

Index

A v. Norway, 186, 187, 189 Aakre, B., 125 Aaserud, Rigmor, 220 absolutist rule of Danish monarchy, 57, 60 abuse of power, 97 accountability, 6 Act of Concessions (1909), 79-80 actionable rights, 241 actual majoritarianism, 98 adjudicative openness, 269 administrative actions, 25 administrative agencies, 83 adversarial nature of judicial decisions, 8 Aftenposten newspaper, 114 Agrarian Center Party, 222, 235, 243, 246 Alcohol Act (1904), 86, 87 Allied Powers, 43 American argument, 76, 106 American Constitution (1787), 56 Andenæs, Johs., 84, 109, 112, 115, 117, 121-122, 124, 128-129, 176-177 Andresen, J.P., 67, 70 Anglo-American law, 147 Animal Defenders International v. U.K., 197-198 Antarctic whaling prohibition, 115-116, 130, 137, 231 argument against political limits, 101 Aschehoug, T.H., 60, 61, 66, 81, 93, 120 Aubert, L.M.B., 61, 67, 214 "automatic function" of courts, 91 Axel Springer case, 188

Backer, Inge Lorange, 246 Benjamin, George, 62 Berg, Paal, 84–85, 100, 142, 145 Bergen Police Association, 181 Bergens Tidende v. Norway, 181 bicentennial debate, 3, 270-273 Bickel, Alexander, 7 Bjørnson, Bjørnstjerne, 70 Bladet Tromsø newspaper, 180 Bødtker, Henning, 116-117 Bølgepapp doctrine of clarity, 153, 154, 155 Borten Moe, Ola, 222, 224-226 Borvik, Bjørnar, 183 Bosnia-Herzegovina, 218, 219 Braanen, Bjørgulv, 245 Bratholm, Anders, 176 Brighton Declarations (2012), 46, 48, 50-51, 201 Broadcasting Act, 196, 197, 201 Broch, Oftedal, 191-192 Brofoss, Erik, 113

Carolene Products case, 137 Castberg, Frede, 112, 119, 141-145 Castberg, Johan, 80, 102 Center Party, 18 Christensen, Jette F., 18 Christian Democrats' coalition, 113 Church of Norway endowment foundation, 210-217 civil and criminal code, 50 Civil Damages Act, 184 Civil Procedure Act (1915), 32, 52 Civil Procedure treatise (1929), 88 civil rights, 241, 243, 244, 254 clear constitutional law, 130 Cold War, 113 collective consequentialism, 166, 202 collective vs. individual rights, 271 Common Program (Fellesprogrammet), 112



Index 291

communist propaganda, 178 Communists, 151 compensation regulation, 123-129 Conservative Left Party, 103 Conservative Party, 18, 19, 243, 246, 263 Constitution Committee, 244-245, 246, 249, 252. 258 constitutional amendment procedure, 57, 77, 89, 254 constitutional democracy, 203, 222 constitutional review. See also Judicial review Church of Norway endowment foundation, 210-217 constitutionalism, 35-40 customary law, 226-230 debate and follow up, 220-226 ideals of, 273 introduction to, 206-208 judicial review exceptions, 230-232 shipping tax case, 208-210, 220, 221-222, 233 war crimes, 111-112, 217-220, 223-224, 226-227 constitutional revitalization, 247-253 constitutionalism, 35-40, 101 constitutionality argument, 75, 98, 104, 216 constitutionalization of review, 36, 149-150, 203, 239-247, 260, 270 constructive debate, 9 controversial decisions, 9 Convention on the Rights of Persons with Disabilities (CRPD), 252-253 Convention on the Rights of the Child, 250 Cooley, Thomas M., 121 Council of Europe (CoE), 43, 196–197 countermajoritarian difficulty, 1-2, 74, 87, 95, 101, 262 Court of impeachment, 58 court-skeptic argument, 101, 105 Courts Act (1915), 33-34 Criminal Procedure Act (1981), 52, 147, 248 customary law in Constitutional review, 226-230

Danish-Norwegian legal system, 60 death penalty, 111–112, 135 decision-making processes, 6, 10–11, 17, 158 decriminalization, 184 defamation cases, 173, 174–185 delegation laws, 113 delegatory price legislation, 114 deliberative democratic input, 162

democracy. See also Social democratic constitutionalism authority of decision-making bodies, 3 constitutional democracy, 203, 222 free speech and, 202, 203 human rights to, 155 of international conventions, 4 international human rights and, 157 introduction to, 1, 5, 12 judicial review and, 97 Power and Democracy Project, 24, 156–160, 272 procedural democratic input, 235, 254 social democracy, 14, 15, 17, 18 Swedish unionization and, 13 democratic ideals, 269-270 democratic legitimacy, 6, 156-158 Denmark, 12, 36, 56–58, 60, 141, 145 departmentalism, 60, 73 derogation provisions, 242 dissenting opinions among justices, 31, 32 division of powers/power balance argument, 74 doctrine of clarity, 145–148 doctrine of precedence (stare decisis), 29, 40 doubtfulness/doubtlessness divide, 233, 237–238 dual basis for judicial review, 4 dual review constitutionalized, 253-259 dualist legal system, 51–52 Due Process Clause, 90, 107 Dunker, B., 66, 68-69, 71

East Block countries, case-load system, 50 Ebbell, J., 70 Eckhoff, Torstein, 42, 109–110, 114–115, 135–136 economic liberalization, 15 Elgsem, Frode, 246 embedded expertise, 97 enfranchising, 12 enumerated rights, 240 European Central Bank, 3 European Commission, 3 European Convention on Human Rights (ECHR) background, 43-45 central features, 45-47 constitutional revitalization, 249 democratic ideals, 269-270 Doctrine of Clarity, 145-148 free speech under, 204 Human Rights Act preparations, 148-156



292 Index

ECHR (cont.) introduction to, 2 judicial review by, 3, 16-26 judicial review revival, 207 Norwegian Official Report (NOU), 148-150 outline of review, 51-55, 273 protection of individual rights, 255 recognition of, 141-145 travaux préparatoires, 30, 41, 44-45 European Convention on Human Rights (ECHR) debates ECHR norm vs. national norm, 160-164 introduction to, 130 original intent, 140-145 ratification of, 140-141 teleological interpretation, 154 European Court of Human Rights (ECtHR) Anglo-American law, 147 central features, 45-47 constitutional revitalization, 249 defamation cases, 187-190 ECHR and, 141–145 free speech case law, 167, 172-173, 176 Human Rights Act and, 156 interpretive method, 47-51 introduction to, 2 judicial review and, 25-26, 43-44 political advertising cases, 194-195, 198, 200 political review challenges, 264 post-national constitutionalism, 162-163 Power and Democracy Project, 158 European Economic Area (EEA), 15 European Economical Agreement (EEA Act), 150 European modernity, 94 European political advertising cases, 197-198 European Social Charter, 252 executive branch of government, 1, 73 Expropriation Compensation Act of 1973 (ECA), 109, 123-129

Falsen, Christian Magnus, 62, 64
Faremo, Grete, 152
Farmand (newspaper), 114
final arbiter-argument, 75
First Amendment (U.S. Constitution), 178–179
Fleischer, C.A., 126, 127, 176
Fliflet, Arne, 246
foreseeability, 158

Fourteenth Amendment (U.S. Constitution), fourth instance doctrine, 48 Frederik, Christian, Prince, 56, 62 free speech case law background on, 169-170 basis and speech selection, 165-169 current legal situation, 173-174 defamation cases, 173, 174-185 ECHR review, 204 ECtHR review, 167, 172-173, 176 free speech protection, 174-177 personality rights vs., 169-190 perspectives on, 185-190 political advertising cases, 190-202 summary of, 170-173, 202-205 Supreme Court review, 21-22, 170-172 freedom of assembly, 240 Freedom of Expression Commission, 180, 182 French Constitution (1791), 56 French constitutional theory, 61 Friheten (newspaper), 114 Frisak, Henrik, 84 fundamental rights, 242

Gaarder, P.K., 67 German occupation of Norway, 110–112 Giske, Trond, 21, 165, 214–215 globalization impact, 22 "good" court results, 8–9, 11 Grand Chamber, Supreme Court, 46 Graver, Hans Petter, 236 Greenpeace, 178 Grendstad, Gunnar, 225 Ground Lease Act, 250–251, 269 ground lease arrangement, 250 Guardianship Act (2010), 252

Hague Congress, 43
Hambro, Edvard, 144, 146
harmonizing process, 36
Haug, B., 131
Haugland, Jens, 126, 128–129, 135, 142–143, 144, 162–163
Heggen, Halvard, 84
Hiorthøy, F., 117–118
historical legitimacy, 5
Hjort, I.B., 118
Høgberg, Benedikte M., 236
Holmboe, A., 108
Holmøyvik, Eirik, 62



Index 293

Holship case, 251, 269 debates over, 146, 147 Hønsvald, Nils, 142, 143 democratic responsibility and, 157 incorporation into Norwegian law, 149-150 horizontal effect (drittwirkung), 172 Hornsrud, Christopher, 103 introduction to, 3, 4, 5, 16 Human Rights Act (HRA). See also legitimacy of review, 167-168, 258 International human rights protection by, 24, 43 protection of, 153-154 abolishment of, 54 constitutional revitalization, 247-253 international humanitarian law, 219 democratic legitimacy, 156-158 internationalization of economy and discussions in Parliament, 155-156 society, 157 interpretivist approach, 81 drafting of, 52, 53 dual review constitutionalized, 253-259 Ireland, 141 Irgens, K., 143 ECHR and, 130 enactment of, 179, 182 Izmir Declarations (2011), 46 fundamental rights, 242 Jagland, Thorbjørn, 18, 240 human rights treaties, 239 interpretation of, 53-54 judges/justices judicial review constitutionalization, neutral principles and, 7 political affiliations, 226 245-247 judicial review revival, 207 in Supreme Court, 29-30, 34-35, 111 modification of, 54 judicial activism, 90 non-constitutionalized human rights, 252 judicial branch of government, 1 overview of, 17, 23, 26 judicial independence, 162 post-national constitutionalism, 160-164 judicial legitimacy, 187, 201, 264 Power and Democracy Project, 156-160 judicial review. See also Constitutional review preparations for, 148-156 attempts to abolish, 102, 103-108 Human Rights and Fundamental background and context, 1-12 bicentennial debate, 270-273 Freedoms, 47 Human Rights Committee, 52, 164, 230, challenges, 267-270 confirmation of, 134-138 239-242, 256, 257 human rights interpretation, 144 constitutional system, 220 human rights law, 146 constitutionalization of, 36, 149-150, 203, human rights to democracy, 155 239-247, 260, 270 human rights violations, 45 courts, lawyers and background, 58-63 Hvalolje case, 263 debates on, 16-21, 26 defined, 25 exceptions to, 230-232 Iceland, 36, 145 individuals as moral agents, 202, 203 features of, 40-42 input legitimacy, 6-7, 235 non-use of judicial review, 96 input outcome entanglement, 6, 10-11, 99, Norwegian history and, 12-16 260-261 regulatory state emergence, 78-79 Interlaken Declarations (2010), 46 in U.S., 76 international breach cases, 75 judicialization, 22, 159 international conventions, 4 Judt, Tony, 17 jurisprudence as a balancing model, 42 International Covenant on Civil and Political Rights (ICCPR), 149, 239 justification ideal, 234–235 International Covenant on Economic, Social and Cultural Rights (ICESCR), 149, Kant, Immanuel, 56 Kings Bay case, 119 152, 239 international human rights Klassekampen newspaper, 245 central tenet of, 22 Klinge case, 219



294 Index

Kløfta case (1976)
collective vs. individual rights, 271
Constitutional review, 226
follow up to, 132–134
human rights and, 150
introduction to, 15, 37, 108
judicial review, 109–110, 118, 206, 207, 230, 231, 268
overview of, 129–132, 262
review debates, 75
self-owned endowment, 213–214
trisection in, 153
knowledge-based legitimacy, 7, 164
Knudsen, Gunnar, 80, 82, 84
Kolberg, Martin, 18, 245, 259

Labour Party, 14-15, 18, 89, 102, 105, 112-113 Lasson, P. C., 63, 69-70, 75 law and politics, 117-118 legal argument, 40, 74, 120, 232 legal-historical development, 95 legal interpretation of rights, 241 legal-methodological strategy, 248 legal-political foundation, 40 legal positivism, 41 legal predictability and rule of law, 132 legal procedural guarantees, 162 legal questions for courts argument, 74 legal science, 40, 41 legislative acts, 23, 39, 65, 80, 247 legislative branch of government, 1, 73 legitimacy ideals defined, 5 democratic legitimacy, 6, 156-158 disentanglement of, 260-263 doubtfulness/doubtlessness divide, 233, 237-238 historical legitimacy, 5 input legitimacy, 6-7, 235 international human rights, 167-168, 258 judicial legitimacy, 187, 201, 264 knowledge-based legitimacy, 7, 164 liberal principle of legitimacy, 9, 161-162 normative legitimacy, 5, 122 political legitimacy, 229 procedurally democratic legitimacy, 164 review legitimacy, 8, 10, 271-272 social legitimacy, 5, 92, 96 Lerche, F.G., 60 levelheadedness, 96 lex superior, 59-60, 64, 74, 86, 97, 231, 232

liberal argument, 75, 97, 105 liberal constitutionalism, 62, 74-76 liberal guarantee of review, 99 Liberal Left Party Expropriation Compensation Act, 125 introduction to, 14, 19, 89 legitimacy cases, 263, 266 party line, 102-103 recommendation to abolish judicial review, 102 liberal principle of legitimacy, 9, 161-162 liberal revolution, 148 Lie, M., 89-93, 94, 107 Lillo Stenberg case, 189, 270 Lindheim case, 251, 263, 268, 270 lochnerizing, defined, 107 Lønning Committee, 18, 240, 249 Lorentzen, Paal W., 246 Lovdata database, 51 Stang Lund, Eilert, 170, 171 Lund Commission Report, 151

Magnussen, A., 94–95
mandatory jurisdiction, 93
manipulative communication, 190
Marbury v. Madison, 63
margin of appreciation, 48, 201
Media Surveillance Authority, 197
methodological principle, 42
Mill, John Stuart, 202
minority protection, 96
moderate use argument, 98
Morgenstierne, Bredo, 85, 89, 93–94, 106
Motzfeldt, U.A., 65
movable or immovable property, 65
multi-party systems, 229
Murphy v. Ireland, 192, 194

National Human Rights Institution Act, 267
National Human Rights Institutions
(NHRIs), 267
National Socialist Party, 112, 143
natural law
constitutional limits, 81
human rights ideals and, 90
impact of, 41
metaphysical aspects of, 42
social contract and, 91
theories of, 57–58
negative freedoms, 132
Nelson, Knute, 107



Index 295

delegatory price legislation, 114 neutral principles, 7 dual review constitutionalized, 253-259 newspaper freedom of expression, 172 1866 case, 68-74 Nilsen and Johnsen v. Norway, 181 non-constitutionalized human rights, 252 free speech case law, 21-22, 170-172 non-retroactivity of laws, 39 Holship case, 251, 269 non-use of judicial review, 96 Hvalolje case, 263 normative legitimacy, 5, 122 Kings Bay case, 119 Norwegian Boycott Act, 251 Klinge case, 219 Norwegian Broadcasting Act, 190 liberal constitutionalism, 74-76 Norwegian Broadcasting Company Lillo Stenberg case, 189, 270 (NRK), 196 Lindheim case, 251, 263, 268, 270 Norwegian Childrens Act, 250 Marbury v. Madison, 63 Murphy v. Ireland, 192, 194 Norwegian Constitution arguments following 1866 case, 69-74 Norwegian Boycott Act, 251 constitutional amendment procedure, 57, political advertising cases, 165, 191-194, 200 as political institution, 120-122 77, 89, 254 constitutionality argument, 75, 98, 104, 216 Price Act, 114-115 constitutionalization of review, 36, 149-150, reasoning behind cases, 20, 26 203, 239–247, 260, 270 role of, 72 debates over judicial review, 19-21 shipping tax case, 208-210, 220, 221-222, 233, 1866 case, 68-69 261, 268 introduction to, 3, 4, 29 splitting of, 84 judicial review by, 16-25 TV Vest case, 190-194 overview of, 56-58 Vauvert case, 104, 137 VgT Verein Tierfabriken v. Switzerland, prior review discussions, 64-68 protection of individual rights, 255 192, 194 war crimes case, 111–112, 217–220, 223–224, recommendation to abolish, 92, 102 U.S. influence on, 63-64 226-227, 243, 261 Norwegian doctrine of precedent, 61 waterfall management case, 79-85, 108, Norwegian EU (EEC) membership, 15 137, 262 Norwegian ground lease arrangement, 250 West Coast Hotel case, 137 Norwegian Human Rights Committee, 149 Whaling case, 115-116, 130, 137, 231 Norwegian-Swedish union, 56 Norwegian National Human Rights Institution, 267 Norwegian Transport Workers Union, 251 Norwegian Nazi collaborators, 112, 142 nulla poena sine lege principle, 58, 218, 219 Norwegian Official Report (NOU), 148-150 Norwegian Parliament, 19, 260, 264-265. See obiter dictum, 209, 213 also Parliamentarism "on other grounds" proposal, 113 Norwegian Penal Code (NPC), 170, 173, 184, open-ended rights, 44–45 Opplysningsvesenets fond (OVF), 210-217, 220, 185, 217-220, 230 Norwegian Police Association, 181 222-223, 231 Norwegian Shipowner's Association, 208 Opsahl, Torkel, 52, 114-115, 117, 134, 148-149 Norwegian Study on Power and Democracy. outcome perspective, 10, 122, 257, 268 See Power and Democracy Project Norwegian Supreme Court Parliament Committee on Finance, 210 A v. Norway, 186, 187, 189 Parliament Justice Committee, 125 Parliament preparatory committee, 243 Axel Springer case, 188 background on, 28-35 parliamentarism case load, 39 constitutional limits of, 81 death penalty, 111-112 death penalty, 135 debates over, 121 defamation cases, 188



296

Index

Property Lease Instruction (PLI), 211-217, parliamentarism (cont.) introduction to, 13, 19, 36, 37, 38 235-236 proportionality assessment, 209 judicial review, 119-120, 242, 270 legal theory and, 64 Protocol 11 (ECHR), 49, 53 Parliamentary Assembly, 46 Protocol 14 (ECHR), 45, 46 parliamentary debates, 80, 94-103 Protocol 15 (ECHR), 46 parliamentary development argument, Protocol 16 (ECHR), 46 Particular Parliamentary Committee on the quasi-retroactivity, 209 Study of Power and Democracy, 159 Quisling, Vidkun, 84-85, 143 Penal Code. See Norwegian Penal Code Pensioners' Party, 195, 200 Radical Liberal Labour Party, 80, personality rights vs. free speech, 102, 221 169-190 Rawls, John, 9 Plenary Act (1926), 100, 104 real considerations (reelle hensyn), 42 plurality of opinions, 6, 8 regulatory reconstruction, 112-119 political advertising cases regulatory state background, 190-191 constitutional questions, 77-79 current legal situation, 195-202 judicial review, 78-79 ECtHR review, 194-195, 198, 200 legal opinions, 1912/1916 cases, 85-88 in Europe, 197-198 legal opinions, after 1918 case, 88-94 in Norway, 195-197 parliamentary debates on review overview, 165, 190-202 abolishment, 94-103 perspectives on, 199-202 waterfall management case, 79-85, 108 reigning constitutional doctrine, 146 Supreme Court review, 165, 191-194, 200 political affiliations, 34, 46, 102, 226 religious advertising, 195 political argument, 74 representative popular input, 234 political freedom of expression, 193 retroactive legislation, 58 political legitimacy, 5, 229 rettsavklaring (clarification of law), political limits, argument against, 101 political review challenges, 263-267 rettsenhet (uniform legal application), 31 political rights, 239, 241, 243, 244, 254 rettsutvikling (development of law), politicization of law, 235 30, 31 poor systemic fit, 97 review abolishment, parliamentary debates, popular sovereignty, 74, 81 94-103 post-national constitutionalism, 160-164 review legitimacy, 8, 10, 271-272 post-war adjudication, 110-112 revolutionary agitation, 95 Power and Democracy Project, 24, 156-160, 272 Richter, Ole, 70 pragmatism, 41, 42 rights reform, 239-245 preferred position principle, 138 Riisnaes, Sverre, 84-85 Presidency of Parliament, 265 Rogaland Pensjonistparti, 198 rule of law, 1, 5, 13, 132 Presidency of the Council of the EU, 3 presumption of innocence, 148 Ryssdal, Rolv, 146 presumption principle, 52, 150 Price Act (1953), 114-115 Schei, Tore, 186, 225, 249 Schjødt, A., 80, 86, 88 price laws, 114 privacy invasion cases, 171 Schweigaard, A.M., 60, 65 procedural democratic input, 235, 254 Seip, J.A., 77, 102, 109, 120-122 procedural democratic legitimacy, 164 Sejersted, Francis, 123, 180 Progress Party, 18, 261, 263, 265 Sejersted, Frederik, 245, 246 Property Lease Act, 210-217 sense of security, 97



> Index 297

Swedish "Folkhemmet," 13 shipping tax case, 208-210, 220, 221-222, 233, 261, 268 Swedish-Norwegian King, 19 Skeie, Jon, 86-88, 104, 105, 260 Swedish Supreme Court, 265 Skjeie, Hege, 245 Skoghøy, Jens, 193-194, 219 Teitgen report, 140 Slagstad, Rune, 92 Terboven, Josef, 110-111 Tetzschner, Michael, 18, 245 sloganized communication, 190 Smith, Carsten, 31, 52, 146 textualist argument, 74 Smith, Eivind, 245 Thrane, Marcus, 95 social democracy, 14, 15, 17, 18 social democratic constitutionalism travaux préparatoires Expropriation Compensation Act, codifying review, 259 122-120 introduction to, 109-110 confusion created by, 252 judicial review confirmation, 134-138 defamation cases, 182 democratic ideals, 269-270 Kløfta case, follow up, 132-134 ECHR and, 30, 41, 44-45 Kløfta case, overview, 129-132 law, politics and history, 119-123 occupation and post-war adjudication, judicial review and, 30, 41 110-112 open-ended rights, 44-45 regulatory reconstruction, 112-119 political advertising, 199 social legitimacy, 5, 92, 96 social reform strategy, 79 264, 267 social regulations, 77, 104 shipping tax case, 209 Treaty of Kiel, 56 Socialists, 151, 211, 221, 266 socio-economic rights, 244 Socratic contestation, 7, 271 Søreide, Eriksen, 214 TV Vest case, 190-194 Ørbeck Sørheim, Ingjald, 221 two-party systems, 229 sovereign branches, 72 Special Committee (1927), 37 unelected elites, 24 unity of statutes, 67 Standing Committee on Scrutiny and Constitutional Affairs, 94, 98 Stang, E., 94-95 (UNDHR), 43, 140 Stang, Fredrik, 60, 65, 82, 126, 231 unlimited popular rule, 105 unsuitability argument, 96 stare decisis, 37, 40, 147 state-citizens balance, 82 unwanted outcomes, 104-105 statute-based rights-thinking, 18 178-179 Steenbuch, H., 60, 65 U.S. constitutionalism, 36 Stoltenberg, Jens, 240 Story, Joseph, 62 U.S. exceptionalism, 107 strong forms of review, 2, 4 Stuevold-Hansen, Birger, 84 subsidiarity principle, 48, 53 Valle, Inger Louise, 207 substantial adjudication, 255 value conservatism, 243 Vauvert case, 104, 137 supernational courts, 2 Supreme Administrative Court, 265 Supreme Court. See Norwegian Supreme 102, 104 Court Sverdrup, J., 72 (VCLT), 47 Sweden, 13-14, 141

Tønsberg Blad newspaper, 182 compensation regulation, 124 interpretation of rights, 256-257 political review challenges, 263, true meaning interpretation, 81 TV medium for political advertising, 165 Universal Declaration of Human Rights U.S. Constitution, 56, 59, 62, 72, U.S. Supreme Court, 90, 107-108, 225

VgT Verein Tierfabriken v. Switzerland, Vienna Convention on the Law of Treaties volume, in judicial review, 96



298

Index

wage reductions, 99 War Crimes case, 111–112, 217–220, 223–224, 226–227, 243, 261 waterfall management case, 79–85, 108, 137, 262 weak forms of review, 2 welfare state, 14 West Coast Hotel case, 137 Whaling case, 115–116, 130, 137, 231 Wold, Terje, 145, 146 working capacity of Court, 83