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Who Is Afraid of European Constitutionalism? The Nordic Distress with Judicial Review and Constitutional Democracy

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Abstract:

According to Ronald Dworkin, majoritarian democracies like the Nordic ones are founded upon the notion that parliamentary majorities are elevated above the other branches of government and that such majorities should not be subject to judicial review. The emergence of a powerful supranational judicial body at the EU level which, on a regular basis, sets aside national law and sovereign prerogatives, therefore shakes the very foundation on which majoritarian democracies rests. This article shows how conceptions of democracy in the Nordics can explain the critical Nordic attitude towards the legitimacy of the European Court of Justice and of European law more generally. Using Denmark as a case, I show that national courts in a majoritarian democracy only reluctantly cooperate with supranational judicial bodies by referring very few cases. I argue that Nordic courts forward few cases to the European court of justice both because they have little experience with judicial review at the national level but also – and more importantly – due to a widespread hostility towards (supranational) judicial review in general.

KEYWORDS: European Constitutionalism, Denmark and judicial review, constitutional and majoritarian democracy, preliminary references, national courts.

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Who is afraid of European Constitutionalism?¹

The Nordic distress with judicial review and constitutional democracy

By Dr. Prof. Marlene Wind, University of Copenhagen²

Is judicial review in accordance with our democratic sensibilities or should parliaments be unconstrained in the sense of not having to subject themselves to review by courts? Should the parliaments be trusted to protect fundamental rights – as some theorists³ (and certainly politicians) claim – or do we need independent courts for that?

In the Nordic countries⁴ the question of judicial review has been the subject of public contestation in recent years⁵. That the role and legitimacy of courts and judicial bodies have been increasingly debated may be a result of the fact that courts and constitutionalism sticks its nose out almost everywhere these days and because judicial power seems to continue to grow globally as well as nationally⁶. Not only has the European Court of Justice cemented its powers as the EU has enlarged and EU legislation become more fuzzy – sworn by compromises. Also the European Court of Human Rights and other international dispute settlement bodies have become increasingly powerful⁷.

Perhaps as a response to this *empirical* trend towards judicialization, judicial review has become increasingly debated and challenged within academia, that is, *theoretically*. The political philosopher Richard Bellamy has thus recently referred to the judicial review-instrument as ‘tyranny of the minority’. He dedicated an entire volume to a full-fledged attack on judicial review

¹ Forthcoming in Claudio Franzini/Franz C. Mayer/Jürgen Neyer (eds.); Modelle des Parlamentarismus im 21. Jahrhundert. Neue Ordnungen von Recht und Politik; Recht und Politik in der Europäischen Union Band 4, Baden-Baden: Nomos 2015.

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³ Robert Dahl, *Democracy and its critics*, New Haven: Yale University Press, (1989), pp. 154-159.

⁴ Denmark, Sweden, Norway, Iceland and Finland.

⁵ A.Føllesdal & M. Wind (2009), Nordic Reluctance Towards Judicial Review under Siege, *Nordic Journal of Human Rights*, vol. 27, no.2: 131-141.

⁶ R. Hirschl, (2006), *Towards Juristocracy*, Cambridge: Harvard University Press.

⁷ K. Alter, (2014), *The New Terrain of International Law*, Princeton University Press. See also the iCourts project at the University of Copenhagen, Faculty of Law where all international courts are mapped see www.icourts.jur.ku.dk

by courts and what he terms ‘legal’ as opposed to what he sees as a much more democratic ‘political’ constitutionalism where all powers are left to a more or less unconstrained majority⁸. As this brief article will show, Professor Bellamy has certainly not been talking to deaf ears in the Nordics. The fact that (international) courts and judicial review has become more and more prolific has generated a wide debate not only among specialists but equally among the public in the Nordic countries. A few examples from the Nordics illustrate the growing scepticism:

Danes have become increasingly worried that the European Court of Justice’s ever expanding rights interpretations will challenge their strict immigration policy. In a few recent judgements the Court of Justice has thus interpreted the EU’s residence directive⁹ and the European freedom of movement in a way which has forced Denmark to grant residence to non-approved asylum seekers married to EU citizens. The ECJ also recently argued that it was discriminatory if EU citizens working for a brief period in Denmark could not get access to generous university scholarships¹⁰. Both cases (and many others) caused so much stir that prominent politicians and even ministers wrote up-eds in leading newspapers shaming the European Court of Justice, arguing that judges are ‘only’ civil servants who should not stick their nose into political matters¹¹.

Swedes have equally challenged the European Court. In particular the Court’s efforts to put limits on Swedish trade unions’ attempts to force foreign companies to sign collective agreements when operating in Sweden¹². Moreover, proposed changes by an expert group for Constitutional Reform¹³ to introduce some form of limited judicial review into the Swedish constitution led to a more than just vivid debate in Sweden among experts as well as lay people.

In Norway, an influential ‘Power and Democracy Study’ from 2007 concluded that there were good reasons to worry about international conventions and courts serving to undermine and emasculate popular rule¹⁴.

The intriguing question is, of course, why the Nordics express such deep scepticism towards judicial review in stark contrast to most other European countries?

⁸ R. Bellamy, (2007), *Political Constitutionalism*, Cambridge University Press, see page 26. Bellamy’s distinction between political and legal constitutionalism corresponds roughly to the parallel distinction utilized by Dworkin between majoritarian and constitutional democracy.

⁹ Metock and others case 127/08.

¹⁰ L.N. Case 46/12.

¹¹ Birthe Rønn Hornbek Berlingske Tidene August 3rd 2008. Berlingske Tidende 3. august 2008: ”Kronik: Udlændingeregler: EF-Domstolen skal ikke undergrave dansk lov”. [The European Court of Justice should not undermine Danish law].

¹² See the Laval case: <http://www.eurofound.europa.eu/eiro/2008/01/articles/eu0801019i.htm>

¹³ Grundlagsutredningen, SOU 2007:85, Olika former av normkontroll.

¹⁴ NOU (2003) *NOU 2003:19 Makt- og demokratiutredningen*.

In this article, I propose an explanation that focuses on national democratic culture. In order to conceptualize “democratic culture”, I draw on legal philosopher Ronald Dworkin’s distinction between constitutional and majoritarian democracies¹⁵. Whereas constitutional democracies (e.g. Germany) generally embrace judicial review and view it as a constitutive part of being a “true” democracy, majoritarian democracies (e.g. the Nordics and to some extent the UK), perceive parliamentary majorities as elevated above the other branches of government. And these majorities should not be constraint or subject to review by courts. As this article will demonstrate, the democratic culture of the Nordics – which with minor variations - are all majoritarian democracies¹⁶ – is indeed a possible explanation to the disquiet with judicial review by courts – including European judicial review.

Due to lack of space I will exclusively focus on the Danish case in this article however, more specifically on the Danish courts’ relationship with the European Court of Justice. I argue that the Danish judges’ reluctance to forward cases (preliminary questions) to the European Court of Justice mirrors an ordinary hesitance and disquiet about judicial review by Danish courts when it comes also to national legislation¹⁷. It is simply not part of Danish legal and political culture. Forwarding a preliminary reference to the European Court of Justice by a Danish court – lower or higher – would thus de facto constitute an introduction of judicial review in Denmark just under much ‘worse’ conditions as it would be a foreign (European) court doing the job rather than the Danish Supreme Court. The empirical data and analysis put forward below draws on my earlier extensive work on this topic which has been published in a number of international journals (Wind et al., 2009; Wind, 2009; Wind 2010; Rytter & Wind 2011)¹⁸.

The Danish constitutional struggles

¹⁵ R. Dworkin (1996), *Freedoms Law*, Harvard University Press.

¹⁶ Norway is different as judicial review is in fact allowed and practiced to some degree in Norway. Recent research shows that this difference among the Nordics is also reflected in the supreme courts citation of international law. Here Norwegian Supreme courts cite international law and courts significantly more than Swedish and Danish. See M. Wind 2015 forthcoming.

¹⁷ See Press release dated 19 February 1999 with Judgment passed on the same day by the Supreme Court; made public at <http://www.thybo.dk/tvind.htm>

¹⁸ This section in part draws on my article: “When Parliament comes first: The Danish Concept of Democracy Meets the European Union”, *Nordic Journal of Human Rights*, 2009, Vol. 27: 272-289. M. Wind et al, (2009), The Uneven Legal Push for Europe: Questioning Variation when National Courts go to Europe, *European Union Politics*, 10:1: 63-88; M.Wind (2010), The Nordic, the EU and the Reluctance Towards Supranational Judicial Review, *Journal of Common Market Studies*, vol. 48:3: 1039-1063; J.E. Rytter & M. Wind, (2011), In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms, *International Journal of Constitutional Law*, 9:2, 470-502.

Where does the Danish reluctance towards judicial review by courts come from, e.g. why did Denmark become a majoritarian democracy – and stayed so - as opposed to most other European countries after the Second World War?¹⁹ In fact this has never been studied and only rarely reflected on previously in the legal or political science scholarly literature²⁰. The scepticism is not simply due to the fact that Denmark is a small state with a dualist legal system. Many other European countries with dualist legal structures have embraced constitutionalism and the European legal order in full. It is more convincing, I argue, to try to understand the Danish legal and democratic systems by binding together the past with the present, that is, examine how Denmark transformed from absolutism to a full-fledged democracy and in this process developed into a majoritarian system.

Counter to the narrative still often heard in schools, universities and the public debate that Denmark always has been a decentralized state and later a very transparent democracy,²¹ the Danish historian, professor Gunner Lind, has characterized Denmark as one of the most centralized states in Europe where democracy as a division of powers never fully took root.²² He explains this by the strong role of absolutism and Danish monarchical rule, which in itself was extremely centralized: “There were more pluralism and separation of power in ‘the France of the Sun King’ than under Danish absolutist rule.”²³ As Lind argues, because Denmark had a non-violent transition from absolutism to democracy, the idea of one body as the ultimate authority and symbol of power in society was never really challenged. So when Denmark introduced democracy and ‘rule by the people’, it simply replaced the elevated role and status of the king with the parliament (Rigsdag). There was no mention of judicial review in the Danish constitution and as law professor Henning Koch has pointed out, the Danish Supreme Court curiously emphasized its own full support for the supremacy of the parliament in the same ruling where it - for the first time (in 1921) - formally stated its competence to try the constitutionality of legislative acts. As Koch noted: “The Supreme Court

¹⁹ See A. Stone Sweet 2004 for the argument that most European states became constitutional democracies with extensive judicial review mechanisms after the Second World War. See A. Stone Sweet (2004), *The Judicial Construction of Europe*, Oxford: Oxford University Press.

²⁰ But see Palmer Olsen, (2005), *Magtfordeling*, Copenhagen: Djøf.

²¹ See Hal Koch 1945 and the Danish ‘Magtudredning’ 2003 as examples. H. Koch (1945), *Hvad er Demokrati*, Gyldendal; L. Tøgeby et al (2003), *Magtudredningen*, Gyldendal.

²² See also Knudsen (2001), *Da Demokrati blev til Folkestyre*, Akademisk Forlag, page 181; T. Knudsen (2012 4th ed.), *Fra Enevælde til Folkestyre*, Akademisk forlag, pages 122ff.

²³ Lind cited in Knudsen 2001: 181.

equally resolved that in principle there were: no one over or next to the Rigsdag.”²⁴ When the Rigsdag (upper chamber) was demolished in 1953, the Folketing (lower chamber) was immediately regarded as the most authentic representative of the ‘the people’.

The negotiators of the Danish constitution of 1849 generally spend very little time on the separation of powers and none at all on judicial review.²⁵ However, § 2 of the constitution –which is still active today - reads in the following way: “The legislative power rests with the King and the Rigsdag in unison. The executive Power rests with the King. The judicial power rests with the courts.”²⁶ The Danish constitution is in other words silent on the courts’ power to exercise judicial review of legislation.²⁷ As Jens Peter Christensen – a former law Professor – now judge in the Danish Supreme Court - has pointed out, the courts were intended to be nothing but ‘les bouches de la loi’, and thus not meant to play a truly independent role in the law interpretation.²⁸ The politicians agreed to this subtle role of the courts probably because judges – among the social democrats at least – were considered a very conservative and elitist power in society. When the first Danish constitution was negotiated a majority in the Danish parliament thus explicitly warned against any kind of judicial review by courts, and several prominent lawyers as well as politicians emphasized that since the judges were appointed by the king and the government they clearly could not be either above these instances nor on an equal footing (and thereby in a capacity to exercise judicial review)²⁹. Interestingly, this argument resembles that of Alf Ross – the internationally most reckoned Danish law professor – who from a more philosophical angle argued that the courts logically had to be considered subordinate [underlagt]³⁰ to the parliament because the parliament would be able to overrule any court case any time by legislating against it ex post.³¹ This clearly differs from the conclusion drawn by US justice Marshall in his famous ruling in 1803 in the

²⁴ H. Koch (1999), Dansk Forfatningsret i Transnational belysning, *Juristen*, vol. 81: 213-227, see page. 216. My translation from the Danish, which reads in its full text: “Thi med UFR 1921. 644 H fastlog den danske Højesteret ikke alene domstolenes prøvelsesret, som det normalt påpeges, men anerkendte også parlamentets overhøjhed, idet Højesteret brugte vendingen: ‘...den Sikkerhed, som maatte kræves ... for at tilsidesætte en lov som grundlovsstridig’. Højesteret resolverede i samme åndedrag, at som udgangspunkt var der: Ingen over eller ved siden af Rigsdagen” (Koch 1999: 126).

²⁵ Knudsen 2001: 122.

²⁶ In the 1953 Constitution § 2 became §3 but there were no changes in wording except *Folketing* replacing *Rigsdag*.

²⁷ J.P. Christensen (2003), *Domstolene – den tredje statsmagt*, Gyldendal, page. 11-13.

²⁸ Christensen 2003: 11-13. In § 64 of the Danish Constitution it reads that “The Judges are only to obey the law” (my translation). In Danish: “Dommerne har I deres kald alene at rette sig efter loven”.

²⁹ Christensen 2003: 12-13; see also Schaumburg-Müller (2009), *Parliamentary Precedence in Denmark- a Jurisprudential Assessment*, *Nordic Journal of Human Rights*, vol. 27, no.2: 170-185.

³⁰ See Palmer Olsen’s discussion of Ross 2005: 296ff.

³¹ Palmer Olsen 2005: 296.

Marbury v. Madison case. This case not only established judicial review of courts in the United States but is also again and again referred to by constitutional theorists saying that: “If then the courts are to regard the constitution; and the constitution is superior to an ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply”³².

All this is not meant to imply that judicial review by courts is directly illegal in the Danish constitution from 1849 as it was until very recently in both the Finnish and the Swedish constitution.³³ Most constitutional lawyers in Denmark would probably argue that judicial review is a theoretical possibility but a possibility that should be avoided by all means. The judges should thus exhibit ‘self-restraint’ and leave it to the politicians and the majority in parliament – not only to rule but also to protect basic rights (Rytter 2001; Rytter & Wind 2011). 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 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.”³⁴

So even though the theoretical possibility of judicial review was established in case law back in 1921, it never entered into the most recent constitutional amendment in 1953 and has only led to ‘judicial overturning’³⁵ of a legislative act once in the past 165 years in the Tvind case from 1998³⁶. Being formally *elected by the people* as only parliaments are has thus always been considered the ultimate symbol of democratic legitimacy in Denmark – also in the academic literature on democracy. The Danish constitutional lawyer Jens Elo Rytter implicitly says exactly this when he in

³² Here cited from Eivind Smith (1993), *Høyesterett og Folketyret*, Universitetsforlaget i Oslo, page. 306.

³³ See M. Schenin (2001), *The Welfare State and Constitutionalism in the Nordic Countries*, Copenhagen: Nordisk Råd.

³⁴ N. 7 J. E. Rytter & M. Wind supra 6, p. 5.

³⁵ There is a great difference between officially endorsing the institution of judicial review and implicitly accepting the institution in principle. It is also useful to distinguish the right of judicial review with actual judicial setting aside of national legislation.

³⁶ Christensen 2005; Palmer Olsen 2005; Knudsen 2006. This does not mean, however, that the ordinary courts (Denmark has no administrative courts) do not review administrative acts. They do. However, setting aside legislation from is an entirely different matter.

the quote below refers to ‘election’ as being the ultimate definition of democratic legitimacy in the Nordic countries:

“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.”³⁷

The logic here is however puzzling from a constitutional point of view. Was the shielding of judges from popular ballots not precisely what was desired when Montesquieu launched the principle of the separation of powers? Being protected from elections and other popularity contests was exactly what gave courts and judges their role as indispensable components in the protection of basic rights, one could argue. This is however not how many Danish law professors and politicians have perceived it. The rather sceptical approach to rights protection by supranational judicial bodies is well illustrated by a Danish law professor who for years questioned Denmark joining the European Convention of Human Rights. It was signed by Denmark in 1953, but not given legal effect (incorporated) in Danish law until 1992. Professor Gorm Toftegaard Nielsen thus argues that Denmark never needed this Convention. Denmark does not – as he sees it – have any problems with human rights (unlike other European countries),³⁸ but simply joined because: “[w]e would like to help other countries who had problems with their human rights protection”.³⁹ The fact that he and many others in Danish society saw Denmark as elevated above human rights conflicts combined with a sceptical view on judges (as opposed to politicians) as the best human rights guardians, may explain why it took 40 years before the convention was incorporated into Danish law and applied by the Danish courts.⁴⁰

It now seems more understandable why the Danish political and legal establishment and the general public have expressed such scepticism towards the Danish engagement in not just the ECJ but also in ECtHR: By joining these European legal mechanisms, we have de facto subjected ourselves to judicial review by two strong international courts, which stand in stark contrast to the majoritarian tradition outlined above. If there is no tradition for judicial review at home, how can we then accept

³⁷ J. E. Rytter *Grundrettigheder. Domstolenes fortolkning og kontrol med lovgivningsmagten* (2000), page 138.

³⁸ G. T. Nielsen (2001), *Parlamentarismen – hvem tog magten?*, Århus Universitets Forlag, page 170.

³⁹ *Ibid.*

⁴⁰ Togeby et al 2003: 119; see also Koch, Røberg, Schaumburg-Müller & Vedsted-Hansen 2004.

almost daily judicial review and scrutiny of national legislation by international judicial bodies? In practice, it seems that Denmark constantly tries to keep the judicial review of the European Courts at bay and thus at an absolute minimum level. Below I will sketch how this can be illustrated by looking at the rather low level of preliminary references submitted by Danish courts to the European Court of Justice.

Denmark and European Judicial review⁴¹

The still unsettled issue of a judicial dialogue between the courts of the member states and the European Court of Justice thus illustrates and underscores the continuing relevance of the more philosophical discussion between constitutional and majoritarian democracies. Due to the full fledged Danish adoption of the Dworkinian majoritarian democracy-conception with the lawmaker at the centre, Danish courts – and indeed the public administration managing the day to day business with the EU – 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 all 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.⁴² A political and legal culture with no tradition of judicial review, clearly must regard it as counter-intuitive to ask a supranational court to evaluate and judge on what a Danish lawmaker (and administration) has been deciding when implementing EU law. What makes it even ‘worse’ is of course that we in addition are dealing with a supranational court, which do not reveal dissenting votes and which employs a dynamic style of legal interpretation.⁴³ The political control with the courts, which is – I will argue - implicit and very rarely discussed in a Nordic context, is thus non-existent 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 has explicitly and consistently rejected it, 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.

⁴¹ The section above draws on my previous work and a piece written together with Dorte Martinsen in a Festschrift for Hjalte Rasmussen from 2010. D.S Martinsen & M. Wind (2010), *When national courts go to Europe. Reluctant or active players in the integration process?* In H. Koch, K. Hagel-Sørensen, U. Haltern & J.Weiler (eds.), *Europe: The New Legal Realism*, Djøf Publishing, Copenhagen.

⁴² Wind, Martinsen & Rotger (2009); and Rytter & Wind (2011)

⁴³ H. Rasmussen (1986), *On Law and Policy in the European Court of Justice*, Martinus Nijhoff.

Referring cases to the ECJ when in doubt of the interpretation of EU law is nevertheless the cornerstone in the EU constitutional order and something that all Nordic countries have had to learn to live with – even Iceland and Norway, which are part of the European Economic Area (EEA).⁴⁴ In order to make sure that the EU's legal system develops in a harmonious and uncontradictory manner and to secure that citizens and enterprises are equally protected in all of Europe, it is (and always has been) essential that national courts engage in an open and deliberate dialogue with the European Court of Justice.

In a long-term perspective, national courts – in the EU as a whole – have indeed accepted and taken up that role.⁴⁵ The statistics presented below however also reveals great differences between the European countries.

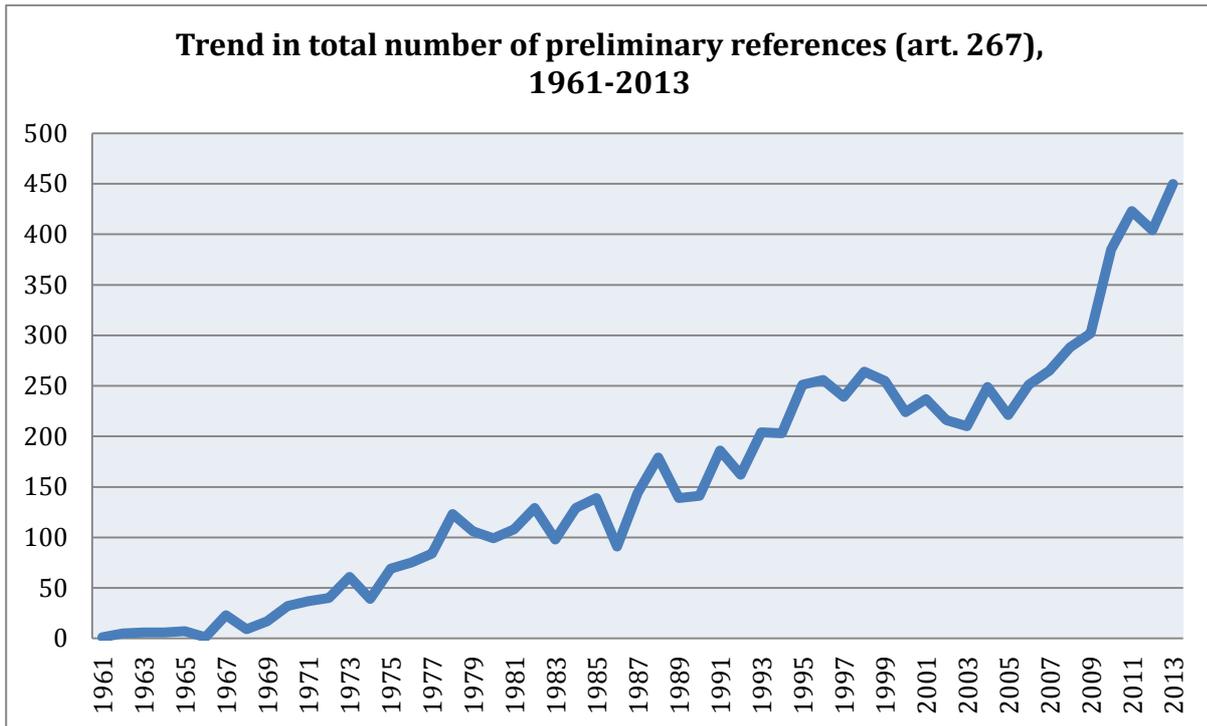
Overall, Article 267 (previously art. 234 and art. 177) references continued to increase significantly between 1961, when the first preliminary reference was forwarded to the Court, and 2013. Figure 1 illustrates this trend.

Figure 1⁴⁶

⁴⁴ J. H. H Weiler, 'The Transformation of Europe', (1991), *The Yale Law Journal* 100: 2403-2483.

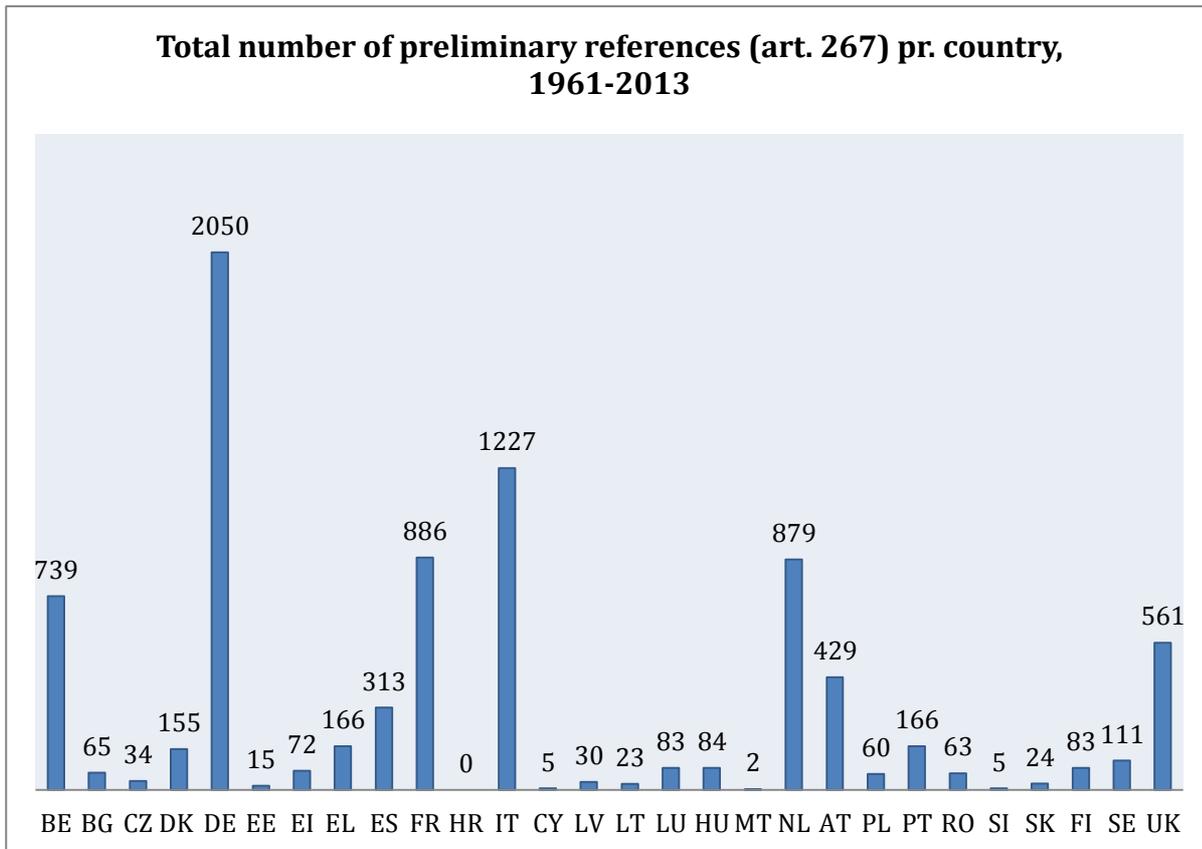
⁴⁵ K. J. Alter, 'The European Union's Legal System and Domestic Policy: Spillover or Backlash?', (2000) *International Organizations* 54(3): 489–518; see also K. J. Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*. (2001) Oxford University Press.

⁴⁶ Own data elaborated on the basis of: The Annual Report 2013, The Court of Justice of the European Communities (2013).



By the end of 2008, 6317 preliminary references had been made to the European Court. From 1993 onwards, more than 200 references were made annually, with a maximum of 288 references in 2008 and 450 in 2013. The interplay between national courts and the European Court is thus a growth factor on its own in the European integration process and in many ways a huge success. However, as indicated above, my data also confirms that national courts are not equally eager to participate in this general trend. Figure 2 present the number of references from the different EU member states.

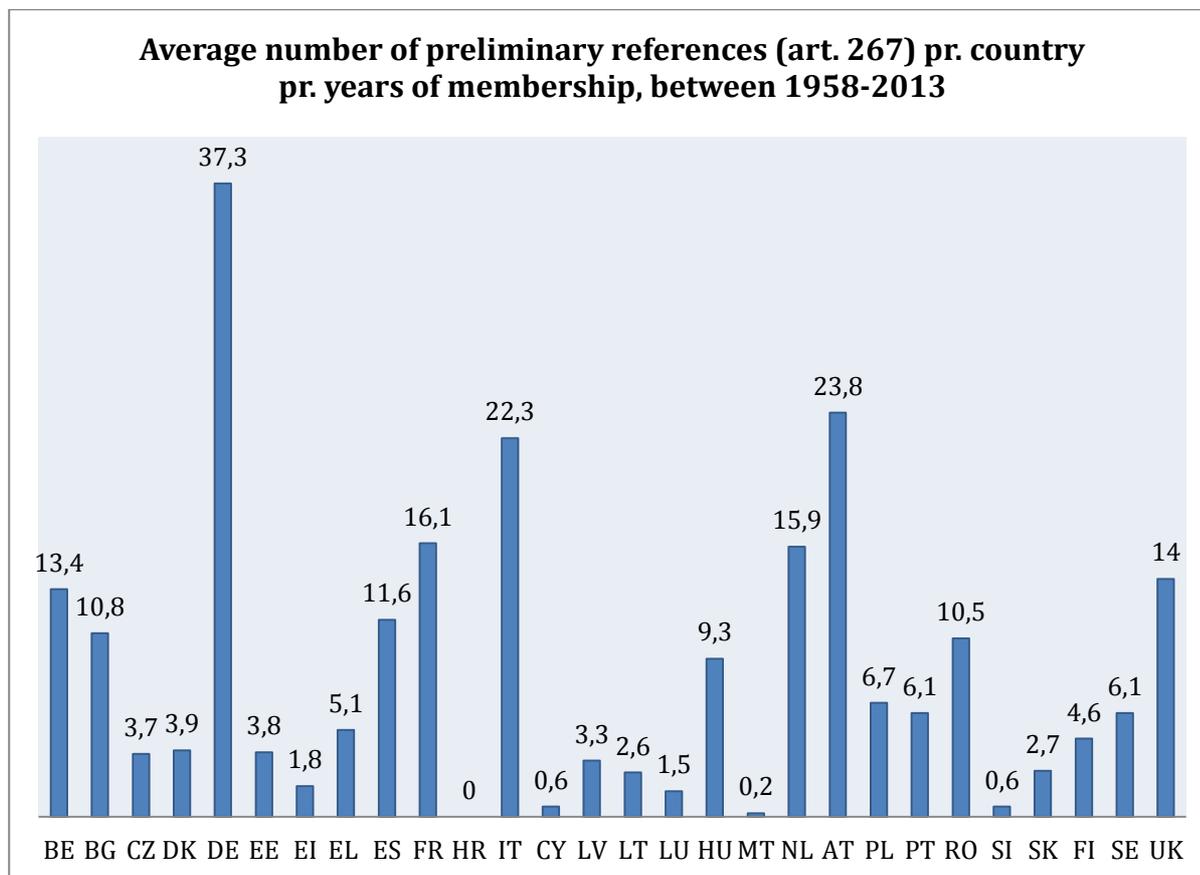
Figure 2⁴⁷



It is clear, however, that the differences in the total number of references per member state may be explained by various factors. The length of membership 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.

⁴⁷ Ibid.

Figure 3⁴⁸



It has been argued that “population size” may in part explain the heterogeneity across member states’ reference practice, i.e. that the larger states will refer more often than smaller states.⁴⁹ However, when controlling for this factor, the variance across member states is still remarkable. In my previous work, I have demonstrated that *there is no significant causality* between population size and preliminary reference practice.⁵⁰ 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 – a constitutional democracy with a

⁴⁸ Ibid. Years of membership is calculated between 1958 and 2013.

⁴⁹ N. Fenger ‘Om danske domstoles relative tilbøjelighed til at forelægge præjudicielle spørgsmål for EU-domstolen’, (2009) *Juristen*, vol 91, no. 10, pages 269-279. See also M. Broberg & N. Fenger (2014 2nd.ed), *Preliminary references to the European Court of Justice*, Oxford University Press.

⁵⁰ Wind, Martinsen & Rotger (2009), page 79.

very strong judicial review tradition - has referred more than four times the number of cases than the Swedish majoritarian democracy (Wind 2010)⁵¹.

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 European Court have a long, tiring and troubled way to go before reaching the European Court. In sum, the absence of causality between population size and preliminary references substantiates the plausibility that my proposed explanation, ‘type of democracy’ and tradition of judicial review, serves to increase our understanding of the differences and similarities in the interplay between the EU and national courts.

Denmark as the not so dutiful pupil in the class

As a European Community member since 1973, Denmark has had considerable time to accustom itself to the European legal system. Moreover, Denmark is 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 if we are merely interested in formal and not practical implementation⁵². Moreover, as Hagel Sørensen (a long time legal advisor to the Danish government) has pointed out – the reason for Denmark’s high and fast implementation frequency concerning EU legislative acts can be explained by the fact that these are 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.⁵³ Regarding sufficient implementation in practice, Denmark does, however, not always live up to its reputation as one of the most obedient compliers.⁵⁴

⁵¹ M. Wind, ‘The Nordics, the EU and the Reluctance Towards Supranational Judicial Review’, (2010), *Journal of Common Market Studies* 48(4) pages 1041-1065; see also Rytter & Wind (2011).

⁵² The difference between formal and practical is important. Formal implementation simply deals with objective time deadlines i.e. whether a certain directive is transposed into national law by a certain pre-specified time limit. It is Ministries themselves who rapport to the Commission whether this deadline has been met or not. Practical implementation on the other hand deals with the actual and practical transformation of a EU legislative act on the ground. I.e. in the local administration, vis-a-vis citizens and firms and on the home pages communicating about EU rights and obligations to the broader public.

⁵³ K. Hagel-Sørensen ‘Fællesskabsretten som en del af dansk ret’, (1994) *Festskrift til Ole Due*, Copenhagen: G.E.C. GadsForlag: 115.

⁵⁴ 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.

Returning to the role and impact of the Danish courts, the findings presented in figures 2 and 3 above indicate that Denmark is one of the member states that has made fewest preliminary references to the ECJ; a total of 122 between 1973 and 2008 or an average of 3.39 cases per year of membership.

Earlier studies have demonstrated 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.⁵⁵ 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).⁵⁶ This in part explains why the so-called Judicial Committee plays an influential role when it comes to preliminary references. In one study, Law professor Peter Pagh demonstrated how the Judicial Committee not only advises the Danish courts through the attorney of the Danish state by participating in both the selection and drafting of art. 267-questions which goes to the ECJ, but also at the same time advice the government in the implementation of EU law.⁵⁷

As there is also no tradition for exercising the judicial review of legislation in Denmark, the preliminary reference procedure has by some been regarded as an unnecessary foreign element interfering in matters which should be dealt with by the national courts themselves⁵⁸. Danish courts have thus repeatedly invoked the *acte claire* doctrine, and thereby avoided asking the ECJ to clarify whether national law was in breach with EU law.

Moreover, as demonstrated by Pagh, from 1986 to 2003, the Judicial Committee recommended to the national courts *not* to refer 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 explicitly requested an interpretation by the Court of Justice.⁵⁹ Generally speaking, the Judicial Committee has only recommended Danish courts to make preliminary references in those cases where there is already

⁵⁵ 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 H I lyset af nye EF-domme.' (2007) *Ugeskrift for retsvæsen*: 126-132. See also Wind 2010 (JCMS article).

⁵⁶ J. P. Christensen *Domstolene – den tredje statsmagt*. (2003) Aarhus: Magtudredningen, 75-90;

⁵⁷ P. Pagh (2008), *Juridisk Specialudvalg og præjudicielle forelæggelser for EF-domstolen*, in B. E. Olsen & K.Engsig Sørensen (red.), *Europæiseringen af Dansk Ret*, Copenhagen: Djøf.

⁵⁸ Own research; see also, Pagh (2004), page 63.

⁵⁹ Pagh (2008) page 307.

direct action being taken against Denmark by the Commission.⁶⁰ Whereas the Judicial Committee may “just be doing its job” - that is advising the one party in a case - the Danish government- it is perhaps more puzzling that the Danish courts and judges treat this advice as “the highest legal expertise” – as one of the judges interviewed put it (Wind 2010)⁶¹. However, being brought up in the Ministry of Justice themselves (which is still common), most judges may feel inclined to take advice from this source very seriously.

There is in other words an enormous unease and unfamiliarity with the European legal system which is further emphasised by the dominance of Scandinavian legal realism and its “anti-rights” tradition in the Nordic countries (Nergelius 2001).⁶² In Denmark and the other Nordic countries, there is a firm conviction that rights 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 European rights may be felt less strongly. The result may ultimately be an uneven rights protection in Europe and a less deep felt one in the Nordics. This despite the fact that we like to look at ourselves as ‘moral superpowers’ vis-à-vis the rest of the world⁶³.

Conclusion

In Denmark and the rest of the Nordic part of Europe, there is a broad but unspoken consensus that democracy equals the will of the majority in parliament and that this majority should be more or less unconstrained by other powers. Close links between the courts, the legislature and the executive

⁶⁰ 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.

⁶¹ In 2006 I did a comprehensive survey of 388 Danish judges and their practice with the preliminary ruling procedure. Several of these judges were later interviewed in depth. Civil servant in the Ministry of Foreign Affairs Law Office and the Ministry of Justice were also interviewed.

⁶² See J. Nergelius (2001), North and South: Can the Nordic States and the European Continent Find each other in the Constitutional Area – or are they too different?, in M. Scheinin, *The Welfare State and Constitutionalism in the Nordic Countries*. See also J. E. Rytter *Grundrettigheder. Domstolenes fortolkning og kontrol med lovgivningsmagten* (2000); see also Rytter & Wind (2011).

⁶³ The term ‘moral superpowers’ has been used by several in the international relations literature. See generally L. Elliot & G. Cheeseman (eds), (2004) *Forces for Good*, Manchester University Press; see also Wind 2015 forthcoming.

branches of government are moreover regarded as a pragmatic and efficient way of managing politics and day to day business. Indeed, the successful Nordic welfare states see 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 majoritarian decisions. This consensus approach to law and politics may work smoothly in homogenous societies with few violent conflicts and little ethnic diversity. However, as both the EU and the juridicalization of politics becomes more and more prevalent, we may face severe challenges. Moreover, not everyone believes that the Nordic reticence is sustainable in a globalizing world. One of the rather few critical voices in the Danish judiciary on this point is the former Danish President of the Supreme Court Niels Pontoppidan who some years back warned against the 'Parliament comes first' rhetoric in the 21 century:

"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"⁶⁴

Only time will tell whether Pontoppidans analysis will spark any changes to the current state of affairs in the Danish constitutional debate.

⁶⁴ Niels Pontoppidan - then President of the Supreme Court - in an interview in the Danish journal Weekendavisen 28 June 1996, p. 11.

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