1

Introduction

1.1 BACKGROUND AND CONTEXT

Judicial review of democratically enacted legislation under constitutional norms has long been seen to present a "countermajoritarian difficulty":[1] If the central basis for legitimate public power is popular majorities, how may unelected judges justifiably set aside the democratically enacted legislation of these majorities? And if the legislative and executive branches of power are the ones democratically designated and legitimated to make the laws, how may the judicial branch decide on constitutional questions in ways affecting and narrowing the scope for future democratic law-making? These are, essentially, questions of the ideals of democracy and rule of law that are emphasized – which, how and why.

Traditionally, the countermajoritarian difficulty plagued primarily US legal and political scholarship.[2] As judicial review of legislation has spread outside the United States,[3] so has the difficulty. Following this, review is debated also within those other nation states and constitutional democracies that practice judicial review. The national debates vary with the political and legal arrangements in the systems they address, particularly with the *form* of review practiced. The degree of difficulty is lower where courts' constitutional

[1] A phrase introduced in Bickel, *The least dangerous branch* (1968), the first edition was published in 1962.

[2] See i.a. Friedman, The history of the countermajoritarian difficulty, part one: The road to judicial supremacy, (1998), The history of the countermajoritarian difficulty, part two: Reconstruction's political court (2002), The history of the countermajoritarian difficulty, part three: The lesson Of Lochner (2001), The history of the countermajoritarian difficulty, part four: Law's politics (2000), The birth of an academic obsession: The history of the countermajoritarian difficulty, part five (2002); Graber, The nonmajoritarian difficulty: Legislative deference to the judiciary (1993); Somin, Political ignorance and the countermajoritarian difficulty: A new perspective on the central obsession of constitutional theory (2004).

[3] Law and Versteeg, The declining influence of the United States constitution (2012).

decisions may be altered relatively easily by subsequent political decision-making, and higher where courts actually have the last word on constitutional questions, without much room for political alterations afterwards. *Weak forms* of review, such as in some Commonwealth countries, exist where parliaments retain broad formal power to override court decisions, so that the legislature or executive can reject constitutional rulings by the judiciary.[4] The most comprehensive or *strong forms* of review occur where courts have the power to set aside or even nullify unconstitutional legislation, and where the procedures for subsequent legislative alterations of constitutional provisions are more cumbersome than normal legislation – or close to impossible, either formally or in practice.

With the emergence of supernational courts the questions of review legitimacy spread also to the international level. There, the bases for review are not constitutions, but conventions, regional or international agreements between sovereign states. While different in structure, origin, democratic input and enforcement, such conventions too may be adjudicated in ways that make them also function constitutionally – such as by protecting individual or group rights in ways that limit the scope for political decision-making. Conventions may have their own enforcement mechanisms or courts – such as the Europan Court of Human Rights (ECtHR) – which have the last say over the interpretation of the European Convention on Human Rights (ECHR). Jurisdictions in which the ECHR apply are then left with review on two levels: national courts reviewing national legislation under the ECHR; and the ECtHR doing the same, but on a different level, in those cases that end up before it. This too, has caused significant debate over review legitimacy. Compared to national debates, debates of supernational review are complicated by parallel and multilevel judiciaries and political institutions, and actors structured and legitimized differently than those in nation states.

Perhaps curiously, even absent a representative, democratic character, judicial review is an institution in which people seem to have relatively high confidence, sometimes even higher than that in elected bodies.[5] Indeed, also outside the judicial sphere, a number of substantial decisions affecting a great number of people are made without the demos being able to influence them,

[4] See Tushnet, *Weak courts, strong rights* (2009). While weak-form review is in principle less democratically troublesome, it may still seldom result in legislatures overruling judicial decisions of constitutional questions; see Dixon, Weak-form judicial review and American exceptionalism (2012).

[5] See Zürn, Autorität und Legitimität in der postnationalen Konstellation (2012), with further references; and Grødeland, *Perceptions of European supranational courts: The legal insiders' and outsiders' perspective* (2012).

in any direct meaning of the word "influence." Central examples of such are decisions made by the "European Institutions": the European Central Bank, the European Commission and the Presidency of the Council of the EU, that make decisions with little, if any, degree of actual, popular input. This arguably makes the authority wielded by these decision-making bodies undemocratic. Still, perhaps due to the (perceived) necessity of their continued work, the relative distance to the people whose lives they affect and the lack of a European public sphere for discussion of concerns, they have, at least until recently, been subject to few accusations of perceived illegitimacy claims by their constituents.[6]

It could be thought, then, that the relatively lesser amount of authority wielded by courts through judicial review would not give rise to much concern, whether it be carried out on the national or supernational level, whether as a matter of normative, political-institutional desirability of review in itself or as a question of what is the right way to exercise review authority, particularly when the values protected by such review are human rights, the fundamental significance of which most affected parties agree upon. Yet claims that judicial rights review is undemocratic or in other ways illegitimate, and that this is, in fact, a problem, persist. This persistence is one reason to continue thematizing review legitimacy in general. The real-world contingencies at play when assessing the legitimacy of this institution make for a better understanding of the way it is justified and understood in a variety of specific settings.

In this book, I introduce the case of Norway into the general debates over review legitimacy. I do this by looking into review debates as they have developed from 1814 until today, a period of just over 200 years. This bicentennial debate analysis looks to discussions of review among the popularly elected, the legal community and, where accessible, public opinion.

Under the 1814 Norwegian Constitution, general courts have the competence of the strong form review of legislation, a tradition practiced since the early 1800s. Since the 1990s, this national constitutional basis for review has been supplied with courts' competency of review under the central international human rights instruments, most notably the ECHR. Since then, Norwegian courts have reviewed legislation under both the Constitution and the ECHR. Following the most fundamental constitutional reform in Norwegian history, several of what had until then been convention-based human rights were constitutionalized in 2014, thus enhancing the formal constitutional protection of rights in the country. And in 2015, what had

[6] Habermas, Democracy, solidarity and the European crisis (2013).

until then been customary law-based foundations for judicial review were amended to the written Constitution.

The existence of a dual basis for judicial review is not unique to Norway; many European countries have courts exercising some form of review under their national constitutions – and in various forms under ECHR and EU law as well, following incorporating acts or other legal instruments. What sets Norway apart is that its combination of review bases and forms, as well as its historical development and political endorsement of rights and review, seem to present a case contradicting some general, theoretical assumptions about review legitimacy.

One such assumption is that *strong form* judicial review has a substantial democracy-compromising potential. Another is that the broader the bases for strong form judicial review, the greater the undemocratic potential: constitutions with few rights provisions in theory leave less power to courts than do bases for review containing more, or more open-ended, rights provisions. A third assumption is that international conventions, based on compromises between a number of sovereign states, have less of a democratic input than national constitutions, so that review under such instruments is potentially even less democratic still than review under national constitutions.

Norwegian courts have had strong form review powers for more than 150 years under the 1814 Norwegian Constitution. The Constitution did not, however, originally, have many rights provisions. When, in 1999 Norway incorporated international human rights in a way that gave them legal preference before Norwegian law in cases of norm conflict, the scope of the constitutional and "semi-constitutional" basis for judicial review in Norway was substantially widened. Following the 2014 constitutional reform, several international rights were also constitutionalized. This has left Norwegian courts with the authority and duty to exercise a strong form review of legislation under a substantial amount of rights provisions, many of which are based on international conventions, which have less democratic input than those in the Norwegian Constitution. With the democracy-undermining potential of this dual source of strong court power, one might think Norway would suffer from some democratic deficit. Yet, Norway tends to be ranked as one of the most democratic countries in the world.[7]

How did this alternative review story develop? One explanation may be the historical legacy of a collectively focused and consensus-oriented society,

[7] See i.a. The Economist Intelligence Unit Democracy Index https://infographics.economist.com/2017/DemocracyIndex/, ranking Norway as number one in 2016; Democracy Ranking http://democracyranking.org/wordpress/?page_id=679 doing the same (both assessed May 2017).

combined with a lasting, underlying current of liberal rule-of-law principles – one possibly stronger in Norway than in the other Nordic countries. The persistence of liberal ideas may be observed in the various historical periods analyzed in this book. The analyses look at how the institution of judicial review – as one exponent of this tenet – has been discussed in Norway through its working history, and what arguments have been brought for and against it – both in its original constitutional form, and its international human rights-revitalized form.

The arguments traced in this bicentennial debate concern how judicial decision-making relates to ideals essential to democracy and rule of law. Central to the countermajoritarian difficulty is a sense that review is in some way undemocratic, as a core feature of democracy is some form of popular majority rule. A core feature of rule of law is, however, that courts are *not* to be guided by popular majority opinion. And the point of rights review is often to protect minorities or individuals *against* popular majority decisions.

Review debates are often based on various assertions or arguments as to why review is or is not *legitimate*. What people mean when they use this word differs, often because of how they emphasize the different societal ideals underlying democracy and rule of law, due to the potential paradox that a constitutional democracy represents. To structure the arguments in this bicentennial debate analysis, I find the following conceptualizations and elements of legitimacy relevant.

Legitimacy is a term hinting at something right, just or good, in some sense of those terms. Defining for legitimate practices is that their consequences in concrete cases are *accepted* or viewed as *acceptable*, even when one does not agree with one or several of the concrete outcomes. Legitimacy is not the same as legality,[8] although legality may be a source of legitimacy. But legitimacy is a thicker concept than legality, one that can be conceptualized in a number of ways.[9] One main distinction is drawn between normative and social or historical-political legitimacy. Normative legitimacy exists where there are good reasons to respect an exercise of public power, if it is respect-*worthy*;[10] social or historical legitimacy exists where the exercise is, in fact, respected.[11]

[8] d'Entreves, Legality and legitimacy (1963); Dyzenhaus, *Legality and legitimacy – Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (1997); Schmitt, *Legality and legitimacy* (2004); Ashenden and Thornhill, *Legality and legitimacy – normative and sociological approaches* (2010).

[9] See i.a. Peter, *Political legitimacy* (2010); Solum, *Legitimacy* (2010).

[10] Rawls, *Political liberalism* (1993), 233; Michelman, Ida's Way: Constructing the respect-worthy governmental system (2003).

[11] Weber and Parsons, *The theory of social and economic organization* (1964), 382.

Central to discussions of legitimacy is a distinction between the *input to* and *outcome of* a particular institution or decision-making process.[12] The input perspective looks at what contributions do or at which should be incorporated into an institution or system to make it respected or respect-worthy. Outcome arguments focus on whether review produces good results. A plurality of opinions exists about what does, in fact, represent substantially "good" results – one may like or dislike the outcome of particular review cases or such a practice in general. Some thus argue that the only way to ensure the legitimacy of outcomes is by agreeing upon what is a fair *process* for establishing authority and resolving disagreement,[13] or, in the case of review, for ensuring the procedural due process to assure majority governance while protecting minority rights.[14]

From the side of *input legitimacy*, a central component is popular consent in the form of procedural mechanisms for popular majority rule or deliberative democratic involvement. Courts and their review authority may enjoy such consent through a written constitution, or through the development of customary law, or other forms of democratically enacted legislation defining court powers. Depending on democratic theory, the *size* of a popular majority going into such an establishment is relevant. An input factor relevant from a deliberative point of view may be that of the traditionally developed or "organic nature" of norms or institutions: the more they are rooted in tradition, or can be seen to have "grown out of the people" themselves, the more legitimate they are. Even without a democratically authoritative basis for review, the absence of democratic movements to abolish review already in existence – or attempts at abolishment with little popular support – may provide a negative variety of such input.

The input perspective to review legitimacy may also include the derived (or posterior) variety of *accountability*; the procedural and formal ease with which elected representatives may override the effects of review by altering the constitutional basis for it. On the supernational level, exit possibilities from treaties are relevant to this end. In national review regimes based on constitutions that are hard to alter, the degree of constitutional rigidity, formally and in practice, is an important factor for assessing input legitimacy from both an aggregative and a deliberative democratic point of view.

[12] Scharpf, *Governing in Europe – effective and democratic* (1999).
[13] Dahl, *A preface to democratic theory* (1956), Gaus in Bohman and Rehg, *Deliberative democracy – essays on reason and politics* (1997), 205ff. As the concept of fairness is also open to debate, however, procedural perspectives are also to some extent substantial, Michelman, *Brennan and democracy* (1999).
[14] Ely, *Democracy and distrust* (1980).

An important factor on the input side of legitimacy is the ideal of particular *knowledge*. Knowledge represents expertise that may be necessary, but is sometimes found wanting in the political process. Carrying a different basis and logic for decision-making than that of popular support, differing forms of knowledge are also elements grounding the ideal of *division of powers*. Particular expertise may be recognized as a desirable foundation for decision-making, and the unease of leaving too much power in the hands of one state branch may make desirable the counterbalancing decision-making powers of another. Adding to the latter is the differing form in which different institutions function. A classic ideal of judicial review in this respect is the "sober, second thought," as represented by courts, in the words of Alexander Bickel in 1963.[15]

"Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry."[16] But are courts a trustworthy forum of principle, or unaccountable, unrealistic philosopher-kings?[17] Judges are not politicians, and are instead set to employ "neutral principles" to resolve constitutional disputes.[18] If they are suspected of being but political actors, they must still *appear* neutral, and are thus forced to preserve neutrality in a different way from politicians.[19] As democracy needs transparent justifications obtainable only in concrete cases through questioning or "Socratic contestation," courts may be seen as the Socrates inviting politicians to deliver such justifications.[20]

From this knowledge-based, institutional perspective, the independence and impartiality of courts are important. These factors are influenced by the structuring and funding of courts, the appointment procedures and professional quality of judges and courts' formal and actual independence – both in their establishment and in their independence of later instructions or other

[15] Bickel, *The least dangerous branch* (1986), with further reference to Stone, The common law in the United States (1936). See also Vermeule, Second opinions (2011).
[16] Bickel, *The least dangerous branch* (1962), 26.
[17] Dworkin, *A matter of principle* (1985) ch 2.
[18] See Wechsler, Toward neutral principles of constitutional law (1959), 17, defending judicial review to the extent it is based on neutral principles: "[I]s not the relative compulsion of the language of the Constitution, of history and precedent – where they do not combine to make an answer clear – itself a matter to be judged, so far as possible, by neutral principles – by standards that transcend the case at hand?"
[19] Shapiro, The Supreme Court and constitutional adjudication: Of politics and neutral principles (1963).
[20] Kumm, The idea of Socratic contestation and the right to justification: The point of rights-based proportionality review (2010).

influences from outside. To these ends, the salary, privileges and immunities of judges, their tenure, nonremovability and the transparency of court financing, are also factors to be considered.[21] Other elements concerning the *process* under which courts conduct review may be ensured by the democratically enacted framework for courts' decision-making. To these factors belongs the composition of courts: how many judges are sitting to decide, and whether they are life tenured, term limited or ad hoc. Relevant are also to what extent judicial proceedings are adversarial, what the rules of evidence allow parties to present and how publicly transparent and challengeable written and other proceedings are. Differing systems regulate differently depending on whether arguments are based on written statements or oral presentations allowing for direct deliberation in court. Variations also exist as to how internal court disagreements may be settled – by majority vote, weighing votes of senior judges more on the basis that they have more experience or of junior judges because they are likely to better represent popular opinion,[22] and as to what extent unprofessional or otherwise delinquent judges may be held accountable.

Central to the *outcome* ideals of review legitimacy is the liberal ideal of protecting individuals or minorities; it serves as a guarantee against the tyranny of the majority and a check against political usurpation of state power. Given the fact of plurality – that different individuals have different conceptions of a good life and a fair society – outcome ideals for review often differ: Did the court strike the right balance between collective and individual interest in this or that case? Differing ideas of "good" outcomes entail the whole enigma of what law *is* and how adjudicators – not only courts – "find" the law, as well as what constitutes "good" law. Such differences notwithstanding, some outcome ideals are more generally regarded as necessary for adjudication to be considered legitimate: Judges' attempts at best interpretation and application as measured by a certain set of norms – i.a. linguistic, teleological and rhetorical, and an internally consistent and predictable interpretative practice conforming to what the relevant "legal community" accepts as methods for application. Outcome factors delegitimizing adjudication are illogical or inconsistent argumentation, selective or unrepresentative reading and presentation of legal authority, untenable analogies and justification seriously undermining the possibility of predictability in later cases.

Also significant for assessments of "good" court results is whether they contribute to the central judicial role of problem-solving, and to what extent they follow established adjudicative patterns or readily introduce new ones.

[21] Venice Commission CDL(2012)035.
[22] The latter example is from Dworkin, *Justice for hedgehogs* (2011), 483, fn. 9.

From a *deliberative* point of view they can be measured by what further deliberation they produce, and how they pave the way for institutional dialogue – either within traditional institutional levels or toward and within new ones. Courts' review may stir up popular debate. While all debate is not necessarily good debate, court decisions may, to the effect of debate, be more conducive the more controversial the issue decided by the review decision.[23] Controversial decisions may thwart constructive debate by deciding them "once and for all," but may also promote it – through popular debate and institutional dialogue between the branches of government, by pushing forth issues of importance. Review decisions may thus inspire legislatures to address difficult issues, possibly even in a constitutionally principled manner.[24] Review decisions may also implement popular deliberation through supplying their legal assessment of conflicts at hand also with that of public opinion,[25] or indeed through harmonizing constitutional provisions with prevalent democratic influences, thus modernizing constitutionalism with the help of public opinion.[26]

The degree to which premises or justifications are of a type understandable and acceptable to most is important to further the rule of law ideals sustaining review legitimacy. So too is the extent to which review practice is generally in accordance with Rawls' "liberal principle of legitimacy" – namely, founded on a constitutional or conventional basis, "the essentials of which are of a kind all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."[27]

The inherent logic of review is conservative – not in a meaning corresponding to a left–right political or ideological axis, but in that the very dynamic of review is aimed at preserving some "old" provision already embedded in a constitution, to the potential detriment of some more "modern" provision in a statute. While the constitutional provision may lead to review cases coming out in favor of some more progressive or unconservative result in the *political* sense – e.g. criminals cannot be punished as harshly as some factions of the contemporary conservative political majority wants because of constitutional bans on nonretroactive laws – minority segregation is untenable under equal protection clauses, for instance; review cases may for this reason still be perceived as conservative.

[23] Post and Siegel, Roe rage: Democratic constitutionalism and backlash (2007).
[24] Friedman, Dialogue and Judicial Review (1993).
[25] Friedman, *The will of the people: How public opinion has influenced the Supreme Court and shaped the meaning of the constitution* (2009).
[26] Strauss, The modernizing mission of judicial review (2009).
[27] Rawls, *Political liberalism* (1993), 217.

Continuing the outcome perspective, the degree of authority or power wielded is another important factor. Strong form review is more in need of solid legitimation than weak-form review – and enforceable review decisions more than nonenforceable ones. Considering this factor, however, may imply something of a paradox: Judicial decisions are made transparent and, to the extent possible, verifiable through explaining how and why premises lead to conclusions; how and why what appears as deduction is supplied with legal discretion. Consequently, the *justificatory* parts of cases exercising judicial review seem to be a central outcome-legitimating factor. The better, more comprehensive and more transparent the justification, the greater the potential for legitimacy.[28] The more reasoned a decision is, however, the greater is its potential for law-making – and the greater the authority wielded, thus the greater the legitimacy required. Its contribution to the law outside the case at hand also increases with the level of detailed explanation of the principles employed and the moments relevant for balancing them toward a concrete decision – the narrower the rule created, the lesser the authority wielded. So, the better reasoned a decision is, the more legitimate it may be seen to be, yet the more "rule" or public authority it wields, and the more legitimacy it needs. This is one of several areas in which review confronts two potentially conflicting ideals of legitimacy.

These distinctions between normative and descriptive or historically embedded ideals, and between input and outcome factors, clarify some of the concerns we have about review legitimacy. Due to their internal interdependency, however, they are more challenging to trace in any stringent manner when assessing actual debates. Normative legitimacy is hard to conceive sans descriptive, historic or doctrinal embeddedness of norms and institutions, outside a particular historic context and set of linguistic conventions and justificatory structures.[29]

One blurring of such distinctions prevalent in the Norwegian debates, perhaps in all debates over review legitimacy, is what could be termed the *input–outcome entanglement*: What is formed as critique of the institution of review, based on some lacking *input* factor such as democracy or accountability, is instead critique of certain *outcomes* of review. Or, praise of review as a decision-making mechanism as such is not necessarily based on the

[28] See i.a. Forst, *The right to justification* (2012). A convincing argument for judicial *minimalism* is given in Sunstein, *One case at a time* (1999); see, however, Sunstein, Beyond judicial minimalism (2008).

[29] Hurrell, Legitimacy and the use of force: Can the circle be squared? (2005), 29; Bodansky, Legitimacy in international law and international relations (2013).