

# **New Tendencies in Modern Nordic Constitutional Doctrine or the Development of Nordic Constitutional Law Introduction and General Background**

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## **Introductory Remarks**

Hopefully, this special volume of Scandinavian Studies in Law will provide the reader with a selection of articles that is somehow representative, and one that gives an adequate overview of different strands and fields in the contemporary Nordic constitutional research. Should that assumption be true, as I hope, this rather bold statement will perhaps merit a further clarification and justification.

This “inventory”, or whatever we should call it, of current Nordic constitutional scholars (which is of course by no means complete), must be seen in the light of both theoretical and scholarly, political and ideological developments during the last twenty years. First of all, it should be noted that there exists, generally speaking, no real strong tradition of constitutional law or constitutional doctrine in the Nordic states (with a certain exception for Norway, where authors such as Andenaes and Castberg have been great authorities). On the contrary, the development of the various – and by no means identical – Nordic welfare states during the 20<sup>th</sup> century, which has been achieved mainly by legislation and other political decisions, has definitely not favoured constitutional law as a topic, since some of the main features of the discipline of constitutional law, like the need to protect the individual from possible interventions or violations committed by the state or the public authorities, are not significant in the welfare state model (which is rather based on the idea of the state as basically a good actor, a benefactor of the citizens with the inherent mandate to try to improve their living conditions). This does not mean, which needs to be stressed, that the idea of the welfare state and constitutional law as a discipline – or indeed constitutionalism as a phenomenon or an ideal – are

necessarily incompatible,<sup>1</sup> but only that the development of this particular societal model has meant that areas like administrative law or even social security (welfare) law have been more crucial and of greater political importance in the Nordic states during the main part of the former century than constitutional law. The absence in the Nordic countries for most of this period of classical issues within constitutional law such as separation of powers, federalism, bicameral legislatures and judicial review has also brought about a lack of theoretical discussions in the doctrine and sometimes obviously even a lack of general interest in those issues. The emphasis in the constitutional debate has instead, for perfectly logical reasons, very clearly been put on concepts like popular sovereignty, parliamentary supremacy and majority rule.

Crucial conceptions within the topic such as the abovementioned ones will not be further analysed or defined in this introductory article, which rather aims at describing a general societal development, with deep theoretical and political implications within the constitutional field. Furthermore, there is hardly any need here to continue the discussion or analysis of the welfare state as a societal model, an issue that is being dealt with in a number of contemporary research projects, mainly ones with a historical orientation.<sup>2</sup> What is much more important in this context, instead, is to try to analyse why constitutional law is today much more important than it was during the 20<sup>th</sup> century and why there is today a great renewed interest in the topic from many scholars, not least young ones – an interest of which this volume may hopefully testify.

First of all, it should be noted that this “re-birth” or re-vitalisation of Constitutional Law as a topic in the Nordic countries has come about without any official death or even withering away of the welfare state as such, which illustrates once again that the two traditions of thinking – one wishing to guarantee or assure good social conditions for everyone and the other one aiming at protecting individuals from encroachments made by the public power – are probably not contrary or at least not incompatible as such. If anything, the Nordic societal model is today once again seen as efficient and well-functioning, not least in comparison with some countries on the European continent, though that analysis is perhaps more based on economically interesting criteria like a relative openness against foreign investors and the global economy, as well as a high degree of economic and administrative transparency, than on a general admiration of the social protection as such.

Thus, there are other factors in the contemporary Nordic society that may much better explain the increased importance of constitutional law. Some of those are identified in the rather open and earnest instruction to the Swedish Committee preparing a revision of the Constitution (*Grundlagsutredningen*), which was given its mandate in 2004.<sup>3</sup> Identified there are some clear differences between today’s society and the one of 1974, when the current

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1 For further reading on this point, see Martin Scheinin (ed.), *The Welfare State and Constitutionalism in the Nordic countries*, Copenhagen (Nordic Council of Ministers), 2001 (Nord 2001:5).

2 E.g. some which are coordinated by the Center of Nordic Studies, at University of Helsinki.

3 See Direktiv 2004:96.

Swedish Constitution (*Regeringsformen, Instrument of Government*) was enacted. Among the factors mentioned are today's more heterogeneous society, characterised mainly by individualism, the increased lack of public trust in political bodies, the development of new information technology, globalisation and the "sub-ordination", more or less, of Swedish law in some respects to European law.

From a strictly legal perspective, there is in my view no doubt that the last factor is the most important one. The accession of Finland and Sweden to the European Union on 1 January 1995 (a date that will probably in the future be seen as one of the key moments in modern Nordic constitutional history) does not only mean that three of the five Nordic states are since then EU members, but has indeed transformed the constitutional perspective also in other ways. Above all, it has meant that above the traditionally so important and very rarely contested legislation, we now in those countries have not only some rather old and very rarely invoked constitutions, but also the European Convention of Human Rights<sup>4</sup> and the whole body of EU law ("*l'acquis communautaire*"). This has meant, firstly, that conflicts between the traditionally highly respected and hardly contested laws and norms of a higher dignity have become much more frequent than before and, secondly, that it is no longer necessarily considered as strange to invoke the constitution itself in legal proceedings – a fact that is undoubtedly important at least in Sweden. Combined with factors like the entry into force of a new Constitution in Finland in 2000, with a much greater scope for judicial review than before,<sup>5</sup> and a more open attitude towards judicial review also from Danish courts, it seems to be from this big change that many other changes, also in the doctrine, do in fact come.

Still, at the same time, it should be noted both that Norway, who has never been a member of the European Union, is the only Nordic country with a real, vivid tradition of constitutionalism and judicial review (which dates as long back in history as *circa* 1880) and that Denmark became a member of the EU already in 1973, without witnessing the same almost dramatical effect on the constitutional paradigm as Sweden and to a certain extent also Finland did two decades later. We must also observe that tendencies of a vitalised constitutional doctrine were visible already in the late 1980's, with Henrik Zahle in Denmark (who unfortunately passed away in 2006), Kaarlo Tuori in Finland and Eivind Smith in Norway as some leading names, the first two ones elaborating on a new theoretical framework for Danish and Finnish constitutional studies and Smith underlining the important inspiration to be gained in this field from comparative studies. Slowly and gradually, this doctrinal shift contributed to breaking away from the influence of older, highly welfare-state oriented scholars like Alf Ross and Thorstein Eckhoff. Thus, it seems clear that the influence of European law

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4 During the 1990's, the Convention was incorporated into the national law of all the Nordic states, which was necessary in order to give it a legally binding force in those countries, that are traditionally dualistic in the way they consider the relationship between national and international law. The incorporation was not done at exactly the same time or in exactly the same way in all the five states, but that is another detail that will not be dealt with here.

5 See art. 106.

in general and EU law in particular does only partly explain the recent birth of a vivid Nordic constitutional doctrine.

## **Doctrinal Development**

Other factors must therefore also be taken into account and, apart from the issues that have been stressed in the recent Swedish discussion on constitutional reform, as mentioned above,<sup>6</sup> it is somewhat a happy “coincidence” that some explanations may be found in the choice of subjects made by the various contributors to this volume. If we do then analyse those a little bit closer, we may perhaps divide them into a few different groups.

One such clear group consists of the articles dealing with the Draft EU Constitution (Ulf Bernitz, Helle Krunke), as well as related European issues (Jukka Viljanen, Ola Zetterquist). The new Finnish Constitution from 2000 is understandably analysed by a group of Finnish scholars, namely Veli-Pekka Hautamäki, Tuomas Ojanen and Viljanen. All those articles illustrate a logical interest and understanding in the doctrine of important recent constitutional processes.

A number of writers on the other hand deal with what we may call classical themes of constitutional law, albeit in a slightly modernised form: For instance, Henrik Palmer Olsen writes on freedom of religion and Henning Koch on the right of resistance, Michael Hansen Jensen on the right to property and Thomas Bull on freedom of information, in this case concerning the position of so-called *whistle-blowers*, all of which are classical themes in the Danish and Swedish doctrine. The same could be said for constitutional interpretation, dealt with both by Jens Elo Rytter and Hautamäki, and the issue of constitutional amendments, which Kristan Skagen Ekeli has chosen to focus on with interesting results. Pentti Arajärvi discusses the perhaps surprisingly weak constitutional protection of social and economic rights, an issue that though somewhat contested is of course always crucial when the welfare state is being discussed. The article must also be read taking into account the very strong protection of social and economic rights in the new Finnish constitution, which is in this respect much stronger and more generous than any other Nordic constitution, the Icelandic included.

The third category may be said to include new political and constitutional theory (Ekeli, Andreas Føllesdal, Inger Johanne Sand, to a certain extent also Zetterquist) or even focus more precisely and specifically on globalisation and its effects on the nation-state and its constitution (in particular Sand and Føllesdal). Perhaps it is this last category of research, which seems to be particularly vivid in Norway,<sup>7</sup> that represents the really new approach in Nordic constitutional thinking. Here, the real or imagined border between law and

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6 See in this respect also Nergelius, *Svensk statsrätt*, Lund 2006, chapter 1.

7 Anyone who wishes to speculate may of course ask if this is related to the fact that Norway remains outside the EU and that Norwegian scholars are therefore less interested in EU matters, but that interesting aspect must also be left aside here, unfortunately.

politics, so dear or important to an older generation of legal and constitutional scholars, has definitely withered away. Also national borders are far less important in this discourse than they were one or two generations ago. It is with great pride and joy that we may here for the first time publish those two important contributions to a current, important not to say crucial, no longer just Nordic but rather global constitutional debate.

Now, if we analyse some of the different articles a little bit more in detail, another thing that is striking is that there seems to be an emphasis in the Danish doctrine, at least given those articles, on what we may call classic constitutional issues. Anyone who wishes to analyse this tendency in detail may wonder about its relation with the fact that the Danish Constitution from 1953 – which is basically the same as the old one from 1849 – is so extremely hard to change and has in fact not been amended at all since 1953. Koch's article has a particular interest, not only because it relates to his doctoral dissertation from 1994,<sup>8</sup> but also because it actually brings up to date, in a "post September 11-context", issues concerning the right of a democracy to defend itself that we do recognise from some classic works of Alf Ross. Palmer Olsen's article indicates some of the recent developments in the case-law from the European Court of Human Rights, which has indeed been lively also concerning the right to property.

As far as Finland is concerned, the domestic effect of those developments are thoroughly analysed by Viljanen, whose conclusions may in fact be valid also for Sweden. The same is indeed true for Ekeli's article.

## **A Quick view to the Future**

In total, thus, do those articles give an adequate view of where the Nordic constitutional doctrine is at the moment heading?

Although it is of course impossible to give a complete picture of the vast literature in the field, the perhaps slightly surprising answer that I would like to give to that question is actually yes. I believe that the articles presented here offer us insights into many of the new, exciting strands of constitutional thought that are currently present in the Nordic doctrine, where many new paths have been opened in recent years. The contrast, if we compare with the situation two decades ago, is indeed striking.

In the Swedish context, which is needless to say the one that I know best, the constitutional doctrine in a wide sense has in the last ten years been so vivid that it is now possible to talk of a few different main "schools" of constitutional thought. One such main line of constitutional thinking is of course the one that has its roots in EU law and has been particularly influential in Stockholm, with Bernitz as the leading inspirator; among others, Ola Wiklund, Carl Fredrik Bergström and more recently Jane Reichel are important contributors to this tradition. Another one, which used to be particularly strong in Lund, has its roots in legal theory and jurisprudence and has strived to analyse matters on the borderline of legal philosophy, traditional constitutional law and EU law;

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8 Which is called *Demokrati – slå till!*, Copenhagen 1994.

Nergelius, Uta Bindreiter and Zetterquist, as well as Xavier Groussot all have their roots in this tradition, where the late Aleksander Peczenik was undoubtedly the main intellectual searchlight. A third one, which is stronger in Uppsala, has in particular analysed human rights issues on the verge of constitutional law and public international law, with a clear emphasis on the impact of the European Convention of Human Rights in national law; Iain Cameron and Karin Åhman are some examples of this.<sup>9</sup>

To my knowledge, no similar analysis of the recent doctrine has so far been made in any other Nordic country, but the time for that may now indeed have arrived.<sup>10</sup> Given the richness in the current doctrine, of which this volume does indeed bear witness, it will probably very soon be possible to trace similar patterns in most or even all Nordic countries. And this is in itself a clear and hopeful sign of a new vitality in this doctrine.

In order to conclude, without going into any details concerning the different articles in this volume, if we see them as an indication of current tendencies, it seems clear that there is in current Danish doctrine a focus on classical constitutional issues, while the tendency in at least some Norwegian constitutional thought is leaning towards some of the important constitutional implications of globalisation. In Finland, the impact of the new Constitution from 2000, which is also the newest Nordic constitution, is for obvious reasons great, while the importance of EU law and the constitutional changes that it has brought about since 1995 is strong both there and perhaps in particular in Sweden. But then again, this is only a small part of the current doctrine. This volume may absolutely not hold any ambitions to represent the total sum of current Nordic constitutional thinking – but nevertheless, it may hopefully show its new vitality.

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9 Traditionally, there has always been a quite strong tradition in Sweden of administrative law, but most of the writers in this tradition have found it difficult to contribute works to the somewhat new constitutional situation described above. However, an important contribution was offered by Vilhelm Persson in 2005.

10 In Denmark, however, a big doctrinal debate has been initiated following the doctoral dissertations of Rytter and Palmer Olsen; see discussion in *Juristen* in 2004-05.