

45 Lindblom, Per Henrik, *The Role of the Supreme Courts in Scandinavia*, Scandinavian Studies in Law vol. 39, 2000, pp. 325-366, p. 330.

46 A manifest error was required for a law to be set aside.

47 Bull, Thomas, *Judges without a Court - Judicial Preview in Sweden*, in *The Legal protection of Human Rights: Sceptical Essays*, Tom Campbell, K.D. Ewing, and Adam Tomkins (eds.), Oxford University Press, Oxford 2011, p. 407.

Another important factor is that, until 2010, judicial review was attributed to both the courts and other public authorities. According to Joakim Nergelius, this has probably contributed to diminishing the importance of judicial review, “since the public authorities will normally hesitate to engage themselves in such an activity, while the mentioning of them in the Article [14] does not contribute in giving the courts any real feeling that this is their own, important task, so to speak”.⁴⁸

Until the constitutional reform of 2010, there had to be an obvious, apparent conflict (and a manifest error) between a legislative and a constitutional provision for the former to be left unapplied.⁴⁹ Even in the new, rather ambiguous, provision on judicial review (chap. 11, art. 14 IG), it is explicitly specified that the exercise of judicial review must take into consideration popular sovereignty and the Constitution as *lex superior*: “(...) In the case of review of an act of law under paragraph one, particular attention must be paid to the fact that the Riksdag is the foremost representative of the people and that fundamental law takes precedence over other law”.

The Danish legal tradition provides a striking example of judicial restraint, at least in effectively striking down legislation. Professor Henrik Zahle compared the Danish power of judicial review to “a sword stuck by rust in its sheath”.

The fact that it is extremely difficult to amend the Danish Constitution of 1953 could have opened for the need for more judicial interpretation, but instead the courts remained in the shadow, as far as constitutional review is concerned. Indeed, the whole point with this revision procedure is to impede constitutional change and, *a fortiori*, intensive judicial review. As Jens Elo Rytter and Marlene Wind explain, the Danish judicial self-restraint is partly due to “a historical conception of democracy, where democracy essentially means majority rule and where judicial review is considered *undemocratic*, at least insofar as it moves beyond enforcing precise norms against *manifest* violations” (my emphasis).⁵⁰ Indeed, the fact that the Danish Supreme Court, in its judgment UfR 1921 p. 644, argued that the plaintiffs in the case had not proven the unconstitutionality of the legislation with “the certainty that was required” (*den sikkerhed som maatte kræves*), hints that this requirement can be related to that of “manifest” unconstitutionality in Sweden.

It should, however, be observed that this tendency of relatively “ongoing judicial deference” in Sweden and Denmark is not completely accurate in the case of Norway. The evolution of judicial review of legislation in Norway

48 Nergelius, Joakim, *Constitutional Law in Sweden*, Kluwer Law International, Alfen aan den Rijn 2011, p. 118.

49 Chapter 11, article 14 IG (old version): “If a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision may not be applied. If the provision has been approved by the Riksdag or by the Government, however, it shall be waived only if the error is manifest”.

50 Rytter, Jens Elo, Marlene Wind, *In need of juristocracy? The silence of Denmark in the development of European legal norms*, I•CON vol. 9, 2011, pp. 470-504, p. 498.

follows an “ebb and flow” pattern. There have been times when the Norwegian Supreme court proved very active in striking down legislation. The period from 1885 to 1935 (with a special emphasis on the period between 1909 and 1930) was one in which the Supreme Court struck down several laws which unconstitutionally interfered with property or economic liberty, in order to block some social and economic reforms.⁵¹ The resolute activism of the Norwegian Supreme Court when performing judicial review even triggered parliamentary debates on whether to abolish the institution of judicial review.⁵² There is also a famous doctrinal debate, back in the 1960s, which opposed the Norwegian constitutionalists Jens Arup Seip and Johs. Andenæs. Seip described judicial review as “a spanner in the wheels of democracy”, while Andenæs saw the Supreme Court as a guardian of the rights of the minority and of the individuals. The Supreme Court actually kept a “low profile” during this period and deemed a legislative provision unconstitutional only twice from the end of the Second World War until 1976: The 1976 Supreme Court decision in the *Kløfta* case⁵³ symbolises a “renaissance”⁵⁴ of judicial review in Norway and became a landmark decision.

3 Change-triggering Factors in Terms of Judicial Review of Legislation

A general observation may be made that applies, in various degrees, to all three Scandinavian countries: These last decades, the practice of performing judicial review seems to have been constantly evolving, from a traditionally and relatively weak model of judicial review to a (relatively) stronger one. The evolution is not revolutionary, it was more or less expected, as the experience of other European countries have paved the way, and as some elements in the Scandinavian tradition already pointed in that direction. It is nevertheless noticeable, as it follows an accelerating tendency towards more controlling “constitutional” judges.⁵⁵ Sweden and Norway seem to be experiencing that,

51 Helgadóttir, Ragnhildur, *The Influence of American Theories on Judicial Review in Nordic Constitutional Law*, M. Nijhoff, Leiden/Boston 2006, p. 11.

52 The constitutional proposals were rejected by the Storting’s Standing Committee on Scrutiny and Constitutional Affairs in 1923, and subsequently by the parliament with 106 to 33 votes. The same thing happened in 1932 and 1934. See Kierulf, Anine, *Taking Judicial Review Seriously. The Case of Norway*, PhD dissertation, Faculty of Law, University of Oslo, Oslo 2014, p. 197-206.

53 Rt. 1976, p. 1.

54 Smith, Eivind, *Høyesterett og folkestyret*, Universitetsforlaget, Oslo 1993, p. 245.

55 According to Mark Tushnet, “The mark of weak-form review is not that the scope of judicial review is narrow. Courts in weak-form systems have the power to evaluate all legislation to determine whether it is consistent with all of the constitution’s provisions without exception. Rather, the mark of weak-form review is that ordinary legislative majorities can displace judicial interpretations of the constitution in the relatively short run” [Tushnet, Mark, *Alternative Forms of Judicial Review*, Michigan Law Review vol. 101,

and they are slowly, but steadily, heading towards a medium-strong model of judicial review. Even in Denmark, where the weak-form theory of judicial review is still dominant, the Danish Supreme Court begins to show some signs of boldness (that may be enhanced, should a comprehensive revision of the Constitution someday take place), letting us presage similar, if somewhat slower, developments in the not so distant future in Denmark.

The evolution of Scandinavian judicial review of legislation rests on different types of factors that are, sometimes, inextricably intertwined and difficult to grasp. It is not easy to distinguish clearly between the factors and the way they influence, sometimes supplement, each other. Some of them are of “external” or “endogenous” (European, international) origin, some are mainly domestic, e.g. “internal”. This distinction is admittedly rather artificial and may not be the most satisfying one, as all these factors are more or less related, but it helps clarifying what caused a different approach to judicial review by the courts. The focus will mainly be put on legal and institutional factors.

3.1 *The Strengthening of the Constitution as Positive Law and Lex Superior*

As underlined earlier, the Scandinavian countries have a tradition for strong parliaments, judiciary deference and a somewhat lesser importance of the Constitutions as both a source of law and positive law. Yet, the recent years have shown a paradigmatic shift,⁵⁶ with the decline of the concept of parliamentary democracy to the benefit of that of constitutional democracy, where the concepts of rule of law⁵⁷ and of the Constitution as *lex superior* are

2003, pp. 2781-2802, 2786.], whereas in “strong-form judicial review, the courts have general authority to determine what the Constitution means” [*Ibid.*, p. 2784].

56 The shift has probably been triggered by the combined pressure from globalisation (mostly European integration and development of a worldwide protection of human rights) and the political evolution of the state powers. There has been an evolution from a Westminster-like conception of separation of powers (with a parliament elevated above the other branches of government) to a “Madisonian” one (characterised by a more balanced and evident separation of powers, by minimizing the power of parliament and increasing ex post control, for example) – if one adopts a political perspective. “[W]e found a growing convergence between these ideas [Madisonianism] and the structure of contemporary parliamentary democracies. We thus noted that a major cross-national trend seemed to ‘strengthen ex post controls and weaken ex ante screening devices’ (Strøm et al. 2003, 701). (...)” - See Torbjörn Bergman, Kaare Strøm (eds.), *The Madisonian Turn. Political Parties and Parliamentary Democracy in Nordic Europe*, University of Michigan Press, Ann Arbor, Michigan 2011, p. 13.

57 The newly revised (in 2012) article 2 of the Norwegian Constitution states that “(...) This Constitution shall ensure democracy, a state based on the rule of law and human rights”, while the new article 113 (adopted in 2014) reaffirms the principle of legality: “Infringement of the authorities against the individual must be founded on the law.”. Article 1 of the Swedish Instrument of Government declares that “(...) Public power is exercised under the law” and its article 3 enumerates the fundamental laws in Sweden: “The Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression are the fundamental laws of the Realm.”

central – and where the majority rule has to be continually balanced with the protection of fundamental rights.

Since constitutional review implies that the hierarchy of norms, with the Constitution at its apex, is respected and that the courts base their decisions on the constitutional text, it appears imperative that the Constitution is considered, respected and applied both as positive law and *lex superior*. In this respect, the revision of the Constitution may be considered as an important factor impacting on the evolution of the practice of constitutional review. Indeed, as the legal status of the Constitution is strengthened, the opportunity for the courts to perform constitutional review in a legitimate way, as “guardians of the Constitution”, is furthermore increased.

3.1.1 Constitutional Strengthening by Way of Constitutional Reforms

The adoption of a new Constitution or of constitutional amendments sets in motion new dynamics within a legal system, and may compel the domestic courts to “react” in a different manner than before.

The Swedish⁵⁸ and Norwegian Constitutions have all experienced a comprehensive “overhaul” in the past decades that can have impacted – and/or will probably have an impact on – the way the courts perform judicial review in these countries. On the contrary, the extreme rigidity (of the procedure of constitutional reform) of the Danish Constitution prevented any formal constitutional change during the last decades, even though, in October 2011, the Danish Government announced its will to start a political and public discussion about a general revision of the Constitution and to establish a Commission on the Constitution (*Grundlovskommisjon*).⁵⁹ The reform of the Danish Constitution is currently no longer planned, despite the fact that the Danish Bill of Rights has not been changed very much since 1849, regarding neither the substance of the individual rights, nor the number of rights contained.

The following constitutional changes can be said to have impacted on the “Scandinavian style” of judicial review, *i.e.* by precisising and extending the scope of judicial review: Norway has recently adopted a comprehensive revision of its Constitution, with an emphasis on a larger catalogue of rights,

58 More precisely, the Instrument of Government, in the case of Sweden. The Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression are the fundamental laws of the Realm, *cf.* Chapter 1, article 3 IG.

59 *See* the Danish Government’s platform, *Et Danmark, der står sammen* [A Denmark that stands together], The Prime Minister’s Office, København 2011, p. 61, “www.stm.dk/publikationer/Et_Danmark_der_staar_sammen_11/Regeringsgrundlag_okt_2011.pdf”. Maybe the celebration of the 100-anniversary of the former 1915-Constitution (which is considered to have turned Denmark into a real democracy) in 2015 will initiate new debates and even launch a well needed constitutional reform, including new provisions on judicial review? But, for now, a constitutional reform (or, more precisely, its absence) is not a factor impacting on the evolution of judicial review in Denmark. *Cf.* Krunke, Helle, *Recent constitutional revision debate in Denmark*, 2014, “constitutional-change.com/recent-constitutional-revision-debate-in-denmark/”.

while Sweden revised the Instrument of Government in 2010, amending key-provisions on the judiciary and judicial review that may have (already have, to a certain extent) a tremendous impact on the way constitutional review is performed in this country.

3.1.1.1 The Constitutional “Overhaul” of the Swedish Instrument of Government

On 24 November 2010, the Swedish parliament adopted a comprehensive revision of the Instrument of Government (with effect from 1st January 2011). The Instrument of Government was modernised and restructured. It now includes new or amended provisions *inter alia* on elections, Swedish parliamentarism, parliamentary control, judicial preview by Council on legislation and on the municipalities.⁶⁰

Already in the 1970s, when fundamental rights and freedoms were increased in number and scope, and strict conditions and threshold requirements were put in place to make it more difficult to limit them, judicial review took on greater significance in Sweden. The same may be expected now, since the provisions on fundamental rights and freedoms were also amended in 2010 in order to further strengthen and clarify protection of individuals against infringement upon their rights and freedoms.⁶¹

The revised chapter 11 IG is now exclusively dedicated to the judiciary and Chapter 11, article 14 IG, to judicial review.⁶² Significantly, the latter underlines, *inter alia*, in its final sentence, that “fundamental law takes precedence over other law”. These amendments were supposed to make it easier to determine whether new laws contravene the constitution (or the Charter of Fundamental Rights of the European Union).

This reform undoubtedly helped strengthen the Instrument of Government’s status and legitimacy, as well as the courts’ judicial power.⁶³

3.1.1.2 The Extension of the Catalogue of Rights in Norway

In Scandinavia, it is still in the area of human rights that judicial review of statutes is most significant.⁶⁴ This observation made in 1993 is still accurate today, especially now that the 200 year old Norwegian Constitution has undergone a comprehensive revision in 2014, *inter alia* in order to expand its

60 Cf., among others, Wilske, Olof, *Nyheter i den svenska regeringsformen m.m.*, Nordisk administrativt tidskrift, vol. 88(1), 2011, pp. 49-57.

61 See the Government’s Bill, *A reformed Constitution*, Govt. Bill 2009/10:80; SOU 2008:125, *En reformerad grundlag* (summary in English p. 37-52); Government offices of Sweden, *Amendments to the Constitution of Sweden*, “www.government.se/sb/d/12711/a/138927”. Note that, through the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, certain aspects of freedom of expression and information receive stronger and broader constitutional protection.

62 See our developments in section 3.2. *infra*.

63 See our developments in section 3.2. *infra*.

64 Cf. Smith, Eivind, *Høyesterett og folkestyret*, Universitetsforlaget, Oslo 1993, p. 47.

catalogue of rights.⁶⁵ As the Norwegian catalogue of rights is extended, so is the potentiality for the courts to intervene more often on this basis.⁶⁶

Some human rights and the rule of law were mentioned already by the Constitution in 1814,⁶⁷ and article 2 of the Constitution, amended in 2012, specifies that human rights are part of the State's core values, but the real novelty is the creation, on 13 May 2014, of a new chapter of the Norwegian Constitution (Chapter E), exclusively dedicated to human rights.⁶⁸ Several proposals on strengthening human rights were adopted. Some political and civil rights were unanimously adopted.⁶⁹ But the most important and potentially controversial new provision in Chapter E (in terms of scope and interpretation – but it is too soon to grasp the full extent and consequences of the reform) is probably the “opening” one, the new article 92,⁷⁰ according to which “[t]he *authorities of the State* shall respect and ensure human rights as they are expressed *in this Constitution* and in the treaties concerning human rights that are binding for Norway.” (my emphasis) Article 92⁷¹ thus binds all the authorities of State, the courts included: they now seem to have the duty to take into account the human rights provisions both in the Constitution and in

65 It had also been amended in 2012, with new provisions on the State's core values (*statens verdigrunnlag*, § 2) and on religion (*trossamfunn*, § 16).

66 Thanks to the “modernisation” of its language earlier in May 2014, the Norwegian Constitution of 1814 is finally understandable by non legal experts, by the people of Norway. As the access to the constitutional text in *bokmål* and *nynorsk* has been facilitated, so has been the possibility to rely on this source of law during legal proceedings, as it prescribes the rules of procedure to follow and the material limits that should not be trespassed.

67 Among these were freedom of expression, property rights, freedom from torture and the legality principle in criminal matters (no sentence without a legal basis). The right to vote was also included in the Constitution, though only for a limited part of the population, until the general right to vote was introduced for men in 1898 and for women in 1913.

68 On 6 May 2014, a full revision of the language of the Constitution was adopted, resulting in two equal Norwegian language versions of the Constitution – one in *bokmål* and one in *nynorsk*.

69 This includes equality before the law, the right to a fair trial, and prohibitions against the death penalty, torture and inhumane treatment. Prohibition against arbitrary detention, freedom of association and assembly, children's right to respect and to being heard are other examples of constitutionalised rights. Some rights proposals were more debated and deemed too controversial to be adopted, at least in their actual version, such as the right to health care, asylum and the recognition of the Sami as an indigenous people. Proposals to protect the right to life from the point of conception, and to have the family written into the Constitution as the fundamental unit, also failed to gain a majority. For a more detailed and academic account of the human rights reform, see Tverberg, Arnulf, *Ny vår for menneskerettighetene i Grunnloven?*, Lovdata 2014, “/ovdata.no/artikkel/ny_var_for_menneskerettighetene_i_grunnloven_/1437”.

70 This new provision replaces former article 110c of the Constitution and constitutes an obvious reinforcement of (or supplement to) article 2 of the Constitution (amended in 2012), where, however, the term “human rights” does not make any reference to international human rights treaties.

71 See also a comment on article 92 in Smith, Eivind, *Konstitusjonelt demokrati*, Fagbokforlaget, Bergen 2015, p. 159-160.

the treaties on human rights when they interpret and implement national legislation.

Initiated in 2009, the main purpose of the constitutional reform of 2014 was indeed to strengthen the constitutional protection of human rights, including the international ones. These new chapter and provisions extend significantly the judicial review power of the domestic courts as well as the content of the norms of references, although several codified rights are more of a symbolic and/or programmatic nature, even though it remains unclear what legal status international human rights are supposed to have in domestic law.

3.1.2 The Constitution in Recent Scandinavian Case-law

It is as important for the functioning of a democratic legal system as it is for the development of constitutional review by the judiciary, that the Constitution is recognised as positive law by the courts and is implemented as such. At least three recent judgments “stand out” in that respect.

3.1.2.1 Sweden

In Sweden, there are a limited number of judgements where judicial review has been performed and fewer where legislative provisions have been set aside as contrary to the constitution.⁷² Moreover, until 1995, the few Swedish courts’ decisions setting aside legislation were mainly based upon incompatibility with constitutional procedural rules about the legislation process. As Joakim Nergelius explains, “it seem clear that technical rules (...) have been easier for the courts to invoke against legislation that has not met certain formal requirements than material, crucial human rights rules like the ones in chapter 2 IG or in ECHR.”⁷³

Yet, the comprehensive Swedish constitutional reform of 2010 has resulted in a “renaissance”⁷⁴ of the Constitution in general, and the Instrument of Government, in particular: it seems to have been given a renewed significance, a stronger position in court practice quite rapidly (by comparison with the aftermath of the 1979 reform): it took nearly 10 years for the Swedish courts to refer to constitutional provisions after the constitutional reform in the 1970s, but it only took them a year and a half after the reform.⁷⁵ For Thomas Bull, the *manga* judgment (NJA 2012 p. 400) illustrates perfectly this shift experienced by (and in favour of) the IG: the Supreme Court chose to base the *Manga*

72 See Åhman, Karin, *Normprövning – Domstolskontroll av svensk lags förenlighet med Regeringsformen og Europarätten 2000-2010*, Norstedts Juridik, Stockholm 2011; Strömberg, Håkan, *Normprövning i nyare rättspraxis*, FT 1988, pp. 121-143.

73 Nergelius, Joakim, *Judicial Review in Swedish Law – A Critical Analysis*, Nordic Journal of Human Rights vol. 2, 2009, pp. 142-159, p. 148.

74 Bull, Thomas, *Regeringsformens renässans*, in Thomas Bull, Olle Lundin, Elisabeth Rynning (ed.), *Allmänt och enskilt – offentlig rätt i omvandling*. Festskrift till Lena Marcussen, Iustus Förlag, Uppsala 2013, p. 76.

75 *Ibid.*, p. 77.

judgment exclusively on the IG, rather than on the ECHR for the interpretation of Swedish criminal law provisions.⁷⁶

The conception of the Constitution as positive law and *lex superior*, setting limits to the powers of the state authorities, has been confirmed in a recent and much discussed judgment of the Swedish Supreme Court, NJA 2014 p. 323 (*Blake Pettersson*). In this decision, an individual has been awarded 100.000 SEK in damages for breach by the State of a right guaranteed by chapter 2, article 7 of the Constitution – here for unlawful loss of citizenship.⁷⁷ And, as remarks Joakim Nergelius, the Constitution has become a relevant legal source in the resolution of conflict of norms: “conflicts between the traditionally highly respected and hardly contested laws and norms of a higher dignity have become much more frequent than before and (...) it is no longer considered as strange to invoke the Constitution itself in legal proceedings – a fact that is undoubtedly important at least in Sweden”.⁷⁸

It is too soon to tell whether the number of cases has significantly increased, following the revision of the Swedish Constitution, but, according to professor Nergelius, important Supreme Court judgments such as NJA 2013 p. 502 and NJA 2014 p. 323 would not have been adopted without the constitutional reform.⁷⁹

3.1.2.2 Norway

In case of conflict between a legislative and a constitution provision, the Constitution comes first. That is, in a condensed way, the lesson to be learned from the Norwegian Supreme Court’s recent case law, particularly from the *Church Endowment* judgment (Rt. 2010 p. 535, herunder “*OVF*”):⁸⁰ the Storting’s assessment of the constitutional issue in the case was ignored and a somewhat “outdated” constitutional provision (§ 106) was applied respectfully by the judges. The reasoning of the minority of the Supreme Court in the *OVF* case was indeed dismissed, even though the second-to-vote, Justice Endresen, asserted that article 106 of the Constitution on church property “was out of date”

76 *Ibid.*, p. 76. On the manga judgment, *see* also our developments *infra*.

77 Under the Swedish Constitution, “[n]o Swedish citizen who is domiciled in the Realm or who has previously been domiciled in the Realm may be deprived of his or her citizenship” (Chap. 2, art. 7 IG). There is no distinction, in the Constitution, between citizenships that are obtained correctly and those obtained through error. Blake Pettersson was born in the USA to a British woman married to a Swedish man. After he arrived in Sweden and gained Swedish citizenship, it was revealed that the Swedish man was not the biological father, and that the biological father did not have Swedish citizenship. The Tax authority thus changed the nationality of Pettersson in their records (he was 17), and, because of that, he lost the opportunity to be an active citizen (to participate in one election and one referendum on the Euro, to participate in military service), as well as a professional carrier in the police. He regained his Swedish citizenship after nearly five years, based on a court order issued by the Supreme Administrative Court in 2006.

78 Nergelius, Joakim, *Constitutional Law in Sweden*, *op. cit.*, p. 122-123.

79 *See* our developments, *infra*.

80 Smith, Eivind, *Norway: Supreme Court strongly reaffirms supremacy of constitution by striking down controversial legislative provisions*, Public Law 2011, pp. 188-190, p. 190.

and that this provision could “not be used as an obstacle for the legislator” [at 235]. As long as a constitutional provision, however old or obsolete, is not amended, it remains valid and binding. This formalism contributes to legal certainty and stability.⁸¹ The Constitution is more than a symbol. It is a positive legal text (it has been positive law since the early nineteenth century, and has to be applied as such). It is a *lex superior* that must be respected by all, state powers included. If a constitutional provision stands in the way of a legislation, it has to be amended in the proper way (according to article 121 (former article 112) of the Constitution), before a law (as the one deemed unconstitutional by the Supreme Court in *OVF*) is passed. The Supreme Court’s ruling in the *OVF* case, confirming the stance already taken by the Supreme Court in the *Shipping tax* case (Rt. 2010 p. 143) earlier the same year, has demonstrated that it can be “formalist” when needed. Respect for the rule of law and for the hierarchy of norms, loyalty to the Constitution in particular, now seem to prime over respect for the will of the people expressed through the political majority in parliament in Norway. If the meaning of an entrenched constitutional provision is deemed by the courts sufficiently clear, it is the constituent power (the Parliament with a two-third majority) who has the constitutional duty to change it, if it is “in the way” of the parliament’s legislative acts.

3.1.2.3 Denmark

In Denmark, the main case (and, for now, the only case resulting in the unconstitutionality of a legislative provision) is undoubtedly the *Tvind* judgment of 1999 (U. 1999. 841H), where the Supreme court decided that a law (concerning the legal position of the Danish Free Schools, schools not founded by the State) violated the general principle of separation of powers guaranteed by Article 3 of the Constitution. The courts sent the message that the Parliament was not omnipotent, that it is bound by the Constitution, and that they were here to ensure that it respected it. Otherwise, they would take action, particularly when it comes to the protection of rights.

3.2 *The Judiciary: the Emergence of a Real “Third Power” in Scandinavia?*

Our thesis here is that an empowered and emboldened judiciary opens the path to more active constitutional review.

The status of the Scandinavian courts seems to have evolved quite drastically during the last decades. From relatively weak or discreet courts when performing constitutional review, they now seem to be standing “in the spotlights” much more often than before. They now seem to assert themselves as a real third power – and to be acknowledged as such. The constitutional

⁸¹ Nguyễn-Duy Iris, *The End of a Nordic Exception? Some Thoughts on the Sovereignty of the Norwegian Parliament*, paper presented at the IXth World Congress of Constitutional law, Oslo 2014, “www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws15/w15-nguyen-duy.pdf”.

reinforcement of the status of the judiciary in general and the constitutional entrenchment of judicial review partakes to this evolution.

3.2.1 The Constitutional Entrenchment of the Power of Judicial Review

Since constitutional review enables the enactments of an elected legislature to be set aside, it is all the more important that the power of judicial review appears legitimate or is, at least, acknowledged – and acknowledgeable – by all. The entrenchment of judicial review in the Constitution represents the codification of what constitutes a source of power, as the judicial power to review the constitutionality of law is given a formal constitutional basis.

3.2.1.1 Sweden

In Sweden, as pointed out earlier, the power of judicial review was codified during the constitutional reform of 1978. It was reformed again in 2010, with the status of the judiciary being clearly improved and the (scope of the) power of judicial review, redesigned at the expense of the legislator.

Since the comprehensive Swedish constitutional reform of 2010 (with effect from January 1, 2011), the task of performing judicial review is now reserved solely to the courts. They do not share this function with the “other public powers” anymore. This is reflected both in chapter 11, article 14 IG⁸² and in the title for the Chapter. Before 2010, the title of this chapter was “Administration of justice and general administration”, encompassing both the judiciary and the administration. There is now a clear distinction between the two, since the chapter solely refers to the “Administration of justice” and article 14 has now its own surtitle as well: “Judicial review”. These apparently small, structural, changes are thus not only formal but also suggest a deep reshaping of the Swedish legal system. Indeed, this separate chapter on the judiciary is meant “to highlight the special place occupied by the courts and the judges in the constitutional system”.⁸³

Chapter 11, article 14 IG was amended *inter alia* to remove the requirement of “manifest error” and to add a few *caveat*.⁸⁴ The courts may set legislation

82 An identical rule on judicial review of the public authorities’ acts now exists in Chapter 12, article 10 IG.

83 *The Constitution of Sweden. The Fundamental laws and the Riksdag Act*, Sveriges Riksdag, Stockholm 2012, p. 24. Available online at: “www.riksdagen.se/sv/Start/Bestall/Sprakversioner/English--engelska1/Sveriges-grundlagar-och-riksdagsordningen1/”.

84 The former article 14 was formulated in the following manner: “If a court *or other public body* finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision may not be applied. If the provision has been approved by the Riksdag or by the Government, however, it shall be waived *only if the error is manifest*.” (my emphasis) The new article 14 sounds like that: “If a court finds that a provision conflicts with a rule of fundamental law or other superior statute, the provision shall not be applied. The same applies if a procedure laid down in law has been disregarded in any important respect when the provision was made. / In the case of review of an act of law under paragraph one, *particular attention must be paid to the fact that the Riksdag is*

aside whenever it is contrary to the constitution, and not only when it is “evident” (manifest error) that there is a conflict between the legislative provision and the constitutional one. For professor Nergelius, it is however “unclear whether the courts have an obligation to exercise judicial review whenever they may find such a situation in a case before them – which would also force them actively to look for such possible conflicts of norms – or if they may do so only when the argument has been raised by the parties in a case.”⁸⁵ |

3.2.1.2 Norway

In Norway, the Constitution establishes the judiciary as a separate third branch of government. This is visible already from the architecture of the constitutional text, with a chapter D on the judiciary, as well as from the will to establish, and secure, free and independent courts with a new article 95 since the constitutional reform of May 2014.

The constitutionalisation of judicial review (after more than 180 years of practice) has also been recently proposed in Norway, and it has immediately raised attention and tension among the academics and jurists. Its examination by the Storting has finally been postponed to 2015.⁸⁶

Several formulations for a new article 114 have been suggested.⁸⁷ Some of them propose the insertion of a provision on judicial review under the chapter E on Human rights, thereby “limiting” its exercise to cases touching upon human rights. The others propose to place it under chapter D on the judiciary, thereby giving the courts a means to assert a general power of judicial review over any legislative provision or administrative decision.⁸⁸ The aim of the reform is not to change the established system of judicial review, but to enshrine it in the Constitution. According to the Storting’s Human Rights Commission, it would only “make visible in the Constitution the competence the courts already have”.⁸⁹ Some academics, such as professor Fredrik Sejersted, maintain that such a codification is no more than the codification of a constitutional customary law (*konstitusjonell sedvanerett*), and would thus not change anything.⁹⁰ Others are more critical.⁹¹

the foremost representative of the people and that fundamental law takes precedence over other law.” (my emphasis.)

85 Nergelius, Joakim, *Constitutional reform in Sweden. Some important remarks*, Tijdschrift voor Constitutioneel Recht 2013, pp. 372-379, p. 377.

86 The standing committee on scrutiny and constitutional affairs has until winter 2015 to submit its recommendations to the Storting on that matter.

87 See Grunnlovsforslag 30 (2011-2012); Dok.nr.12:30 (2011-2012), “www.stortinget.no/Global/pdf/Grunnlovsforslag/2011-2012/dok12-201112-030.pdf”.

88 See, however, the formal critics formulated by Eivind Smith in Smith, Eivind, *Konstitusjonelt demokrati*, 3rd ed., Fagbokforlaget, Bergen 2015, p. 306.

89 “*Dette vil ikke endre dagens rettstilstand, men synliggjøre i Grunnloven den kompetanse domstolene allerede er i besittelse av*” – Dok. 16 (2011-2012), Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven, p. 80.

90 Professors Eivind Smith and Inge Lorange Backer, as well as the now former ombudsman Arne Fliflet have all expressed concerns about the eventual codification of judicial review (as formulated in Dok. 12:30 (2011-2012)), fearing a transfer of power from the parliament

It is not the right time, nor the right place to speculate on the potential consequences of the adoption of either of the alternatives, but a constitutional codification of judicial review would probably strengthen further the courts, giving them more legitimacy and an incentive (if ever needed) to perform judicial review more actively, with the consequence of modifying the Norwegian constitutional landscape to a greater or lesser extent.

3.2.2 The Assertiveness of the Judiciary and its Acknowledgment as a Real “Third Power”

As implied earlier, the Constitutions and the courts share a common evolution. They are mutually reinforcing themselves. The Constitution sets the frame for the different branches of government and the courts ensure the respect of the Constitution (*inter alia* by the other state powers) by performing constitutional review. The tradition for weak, deferent judiciaries, remaining in the shadow of the almighty parliaments appears to retreat in Scandinavia. The Scandinavian courts can no longer be overlooked. They have all evolved, but at their own rhythm, from being a relatively marginal judiciary to one to be reckoned with, in democracies where the concept of the rule of law is now central. With the renewed frequency of their activity (and its content), they seem to assert themselves as real third branches of government, ready to exert their constitutional function and willing to perform judicial review whenever necessary. The response or, more precisely, the silence of the other state powers seems to represent a tacit acknowledgment of the judiciary’s status as a third power and of its power of constitutional review.

3.2.2.1 Sweden

The constitutional reform of 2010 has empowered the Swedish courts and may have emboldened them likewise. This is visible in the frequency and content of

to the courts. See, e.g., Fliflet, Arne, *Noen tanker om grunnlovsfesting av menneskerettighetene og domstolenes prøvingsrett*, Lov og rett 2012, pp. 129-130; Smith, Eivind, *Flere menneskerettigheter i grunnloven?*, Lov og rett 2012, pp. 323-338, p. 328fl., Smith, Eivind, *Konstitusjonelt demokrati*, Fagbokforlaget, Bergen 2015, p. 306. As professor Alf-Inge Jansen put it: “That it (...) should be ‘natural’ to constitutionalize judicial power – a celebration of the Supreme Court’s power and an undermining of democracy – is difficult to understand.” (“*At det (...) skulle være ‘naturlig’ å grunnlovsfeste domstolenes makt – en markering av Høyesteretts makt og en beskjæring av demokratiets, er vanskelig å forstå.*”) - Jansen, Alf-Inge, Nyhagen, Atle, *Demokrati eller domsmakt?*, Klassekampen, 22 May 2014.

91 Professor Eivind Smith is very critical about the wording of the reform proposal. Its adoption could have consequences for both legal practice and the current balance of powers between parliament and courts. “What the Supreme Court has done until now with its case-law is to consider in individual cases whether the application of a law was unconstitutional. But with this pending proposal, the parliament would allow the Supreme Court to put the entire statutory provision out of play. But this is a task for the legislator [not for the courts].” This would introduce a new constitutional tradition. - Brække, Jonas, *Advarer mot lovforlag*, Klassekampen 4 April 2014, “www.klassekampen.no/article/20140404/ARTICLE/140409984”. Professor Alf-Inge Jansen is afraid that the codification of judicial review by the Storting might create a new “platform that will provide enhanced opportunities for the Supreme Court (...) to defend its power and the potential to expand it.” - Jansen, Alf-Inge, Nyhagen, Atle, *Demokrati eller domsmakt?*, Klassekampen, 22 May 2014.

recent decisions.⁹² The president of the Court of Appeal of Svea, Fredrik Wersäll, acknowledges the emergence of a more “activist”, “offensive Supreme Court”, especially in the field of criminal law, and gives the examples of the narcotic judgments of 2011 and 2012,⁹³ as well as of NJA 2012 p. 400, NJA 2013 p. 502 and NJA 2013 p. 746.⁹⁴ The *Manga* judgment (NJA 2012 p. 400), already touched upon earlier, is indeed an example of a judgement where the Swedish Supreme Court asserts its position as a more active, less deferent, institution, exercising a nearly abstract judicial review.⁹⁵ The Supreme Court ruled that the restraint on the defendant’s freedom of expression would be too great if he were convicted for violation of the Swedish legislative provisions on child pornography and if the images were held to constitute child pornography. Interestingly, the Supreme Court could have reached the same verdict without rejecting part of this legislation as in violation with the Constitution, by following another line of reasoning.⁹⁶ We could infer from the court’s argumentation that there was thus a judicial will to make an express statement.

3.2.2.2 Norway

The Norwegian Supreme Court has evolved a lot these past few years. It can be argued that it functions as a *de facto* “constitutional court” when it seats *in plenum* and addresses cases where there is a possibility that a law may need to be set aside for its being contrary to the Constitution. It is a court with “will and power” (*vilje og kraft*), something it should not have (but obviously had), at least when it was established.⁹⁷

Because of the evolution and the complexity of today’s society, the workload of the legislator is heavier; the laws are broader, more general, less detailed.⁹⁸ The Supreme Court has had to step in more often, tipping the balance of powers off, in a different way than before. Consequently, there were heated discussions in Norway on the dangers of a “judicialisation of politics”

92 *See infra*.

93 NJA 2011 p. 357, p. 675 I and II, NJA 2012 p. 115, 144, 510 and 528.

94 Wersäll, Fredrik, *En offensiv Högsta domstol. Några reflektioner kring HD:s rättsbilning*, Svensk Jurist Tidning 2014, p. 1-8. But he does not deny that there are also several examples of judgments where the Supreme Court has been more prudent, adopting a more traditional position. See, however, a less enthusiastic position in Wiklund, Ola, *Om Högsta domstolens rättskapande verksamhet – löper domstolen amok?*, Svensk Jurist Tidning 2014, p. 335.

95 In this case, the Supreme Court overturned the conviction of (and thus acquitted) a manga translator on child pornography charges relating to manga data-files, and stated that “[t]he criminalization of possession of the drawings would otherwise exceed what is necessary with regard to the purpose which has led to the restriction on freedom of expression and freedom of information.”

96 *See* Axberger, Hans-Gunnar, *Mangamålet*, Juridisk Tidskrift vol. 13, 2012, pp. 893-900.

97 Professor Jørn Øyrehaugen Sunde, writer on a book on the evolution of the Norwegian Supreme Court during the last fifty years, interviewed in Gangnes, Ole Martin, *Skriver bok om Høyesterett*, Juristkontakt 8, 2014, p. 20.

98 This phenomenon has been amplified with the various international treaties the Scandinavian countries have ratified, *see infra*.

(*rettsliggjøring*) and of “court empowerment” following the critics and concerns formulated in the Power and Democracy study.⁹⁹

However, the fact that the Supreme Court judgments of 2010,¹⁰⁰ despite a very divided bench in the *Shipping tax* case and economically severe consequences for the Norwegian government (in the *Shipping tax* case and the *OVF* case), did not raise any critics or debates on judicial power to review legislation as such, shows that it is now completely embedded in the Norwegian legal system¹⁰¹ and in the mentalities.

3.2.2.3 Denmark

In Denmark, even though article 3 of the Constitutional act clearly states that “(...) [j]udicial authority shall be vested in the courts of justice”, judicial review by the courts has traditionally played a rather marginal role in the political development of the country. The scepticism surrounding the exercise of constitutional review of legislation since the Constitution of 1849, and also when the Constitution of 1953, was adopted, can explain why the courts kept a low profile in Denmark and were not particularly in the focus of the Danish Power and Democracy study of 2003.¹⁰² The Supreme Court traditionally played “its role as dispassionate arbiter of the law with deference and restrained reasoning as its method”.¹⁰³ Yet, even in Denmark, where the courts are the most deferent of Scandinavia, there appears to be a wave of change, especially since the *Maastricht* case of 12 August 1996¹⁰⁴ and 1998¹⁰⁵ on the constitutionality of the admission of Denmark to the EU, and since the *Tvind*

99 On the Norwegian Power and democracy study, see “www.oecd.org/norway/ 33800474.pdf”. NOU 2003:19, *Makt og demokrati. Slutt rapport fra Makt- og demokratiutredningen*, Arbeids- og administrasjonsdepartementet 2003, p. 30-32; Østerud, Øyvind, Per Selle, *Power and democracy in Norway: The transformation of Norwegian politics*, Scandinavian Political Studies vol. 29, 2006, p. 25-46.

100 The *Shipping Tax* case (Rt. 2010 p. 143), the *Norwegian Church Endowment (OVF)* case, 12 May 2010 (Rt. 2010 p. 535), the *War crimes* case, 3 December 2010 (Rt. 2010 p. 1445).

101 See, e.g., Smith, Eivind, *Norway: Supreme Court strongly reaffirms supremacy of constitution by striking down controversial legislative provisions*, Public Law 2011, pp. 188-190, p. 190; Smith, Eivind, *Hvem bør endre grunnloven? Randbemerkninger til plenumsdommen om Opplysningsvesenets Fond*, Lov og Rett 2010, p. 305-306.

102 Togeby, Lise, Jørgen Goul Andersen, Peter Munk Christiansen, Torben Beck Jørgensen & Signild Vallgård (eds.), *Magt og Demokrati i Danmark: Hovedresultater fra Magtudredningen*, Magtudredningen, Århus Universitetsforlag, Århus 2003. This contrasts with the conclusions of the Norwegian Power and Democracy Study. See *supra*.

103 Rógvi, Kári á, *West-Nordic Constitutional Judicial Review*, *op. cit.*, p. 188.

104 U 1996.1300 H: Admission of the Maastricht Ratification Case for a decision on the merits of the complainants' contentions. Before 12 August, 1996, Danish courts had never admitted a constitutional law class action for a judgment on its merits. - See Rasmussen, Hjalte, *Denmark's Maastricht ratification case: Some serious questions about constitutionality*, European Integration 1998, Vol 21, pp. 1-35 and *infra*.

105 UfR 1998 p. 800, see *infra*.

judgment of 1999 on the compatibility of a domestic legislation with the Constitution.

The overruling of the legislative act by the Supreme Court in the *Tvind* judgment was accepted without any reservation by the Danish Government and Parliament. This attitude shows the acceptance or recognition, by the other State powers, of the Danish judiciary's power to perform judicial review. It is even symbolic that it coincided with the 150th anniversary of the Danish Constitution, *Junigrundloven*.

Jens Peter Christensen designated the Danish courts explicitly as the “third branch of government” in the Danish Democracy and Power Study of 2003.¹⁰⁶ He underlined that their role as a third power has been “more prominent and visible during the recent years”¹⁰⁷ and that the political position on the legitimacy of judicial review evolved “from deep scepticism into something resembling enthusiastic approval”.¹⁰⁸ Ten years after this analysis, the *Lisbon* judgment (U 2013. 1451 H),¹⁰⁹ on the constitutionality of Denmark's ratification of the Lisbon Treaty, seems to confirm the path followed by the Danish Supreme Court and the political consensus on its power to review legislative acts.¹¹⁰ In this judgment, the Supreme Court, as it usually does, avoided to make a “political” decision by upholding the traditional relationship between the legislature and the courts and by leaving the task to the parliament and government instead. However, the Supreme Court sent a warning, in relation to indirect transfer of powers, showing its willingness to perform judicial review, if the political actors are not fulfilling their duties. The Supreme Court emphasized the courts' own right to review (*egen prøvelsesret*) as based, *inter alia*, on the *Maastricht*-criterion.

3.3 *Some Remarks on the Evolution of the Judicial Standards of Review and on the Intensity of Judicial Review*

The analysis of the intensity of the constitutionality control exercised by the courts is key to understand where their power of judicial review currently stands, in practice, and how (along which lines) it is evolving, as it varies from one country to the other and over time.

106 Christensen, Jens Peter, *Domstolene: den tredje statsmagt*, Magtudredningen, Aarhus 2003, p. 7, p. 11-32; Christensen, Jens Peter, *Højesteret og statsmagten*, in Højesteret 350 år, Per Magid, Torben Melchior, Jon Stokholm og Ditlev Tamm, Gyldendal 2011, pp. 211-308.

107 “*Domstolenes rolle som tredje statsmagt (...) er blevet mere fremtrædende og synlig gennem de senere år.*” - Christensen, Jens Peter, *Domstolene: den tredje statsmagt*, Magtudredningen, Aarhus 2003, p. 7.

108 “*Fra dyb skepsis til noget der ligner begejstret tilslutning.*” - Christensen, Jens Peter, *Domstolene: den tredje statsmagt*, Magtudredningen, Aarhus 2003, p. 8.

109 Danish Supreme Court, Case 199/2012, Decision of 20 February 2013.

110 See our developments *infra*.

As already inferred, the scope and intensity of the Scandinavian courts' control seems to be increasing – and their restraint, to be decreasing likewise, but always at their own individual rhythm, the Norwegian courts being the more active, the Danish, the less, and the Swedish being in a middle position.

3.3.1 Norway

In Norway, judicial review of legislation is considered to be “constitutional customary law” and has been practiced for nearly 200 years. In the recent years, the Norwegian Supreme Court seems to have intensified the practice of judicial review and lowered the threshold for review of parliamentary legislation.

While there have historically been relatively few decisions where legislative provisions have been openly set aside (*åpne tilsidesettelser*), *inter alia* thanks to the courts' privileged method to interpret the legislation in conformity with the Constitution (consistent interpretation or *grunnlovskonform tolkning*), their number has increased since 2007-2010.

Moreover, in the following judgments, Rt. 2007 p. 1308 (Ground lease III), Rt. 2010 p. 143 (Shipping tax), Rt. 2010 p. 535 (The Norwegian Church endowment, OVF) and Rt. 2010 p. 1445 (War crime), the Supreme Court stated that the constitutional violation was “clear” (*klar*) or “undisputable” (*utvilsom*). This quite drastic formulation might have been triggered by the facts in the case, but it might also reflect a new trend in Norway, according to which the courts are more confident in, and assertive of, their power of judicial review, more willing to impose their own interpretation over that of the legislator. Perhaps it announces a new kind of relationship, a new balance of power, between the judiciary and the legislator, that is also discernible in the evolution of the courts' position on the weight to be given to the Storting's assessment of the constitutional issue at stake.

In Norway, weight is traditionally put on the preparatory works (*travaux préparatoires*) in the control of constitutionality of the laws passed by Parliament, and interpretation is used as a medium, to help reduce eventual conflicts of prestige. The assessment, by the Storting, of the constitutional issues has traditionally been considered as a relevant, and even sometimes a decisive legal argument when assessing constitutionality – the general rule being that the courts have to be cautious, deferent, where the legislator has made a thorough assessment of the compatibility of legislation with the Constitution, while they have to intensify review if the legislator has not considered (thoroughly enough) the constitutionality issue in advance. When one looks at the 2010 judgments, it seems that this doctrine of giving weight to the Storting's interpretation is on the decline.¹¹¹ In the *Shipping tax case* (Rt. 2010 p. 143) and the *OVF case* (Rt. 2010 p. 535), both involving economic rights,¹¹² the Supreme Court stated that the governmental majority's reasoned statements about the statute's conformity with the Constitution were irrelevant. Because of the clarity of the unconstitutionality, there was no need to take into

111 Skoghøy, Edvin, *Forbud mot tilbakevirkende lovgivning*, Lov og rett 2011, p. 278-80.

112 On the court's position in the *War crimes case* of December 2010 (Rt. 2010 p. 1445), see § 91 of the judgment.

account the legislator's assessment of the constitutionality of the legislative provision.¹¹³ Such an assessment will be given a decisional weight by the courts, but only when there is a qualified doubt (*kvalifisert tvil*) on the constitutional interpretation (*grunnlovstolkning*).¹¹⁴ In the more recent, and controversial,¹¹⁵ *Volstad AS* judgment of 23 October 2013 (Rt. 2013 p. 1345),¹¹⁶ the first to vote, Justice Tønder, explained that he has “been in no doubt as to the result, and ha[s] therefore found no reason to examine the significance of the Storting's view of the constitutionality issue, which is consistent with [his]” [138] and “accordingly concluded that the 2007 Regulation is not in conflict with Article 97 of the Constitution, and that the Government's appeal must be upheld on this point” [139] (our translation). Here again, the Storting's assessment of the constitutionality of a legislative provision (*Stortingets syn*) was set aside, by both the majority and the minority of the Supreme Court, to the benefit of the “clarity” of the constitutional violation. The Supreme Court seems also to have acknowledged the legislator's needs for margin of action instead [131].¹¹⁷

Even if it remains difficult to make a definitive statement on the evolution of judicial review in Norway, the trends of an increased intensity of judicial review, not only in the economic field, but also in cases involving fundamental rights, freedoms, criminal law (e.g. *War Crime* case), and of a lesser weight put

113 In the *Shipping Tax* judgment, the first to vote, Justice Utgård, found it “difficult to give weight to the balancing of interests made by the Storting” [172] because the assessment was based on the wrong legal grounds. See Solheim, Stig H., *Domstolskontroll med lover på det økonomiske området*, Tidsskrift for rettsvitenskap vol. 127, 2014, pp. 1-48, p. 12-5; Fliflet, Arne, *Noen tanker om grunnlovstolkning i en ny tid*, Jussens venner 2013, p. 140-155, p. 146; Høgberg, Benedikte Moltumyr, *Grunnloven § 97 etter plenumsdommen i Rt. 2010 s. 143 (rederiskattdommen)*, Tidsskrift for rettsvitenskap 2010, p. 694-744, p. 729 fl.

114 In addition to confirming the *lex superior* status of the Norwegian Constitution by their setting aside legislation, these three landmark judgments of 2010 show that the Norwegian Supreme court has become bolder in performing judicial review.

115 9 justices found in favour of the State, while 8 were of the opinion that article 97 had been infringed. The bench was divided on which perspective on the (non-)retroactivity of legislation should apply in the issue at stake: Was it a case of “actual retroactive effect” (*egentlig tilbakevirkning*) or “no (real) retroactive effect” (*uegentlig tilbakevirkning*)? In the first case-scenario, supported by the minority of the Supreme Court, only “strong social considerations” (*sterke samfunnsmessige hensyn*) could justify retroactivity. In the second case-scenario, favoured by the majority of the Supreme Court, the retroactivity had to be “particularly” (*særlig*) or “clearly” (*klart*) “unreasonable or unfair” (*urimelig eller urettferdig*) to be considered in violation of article 97 of the Constitution.

116 In the *Voldstad* judgment, a regulation, not a piece of legislation, is at stake. However, the court did not seem willing to distinguish between judicial review of an administrative act with judicial review of legislation in its argumentation. The question was whether the time limit in section 7 subsection 1 of Amendment Regulation from 2007 relating to the structural quota system etc. for the deep-sea fishing fleet – the Structural Quota Regulation, was contrary to article 97 of the Constitution prohibiting the retroactivity of the law. The Supreme Court, with a very short majority, found in favour of the State.

117 At the same time, according to Stig Solheim, the intensity of judicial review, in the economic field at least, is perhaps more moderate than it was in 2010. - Solheim, Stig H., *Domstolskontroll med lover på det økonomiske området*, *op. cit.*, p. 22.

on the Storting's assessment of the constitutionality (especially in cases where a core right is at stake), seem to be confirmed.¹¹⁸ There are now less and less issues in which the Supreme Court does not seem ready and willing to perform judicial review.¹¹⁹ The scope of judicial review has seemingly increased during the past decade in Norway.

3.3.2 Sweden

The preparatory works of the 2010 constitutional reform in Sweden confirm the reformers' will to reinforce the power of judicial review (as seen above) and reveal their insistence on a more intense control than before, especially in the field of fundamental rights and freedoms:¹²⁰ “[It is] of significant importance that the constitutional provisions are fully implemented”¹²¹ The same preparatory works reveal, however, that the courts will be expected to show more deference and restraint concerning the relationship between the state powers¹²² - raising the issue of different, differentiated, standards for judicial review (perhaps aligned on the Norwegian “model”).

The removal of the requirement of “manifest error” has probably opened new possibilities for the Swedish courts in terms of judicial review even though it is too soon to assess what all the practical consequences the removal of the requirement of manifest error will have for Swedish law. Yet it is a fact that the exercise of judicial review in Sweden has increased in the recent years,¹²³ but its development is still more visible in relation with EU-law and human rights.¹²⁴

3.3.3 Denmark

Even in Denmark, where the evolution is comparatively slower, there has been a relative, but real, change in the Supreme Court's approach and techniques,

118 Solheim, Stig H., *Domstolskontroll med lover på det økonomiske området*, *op.cit.*, p.41-2.

119 The Supreme Court remains seemingly more deferent when the relationships between the state powers are at stake (e.g. concerning the third category in the “sliding scale” (*glideskala, tredeling*) developed since the Kløfta case of 1976). See, among others, the TV Vest judgment (Rt. 2004 p. 1737) applying this “sliding scale”.

120 The Swedes have however rejected a concentrated form of judicial review involving the creation of a specific, separate organ or instance. - SOU 2008: 125, p. 382.

121 “Lagprövningen utgör en betydelsefull beståndsdel i ett normkontrollsystem då det av olika anledningar, trots förhandskontroll, kan uppkomma frågor om förenligheten mellan en lag och grundlag. (...) Ett område där möjligheten till lagprövning framstår som särskilt angelägen rör visa centrala delar av fri- och rättighetsregleringen i 2 kap. regeringsformen. Här är det av särskild betydelse att grundlagens regler fullt ut får genomslag i rättstillämpningen.” (our emphasis) - SOU 2008: 125, *En reformerad grundlag*, p. 380. See also Prop. 2009/10:80, p. 147.

122 “På andra områden, t.ex. statsorganens arbetssätt och funktionsuppdelning, framstår det däremot som motiverat med ett mer begränsat utnyttjande av möjligheten till lagprövning.” - SOU 2008: 125, p. 381.

123 Nergelius, Joakim, *Judicial Review in Swedish Law – A Critical Analysis*, *Nordic Journal of Human Rights* vol. 2, 2009, pp. 142-159.

124 See our developments, *infra*.

and even some signs of the courts' readiness to perform judicial review whenever necessary. While the *Tvind* judgment (UfR.1999.841H)¹²⁵ remains the only example of a case where a piece of legislation was set aside by the Danish Supreme Court, the Danish courts have shown a more open attitude towards judicial review in general and have reaffirmed their general competence in the field.

In *Tvind*, the Supreme Court's reasoning was based on a clash between legislation and the constitutional division of power found in article 3 of the Constitutional Act. The Supreme Court gives its reading of the principle of division of powers and showed it was prepared to ignore the doctrine of certainty ("*sikkerhedsdoktrinen*"), according to which a legislative act can only be set aside if the constitutional violation "is stated with certainty", and to proceed to a more intensive review whenever it deems it necessary. The judgment *A & C v. Denmark* (UfR.2006.1149H) clarified certain aspects of *Tvind* and showed that "the Supreme Court is starting to refer explicitly to its own case law and is asserting its view that the Basic Law endorses judicial review", on the one hand, and that its judgment "forces Parliament to state its intentions as enforceable and reviewable statutory provisions not as delegation of the legislative to ministers and agencies".¹²⁶ For Jens Peter Christensen, Jørgen Aalbæk Jensen and Michael Hansen Jensen, recent Danish case law shows that the "doctrine of certainty" still plays a role in issues on expropriation, but seems now to "retreat".¹²⁷

The Danish Supreme Court seems to have developed "differentiated judicial review" (*differentieret domstolsprøvelse*), resulting in a difference in the intensity of the control, depending on the matter at stake: the courts will undertake a particularly intensive review of the legislative acts' compatibility with constitutional political rights and freedoms, as well as with other fundamental individual rights, while the review of the constitutionality of a legislative act with article 73 of the Constitution should be subjected to a cautious, restrained, control by the courts (*Almen-Bolig* case, U 2008.378 H).¹²⁸ Amongst those advocating or recognising it, as well as a more active role played by the courts, one can count former Supreme Court presidents Niels Pontoppidan,¹²⁹ Torben Melchior¹³⁰ and Supreme Court Justice Jens

125 *Veddinge Bakker v. Denmark (Tvind)*.

126 Rógvi, Kári á, *West-Nordic Constitutional Judicial Review*, *op. cit.*, p. 224, 225.

127 Christensen, Jens Peter, Jørgen Aalbæk Jensen, Michael Hansen Jensen, *Dansk Statsret*, Jurist- og Økonomforbundets Forlag, København 2012, p. 252.

128 Jensen, Esben Lyshøj, *Intensiteten i domstolsprøvelsen af loves grundlovsmæssighed*, *Rettid* 2013, Specialeafhandling 17, p. 34.

129 Interview with Niels Pontoppidan, *Weekendavisen*, 28 June 1996.

130 Melchior, Torben, *Maastricht, Tvind ... og hvad så?*, In *Hyldestskrift til Jørgen Nørgaard*, 2003, p. 218-219.

Peter Christensen.¹³¹ There is general political support for the evolution of judicial review in Denmark.¹³²

One can also observe the progressive broadening (or relaxation) of the notion of legal standing (*locus standi*) in Denmark, as the Supreme Court in several occasions (the Maastricht case being the first to stand out), interpreted the procedural criteria comprehensively and innovatively.¹³³ It opens for (increases) the possibility, for the courts, to have to review more cases.¹³⁴ In Danish law, the right to bring an action to court is reserved to those who have specific legal interests in the case at stake (the plaintiff must have a substantial and individual interest in the outcome of the case, a concrete and actual interest), as the Danish courts do not perform abstract constitutional review and traditionally refuse to admit a case based on general interest. However, the changing conditions of admissibility show a progressive evolution of the control performed by the Danish courts, showing a relaxation in the judges' attitude, as well as hinting a move in the direction of more "indirect" – if not "abstract" – control, as the examination of the substance of a case is linked to the procedural aspects of the case (its admissibility). In 1973 (U 1973.694 H), the Supreme Court ruled that the citizens who had sued the Prime Minister on the constitutionality of Denmark's accession to the European Community, did not have such a *locus standi* and could not, therefore, get a full trial on the merits of the case. In the *Maastricht* judgment (U 1996.1300 H), on the contrary, the Supreme Court recognised that individuals may have *locus standi* in a case regarding transfer of state power if the matter is considered to be of general importance to citizens or has a substantial impact on ordinary people's lives and thus on the Danish population in general.¹³⁵ In a later judgment, the *Schengen* judgment, the Supreme Court applied the *Maastricht*-criterion, but ruled in the opposite effect in the specific instance in a case regarding Danish ratification of the Schengen Convention (UfR 2001.2065 H). In the *Irak* judgment of 2010 (U 2010.1547 H), on, *inter alia*, whether the participation of

131 Christensen, Jens Peter, *Domstolene: Den tredje statsmagt*, Magtudredningen, Aarhus 2003, p. 26-27.

132 Christensen, Jens Peter, Jørgen Aalbæk Jensen, Michael Hansen Jensen, *Dansk Statsret*, Jurist- og Økonomforbundets Forlag, København 2012, p. 255-257.

133 To understand this evolution, it should be noted that, "(...) the courts have mainly used two devices: one is to demand that strict conditions on legal standing are fulfilled before even allowing a case to be considered on its merits, the second is to apply a standard of review to the cases actually admitted that rarely leads to parliamentary Acts being struck down." – Albæk Jensen, Jørgen, *Denmark - Judicial Review of Legislative Acts*, European Law Review, 1997, pp. 295-300, p. 296.

134 Indeed, by applying strictly the traditional concept of legal standing, the courts were able to obstruct the possibility of judicial review of many legislative acts, as many of those do not concern anyone specifically. Now, the contrary seems possible.

135 "Ved afgørelsen af, om appellerne bør have adgang til at få dette spørgsmål prøvet ved domstolene, må der lægges vægt på, at tiltrædelsen af Traktaten om Den Europæiske Union indebærer overførsel af lovgivningskompetence inden for en række almene og væsentlige livsområder og derfor i sig selv er af indgribende betydning for den danske befolkning i almindelighed. Herved adskiller denne sag sig fra sædvanlige sager om prøvelse af loves overensstemmelse med Grundloven. (...)". – U 1996.1300 H.

Denmark to the war in Iraq had such a general impact (*indgribende i almindelighed*) that any citizen should have a legal interest to sue without having to be directly and individually concerned (*konkret og aktuelt berørt af sagen*), the Supreme Court, when examining the standing of a group of citizens, partly represented by a committee called the “*Grundlovskomité 2003*”, found that neither the general rule on standing nor the Maastricht-criterion were satisfied.¹³⁶ This contributes to establish the Maastricht judgment as a precedent, a fact also confirmed more recently in the *Lisbon* judgment (U 2011.984 H).¹³⁷ Indeed, in this judgment, the Supreme Court confirmed the position adopted in the *Maastricht* judgment and the widening of the scope of what constitutes a legal interest.¹³⁸ As professor Helle Krunke explains “the impact of the Lisbon judgment is that Danish courts will test the constitutionality of concrete acts and judicial decisions based on the Treaty, even though the starting point is that the Supreme Court found no contravention of Article 20 when Denmark acceded to the Treaty”.¹³⁹

As the Danish Supreme Court has shown some uncommon signs of boldness, of “judicial assertiveness”¹⁴⁰ during the past decade (at least in matters involving the transfer of powers to international institutions, but this attitude could be extended to other areas), one may wonder whether the confirmed change concerning the issue of legal standing also suggests a future change in the standard of review. There are several indications that this might be so. Yet, the fact is that Denmark remains the most reluctant of the three Scandinavian countries, when it comes to performing constitutional review.

136 See Krunke, Helle, *Prøvelse af lovligheden af Danmarks deltagelse i Irak-krigen*, *Juristen* vol. 8, 2010, pp. 226-232.

137 See Krunke, Helle, *Lissabon-sagen*, *Juristen* vol. 8, 2011, pp. 245-252.

138 The plaintiffs in the Lisbon case were a group of ordinary Danish citizens who argued for an interpretation of Article 20 that would potentially directly involve the electorate. The Danish Government argued that an Article 19 procedure was sufficient, which gives no role to the electorate. In the Lisbon judgment of 11 January 2011 (UfR 2011, p. 984), the Supreme Court declared that: “This disagreement concerns the legislative competence within a number of general and important spheres of life and, thus, matters which are of far-reaching importance to the general Danish population. (...)” In addition, one could note that the Supreme Court shows use of considerable discretion when (interpreting and) deciding what particular institutional changes are so important that they amount to a change of identity of the relevant international organisations.

139 Krunke, Helle, *The Danish Lisbon Judgment*, *European Constitutional Law Review* 2014, p. 559.

140 Krunke, Helle, *The Danish Lisbon Judgment*, *European Constitutional Law Review* 2014, pp. 542-570, p. 567.

3.4 *Short Remarks on the Impact and Influence of the EU-law and the ECHR on the Development of Constitutional Review in Scandinavia*¹⁴¹

The impact of the adhesion to the European Union¹⁴² (or, in the case of Norway, to the European Economic Area Agreement (EEA)¹⁴³ since 1994, Schengen and other agreements) and to the ECHR¹⁴⁴ on the Scandinavian countries has been both normative and judicial.¹⁴⁵ As Norwegian Justice Bruzelius expresses: “Seen from a Nordic perspective what we now see is the largest reception of foreign law since the reception of church law in the Middle Ages, and it has happened very quickly - during the last twenty years.”¹⁴⁶ European law thus has a significant impact on the functioning of the constitutions and state powers, as well as on the way judicial review is performed, the development of the latter being triggered by the former.

European Law has permitted the enlargement of the scope of judicial review in the Scandinavian legal orders.¹⁴⁷ The immediate result of Denmark’s and Sweden’s accession to the European Union was indeed the entry into force of EU law with a concomitant power granted to the domestic courts to review all national law for its compatibility with EU law (conventionality review),

141 NB: This last subsection is based on an “artificial” distinction as EU-law and international human rights treaties such as the ECHR permeate the different factors and issues outlined in the precedent subsections. But for pedagogical reasons, the impact and influence of the adhesion to the EU and to the ECHR are briefly outlined in this separate sub-section.

142 In 1973 for Denmark and in 1995 for Sweden.

143 Norway’s relationship with the EU is based on association without membership. However, the impact of the EEA Agreement on, *inter alia*, the role of Norwegian courts is, in general, similar to that of the EU member states. See Norges offentlige utredninger (NOU), 2012:2, *Utenfor og innenfor. Norges avtaler med EU*, Oslo 2012, 911 p.

144 The three Scandinavian countries have ratified and incorporated all major Council of Europe and United Nations Human Rights instruments.

145 Despite having been adopted according to classic treaty law, both the EU and the European human rights regime increasingly binds the countries that have ratified them and their institutions. EU law imposes itself on its own merits in Sweden and Denmark (Norway being in a special position in that respect, since it is not a member of the EU), while the ECHR plays a more subsidiary, diffuse (even if tangible), role, being dependent on the status afforded to it by the Scandinavian national legal orders.

146 Bruzelius, Karin, *The Nordic Constitutions and judicial review*, “www.constcourt.md/public/files/file/conferinta_20ani/programul_conferintei/Karin_Bruzelius_2.pdf”.

147 The content of domestic legislation in Scandinavia is now, for a non-negligible part, subordinated to and influenced by the European one. The classical “hierarchy of norms” has been materially considerably enriched by the bulk of EU legal norms overarching over the statutes made by parliament. The subordination of Swedish and Danish law to European law in many areas (*acquis communautaire*) is unequivocal. Even Norway has adopted roughly ¾ of EU legislation compared to those Member States that participate in everything, and it has implemented this legislation more effectively than many. – See NOU 2012: 2, *Outside and Inside. Norway’s agreements with the European Union*, unofficial translation, Chapter 27, p. 3.

regardless of its *lex posterior* nature or its hierarchical status.¹⁴⁸ And an important consequence of the incorporation of the ECHR in Danish, Norwegian and Swedish law is that these international human rights norms assume a “para-constitutional function” by serving as one of the standards for judicial review.¹⁴⁹

The development of conventionality review, in parallel to the constitutional one, has both established a new basis for review of legislation and impacted quite profoundly on the Scandinavian system of judicial review of legislation. It has triggered that of constitutionality review, at least in Sweden, and also probably in Denmark. Indeed, in countries with weak diffuse method of judicial review of legislation such as Sweden and Denmark, it has only been after the beginning of the “Europeanisation” of Scandinavian law in the late 1990’s that some sort of judicial review has been developed, mainly due to the progressive subordination of Scandinavian law to European law, and particularly, to the European Convention of Human Rights.¹⁵⁰

Moreover, judicial review exercised at European-level by the European Court of Justice (ECJ), as well as the need for the domestic courts to enforce European law and the ECHR, to protect fundamental rights, has now become a “classical” reason or incentive for a more active judicial review performed by the Scandinavian courts. The ECHR and the ECtHR provide new legal sources, tools, methods and interpretations. The courts have to cope with the ECHR’s dynamic and activist approach to human rights protection. They are pressed –

148 All the Scandinavian countries are, by tradition, dualistic. The principle of dualism implies that international and national law are considered as constituting two different legal spheres and it requires that legal norms of international origin are implemented in a country’s domestic law before they can have legal effect for and against its citizens, thus preventing their direct application by, for example, national courts. Implementation can take different forms, such as passive transformation, incorporation, transformation.

149 To this day, no country is under the obligation to incorporate the ECHR into its legal system at the constitutional level, yet there is an increased reference to human rights (extension of the human rights catalogues) and human rights conventions in the State Constitutions. According to chapter 2, article 19 of the Swedish Instrument of Government: “No act of law or other provision may be adopted which contravenes Sweden’s undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms.”; The newly adopted article 92 of the Norwegian Constitution declares that “[t]he authorities of the State shall respect and ensure human rights as they are expressed in this Constitution and in the treaties concerning human rights that are binding for Norway”, not to mention the precedence clause contained in article 3 of the Human Rights Act 1999. In Denmark, the whole Chapter 8 of the Constitutional Act addresses constitutional (human) rights.

150 See Brewer-Carías, Allan, *Constitutional Courts as Positive Legislators in Comparative Law*, General report for XVIII International Congress of Comparative Law, International Academy of Comparative Law, Washington July 26-30, 2010. Consequently, the most important cases of judicial review have been cases of “conventionality review” decided by the courts confronting the national legislation with the provisions of the European Convention of Human Rights. For an overview of the judgments concerning judicial review of legislation in Sweden, cf. Åhman, Karin, *Normprövning. Domstols kontroll av svensk lags förenlighet med regeringsformen och europarätten 2000-2010*, Norstedts juridik, Stockholm 2011. In the case of Denmark, see, for example, the *Maastricht* and *Lisbon* judgments.

and emboldened at the same time – to take them into account and to adapt their own methods and review. A consequence of importing the ECHR to Denmark, Norway and Sweden is indeed that, as with EU law, the domestic courts have to get used to (and use) *inter alia* methods of interpretation that are different from those they use when working with domestic law. And references to EU law in the Swedish Supreme Court decisions are now more the rule than the exception.¹⁵¹

In Denmark, it has been discussed whether the signs of “intensified” constitutional review (implying, *inter alia*, a lesser weight put on the preparatory works) had been influenced by the dynamic interpretation style practiced by the ECtHR and the German Constitutional Court, for example. For Esben Lyshøj Jensen, the fact that in no other recent examples, since *Tvind*, the Supreme Court has practiced a more dynamic interpretation of the Constitution, seems to rule out this hypothesis.¹⁵² Yet, as mentioned earlier, while the Danish judiciary is still very reluctant in interfering with politically and economically sensitive issues, it seems now more confident when protecting the law and the citizens’ rights.¹⁵³

EU membership and the commitment to the ECHR have also led to a considerable strengthening of the national courts’ constitutional position and their powers in relation to the legislative and the executive. As the competence of the courts to perform conventionality control is extended, so is their competence (and confidence) in terms of constitutional review. Thanks to their new jurisdiction, the courts have felt empowered to set aside a law contrary to fundamental rights, for example, and to assert their power of judicial review. The Danish Lisbon judgment of 2013 is interesting in that respect: by rendering the Danish public authorities and the CJEU responsible for ensuring that the scope of European Union powers is not widened, the Danish Supreme Court has indirectly, but undoubtedly, potentially increased the power of judicial review of the courts, by naming them guardians of the Constitution, to the detriment of the Parliament, the Government and the CJEU.¹⁵⁴

151 Wersäll, Fredrik, *En offensiv Högsta domstol. Några reflektioner kring HD:s rättsbildning*, Svensk Jurist Tidning 2014, p. 1-8, p. 2.

152 Jensen, Esben Lyshøj, *Intensiteten i domstolsprøvelsen af lovens grundlovsmæssighed*, Rettid 2013, Specialeafhandling 17, p. 35.

153 Shaumburg-Müller, Sten, *Parliamentary precedence in Denmark: A Jurisprudential Assessment*, Nordisk tidsskrift for menneskerettigheter vol. 27 (2), 2009, p. 176. See also our developments on the extension of the scope of legal interest following the *Maastricht*, *Schengen*, *Irak* and *Lisbon* judgments, *supra*.

154 “The Danish courts will act as guardians to ensure that the EU institutions interpret the Lisbon Treaty within the limits of the powers delegated to them by Denmark”. - Krunke, Helle, *The Danish Lisbon Judgment*, European Constitutional Law Review, 2014, p. 559. See also the Maastricht judgment (UfR 1998 p. 800, p. 871) and our developments *supra*: while it ruled that the accession to the Maastricht Treaty in accordance with the ordinary transfer procedure in Section 20 of the Danish Constitution had been constitutional, the Danish Supreme court reaffirmed the competence and willingness of the Danish courts to review the constitutionality of EU law (with a reference to judged made law from the ECJ). Even though this option is reserved to extraordinary cases of manifest ultra vires

The judgments made by the ECtHR (and other international courts, for that matter) can, in the long run, influence the way the domestic courts perform judicial review, either by inspiring them to be as audacious as their European counterparts or by compelling them, if not formally, at least “psychologically”, to comply with the various decisions taken at the European level, the tightening and intensity of judicial review at domestic level going hand in hand with the status attained by the international norms in each country, their degree of “entrenchment”, “rooting” or “domestication” in the domestic legal systems.¹⁵⁵

Concerning Norway, “[t]he way in which Norwegian courts have employed rights review under the [Norwegian constitution] in many respects resembles the way they engage the ECHR as a constitutional minimum standard or rights guarantee. In very few (if any?) cases has the [Norwegian Supreme Court] set aside a Norwegian provision as conflicting with the ECHR; the usual way of resolving conflict in the meetings between a ECHR norm and a national norm is through interpreting the Norwegian provision in light of the ECHR, and harmonized so as to avoid conflict.”¹⁵⁶ It is however worth noticing that, even though the expansion curve has now flattened, there was an average of 75.9 and 18.6 cases per year (out of an average total number of 497.4) mentioning the ECHR and the ECtHR respectively, between 2010 and 2013.¹⁵⁷ All in all, they are more frequently mentioned than the Norwegian Constitution.¹⁵⁸

Since they have a pivotal role in judicial review of legislation, the domestic courts are sometimes forced to strike a balance between the implementation of human rights and a protection of other qualities of legislation. They can actually choose to turn back to domestic sources, to the Constitution and their own case-law instead.

The already mentioned Swedish *Manga* judgment of 2012 (NJA 2012 p. 400) sends this signal: Instead of focusing on the significance of the ECHR for the interpretation of Swedish criminal law, the Supreme Court refers directly to the Constitution. In Norway, since May 2014, the national authorities, courts included, have a duty to “respect and ensure human rights as they are expressed in this Constitution and in the treaties concerning human rights that are binding for Norway” (article 92 of the Constitution). But it is unclear whether this new constitutional provision will have a deep impact on the Norwegian legal system or on the way judicial review is exercised.

acts by the EU institutions, it shows that the Danish courts can be bold and assert their power when needed.

155 Of course, the impregnation does not go only one way. It is mutual, reciprocal, notably thanks to the dialogue between the judges (domestic and European). It is well known that a dialogue between national and European judges (judicial dialogue) has developed in connection with the task of providing preliminary interpretations which the Treaties confer on the ECJ.

156 Kierulf, Anine, *Taking Judicial Review Seriously. The Case of Norway*, PhD dissertation, Faculty of Law, University of Oslo, Oslo 2014, p. 331.

157 Kierulf, Anine, *Taking Judicial Review Seriously. The Case of Norway*, PhD dissertation, Faculty of Law, University of Oslo, Oslo 2014, p. 278, 391.

158 *Ibid.*, Compare the tables pp. 390 and 391.

For Thomas Bull, the “revitalisation of constitutionally protected rights” goes hand in hand with a “renaissance of the Instrument of Government”¹⁵⁹ following its comprehensive reform in 2010. The *Pettersson* judgment of 23 April 2014 (NJA 2014 p. 323) constitutes another example of the evolution of judicial review in Sweden: the violation of fundamental rights and freedoms can lead to the payment of damages for moral damage (*ideell skada*). It was presented as ground-breaking because there is no formal right to damages in the Constitution and Sweden has never formally recognised a principle of law that entitles victims to damages for pain and suffering without direct support in law.¹⁶⁰ As the Constitution goes from “paper tiger to watch dog for the individual’s [constitutional right]”,¹⁶¹ to borrow the words of Clarence Crafoord, the Director of Centrum för rättvisa (the organisation that represented Pettersson), the Swedish courts seem now ready to endorse a more active role when performing constitutional review.

4 Conclusion

The aim of the article was to identify the historical and legal factors that may explain the recent developments in the exercise of constitutional review – and the direction it is now taking in Scandinavia.

There is a modest, but tangible, constitutional evolution in Scandinavia. The Swedish and Norwegian Constitutions have recently been reformed. The whole constitutional landscape is evolving, as well as the domestic judicial, legal and political culture. The same goes with the development of the courts and of their power of judicial review.

There is a palpable, strongly increased, political relevance of the national courts in Europe, and even in Scandinavia. The Scandinavian courts do not fully embrace judicial review of legislation yet, but they evolve along the same line, in that direction, at their own rhythm – Denmark being the slowest actor and the most reluctant of all three countries, Norway, the quickest to embrace a less unrestrained approach to judicial review, and Sweden, meeting them half way. They all show, in various degrees, less scepticism and reluctance than before in performing constitutional review.

Thanks to various factors, such as the strengthening of the Constitution and of the judiciary, the influence of EU-law and the jurisprudence of the ECHR and of the CJEU, the courts have become more willing to – or have felt more compelled to – engage into constitutional review in the past few years. And

159 Bull, Thomas, *Regeringsformens renässans*, in Thomas Bull, Olle Lundin, Elisabeth Rynning (ed.), *Allmänt och enskilt – offentlig rätt i omvandling*. Festskrift till Lena Marcusson, Iustus Förlag, Uppsala 2013, pp. 67-81.

160 But it follows a jurisprudential evolution that had begun in 2005. See the *Lundgren*-judgment (NJA 2005 p. 462) and the *Trafikskolemålet*-judgment (NJA 2012 p. 211).

161 “Den svenska grundlagen går från papperstiger till vakthund för enskildas fri- och rättigheter.” - *Vinst i Högsta Domstolen*, Centrum för rättvisa, 23 April 2014.

they are more likely to perform a more intensive review of the constitutionality of the law, in the years to come.

While there is currently no immediate risk of “juristocracy”¹⁶² in Scandinavia, the judiciary has now obviously become a major and unavoidable actor and even partner to the legislator. They *inter alia* are entrusted with a shared duty to protect constitutional rights. A more active judiciary may be welcome, but it has to be a cautious and conscious one, aware of the repercussions of the choices they make, each and every time they exercise judicial review. “With [such a] great power, comes great responsibility.”

¹⁶² Hirschl, Ran, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Harvard University Press, Cambridge 2007.