

The Nordic Constitutions

A Comparative and Contextual Study

Edited by
Helle Krunke and Björg Thorarensen

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Introduction

HELLE KRUNKE AND BJÖRG THORARENSEN

I. The Purpose of this Book

The aim of this book is to present the Nordic constitutional systems in a comparative context, which reveals similarities and differences. The Nordic countries include Denmark, Finland, Iceland, Norway and Sweden. Despite the seemingly widespread interest in the Nordic constitutional systems from the outside world, little literature on the constitutional systems of these states exists in English. At the same time, the Nordic constitutional systems are often viewed as similar from the outside because of the closeness of their culture and languages, and their interwoven history to an extent not necessarily supported by a closer look.

The purpose of the book is twofold: first, it aims at making each of the Nordic constitutional legal systems accessible to the rest of the world in English; second, it aims to show which features are similar in all or some of the Nordic constitutional systems and in which areas limited or no coherence exists. The analyses will be embedded in their political, historical and cultural context.

The book focuses on selected aspects, particularly on how European and international cooperation through the European Union (EU), the European Economic Area (EEA) and international human rights conventions (mainly the European Convention on Human Rights (ECHR)) has impacted the Nordic constitutional systems. On an important issue such as EU membership, the Nordic countries have made different choices and at different times. Among other things, we will discuss how this has affected the individual country and whether a divide between EU Member States (Denmark, Finland and Sweden) and non-members (the EEA states—Iceland and Norway) has appeared in relation to the development of the respective constitutional systems. All the Nordic countries have incorporated the ECHR, whereas only some Nordic countries have incorporated other international human rights conventions. The impact of this development on the individual constitutional systems and on the unity of the Nordic constitutional systems will be examined.

The Nordic national parliaments, the key actors in the constitutional systems, have increasingly been challenged by the internationalisation of politics and in

particular the ongoing process of European integration. Closely related to this are the increased powers of the judicial branch in the exercise of judicial review, involving obligations deriving from European treaties which are placing greater restraints on the legislator. The growing Europeanisation of politics will be discussed and compared, particularly how Nordic parliaments have sought to compensate for their alleged decline in legislative activity by developing their oversight and control mechanisms with respect to EU affairs. Meanwhile, the EEA states are in a weaker position in terms of strengthening their parliamentary oversight in EU/EEA affairs, due to many factors.

Together, these analyses will contribute to an overview of the complex contemporary constitutional setting in the Nordic countries based on national constitutions, EU/EEA law, international human rights conventions and a special Nordic constitutional identity, which is, among other things, reflected in a Nordic free movement zone.

This brings us to the main thesis of the book and the methodology chosen to test this thesis and achieve the book's purpose.

II. The Main thesis and Methodology of this Book

This book compares the constitutional systems of the Nordic countries. The main thesis of the book is that viewed from the outside—a European or global perspective—the Nordic constitutional systems share some common features both at a more functional level and at a deeper level of values. However, viewed from a closer Nordic perspective, differences appear in the aforementioned general pattern. This volume aims at identifying both the broader common features and the more detailed differences, in this way presenting a rich analysis of the Nordic constitutional systems seen both from a macro- and a micro-perspective.

Methodologically, a contextualised functionalism approach¹ is chosen. We have identified some key features of constitutional systems. Within each of these fields, we will conduct a comparative study. The chosen key features are the following:

- Institutional structure and division of powers.
- Mechanisms for parliamentary control of the executive.
- Judicial review of legislation.
- Human rights in Nordic constitutions and the impact of international obligations.
- The impact of the EU/EEA on the Nordic countries.

¹ VC Jackson, 'Comparative Constitutional Law: Methodologies' in M Rosenfeld and A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012) 72.

Although each field has a main author, all the authors—who together represent all the Nordic countries—have cooperated on each chapter.² This cooperation ensures the quality of the comparison, including our emphasis on performing a contextualised functionalism comparison. This approach will require a deep understanding of each constitutional system and the values and identity it builds on. The chosen main author is an expert in his or her specific field. Furthermore, we support our analysis in a chapter on the common roots and foundations of the Nordic constitutional systems. Each chapter explains the structure of the analysis carried out, possible delimitations and other analytical choices the author has had to make.

All the comparative studies of specific constitutional features are in the end included in a general comparative study of the Nordic constitutional systems. Here we will also be able to show the interaction between the sub-studies. The overview given in the last concluding chapter will allow us to make some more general observations on whether the similarities are strong enough to form a ‘Nordic constitutional model’ which at least, seen from a European or global perspective, has some distinct features.

In this way, our comparative analysis process will be somewhat similar to peeling an onion. We will work our way through the different layers of history, culture, values, constitutions and practices, which are closely interwoven and together form the Nordic constitutional systems.

Throughout the book, a number of important distinctions will play a special role in our comparative analysis. These distinctions are inherent components in our comparative study and therefore deserve a few words. First, as mentioned above, we make a distinction between the macro-level and the micro-level. The idea is to distinguish between an outside perspective and an inside perspective.³ Viewed from the outside—a European or global perspective—the Nordic constitutional systems might appear very similar. However, following a closer look, it becomes clear that these similarities are not all based on similar constitutional provisions, but just as much on shared culture, values and policy outcomes, which are expressed in European and international fora. Furthermore, a closer look also shows that though some general constitutional features can be identified, a further comparative study uncovers many nuances and differences in the Nordic constitutional systems. The macro-/micro-perspective forms part of the main thesis of this book. Second, an East/West distinction serves as a helpful tool in our analysis throughout the book. Traditionally, the Nordic constitutional systems have been grouped into a Western (Denmark, Norway and Iceland) and an Eastern (Sweden and Finland) constitutional tradition. We still find some distinct constitutional

² The responsibility of each chapter remains solely with the chapter author.

³ M Suksi, ‘Markers of Nordic Constitutional Identity’ (2014) 37(4) *Retfaerd* 66, 67.

features in the East and in the West, especially as regards institutional structure. However, as our analyses will show, similarities and differences also appear across this East/West structure and new distinctions are formed, among others, based on the EU/EEA cooperation and international human rights conventions. Third, our comparative analysis pays special attention to the distinction between EU Member States and EEA Member States among the Nordic countries. This distinction serves as an analytical instrument throughout our analyses. As the chapters will show, the EU/EEA distinction is perhaps not as dominant as one might expect, and another important distinction between formality and reality seems to form part of the picture. Even though the aforementioned distinctions do not find a clear and consistent expression—or maybe precisely for that reason—they serve as fruitful instruments in terms of structuring and carrying out our comparative analysis, revealing new insights in the complex processes that the Nordic constitutional systems are undergoing in the context of history, contemporary constitutional thought and impacts caused by outside forces in the form of EU/EEA and international human rights conventions. By combining the functional analysis of a number of carefully chosen constitutional features with the aforementioned main distinctions, we are able to focus our comparative study even further and draw attention to new relevant layers of comparison.

As mentioned above, an important feature of this volume is the focus on whether and how the EU/EEA and international human rights conventions impact the Nordic constitutional systems, and whether this leads to new distinctions or more unity in the Nordic constitutional order. In this way, our constitutional analysis has several layers and the time perspective plays an important role. In order to identify the impact of the EU/EEA and international human rights on the Nordic constitutional systems, both individually and seen together, we need to carry out a comparative analysis of the constitutional systems before and after the emergence of this outside influence. As a result, our comparative analyses will reflect different stages in the development of the Nordic constitutional systems in light of Europeanisation and internationalisation. In the conclusion, we will add a further dimension by attempting to look into the future in terms of further unity or diversity in the Nordic constitutional systems.

Finally, some remarks on the final comparative analysis in the concluding chapter. As mentioned above, all the comparative studies of specific constitutional features are in the end included in a general comparative study of the Nordic constitutional systems. The purpose of this chapter is to combine the sub-studies into a broad overview of some more general observations on whether the similarities are strong enough to form a ‘Nordic constitutional model’ which at least from a European or global perspective has some distinct features. Furthermore, we focus especially on how the EU/EEA and international human rights (in particular the ECHR) impact the Nordic constitutional systems, and whether this impact creates new differences and similarities in the Nordic context. The analysis will be structured and carried out in the following way. First, we draw upon historical analysis

and extract the main common features. Second, we compare the findings in the functional analysis across all the chapters, mapping:

- first, some main features, which we find or do not find in all the Nordic constitutional systems;
- second, areas where the East/West divide still exists;
- third, areas in which we find differences across the Nordic countries and the East/West divide.

We use diagrams to provide overviews of the results of this mapping of similarities and differences of constitutional features. The concluding chapter provides a general overview and the reader will need to consult the topic-based chapters for more detailed information on the similarities and differences between the individual Nordic systems. Following the comparative mapping, we turn to the question of whether the EU/EEA and international human rights conventions are creating new divides or more unity in the Nordic constitutional systems. Here we draw not only on the specific chapters (Chapters 6 and 7) in relation to these questions, but also on the other chapters, which have all approached the impact of such European and international cooperation. We conduct this analysis through the following steps:

- First, we map areas in which an East/West division seems to exist across the EU/EEA division and attempt to explain this.
- Second, we map ways in which a strengthened unity appears as a result of the EU/EEA.
- Third, we map areas in which international human rights conventions seem to create new divides.
- Fourth, we map ways in which international human rights conventions create unity in the Nordic human rights protection.
- Fifth, we combine our observations in order to provide an overall complex picture of the processes in the Nordic constitutional systems when influenced by the EU/EEA and international human rights conventions.

In the final conclusion, we revisit the historical context and briefly reflect on it in relation to the Nordic approach to EU/EEA cooperation and international human rights conventions, and then turn to reflections on future Nordic movement towards new constitutional divisions, differences or further unity.

When summarising our methodological approach, it should be noted that by choosing to organise and structure our constitutional study of the Nordic constitutional systems as a functional *topical-based* analysis, we deviated from the common *country-based* comparative approach. In the country-based comparative approach, the comparative study is normally structured with chapters on each of the countries compared, ending with a general chapter in which a general comparative analysis is carried out. Each country-specific chapter will normally discuss the same functional elements, making the comparison in the last chapter easier

to carry out. In the topical-based approach, the functional analysis is carried out across all the compared legal systems in each chapter.

The concluding chapter in this volume will then be based on the comparative analyses already carried out throughout the book and will contain some general comparative analyses on the entire legal systems across countries. Both approaches have their strengths and weaknesses. The strength of the country-based approach is that it provides a good and easy-to-access overview of many specific features of each legal system. The strength of the topical-based approach is that it provides a possibility to reach a deep level of comparison in specific areas since the comparison is carried out at two levels—throughout the book and in the final comparative analysis. One might say that the topical-based approach demands a little more from the reader as well as the authors. At the same time, the aforementioned strengths indicate the weaknesses of the two approaches. Our choice to apply a topical-based approach in our comparative analysis of the Nordic constitutional systems was based on several factors: the wish to create a dynamic, innovative and interesting book, which already from its very outset combines the Nordic constitutional systems in its narrative, thereby choosing a methodology which reflects the presumption that the Nordic countries share a certain common constitutional tradition (even if it does not apply to all fields).

By starting the comparison already in the functional analyses, we hope to reach a deeper level of comparison. We attempt to counter the possible weaknesses of the applied methodology through the close cooperation between experts from all the Nordic countries in reading and commenting on the chapters written by each other and by choosing an expert on each chosen topic (who already has knowledge of the Nordic countries in that particular field) to write that particular chapter. During the writing process, the group of authors met twice in Copenhagen at seminars on the book project—at the start of the project and towards the end—to discuss the overall design of the book, methodology, individual chapters and how to coordinate the project. No matter how much effort we have put into designing the methodology and the process in the best possible way in order to facilitate the comparative study, we have no desire to try to disguise that we have set out on an ambitious task and our work should be seen in that light.

III. Structure of the Book

The structure of the book has already indirectly appeared through the previous sections. After this introductory chapter (Krunke and Thorarensen), in which we have described the purpose, main thesis, methodology and structure of the book, is Chapter 2 on the common roots of Nordic constitutional law (Suksi). This chapter analyses legal-historical developments and relations between the constitutional systems of the five Nordic countries. Chapter 3 (Bull) provides the reader with a comparative overview of political institutions and division of powers. Chapter 4

(Thorarensen) compares parliamentary control mechanisms of the executive. Following this, a comparative analysis is carried out in Chapter 5 in relation to judicial review of legislation (Smith). The book then moves from the primarily institutional focus to the area of human rights. Chapter 6 (Ojanen) compares human rights in the Nordic constitutions and the impact of international human rights obligations. After having addressed human rights, Chapter 7 (Krunke) focuses on the impact the EU/EEA have had on the Nordic countries. Drawing on the earlier chapters, the concluding chapter (Krunke and Thorarensen) combines the historical analysis and the functional analysis to provide a general comparative overview of the common features, differences and impact of EU/EEA cooperation and international human rights conventions on the Nordic constitutional systems.

IV. Before We Start: The Nordic Legal Systems as a Legal Family?

The Nordic legal systems are sometimes characterised as a separate legal family.⁴ Other authors define the Nordic legal systems as primarily belonging to the legal systems in continental Europe, having more in common with the civil law tradition than the common law tradition.⁵ The following characteristics of the Nordic legal systems have been emphasised:

- the limited importance of legal formalities;⁶
- Scandinavian realism;⁷
- a ‘specific legal method, its mixture of statutory and case law and its, in relation to most continental EU countries, less theoretical and conceptualised approach to legal problems’;⁸
- the absence of an actual reception of Roman law;⁹
- no civil codes;¹⁰
- the fact that ‘all-embracing legal principles play a more limited role in Nordic law than in, for example, French or German law’;¹¹

⁴ See, eg, K Zweigert and H Kötz (eds), *Introduction to Comparative Law*, 3rd revised edn (Oxford, Oxford University Press, 1998); D Tamm, ‘The Nordic Legal Tradition in European Context’ in P Letto-Vanamo (ed), *Nordisk identitet—Nordisk rätt i europeisk gemenskap* (Helsinki, KATTI, Institute for International Economic Law at Helsinki University, 1998) 15 ff; Å Malmström, ‘The System of Legal Systems: Notes on a Problem of Classification in Comparative Law’ (1969) 13 *Scandinavian Studies in Law* 127.

⁵ See, eg, M Bogdan, *Komparativ rättskunskap*, 2nd edn (Lund, Norstedts Juridik, 2003) 82 f.

⁶ See D Tamm, ‘The Nordic Legal Tradition in European Context’ in Letto-Vanamo (n 4) 15 ff.

⁷ See Zweigert and Kötz (n 4).

⁸ U Bernitz, ‘What is Scandinavian Law? Concept, Characteristics, Future’ (2007) 50 *Scandinavian Studies in Law* 14, 28.

⁹ See D Tamm, ‘The Nordic Legal Tradition in European Context’ in Letto-Vanamo (n 4) 15 ff.

¹⁰ See Bernitz (n 8) 20; and see also Zweigert and Kötz (n 4).

¹¹ Bernitz (n 8) 20.

- frequent use of analogies taken from available legislation, particularly within the law of obligations;¹²
- the importance attached to preparatory legislative material (*travaux préparatoires*) when interpreting legislation.¹³

Most similarities between the Nordic legal systems are found within the field of private law and Nordic cooperation on legislation has traditionally taken place within this field.¹⁴ Therefore, it is normally private law that is presented as an argument for the existence of a special Nordic legal family. The field of constitutional law is normally not used as an argument in this regard. When it comes to understanding and comparing constitutional law in the Nordic countries, Kaarlo Tuori's theory on 'the three levels of law' is sometimes applied.¹⁵ The idea is that three levels of law exist: surface law (legal norms), the middle layer (legal culture) and the deep structure (general principles and values). It has been stated that if the Nordic constitutional systems are compared, the likeness grows the further one moves down into these three levels, meaning that the differences are most significant at the legal norm level expressed through the constitutional text, that we find more similarities at the level of legal culture and the most similarities at the level of general principles and values.¹⁶ Seen in this light, the reason why the Nordic constitutional systems might appear alike to the foreign observer is because the Nordic countries share general principles and values at a deeper level. One might also add that the Nordic constitutional systems share certain features which clearly make them stand out from other constitutional systems—for instance, in the field of judicial review of constitutionality—and this attracts attention from the outside.¹⁷ However, the Nordic constitutional systems as such have not been the subject of extensive comparative studies so far,¹⁸ and our task in this book is precisely to carry out such a comparison. Hopefully, this will lead us closer to an understanding of how close to each other the Nordic constitutional systems actually are—historically, traditionally, contemporarily and in light of EU/EEA integration and international human rights conventions—and how similarities, differences and developments might be explained. In the following chapters, this is precisely what we set out to do and we invite the reader to follow us on this comparative journey into the Nordic constitutional systems.

¹² *ibid.*

¹³ See *ibid.* 8.

¹⁴ See the overview in Bernitz (n 10) 16.

¹⁵ See K Tuori, 'Introduction to the Theme: Constitutional identity' (2014) 37(4) *Retfærd* 3; and F Sejersted, 'Grunnlovens funktion i de nordiske land' (2014) 127(5) *Tidsskrift for Rettsvitenskap* 535, 559.

¹⁶ Sejersted (n 15).

¹⁷ See, eg, R Hirschl, 'The Nordic Counternarrative: Democracy, Human Development and Judicial Review' (2011) 9(2) *International Journal of Constitutional Law* 449.

¹⁸ An interesting recent comparison of the Nordic constitutional systems can be found in Sejersted (n 15) and in a special issue of *Retfærd* on constitutional identity in the Nordic countries: (2014) 37(4) *Retfærd*.