



Københavns Universitet



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Martinsen, Dorte Sindbjerg; Wind, Marlene

Published in:

Europe. The New Legal Legal Realism

Publication date:

2010

Document Version

Early version, also known as pre-print

Citation for published version (APA):

Martinsen, D. S., & Wind, M. (2010). When National Courts go to Europe: Reluctant or active players in the integrationprocess? . In H. Koch, K. Hagel-Sørensen , U. Haltern, & J. H. H. Weiler (Eds.), Europe. The New Legal Legal Realism : Essays in Honour of Hjalte Rasmussen (pp. 479-501). Kbh: Djøf Forlag.

When National Courts go to Europe. Reluctant or active players in the integration process?

Dorte S. Martinsen & Marlene Wind¹

1. Introduction

It is not an exaggeration to say that Hjalte Rasmussen opened the eyes of many Danish political scientists to the role of courts in the study of Europe. Rasmussen's now legendary dissertation "On Law and Policy in the European Court of Justice",² from 1986, and his many law textbooks had a strong appeal to political scientists interested in the interplay between law and politics in the European Union. Rasmussen's work on the European Court of Justice described how courts in general should be taken seriously as *political actors*, and by employing the so-called "law in context approach" to the study of law and courts, he refused to see law as an isolated island far removed from political predispositions. Today, the law in context school has become almost mainstream – at least outside Scandinavia – and thus the point about courts' *political* power may no longer seem so controversial. However, many factors suggest that the issue of courts (including national courts) as important political players continues to fly in the face of many lawyers as well as political scientists in the Nordic countries³. The point of departure for this

¹ Dorte S. Martinsen is Associate Professor at the Department of Political Science, University of Copenhagen. Marlene Wind is Professor of Law and Politics in the Department of Political Science, University of Copenhagen.

² H. Rasmussen, 'On Law and Policy in the European Court of Justice', (1986), Dordrecht: Kluwer Academic Publishers Group.

³ We refer here to Denmark, Sweden, Finland and to some degree Norway. Despite the fact that Norway represents the odd man out in a Nordic context, as Norway was one of the first countries in Europe to have a constitutional court, criticism of courts political power (e.g. judicial activism) and international courts, such as Strasbourg and Luxembourg, has been quite significant in Norway in the past 10 to 15 years. In particular, the government spon-

contribution will be a more fundamental discussion of the role of courts in democracy. Our recent research shows that not only lawyers but also political scientists in the Nordic countries have had great difficulties accepting the view – so well known from, for instance, the US and other European countries – that courts can (and should) play a central role as active protectors of fundamental rights, including rights pertaining to EU membership. From this perspective, courts not only reflect what has been decided in parliament but are – and should be – societal actors themselves. Or to put it differently, according to this view, when (national as well as supranational) courts are “non-activist” – to use a phrase often employed by Hjalte Rasmussen – judges are making a *political choice* nonetheless. And by making such a choice, they de facto take part in a political game which is far from innocent and which deserves serious scientific scrutiny. In other words, when a Danish court decides *not* to forward a case to the ECJ through the preliminary ruling procedure, it is a *choice*, which *may* be influenced by factors other than a simple legal analysis. Recent research shows that it often will be influenced by other factors even at a sub-conscious level as reflected in societies’ legal and political culture. For anyone seeing courts as mere reflections of what is decided by a majority in parliament – a mere “*bouche de la loi*” of what politicians have decided – this is clearly thought provoking. However, building on our previous work, we will argue that while addressing specific legal questions, courts are – and should be – also analysed as collective actors embedded in society and influenced by a specific legal and political history and culture. Because courts and judges in this perspective are much more than just machines which process and interpret legislative acts, it must be of scientific relevance – both for lawyers and for political scientists – to try to explain how national courts interact with international courts. It must thus also be highly relevant to understand *why national courts from different member states may be more or less interested in asking the European Court of Justice for its interpretation of EU law through the preliminary reference mechanism.*

While a legal dogmatic perspective would argue that only narrow legal doctrine influences the decision of whether a national court should refer a case to the ECJ or not, our analysis shows that looking at other intervening variables is essential in order to explain why variance exists in the first place. In sum, if the driving force behind a court’s decision to ask the ECJ for help when interpreting European Union law rested on narrow legal doctrine alone, the variance in reference patterns among member state courts would be insignificant.

sored power analysis (‘Makt og demokratiutredningen’) from 2003 focused on the alleged transfer of power from elected politicians to the courts. See also Ø. Østerud & P. Selle 2006.

nificant. However, as our studies have shown, *variance does exist* and deserves – at least from a social science perspective – to be explained.⁴

Before we present a summary of our examination of variance in national courts' reference practice, let us take a brief look at the underlying and much broader question of what role courts ought to play in society and democracy in general. This debate is far from new, but has influenced legal philosophy and political theory for centuries. It is, however, essential to rehearse the competing views again here, partly because they often seem to be forgotten in the fierce Danish debate on the role and influence of supranational courts⁵; but also partly in order to avoid a simplistic criticism of court activism and judicial review and in particular an uncritical celebration of unconstrained majoritarian democracy, which has been dominant in a Danish and Nordic context.

2. Law, politics and courts

How should one situate the role of courts in a democratic society? Do they – as unelected bodies – fit in at all? The classical question of the legitimacy of unelected judges conducting judicial review over an elected political majority has been prominent as far back as the earliest writers on democracy. The basic question – even today – and certainly also in relation to the ECJ and other international courts is: should the parliament be sovereign and without limits in the sense of not having to subject itself to some kind of review mechanism by courts? Should politicians themselves be trusted to protect fundamental rights as some theorists⁶ (and certainly politicians) claim, or do we need independent courts for that? Are courts better than politicians to do the job?⁷ In this context it may also be highly relevant to ask whether there is (or should be) a difference between the review power of national and supranational/international courts? To put it differently, if we – as in the Danish case – have no tradition for *national* judicial review, can we then accept judicial review of national legislation by international courts? This is in a nutshell

⁴ M. Wind, D. S. Martinsen & G. P. Rotger, 'The Uneven Legal Push for Europe', (2009) *European Union Politics* 10(1) and M. Wind, 'The Nordics, the EU and the Reluctance Towards Supranational Judicial Review', (2010), *Journal of Common Market Studies* 48(4).

⁵ J. Christoffersen & M. Rask Madsen, *Menneskerettighedsdomstolen – 50 års samspil med dansk ret og politik*, (2009).

⁶ Robert Dahl, *Democracy and its critics*, New Haven: Yale University Press, (1989), pp. 154-159.

⁷ See "Symposium: An exchange with Jeremy Waldron" in *ICON (International Journal of Constitutional Law)* 2009 vol. 7, no 4.

the Danish dilemma. We have no practice in letting our own national courts set aside national legislation (at least it has only happened once in 160 years in the so-called Tvind case), but by being part of both the EU and the ECHR, we have de facto subjected ourselves to judicial review by two strong international courts.

Though this discussion may seem trivial to some, it is certainly vibrant when looking at the Danish debate in recent years⁸, where not only the role of international courts but equally the role of national courts are intensely discussed. The still unsettled issue of the judicial dialogue between the member state courts and the ECJ thus illustrates and underscores the continuing relevance of this philosophical discussion. Looking at this from a theoretical perspective, not only lawyers and legal philosophers have shown an interest in this debate. Another voice in the discussion on the role of courts in democracy has been that of the prominent and highly influential American political scientist Robert Dahl. In his view, a true democracy should as a principle *not* subject itself to any kind of judicial review by courts. As he boldly puts it: “No one has shown that countries...which lack judicial review...are less democratic...”⁹ This also goes for the protection of fundamental rights, which of course has been the most prominent reason for having courts with strong review powers. In fact, according to Dahl, majoritarian democracies are perfectly capable of protecting fundamental rights *without* the help of judges. As he argues, democracies with judicial review to protect minorities and fundamental rights often get lazy: “Over time, the political culture may come to incorporate the expectation that the judicial guardians can be counted on to fend off violations of fundamental rights”.¹⁰ According to Dahl, this will make politicians less attentive to their own responsibilities. In sum, in Dahl’s view elected politicians may even be better than judges for protecting fundamental rights!

Though Dahl’s faith in the formal democratic process is provocative in its boldness, it is a well-known and even dominant view among Danish lawyers, judges and politicians. In fact, this understanding has been part and parcel of

⁸ J. E. Rytter & M. Wind ‘In need of Juristocracy? The silence of Denmark in the development of international legal norms’ (2010), under review in *International Journal of Constitutional Law*.

⁹ N. 6 Dahl, (1989), 189.

¹⁰ *Ibid.*; see also R. Hirschl, ‘Towards Juristocracy: The origins and consequences of the new constitutionalism’, (2004), 3-5; R. Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy*, Cambridge: Cambridge University Press, (2007), 145-176.

a common Nordic¹¹ heritage for at least two centuries – more specifically since these modern democracies acquired their formal democratic constitutions.¹² In the Danish concept of democracy *parliament comes first*¹³ in the sense of being elevated above the other branches of governing power. Majority rule (even in its formal minority government version)¹⁴ has thus been the closest you could get to an ideal type of democracy.¹⁵ As Jens Elo Rytter has suggested:

“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”¹⁶

Thus, when the Danish Supreme Court in 1921¹⁷ applied its version of “judicial self-restraint” it underscored a constitutional need for the courts to refer to the legislator – in this manner legitimizing that in a democracy it is the majority in parliament which prevails over the judiciary due to its lack of democratic mandate.¹⁸ Danish courts have no doubt conducted self-restraint over the years and continue to do so. As Rytter and Wind writes:

“Generally speaking, it (self-restraint) means that whenever judicial review is undertaken on the basis of broad and imprecise constitutional provisions like for instance human rights, which often have this character of being broad legal principles, the courts should give significant leeway or margin to the assessment of the legislator, recognising the direct democratic

¹¹ Again Norway may be seen as an exception, but as described above, in the past decade, the democracy debate in Norway has been centred exactly on the role and excessive power of (international) courts.

¹² H. Palmer Olsen, *Magtfordeling: En analyse af magtfordelingslæren med særligt henblik på den lovgivende magt* (2005)

¹³ M. Wind, ‘When Parliament Comes First – the Danish concept of democracy meets the European Union’, (2009) *Nordic Journal of Human Rights*, 272-289.

¹⁴ In order to have majority rule, you do not need to have a majority government as long as you have a majority in parliament.

¹⁵ T. Knudsen, *Dansk Statsbygning* [Danish State-Building] (1995).

¹⁶ J. E. Rytter ‘Grundrettigheder som almene retsprincipper’, (2001), *Juristen* 83(4), 138.

¹⁷ Upholding an act of parliament concerning landownership reform, the Supreme Court stated that the citizen’s claim that the act had not provided full compensation for his loss of property could not be affirmed: “with the *certainty* which is required for the courts to set aside an act of Parliament as unconstitutional” (here cited from Rytter & Wind 2010, forthcoming).

¹⁸ See also Henning Koch, ‘Dansk forfatningsret i transnational belysning’ [Danish constitutional Law in a transnational perspective], (1999), *Juristen*, 217.

mandate of the latter. More precisely, judicial self-restraint means that, vis-à-vis the legislator, a court should not insist in every detail on its own final say as to the specific contents of broad constitutional norms”¹⁹

The idea of self-restraint is moreover in good correspondence with the dominance in Danish legal thinking of legal realism and the antipathy of any kind of natural law elements as legal sources.²⁰ However, if the ultimate source of law is not the constitution, not international human rights and principles, but what the legislator decides in (the national) parliament, it becomes an uneasy task for Danish judges to respect and thus refer cases of interpretation to the ECJ (or to the Court of Human rights in Strasbourg for that matter).

In our ongoing research we argue that this explains, better than most other theories, why not only Danish courts and judges but equally the political environment and the executive handling Denmark’s relations with foreign powers such as international courts have been hesitant to refer cases to international courts such as the ECJ.²¹ Few have described the challenge of Danish courts better than the former Danish President of the Supreme Court Niels Pontoppidan:

“The development since the Second World War has strongly reduced the importance of the lawmaker as the most important source of law and legitimation. It simply no longer covers legal realities sufficiently”²²

The summary of our analysis of Danish courts’ reference practice to the ECJ which follows below, illustrates – we think – very well the ongoing challenge to Danish legal and political culture that Pontoppidan refers to above.

3. The divergent reference patterns of national courts

Due to the Danish embracement of what Ronald Dworkin has named *majoritarian democracy* with the lawmaker at the centre, Danish courts – and indeed the public administration maintaining the Danish relationship with the

¹⁹ N. 8 J. E. Rytter & M. Wind supra 6, p. 5.

²⁰ M. Scheinin, *The Welfare State and Constitutionalism in the Nordic Countries*, (2001); J. E. Rytter, *Grundrettigheder. Domstolenes fortolkning og kontrol med lovgivningsmagten* (2000); see also N. 8 Rytter & Wind (2010).

²¹ M. Wind, 'The Nordics, the EU and the Reluctance Towards Supranational Judicial Review', (2010), *Journal of Common Market Studies* 48(4) pp. 1041-1065; see also N. 8 Rytter & Wind (2010).

²² Niels Pontoppidan - then President of the Supreme Court - in an interview in the Danish journal *Weekendavisen* 28 June 1996, p. 11.

European Union – have not been too eager to send cases to the ECJ for interpretation. The preliminary ruling system, which was introduced into the Union with the treaty of Rome in 1957 (then art. 177) and which requires courts and tribunals to refer cases to the ECJ if in doubt about the interpretation of EU law, thus introduces a judicial review mechanism fundamentally foreign to Danish legal and political tradition.²³ Though aware of other explanations, we argue that for a political and legal culture with no tradition of judicial review, it is clearly counter-intuitive to ask a court to evaluate what a Danish lawmaker (and administration) has decided when implementing EU law into Danish law. What makes this whole relationship even ‘worse’, is that we on top of that are dealing with a supranational court which do not reveal dissenting votes and which employs a very dynamic style of legal interpretation.²⁴ The political control with the courts, which is common (but implicit and certainly never discussed) in a Nordic context, is thus nonexistent in the European system. The EU’s preliminary ruling mechanism in this manner not only introduces judicial review into a Danish legal and political system which explicitly and consistently has rejected judicial review by *national* courts, but it also introduces collaboration with a constitutional judicial system that even celebrates legal activism (e.g. a dynamic style of interpretation), and which confronts the Danish ”self-restraint” philosophy head on.

To refer cases to the ECJ when in doubt of the interpretation of EU law is, nevertheless, the cornerstone in the EU constitutional order.²⁵ In order to make sure that the EU’s legal system develops in a harmonious and uncontradictory manner, it is (and has always been) essential that national courts willingly and without any kind of strategic considerations engage in an ongoing dialogue with the ECJ. One can also argue that the ability of the ECJ to enhance and define the scope of European integration depends on national courts’ willingness to bring preliminary references before it. In a long-term as well as a contemporary perspective, national courts – in the EU as a whole – have indeed accepted and taken up that role.²⁶ Below we will take a closer look at the long-time span statistics in order to put the Danish case into perspective. First of all, however, we will look at the general trends.

²³ N. 4 Wind, Martinsen & Rotger (2009); and N. 8 Rytter & Wind (2010)

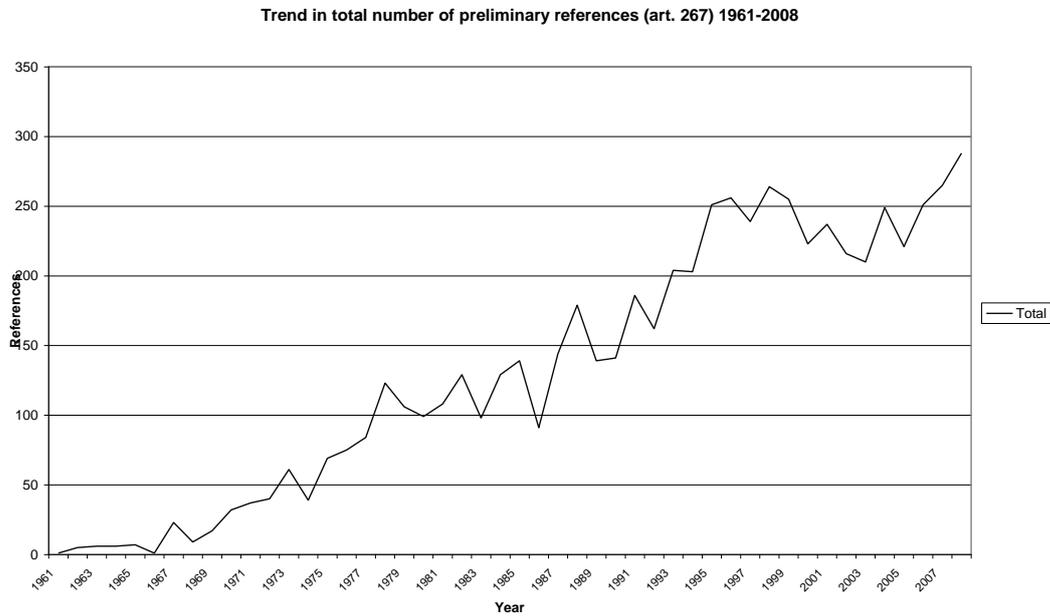
²⁴ N. 2 Rasmussen (1986).

²⁵ J. H. H Weiler, ‘The Transformation of Europe’, (1991), *The Yale Law Journal* 100: 2403-2483.

²⁶ K. J. Alter, ‘The European Union’s Legal System and Domestic Policy: Spillover or Backlash?’, (2000) *International Organizations* 54(3): 489–518; see also K. J. Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*. (2001) Oxford University Press.

Our data below thus confirm that Article 267 (previously art. 234 and art. 177) references continued to increase significantly between 1961, when the first preliminary reference was forwarded to the Court, and 2008.

Figure 1²⁷

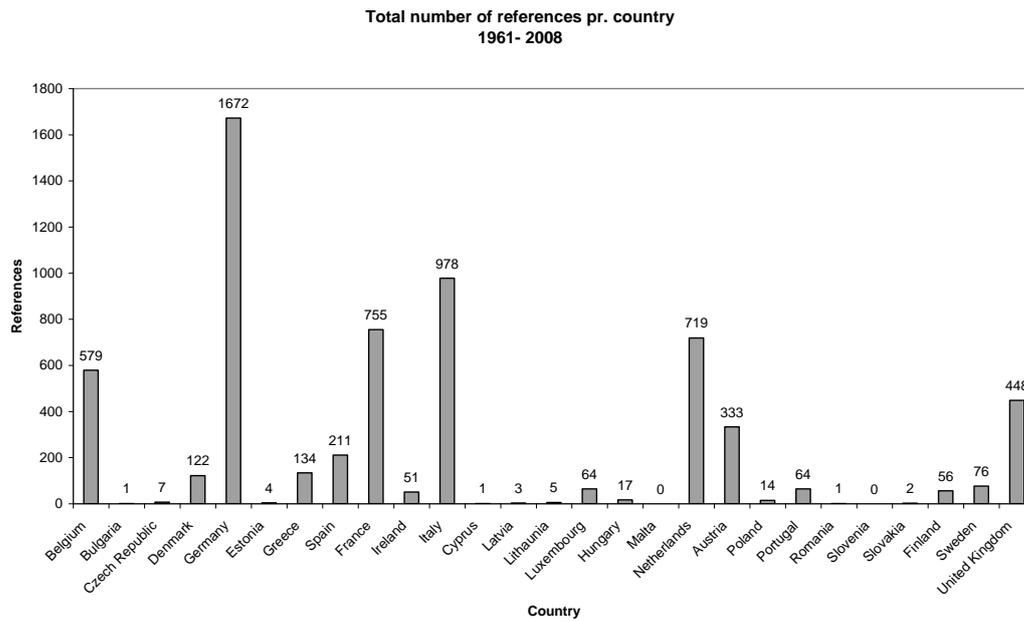


The more recent figures in our data confirm this historical trend. By the end of 2008, 6317 preliminary references had been made to the ECJ. From 1993 onwards, more than 200 references were made annually, with a maximum of 288 references in 2008. The interplay between national courts and the ECJ is indeed a growth factor on its own in the European integration process.

However, our data also confirm that national courts do not participate to equal degrees. Some do appear more reluctant to refer questions to the European judiciary, and one of the most pronounced characteristic behind the aggregated trend illustrated above is the important heterogeneity across member states (see Figure 2).

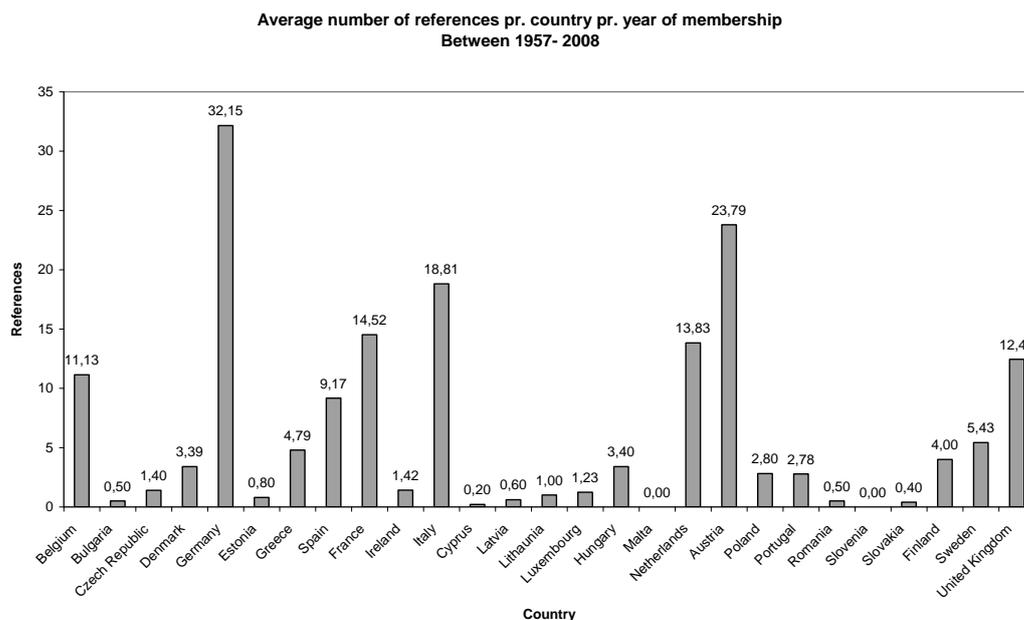
²⁷ Own data elaborated on the basis of: The Annual Report 2008, The Court of Justice of the European Communities (2008).

Figure 2²⁸



It is clear, however, that the heterogeneity in the total number of references per member state may be attributed to various factors. Membership period seems to play a role, as Belgium, Germany, France, Italy and the Netherlands have had the highest number of references, whereas the later arriving EU-12 member states for the most part have made much fewer. If we take year of membership into account, heterogeneity is however still significant, as Figure 3 demonstrates.

Figure 3²⁹



²⁸ Ibid.

²⁹ Ibid. Years of membership is calculated between 1957 and 2008.

It has been argued that population size may in part explain the heterogeneity across member states' reference practice.³⁰ However, when controlling for the different population sizes, the variance across member states is still remarkable. Although the picture of the member states' reference practice is now a different one, in previous work we have demonstrated that there is *no causality* between population size and preliminary reference practice.³¹ In political science terminology, this means that population size cannot *explain* the different number of preliminary references that come from any individual country. A very good example of this is apparent when we compare Austria and Sweden. They entered the EU the same year – in 1995 – and have on average the same population size; however, when looking at the figures, it is clear that Austria has referred more than four times the number of cases than Sweden has.

To put it differently, differences in population sizes do not explain why some member states refer more cases than others. After all, individuals trying to make their case before the ECJ have a long, tiring and troubled way to go before reaching the ECJ. In sum, the absence of causality between population size and preliminary references substantiates the need to take a closer look at other explanatory factors in order to better understand differences and similarities in the interplay between the EU and national courts. Above, when describing the Danish case, we pointed out how legal and democratic culture may explain the hesitance to make use of the preliminary reference procedure. However, the democratic culture explanatory framework has never previously been employed as an explanatory factor in studies of preliminary references. Rather, the most influential explanations launched by political scientists studying variance in reference patterns have been general theories relating to macro factors, such as the amount of trade among countries and court competition.³²

3.1 Explaining national legal push for integration

Existing studies examining the relationship between law and politics in the EU have provided very different explanations for why national courts have

³⁰ N. Fenger, 'Om danske domstoles relative tilbøjelighed til at forelægge præjudicielle spørgsmål for EU-domstolen', (2009) *Juristen*.

³¹ N. 4 Wind, Martinsen & Rotger (2009), 79.

³² A. Stone Sweet and T. L. Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community', (1998) *American Political Science Review* 92(1); see also J. Golub, 'The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice', (1996b) *West European Politics* 19(2).

participated in the legal constitutionalisation of Europe. One of the explanatory variables suggested in prior studies is whether interest groups are active within a policy area, and thus help with resources to push cases to the ECJ.³³ The litigiousness of individual societies is another explanatory factor. That is, are courts in general used to solve societal conflicts – do citizens see it as natural to go to court?³⁴ A third explanation concerns national legal education and judicial learning. How well educated are national judges – do they know enough about EU law and the working of international courts?³⁵ A fourth (and quite prominent) explanation is judicial competition: whether national judges especially from lower courts see a strategic advantage in addressing the European court level and thus by-pass their national legal hierarchy.³⁶

All these factors are highly plausible for explaining the reference practices of individual countries or within different policy sectors. This means, without doubt, that a varied and dynamic mix of factors is likely to explain diverse reference practices. What seems unlikely is that there is one general theory or one main cause which can explain all situations. However, influential American scholars have exactly launched such general explanatory frameworks seeking to explain which general mechanisms can foresee reference patterns in all countries. Stone Sweet and Brunell, for instance, claim that the rise in preliminary references can be predicted by a rise in transnational activity, measured as intra EC trade.³⁷ They argue that the more trade between countries the more cases will be referred to the ECJ by national courts – clearly because more trade will imply more conflicts and more EU legal disputes to be solved. Our previous work, however, has not found any support for this causal relationship even though Denmark as a small open economy is trading significantly with other states. In Denmark, the high trade flow has not lead to

³³ K. J. Alter & J. Vargas, 'Explaining Variation in the Use of European Litigation Strategies', (2000), *Comparative Political Studies* 33(4); see also L. Conant (2001) 'Europeanization and the Courts: Variable Patterns of Adaptation among National Judiciaries', in Maria G. Cowles, James Caposaso and Thomas Risse (eds) *Transforming Europe – Europeanization and Domestic Change*, London: Cornell University Press; see also N. 26 Alter (2000).

³⁴ N. 26 Alter (2000).

³⁵ J. Golub, 'Modelling Judicial Dialogue in the European Community: The Quantitative Basis of Preliminary References to the ECJ', (1996a), EUI Working Paper RSC, No. 96/58; see also N. 26 Alter (2000)

³⁶ J. Golub, 'The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice', (1996b), *West European Politics* 19(2); see also N. 26 Alter (2000) & Alter (2001).

³⁷ N. 32, See Stone Sweet and Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community', *American Political Science Review* (1998), vol. 92, no. 1: 63-81.

more preliminary references. The fact that an otherwise obvious case like Denmark does not fit into Stone Sweet's model made us hypothesise that *type of democracy* might be a much more solid explanatory factor (Wind, Martinsen & Rotger 2009).

There is little doubt that the institutional features that structure the relationship between law and politics differ between democratic traditions in the EU member states. Following Ronald Dworkin³⁸ (as well as Richard Bellamy 2007³⁹) we may divide the European landscape into two different democratic traditions which have shaped the role of the courts and the role of the legislature in fundamentally different ways; *majoritarian* and *constitutional democracy*.

Briefly, *majoritarian democracy* is a well-established tradition in all of the Nordic countries except perhaps Norway, which was the first European country to have a constitutional court. However, as noted in a footnote above – even in Norway the critique of courts and constitutionalism has been prominent in recent years – in particular in the government sponsored "Power and Democracy" report from 2004. The overall concern here was the fear that courts would take over at the expense of political institutions.⁴⁰ The United Kingdom would also fall into this category of majoritarian democracies. Majoritarian democracies are based on the idea of parliamentary supremacy. The parliament is the primary power in and above all other governance structures.⁴¹ The role of the courts in conducting judicial review is thus limited or entirely absent in practice in majoritarian systems. This does not mean, however, that judicial review cannot be a formal right which is mentioned in the constitution. The point we are trying to make here is that judicial review is not practiced and only considered legitimate in extreme cases.⁴² For this reason, it has become commonplace to view constitutional and majoritarian democracy as almost incommensurable: "The ideal of limited government, or constitutionalism, is in conflict with the idea of parliamentary sovereignty".⁴³ Parliamentary governance systems are moreover founded upon the notion

³⁸ R. Dworkin, *Freedoms Law: The Moral Reading of the American Constitution*. (1996) Oxford: Oxford University Press.

³⁹ J. Bellamy, 'Adaptive governance: The challenge for regional natural resource management', (2007) in *Federalism and Regionalism in Australia: New Approaches, New Institutions?*, (A.J. Brown and J.A. Bellamy, eds.), ANU E Press, Canberra ACT, pp. 119-134.

⁴⁰ Ø. Østerud, F. Engelstad & P. Selle, *Makten og demokratiet* (Oslo: Gyldendal Norsk Forlag), 2006.

⁴¹ T. Ginsburg, *Judicial Review in New Democracies*. (2003) Cambridge: Cambridge University Press; see also N. 38 Dworkin (1996).

⁴² N. 8 Rytter & Wind *supra* 6.

⁴³ N. 41 Ginsburg (2003), 2.

that parliamentary majorities represent the "will of the people" and that such majorities should not be subject to judicial review.⁴⁴ Courts are therefore regarded as a "counter-majoritarian" force because they place the protection of rights and civil liberties by the courts above "the will of the people".⁴⁵

Although most majoritarian democracies have constitutions laying down the balance of power principle (at least formally) and as mentioned above even some kind of weak review, it has not been practice that courts challenge or actively review legislation in accordance with the constitution.⁴⁶ As noted, *Denmark, Sweden, Finland and the UK* all have roots in this tradition.⁴⁷ In the UK, there is no written constitution, and the idea of parliamentary sovereignty has always been extremely strong.⁴⁸ Accordingly, the courts have had almost no powers of legislative review and have generally regarded themselves as "*la bouches de la loi*"; loyal primarily to the executive and the democratically elected majority.⁴⁹ EU membership in principle challenged the division of labour between law and politics in the UK. However, British courts did not explicitly accept the supremacy of EU law before the Factortame judgement in 1990, and preliminary references were simply not made during the first decade of membership.⁵⁰ Long established institutional traditions thus resisted adaptation to a new supranational context for a long time. In Finland, the judicial review of legislation was directly forbidden up until a very recent amendment to the constitution in 2000.⁵¹ In Sweden, the review of legislation is formally allowed but almost never practiced. In Denmark, the

⁴⁴ N. 38 Dworkin (1996), 19-20.

⁴⁵ A. Føllesdal, 'Rawls in the Nordic Countries', (2002) *European Journal of Political Theory* 1(2): 181-98.

⁴⁶ N. 20 Scheinin (2001).

⁴⁷ A. Føllesdal and M. Wind, 'Introduction to Nordic Reluctance Towards Judicial Review Under Siege', (2009), *Nordic Journal of Human Rights* 27(2): 131-141.

⁴⁸ D. Chalmers, 'The Positioning of EU Judicial Politics within the United Kingdom', (2001), in Klaus H. Goetz and Simon Hix (eds) *Europeanised Politics. European Integration and National Political Systems*, pp. 169-211. London: Frank Cass Publishers; see also N. 38 Dworkin (1996).

⁴⁹ M.L. Volcansek, 'Judges, Courts and Policy-Making in Western Europe', (1992) *West European Politics* 15(3): 109-21; see also N. 48 Chalmers (2001).

⁵⁰ P. P. Craig, 'Report on United Kingdom', (1998) in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H.H. Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence*. Oxford: Hart Publishing: 200-205.

⁵¹ J. Nergelius, 'North and South: Can the Nordic States and the European Continent Find Each Other in the Constitutional Area – or Are They Too Different?', (2001) in M. Scheinin (ed.) *The Welfare State and Constitutionalism in the Nordic Countries*: 85; see also T. Ojanen 'From Constitutional Periphery toward the Centre – Transformations of Judicial Review in Finland', (2009), *Nordisk Tidsskrift for Menneskerettigheder* 27(2): 194-208.

constitution is silent on the issue and Danish courts have – as noted above – set aside legislation only once in the past 160 years.⁵² Moreover, the majoritarian paradigm in the Nordic countries has cultivated “... a corps of judges who are unusually loyal to the legislator, never questioning his wisdom and not perceiving its task as protecting the rights of the individual against the state”.⁵³ Moreover, as judges perceive themselves as neutral and apolitical civil servants there is little doubt that the entire European development – in the EU as well as the European human rights regime guided by the Court in Strasbourg – has been perceived with great unease and great suspicion. These courts are doing everything that a Nordic judge has been taught not to do.

Constitutional democracy takes a different route. It is first and foremost an American invention, which only gradually came to influence a number of European countries after World War II. Constitutional democracies generally embrace judicial review and view it as a constitutive aspect of what it means to be a true democracy. Supranational judicial review at the European level is therefore perceived as a natural extension of national practice; not as a threat. Theoretical as well as descriptive literature has recently described some very general trends characterizing constitutional democracies in Europe and elsewhere.⁵⁴ These studies often emphasise that judicial review became a reality in Europe after World War II when the defeated powers, Germany and Italy, adopted the institution in order to better protect fundamental rights. In reality, there is of course great variation in the manner in which judicial review was institutionalised in different European countries.⁵⁵ Research suggests, however, that historical/institutional factors such as court structure, monism/dualism, and experience with dictatorship and/or communist rule influence the emphasis countries place on judicial review and the need for limiting

⁵² N. 51 Nergelius (2001), N. 16 Rytter (2001), N. 12 Palmer Olsen (2005), N. 8 Rytter & Wind (2010).

⁵³ N. 51 Nergelius (2001): 88.

⁵⁴ S. Kenny et al. *Constitutional Dialogues in Comparative Perspective*. (1999) London: Macmillan; see also M. Shapiro and A. Stone (eds) ‘Special Issue: The New Constitutional Politics of Europe’, (1994), *Comparative Political Studies* 26(4): 397–561; see also A. Stone Sweet ‘Constitutional Dialogues: Protecting Rights in France, Germany, Italy and Spain’, (1999) in Sally Kenny, William M. Reisinger and John C. Reitz (eds) *Constitutional Dialogues in Comparative Perspective*; see also Stone Sweet, Alec (2002) ‘Constitutional Courts and Parliamentary Democracy’, *West European Politics* 25(1): 77–100; see also Sheive ‘Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review’, (1995) *Law & Policy International Business*; see also N. 20 Scheinin (2001); N. 38 Dworkin (1996); N. 41 Ginsburg (2003).

⁵⁵ N. 54 Kenny et al. (1999).

parliamentary power.⁵⁶ Moreover, as Martin Shapiro has pointed out, countries which conduct judicial review are often (but not always) organized along federalist lines.⁵⁷ The US and Germany are good examples of federalist states in this category. However, Australia and Canada are unitary states and still have a judicial review system,⁵⁸ so the emphasis should rather – he argues – be put on the presence of an explicit division of powers element. Having some kind of division of powers system (sometimes combined with federalism) may thus better explain the acceptance of a judicial review system. Another hypothesis is the rights hypothesis which may supplement the division of powers hypothesis. As Shapiro points out: “Those polities which first adopted judicial review did so because of division of powers. Rights concerns engendered recent judicial review.... Most probable: a conjunction of division of powers and rights concerns is most likely to generate successful review”.⁵⁹ The interesting thing here, however, is that Denmark and indeed the other Nordic countries traditionally have been very rarely occupied with either division of powers or fundamental rights.⁶⁰ Courts have thus not been preoccupied with protecting such rights. Rather, the state has been regarded as an all embracing entity protecting the individual from “cradle to grave”.⁶¹ With little focus on the protection of citizen’s basic rights there has thus been little incentive for Danish courts to actively test the Danish state’s administration of EU law implementation. Moreover, due to the recruitment pattern to the Danish courts where the majority of judges (despite a judicial reform to change this in 2000) are still recruited from the Ministry of Justice, judges will often be more loyal to the state apparatus and to the political establishment than to the basic (EU) rights of citizens.

4. Danish Courts: Reluctant European players?

As a European Community member since 1973, Denmark has had considerable time to accustom itself to European ways and manners, not least the Eu-

⁵⁶ P. Magalhães, ‘The Politics of Judicial Reform in Eastern Europe’, (1999), *Comparative Politics* 32(1): 43–62; N. 49 Sheive (1995), 1-25; see also N. 51 Stone Sweet (2002); N. 41 Ginsburg (2003)

⁵⁷ M. Shapiro, ‘The Success of Judicial Review’ (1999) in Sally Kenny, William M. Reisinger and John C. Reitz (eds) *Constitutional Dialogues in Comparative Perspective*. London: Macmillan, 193-219.

⁵⁸ N. 57, Shapiro (1999), 197

⁵⁹ N. 57, Shapiro (1999), 201.

⁶⁰ N. 16 Rytter (2001).; see also N. 12 Palmer Olsen (2003); N. 4 Wind, Martinsen & Rotger (2009).

⁶¹ N. 8 Rytter & Wind (2010).

ropean legal system. Denmark is, however, often referred to as “the dutiful pupil in the class” when it comes to formal implementation of EU legislation. This is no doubt a correct description. It is, however, also correct – as Hagel Sørensen has pointed out – that the reason for Denmark’s high and fast implementation frequency concerning EU legislative acts is due to the fact that these can be executed administratively. In other EU member states, Italy for instance, the delegation from the legislative to the administrative branch is subject to much stricter constitutional procedures, which clearly influences how fast and vivid the implementation of EU law can be processed.⁶² Regarding sufficient implementation in practice, Denmark does, however, not always live up to its reputation as a good pupil.⁶³

Returning to the role and impact of the Danish courts, however, there is little doubt that institutional features and legal culture continuously impact and structure their relationship to the ECJ. The findings presented in figures 2 and 3 above indicate that Denmark is one of the member states that has made fewer preliminary references to the ECJ; a total of 122 between 1973 and 2008 or an average of 3.39 cases per year of membership.

It has been pointed out that the preliminary reference procedure in Denmark is in part conditioned by an extraordinarily close relationship with the executive branch (the Ministry of Justice and Foreign Affairs) and the Danish courts.⁶⁴ Historically, there has always been a close relationship between the Ministry of Justice and the national courts. Until 1999, Danish judges were exclusively recruited from the Ministry of Justice, and the loyalty to this executive body remains almost unchallenged (Interviews, Danish judges and civil servants, March 2006).⁶⁵ This in part explains why the so-called *Judicial Committee* plays an influential role when it comes to preliminary references. In his study, Pagh demonstrates how the Judicial Committee not only advises the Danish courts through the attorney of the Danish state by participating in

⁶² K. Hagel-Sørensen, ‘Fællesskabsretten som en del af dansk ret’, (1994) *Festskrift til Ole Due*, Copenhagen: G.E.C. GadsForlag: 115.

⁶³ D. S. Martinsen, ‘The Europeanisation of Welfare – The Domestic Impact of Intra-European Social Security’, (2005) *Journal of Common Market Studies* 43(5): 1003–30; D. S. Martinsen, ‘The Europeanisation of gender equality : who controls the scope of non-discrimination?’, (2007), *Journal of European Public Policy* 14(4): 544–562; D. S. Martinsen, & K. Vrangbæk, ‘The Europeanization of Health Care Governance: Implementing the Market Imperatives of Europe’, (2008), *Public Administration* 86(1): 169–85.

⁶⁴ P. Pagh, ‘Præjudicielle forelæggelser og Juridisk Specialudvalg’, (2004) *Ugeskrift for Retsvæsen* 41: 305–13.; P. Pagh ‘Bopælspligt, menneskerettigheder og EU-ret: en kommentar til U 2007.99 HI lyset af nye EF-domme.’ (2007) *Ugeskrift for retsvæsen*: 126–132.

⁶⁵ J. P. Christensen, *Domstolene – den tredje statsmagt*. (2003) Aarhus: Magtudredningen, 75–90.

the selection and drafting of 267-questions (formerly art. 234) but also that many of the same people from the committee advise the government in the implementation of EU law.⁶⁶

As there is no tradition for the judicial review of legislation in Denmark, the preliminary reference procedure has been regarded – in most cases – as an unnecessary foreign element interfering in matters which may be dealt with by the national court system itself.⁶⁷ Danish courts have thus repeatedly invoked the *acte claire* doctrine, and thus avoided asking the ECJ for clarification.

Our research shows that because of its many overlapping and occasionally contradictory tasks, the Judicial Committee will have little incentive to suggest the national court (through the Danish attorney) to make a preliminary reference. A comprehensive survey conducted amongst all Danish judges in the winter of 2006 on this issue confirmed that one of the main reasons for the low number of preliminary references was discouragement from the legal adviser to the Danish government based on a so-called “*responsa*” by the Committee.⁶⁸ Asked specifically about the main reason for not making any (or very few) preliminary references, an overwhelming 69% referred to discouragement from the state attorney. According to Pagh the involvement of the Judicial Committee is the most convincing single explanatory factor for the low number of referrals from Danish courts since Denmark became a member of the European Community. Pagh’s own study shows that from 1986 to 2003, the Judicial Committee has recommended *not* referring a case to the ECJ in 20 out of 26 cases, even though all 26 cases dealt with the interpretation of EU law and at least one of the parties had requested an interpretation by the ECJ.⁶⁹ Generally speaking, the Judicial Committee has only recommended Danish courts to make preliminary references in those cases where there is already direct action being taken against Denmark by the Commission.⁷⁰ Whereas the Judicial Committee is “just doing its job” that is advising the one party in a case – the Danish government – it is perhaps more puzzling that the Danish courts treat this advice as “the highest legal expertise” – as one of the judges in our interviews put it. However, being brought

⁶⁶ N. 64 Pagh (2004).

⁶⁷ Own research; see also N. 63 Pagh (2004).

⁶⁸ The 17-page questionnaire was sent to all (380) of the judges in Denmark. 62% of the judges responded.

⁶⁹ N. 64 Pagh (2004), 307.

⁷⁰ In particular, the infamous ‘can-case’, case c-246/99, in which Denmark was charged by the Commission for hindering the implementation of directive 94/62 dealing with the marketing of cans instead of ordinary bottles on the Danish market.

up in the Ministry of Justice themselves, most judges may feel inclined to take advice from this source very seriously.

Moreover, in the literature it is often argued that the highest courts (and constitutional courts in general) are expected to be least eager to subject themselves to an authority outside of the national legal order.⁷¹ The lower courts, on the other hand, have always been expected to refer most cases as a means of revolting against the often strict national legal hierarchy.⁷² Interestingly, this explanation holds for many EU member states, but not for Denmark (or for the other Nordic countries) where the lower courts leave it to the appellate courts and the Supreme Court to make almost all references.⁷³ In our study (data from a survey of 380 Danish judges), the reluctance towards sending cases forward is quite clear. Some of the main results from this study can be summarised as follows⁷⁴:

<i>What was the attitude (in 2006) of Danish judges towards making use of the preliminary reference system in the EU?</i>	
It is not our duty, but the duty of the parties in a case to figure out whether there is a potential conflict between national law and EU law.	60%
Danish law is still the primary source of law and Danish judges are able to solve most cases without making use of EU law.	30%
Danish judges have only scarce knowledge of EU law.	21%
A main reason for not sending cases to the ECJ is the advice of the Danish State attorney (“Kammeradvokaten”).	69%
Lower courts: The Danish Supreme Court should decide whether a preliminary ruling should be made or not.	36%
Acte Claire – if we consider EU law to be sufficiently clear we do not make a reference.	57%
Too long waiting time at the ECJ.	38%

We will not go into great detail regarding the findings from this study here, but refer to other literature where the results of the study have been presented in more detail.⁷⁵ There is, however, little doubt that the survey of the Danish

⁷¹ J.H.H. Weiler, ‘The Transformation of Europe’, (1991) *The Yale Law Journal* 100: 2403-2483; see also P. P. Craig and G. De Búrca, *EU Law: Text, Cases and Materials*, (2008) Oxford University Press, 344 and 480-501; see also N. 26 Alter (2001).

⁷² N. 26 Alter (2001).

⁷³ N. 13 Wind (2009).

⁷⁴ N. 13 Wind (2009), 283 where this figure was first published.

⁷⁵ N. 21 M. Wind (2010); see also N. 8 Rytter & Wind (2010); N. 13 Wind (2009).

judges supports our cultural/democracy explanation quite substantially. There is an enormous unease and unfamiliarity with the European legal system that, in a Danish context, is further emphasised by the dominance of legal positivism and its “anti-rights” tradition, which creates suspicion towards the increasing number of social and economic rights coming out of the internal market, but which is further emphasised with the Charter of Fundamental rights in the Treaty of Lisbon. In Denmark and the other Nordic countries, there is a firm conviction that rights which contain a distributional element should be decided by the politicians – not the courts. The problem is, however, that the international legal development – not only in the EU but also in the European Court of Human rights – pushes in the opposite direction. The losers if and when national courts refuse (deliberately or by other means) to protect fundamental rights – of any kind – will obviously be the citizens. Many things suggest, in other words, that in countries with majoritarian democracy, with little or no tradition of judicial review and active human rights protection by national courts, the impact of rights will be felt less strongly. The result may thus be an uneven rights protection in Europe.

5. Conclusion

The position taken in this paper is parallel to that of Martin Shapiro: “*judges make rather than simply discover law*”.⁷⁶ While this may be a trivial insight in any constitutional democracy context, it is still a rather provoking statement to make in a Danish/Nordic political setting. In Denmark and the rest of the Nordic part of Europe, a wide but subtle consensus holds that the best way to run a democracy is to elevate parliament above the other branches of government, foster close links between the courts, the legislature and the executive branches of government, and only give courts scarce judicial review powers. Indeed, the successful Nordic welfare states have even regarded their corporatist structure, homogenous culture and more or less unconstrained parliaments as role models for other democracies and as eminent examples of good democratic principles, where “the will of the people” is reflected in political majority decisions. There is no doubt that “the will of the people” is here to stay. The question that we raise is, however, whether it is always reflecting the will of the people when courts refrain from (or are hesitant) to protect fundamental rights – including setting aside majority decisions where the individual citizen (rather than the state apparatus) is wronged? Hjalte

⁷⁶ M. Shapiro, ‘Towards a Theory of *Stare Decisive*’, (2002) in: Shapiro, Martin & Stone Sweet, Alec (eds.): *On Law, Politics and Judicialization* (Oxford: University Press), 20.

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Rasmussen's research on the ECJ has spurred this debate in Denmark and far beyond, and though we may not agree entirely with his conclusions, we doubt that we would have entered the "law and politics" research realm had it not been for his provocative pen.