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## Europe Beyond the Courts – Constitutionalism, Pluralism and Integration in the Nordic Countries<sup>1</sup>

The European Union is not – or so we are told – just a legal construct, it is specifically a judicial construct. The dominant theories in both political and legal science instruct us and have trained us to observe our legal world through the eyes of a court. How the story usually begins is that in the 1960s the European Court of Justice, in its classic case law, began to build the European constitutional project by announcing that EC law was autonomous and independent of national legal orders, but not only that: it was also superior to the norms of national constitutions. What the Court also did was to introduce rights for private individuals. And with the help of private litigants pursuing their own interests through the courts, lower courts in particular – many of which now had review powers for the first time – gained significant influence over national legislatures and national constitutional courts and courts with constitutional jurisdiction.

National constitutions, then – so the story goes – were weakened by the process of Europeanisation, as national lower courts have made themselves the interlocutors of the Court of Justice. There is a whole host of classics that elaborate on these topics. To take just a few examples, Alec Stone Sweet wrote about the ‘*judicial construction of Europe*’. And when, in 1993, Burley and Mattli sought to highlight the role of national lower courts in this process, their new political theory of legal integration was of course entitled ‘*Europe before the Court*’.

In this tradition, we also know that EU law causes changes in the national constitutional contexts. And we know what those changes are. The role of the legislatures diminished compared to what it once was – and with that the role of preliminary works of legislation diminished as well. But above all, this dynamic between the European Court of Justice and the national lower courts sidelined national constitutional courts and courts with constitutional jurisdiction in the institutional structures of constitutional review.

Here we now come to the most important part of the story, which is the meeting of two powerful apex courts. In this story, based on very famous examples from specific national contexts, we know that there was a counterreaction – even a backlash – from constitutional courts and highest national courts that were subject to this treatment.

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<sup>1</sup> *Lectio praecursoria* presented at the public examination of the author’s doctoral dissertation ‘Europe Beyond the Courts – Constitutionalism, Pluralism and Integration in the Nordic Countries’ at the Faculty of Law of the University of Helsinki on 31 January 2025.

And this, then, is the story of the European Court of Justice and an equally powerful constitutional court as its counterweight.

In this narrative, it is the court that stands as the guardian of the national constitution, clinging to its well-established powers. It is the court that ensures that the powers defined by the national constitution are not exceeded, and it is the court that stands as the guardian of national democracy and human rights. It is the court that guides the legislature and, ultimately, it is the court that defines the limits of the legal order, its relationship to other legal orders and the constitutional identity of the nation.

We have a host of theories and different kinds of approaches that build on this tension and balancing between two powerful courts. Here we are talking about so-called *dialogues* between the top courts, where they might go about each other's case-law carefully so as not to step on each other's toes. They might adapt to each other's jurisprudence from their own perspective. Or they might say 'No – up to this point, but no further'. And here we come to the question of the national constitution setting actual limits, or conditions, to legal integration; the possibility of *constitutional conflict*, which is central to my study.

The first and most comprehensive legal theory that builds on this tension is the theory of constitutional pluralism, which emerged in the 1990s. According to Neil MacCormick, there are in fact not one but two constitutions, neither of which recognises the other as the source of its own validity. And the interpretive power of the highest judicial authorities of the system must be ultimate for each system. From this it follows that it is for the European Court of Justice, in the last instance, to interpret the norms of Community law. But it also follows that it must be for the highest constitutional court of the Member State to interpret its own constitutional norms – and thus also the interaction between the validity of Community law and the higher norms of validity in the respective state system.

MacCormick's seminal contribution was inspired by a specific national context, and it was published at a very specific point in time, in the 1990s, when the *German Constitutional Court*, in its Maastricht decision, gave the green light for German ratification of the Maastricht Treaty on European Union. But at the same time, it asserted its willingness to review the constitutionality of European laws and its power to determine the limits of European authority in Germany. While this may sound very practical, pluralism in fact also grows into a whole theory of the relationship between EU law and national law. This is indeed a very compelling story – precisely because it seems to answer a very real question. And in the form in which pluralism has been developed since the 1990s – in the thesis I discuss it especially in the light of Miguel Poiaras Maduro's classic articles – it seeks to offer a new academic space for engagement and accommodation. A step away from contestation and towards harmony and mutual understanding between EU law and the constitutional law of the Member States. A step from conflict to dialogue.

But the way it does this is by building on this meeting of two powerful courts with *two ultimate perspectives*. And here too, the actors of the ‘European legal community’, on whose practices this new discursive understanding of ‘the foundation of the legitimacy of the European legal order and its distinctive identity’ was to be based, were the courts. The reason I want to go through all these stories again is precisely because all these and many other fundamental narratives on the topic presuppose and build on specific assumptions of national constitutionalism and constitutional review. And what is wrong with that is that where we are, in the Nordic countries, this meeting never took place. At least not in the form we are taught.

So, the point of my thesis is to try to go beyond these court-based narratives and theories and specifically into constitutional pluralism and Nordic constitutional law. The Nordic Member States of the European Union, Denmark, Sweden and Finland, all have very different institutional mechanisms of constitutional review, where the courts have long exercised very limited forms of constitutional review, and the main focus of constitutional review has been on the legislature. We also know that the practices on these contested boundaries between EU and national law have been different. In both Sweden and Finland, the legislature has, since their accession to the EU in the 1990s, assumed the role of the court in drawing the boundaries of the constitution in relation to EU law. And in the case of Denmark, the legislature has been doing this since the Danish accession in the 1970s. In the 1990s, then, we begin to see the rise of the Court, which is both a move towards an internally pluralist system of constitutional review, where the tasks are shared between the legislature and the courts – and towards expressing normative critique of EU law.

At this point I knew I had something: the actors of Nordic law are different. Their critical and accommodating practices are different. But it is more fundamental than that: especially in Denmark, the Supreme Court is not only reacting to the impact of EU law, as the dominant accounts explain – it is also shaping the model of constitutional review in its case law. So, there is also a deeper entanglement between the question of limits and the development of the Nordic models of constitutional review.

Overall, if we take this classic story to the Nordic environment, we will see that in reality it is a story told from a very specific perspective. It is a story of an already strong constitutionalism with stable institutional structures and strong courts, which does not take into account the possibility of the rise of national constitutionalism and the slow adaptation to a more judicial style, or the possibility of a majoritarian or pluralist model of review. And if we take the pluralist question into the Nordic environment, we also see that the idea of the sufficiency of the ultimate perspective gives a feeling of great security.

Instead of the exciting realm of judicial politics, we sometimes find ourselves studying the old-fashioned world of party politics. So, are we really talking about the same question, or something quite different? How, in the end, are we supposed to ask

the questions of pluralism if we do not have a judicial perspective that is suitable for the task? What if we are not even sure whether we do or do not have such a perspective? What if, instead of one ultimate arbiter of the limits of the constitution, we have many? And how does such internal pluralism in constitutional review relate to external pluralism at the European level?

Hence, when we choose to look at our legal world through the lens of two apex courts, we are already making profound assumptions about national constitutionalism. And making institutional assumptions is very dangerous because the country's chosen model of constitutional review is also extremely embedded in other constitutional structures. It is extremely telling of the country's history, its conception of democracy, the role of rights in the legal system, and so on. It is not just a question of how constitutional review is organised. And then we are having this discussion in a context where we are talking about the constitution's relation to the outside world, which raises another set of fundamental questions.

What I am suggesting is that while this critique is extremely simple, it has fundamental consequences for how we are able to apply this theory in different national contexts. Which practices we recognise as relevant and what we are able to see in different national contexts. And what I argue in the thesis is that this is a very real world where we do see the full scale of critique and accommodation, but it almost disappears when we look at it through the court-based lens of constitutional pluralism.

So, what I ended up doing in the thesis is that I deliberately took the classic core question of the limits of integration into the Nordic environment and tried to look at it through the Nordic lens. I read it in the light of Nordic sources. I traced the story of Nordic forms of resistance, Nordic ways of solving problems at the limits of law, and Nordic debates and contestations. I placed these stories in the Nordic political context, and the EC/EU accession stories, the simultaneous transformation of Nordic constitutional law, and the interactions within this transformation.

But there are always two focal points in the thesis. The first is the Maastricht turn, where all stories intersect:

- 1) The German Court's famous jurisprudence,
- 2) The turn to constitutional pluralism,
- 3) Sweden and Finland's EU accession in 1995,
- 4) The great Maastricht era turmoil in Denmark, when the Danish people first rejected the Maastricht Treaty and then approved it in another referendum,
- 5) The constitutional turn in all three Nordic countries, where the role of the constitution and the role of the courts begins to strengthen.

These are the developments that we have to understand in order to understand all the developments that followed.

The second focal point is, of course, the *institutional perspective*, and taking an institutional perspective to constitutional pluralism in the Nordic countries can only mean one thing. This is not a story of stable structures; it is a story of changing and evolving models of constitutional review.

This is also the first reason why the study has a very long time frame. The second is that I wanted to cover the three membership periods in the EC/EU as a whole, because I found out that it is indeed possible to read through the whole constitutional transformation in the three countries from the perspective of this question. Especially in the Scandinavian countries, the constitutional question has always been a very big part of the ‘Europeanisation debates’.

So, it also follows that even though this is a very specific perspective – which certainly highlights the frictions and the tensions – it also offers quite a lot from the perspective of complementing what we know about the Nordic constitutional turn and the transitions in Nordic constitutionalism. And it also offers new, or perhaps I should say ignored or forgotten, parallels to the famous counter-reactions of national actors at the Maastricht turn, starting already from the time when the European Court of Justice had first handed down its famous case law and started to construct its constitutional narrative, and Denmark was preparing for its EC accession.

Inevitably, therefore, the thesis also becomes a rereading of the Nordic transition, and I do this three times, in the three country-specific parts of the thesis. I found that the discussion on the problem of limits has mainly emerged in nine partly overlapping settings. And here we see how much the list actually expands when we give up the idea that it is enough to study court practice:

- 1) Adoption and amendment of constitutional provisions on the transfer of powers to international organisations,
- 2) Accession to the EC or the EU,
- 3) Transfer of powers to the EC or the EU in connection with treaty amendments,
- 4) Further regulation of membership of the European Union in the constitution,
- 5) Processing of EU legislation by the legislature during the EU legislative process, including *ex ante* control of EU legislation,
- 6) Adoption and amendment of constitutional provisions on fundamental rights,
- 7) Amendment and development of constitutional review systems,
- 8) *Ex post* judicial constitutional review of EU legislation, and
- 9) Discussion concerning other specific court cases.

As I go through these sources, I observe the balance and shifts between the legislature and the courts. Because outside the constitutional court model, the question of who the key constitutional actors actually are at any given time, and what their mutual relationship and weight in the constitutional system is, is itself an important consideration. But I

also observe the role of the academia in this process, as many leading jurists played an important role in the Scandinavian accession and Maastricht era debates, and in all three countries prominent lawyers participated in the preparation of key reforms in various advisory roles. Several leading figures also had dual roles or moved between academia, government ministries, the judiciary and the EC/EU Courts.

This is interesting primarily because it often helps us to understand the main actors. But when we combine the changing model of constitutional review and the question of the limits of the constitution, we also open the door to something else: the greatest passions of Nordic law. And when we start asking questions like what exactly should be the balance between the legislature and the courts, where exactly should the limits be on the transfer of power to the EU, what are the limits of legitimate normative critique of EU law, to what extent should the Constitution be adapted to the needs of EU law, we will disagree. And so did the protagonists of this thesis. So, Henrik Zahle is still here. Hjalte Rasmussen is still here. Ulf Bernitz is still here. Heikki Karapuu is still here. And so many others. Even some people who are in this room are in the thesis.

Our own discussions in Nordic constitutional law, and what we often call ‘Europeanisation debates’, do contrast with the dominant narratives – we just have not always taken them as seriously as we should have done. But when we try to go beyond court-centred thinking and extend the investigation to these specific contexts, we see that the actors are different, their tools are different, their time perspective is different, and obviously the relationship between law and politics is different. So, in the end, this does lead to a very different picture of our legal world and a critique of constitutional pluralism, which I then explain and elaborate on at the beginning and end of the thesis.

The structure of the thesis is a bit like a sandwich, it begins and ends with constitutional pluralism and the general issues of Nordic constitutional law, and in the middle, there are three country-specific parts on each Member State. I see this as critical basic research, where I test legal and constitutional theory against constitutional practice. And I wrote this thesis with someone in mind who knows constitutional law very well, but maybe not the Nordic countries. Or someone who knows one or two countries, but not all three. And I tried to write the thesis in such a way that people from different positions could draw useful information from it.

So, if you are at all interested in this topic and have the time, please just read it for yourself. Do not let anyone else tell you what it is or how to read it. What I tried to do is gather the evidence, explain as many perspectives on what happened as possible, and give my analysis. But then I often invite the readers to decide for themselves, and to come up with new perspectives. I know that I am writing about the topics of our passions. And I know that different readers may feel differently about what happened, depending on their position. I have really tried to listen to everyone – and I would still like to hear more.