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Courts of people, not of norms? Law and fact in constitutional review as performed by courts of general or administrative jurisdiction

REPORT

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Introduction

Our subject-matter is about fundamental questions traditionally in the core of interest of disciplines like procedural law or the doctrine of sources of law. At the same time, they seem not to have enjoyed much interest in the literature on constitutional law and justice. It goes without saying, thus, that this paper will only be able to discuss – and indeed briefly so – selected aspects of the topic.

Let me start by recalling that questions essential to procedural law and to the sources for adjudication are vital to constitutional scholars only to the extent that constitutional questions may at all be referred to independent courts of law. This has not always been the case. As a matter of fact, the point of departure in Europe until quite recently was rather the opposite one: Somewhat simplifying, the Constitution was about how to produce legislation. The resulting decisions (the "law") was regarded as expressions of *la volonté générale,* enjoyed the prestige lent by some other figure close to various conceptions of "democracy" (adopted by the majority, submitted to the discretion of parliaments, and so on), or quite simply imposed itself by virtue of tradition. Once a piece of ordinary legislation was duly enacted, it was to be applied by everyone – the judiciary included – in the relevant society. When it came to substance, the Constitution – including provisions on human rights – was not admitted as a meter for the validity of the provisions at stake.[1]

This point of departure is well-worth recalling precisely at a time when all that has changed dramatically, namely following the successive fall of more or less dictatorial regimes in most parts of Europe. Even more it should be recalled at a gathering where this still quite new situation is very well reflected by the host institution (the Constitutional court of Lithuania) as well as by the personalities present: The transformation of almost every legal system in Europe in a way admitting the National constitution as part of the positive law to be applied (even) by judges, may well be qualified as revolutionary, a qualification that is justified not the least by a number of the countries that have emerged after the collapse of the Soviet sphere – and sometimes even from the former Soviet Union itself.

Before developing these points further, it should be mentioned that the following remarks are limited to instances of "constitutional review", understood as judicial activities implying some sort of adjudication on the constitutionality of sub-constitutional enactments passed by parliament. Simplifying a bit, let's refer to the latter as "ordinary legislation".

For making such a review relevant at all, it will of course be needed to assess the formal validity (instances, procedure) of the ordinary legislation at stake. By necessity, this implies a minimum of verification of facts (who decided, was the majority sufficient, and so on). But in well established democracies, serious problems in this respect seldom occur, thus limiting at most the formal control of ordinary legislation to assessing the importance and legal effects of relatively minor mistakes (for instance, did the second vote required for adopting a sub-constitutional provision occur some hours before the expiration of the time limit set by the Constitution?). And in any case, these questions will be left aside at this occasion. Instead, our attention will concentrate on questions of substance: Do the contested provision of "ordinary law" contradict the Constitution or not?

[1] For a condensed account of this point of departure and of the path towards the situation today, see my "On the formation and development of constitutional jurisdiction in a democratic society", in: *Festskrift til Fredrik Sterzel* (Uppsala: Iustus förlag, 1999) pp. 289-305.

Types of courts and of functions

A feature common to most of the systems of constitutional justice in Europe born after the end of World War II and after the fall of the Berlin wall is the establishment of specialised constitutional courts. In rather general terms and with many internal variations, of course, they all belong to what has been qualified as the "European" system of judicial review (as opposed to the "American" system).[2]

But this is not the only "model" of constitutional review in existence. Well before the abandon of the European tradition that literally regarded the "Constitution" as nothing more than a political instrument without a clear status as positive law in the sense of being within the cognisance of judges, a small number of systems of judicial review of legislation already existed in Europe. In these systems, courts of general and/or (where appropriate) administrative jurisdiction took upon themselves to adjudicate even on constitutional matters. Broadly speaking, these systems are still in existence. But their status within the constitutional system is more or less different from that enjoyed by separate constitutional courts, as quite often their relationship with the norms of the Constitution – or, in other words, the status of the latter as positive law. We will later revert to some of these questions; suffice it here to be observed that similar observations are not without bearing on the subsequent remarks.

Which courts and legal systems, then, are in the focus of my remarks at this occasion? Outside the United States of America (most of us remember *Marbury v Madison* (1803) and so on) the oldest system of judicial review of the constitutionality of ordinary legislation is by far the one that emerged in Norway through the practice of the Supreme Court already from the first half of the 19th Century.[3] Step by step, it has been followed namely by the other Nordic states (Scandinavia plus Iceland and Finland), Cyprus and Ireland, with Greece and (more recently) Estonia in some intermediate albeit different positions. In the World, we find many others (India, Japan and so on). Of course the role of the constitutional judges varies a lot from one constitutional system to another. But on this occasion, there will be no time for dealing with any of these systems in some detail. We rather have to focus on selected, more general remarks.

As already suggested, one of the main differences between the systems of the latter type and those now largely prevailing in Europe, is the absence of a centralised court for constitutional matters. Actually, they have "constitutional judges" only, and as a matter of fact many of the kind: In principle, every judge – local, at appellate or supreme level – is vested with the power to apply the constitution as "law" when needed for solving the cases brought before them, and they are normally supposed to do so. But quite evidently most questions that appear to be of genuine constitutional importance will sooner or later be brought to the supreme instance available by way of appeal. For that reason, the following remarks will mainly concentrate on the role of the supreme (judicial or administrative) courts. A

[2] The likely father of these denominations is the late Louis Favoreu, se for instance his *Les cours constitutionnelles* (Paris: Presses Universitaires de France, collection "Que sais-je?", several editions).

[3] For a short introduction in English to this development and to the present system, see my "Courts and the Parliament: The Norwegian System of judicial review of legislation", in E. Smith (ed.): *The Constitution as an Instrument of Change* (Stockholm: SNS Förlag, 2003) p. 171-187.

supplementary advantage of this choice is that it facilitates comparison with the specialised constitutional courts.

The two main systems differ at a number of other points with some bearing for our subject-matter as well. This appears even if we limit ourselves to dealing with "constitutional review" in the way already indicated. But of course limiting our subject-matter in this way implies that a number of other functions that a full *tour d'horizon* might bring into our minds (functions like the "impeachment" of ministers or heads of state, the verification of electoral operations, advising other state authorities on constitutional questions, and so on) will be excluded. This delimitation will be maintained notwithstanding the fact that some of the latter are bound to make the constitutional judge the controller even of facts in quite direct manners.

Questions of law and fact intertwined

Elements of fact are never completely absent in adjudication of any kind: A legal norm always refers to facts – established or to come. For that reason, it could never be said that constitutional courts or judges are judges of norms only, not of people.

But the importance and character of the necessary fact-finding and -evaluation varies a lot from one kind of constitutional review to another. Whereas most of the specialised constitutional courts according to the "European" model are vested with powers to review the constitutionality of ordinary legislation *in abstracto,* courts of general or administrative jurisdiction are normally left to execute such review *in concreto,* i.e. by deciding upon the constitutionality of the way the contested legal provisions have been applied on given facts, not upon the constitutionality of the contested legal provisions as such. Elements of fact are not (and cannot be) completely absent in the first category of cases, namely as what has been referred to as "legislative" facts (what are the reasons why the relevant piece of legislation was enacted, what would be the likely effect of different interpretations, are the aims pursued proportionate to the negative entailed by the enactment, and so on).[4] But the facts n question are quite obviously more specific – and frequently more present – in situations of the second type than in the former.

The distinction between "abstract" and "concrete" norm control is closely linked to another dichotomy familiar to students of systems of constitutional review: In its purest form, review *in abstracto* would be executed *before* the relevant piece of legislation has taken legal effect or at least isolated from any practical applications of it (review *ex ante*); but of course, other forms of abstract review exist as well. By contrast, review *in concreto* would by necessity take place after the provisions of ordinary legislation at stake haves taken effect, departing from some dispute over the way it has been applied (review *ex post*). Under the first category of situations, thus, the "facts" to be taken into account are in a certain sense hypothetical, whereas they under concrete and ex post review will have to be assessed in as much more direct manner.

When systems of judicial review are categorised according to established criteria like this, it is always important to recall, however, that the distinctions are not always as clear in practice as they may appear at the first glance. Three series of considerations may come to our minds.

According to *the first* of them, cases born out of specific factual situations is not likely to appear before the supreme instance available as if the legal issues to be resolved were *not*

[4] See Anthony Bradley's paper and the references he indicate.

about the future meaning of (parts of) the Constitution, thus potentially involving a multitude of interests not represented in the individual case.

Moreover, concrete and ex post review offers a wide range of opportunities to distinguish betweens different ways of applying one and the same constitutional provision in a way ruling out one or more of them as unconstitutional while upholding the validity of the provision as such. But when review *in abstracto* is carried out by constitutional courts, the frequent recourse to interpretations construing the contested regulations of ordinary legislation in a way that brings them in conformity with the relevant constitutional provisions turns out to offer more or less the same opportunities to achieve nuanced solutions.

A third observation regarding the inexactness – or rather: the incompleteness – of the basic distinction between "systems" of judicial review recalls that even if the decision of the constitutional judge originates, at least formally, from specific facts regarding the application of ordinary legislation in a manner that is potentially unconstitutional, it is likely to entail consequences far beyond the interests of the parties to that case only. If decisions of specific constitutional courts, unlike those of courts of general or administrative jurisdiction, tend to have legal effects *erga omnes,* those of the latter will frequently produce similar effects through doctrines of precedent or *stare decisis,* or quite simply by their persuasive effect: Few prefer reiterating a case similar to one already lost in the supreme instance available.

More about questions of fact

If the importance of distinguishing between systems of judicial review should not be overestimated, some of the basic criteria are nevertheless pertinent when it comes to questions regarding the relationship between law and fact in different kinds of constitutional adjudication. Not the least, it is worthwhile noticing that as a point of departure, constitutional review carried out by courts of general or administrative jurisdiction starts with disagreement upon what legal norm the qualification of a set of facts related to the case shall be based. This situation is the same regardless the nature of the case (civil, administrative, penal – with or without constitutional aspects in a prominent position).

As a matter of principle, the point of departure in specific facts is identical for courts at local, appellate or supreme level. This observation should be recalled simply because every court of general or administrative jurisdiction has to serve as a constitutional judge to the extent needed for resolving the cases before it. But in systems where two or more successive instances are available – unlike in systems where the task of constitutional review is mainly vested in specialised constitutional courts – the proportions between the parts of the litigation that deal with, respectively, facts and law tend to change as the case mounts the steps of the judicial system. Courts of first instance tend to be more involved in assessing disputes on facts than on questions of law. One of the reasons, of course, is that the law to be applied frequently is quite simple once the facts have been duly established (the accused rarely argue that theft is legal, but rather tries to show that he or she is not a thief). But the focus would often change from one level to the next even when the law appears to be more complex.

When the supreme instance of the relevant system is called to decide, disputes over facts will mostly be settled thus leaving it to the supreme court of general or administrative jurisdiction to concentrate on their legal qualification regarding the relevant constitutional norms. In this way, supreme instances of general or administrative jurisdiction would in many ways be better protected than specialised constitutional courts (when dealing with individual complaints, etc.) from the task of independently assessing the facts of the cases before them. This may leave them

with more latitude for concentrating on the legal parts the dossier. Moreover, they may more easily stand clear of criticism over the way the facts have been established, as over alleged factual mistakes.

There are situations, of course, where supreme courts of general or administrative jurisdiction do not serve as the instance of last resort. One such example is provided by Sweden, where the Supreme administrative court (Regeringsrätten) serves as the first and last instance for complaints directed against acts of the cabinet. In such cases, the advantages of having the facts mainly sorted out by local and/or appellate instances are absent, thus leaving for the supreme body itself to deal with elements of fact as well as of law as the first and only instance. But for the present purpose, we leave such exceptions aside.

One or two examples may help illuminating our main point that even supreme courts of general or administrative jurisdiction tend to concentrate on issues of law notwithstanding the fact that the cases before them originate from disputes over the legal qualification of facts. In the famous (for some: rather infamous) U.S. Supreme Court decision in the Roe v Wade (1973) case on abortion,[5] the pregnancy that gave birth to the case was, by elementary necessity, ended long before the final verdict on the constitutionality of the contested state legislation was rendered. And in the – in Norwegian constitutional law important – Borthen case (1996) on the constitutionality of retroactive legislation lowering social security benefits for people already retired due to age or disability,[6] the Supreme Court of Norway spent little time on the quite simple facts of the individual case, but much more on the implications of the balancing between the interests of the group of persons concerned and of the public burse; again, we may say that "legislative facts" more or less took over.

In different ways, both cases even illustrate that appeal of constitutional review cases originating (at least formally) from litigation over the legal qualification of specific facts to higher judicial instances, normally make the cases develop the more and more towards cases of norm control of a general or even abstract nature - *de facto* if not legally – not unfamiliar to specialised constitutional courts. In any case, they generally move far beyond the direct interests of the private parties involved.

The importance of the type of procedure

Nevertheless, it remains that questions of law ad fact are intimately intertwined even in constitutional adjudication. How do courts proceed in order to assess the specific facts of the case (following Tony Bradley (above), we might call them "adjudicative facts"). The answer of course depends on the procedural principles prevailing in the relevant system of law and for the relevant category of cases.

As we know, a basic distinction between *adversarial* and *inquisitorial* systems is often adopted (with a number of supplementary nuances needed, of course, in order to fully grasp the particularities of the individual system). According to the first procedural principle, it is for the relevant parties themselves to present the facts of the case in a way likely to pave the way to the decision each of them seeks. According to the second, the court has to go beyond the more passive role presupposed by this point of departure, in order instead to take upon

[5] 410 U.S. 113 (1973).

[6] Rt. 1996 p. 1415.

itself to ensure that the relevant facts are sufficiently elucidated for it to proceed to their legal qualification.

Even in systems like the latter, however, some sort of cooperation between the parties to the case and the judge would normally take place, in the way that the judge's role as the inquisitor would normally be to use the proofs presented by the parties as a point of departure for deciding what more is needed in order to ensure that factual elements of special relevance for their legal qualification are sufficiently illuminated. And to a lesser or higher degree, both main systems may open up for the preparatory use of enquiries, external experts, etc. in order better to assess the facts of the case (as the law, by the way), or for accepting *amici curiae* briefs presenting observations from an outsider's position.

In systems where constitutional review is carried out by courts of general or administrative jurisdiction, the constitutional issues from time to time appearing as intrinsic parts of the reasoning will basically be dealt with according to the procedural norms applicable to the sort of case (civil, administrative, penal) that makes it mandatory for the judge to act even as a judge on the constitutionality of the ordinary legislation to be applied. A normal feature would then be that civil law matters are submitted to procedural norms of an adversarial character, whereas the administrative or penal judge would be called upon to play a much more active role in assessing the facts of the case.

A similar schema is easier to operate, however, in systems with a system of separate administrative courts operating side by side with courts vested with the remaining parts of "general" jurisdiction than in systems where the same judge is competent in cases of all the three types (like in Norway, Denmark, Ireland and a number of other countries). In Norway, for instance, administrative cases are normally submitted to the main rules of civil procedure and thus to a quite strict version of the adversarial system. – According to me, this point of departure is highly inappropriate in most cases opposing administrative bodies and private citizens – but that is quite another matter.

Notwithstanding which form of procedure to apply, however, the court must independently assess the facts to the extent needed for being able to assume responsibility for their legal (constitutional) qualification. At this point, another difference between specialised constitutional courts and courts of general or administrative jurisdiction may attract some interest: Constitutional courts tend to be staffed in ways that differ quite systematically from instances of the latter kind in the same societies: Even if members with a high judicial training are present, people with an academic background and/or with a political past will often be in a leading role. Several arguments explain and/or justify this aspect of the "European system" of judicial review when it comes to the specific functions of constitutional adjudication.[7] But at one point at least, the traditional staffing of "ordinary" courts might be an advantage: Could it perhaps be argued that the quite specialised functions of assessing disputed facts would be better served by professional judges than by people with the kind of background that tend to be prominent among the members of constitutional courts?

To some extent and for certain kinds of functions (like the control of electoral operations), the latter would normally be provided with a permanent or ad hoc secretarial staff assisting them in their tasks of fact-finding and assessment of the relevant acts (re-calculation of votes cast,

[7] Suffice it here to refer to the remarks in Favoreu: *Les cours constiutionnelles* (op.cit.).

evaluation of the accounts of campaigning, etc.). This is less frequently so within supreme courts of general or administrative jurisdiction.

I leave it open which of the two sets of solutions that should be preferred. But in any case, it should be recalled that this question cannot be answered unless the type of functions to be fulfilled is taken into account.

More about questions of law

These remarks pave the way to our final main question: How do constitutional judges proceed in order to determine the legal norms to apply? Again, the answer may well be influenced more by the type of functions they are asked to fulfil than by the type of court involved.

In this respect, the distinction – however imperfect – between constitutional review of an abstract and a concrete nature is likely to be the most pertinent. In order to better addressing its importance for the way questions of law are assessed, it may be useful to recall that the question of "law" in constitutional review by necessity must be divided into (at least) two: What is the meaning of the contested piece of ordinary legislation? What is the constitutional norm at the relevant point? Quite simply: Before a decision on the relationship between provisions of a constitutional rank and of ordinary legislation can possibly be reached, we must know the meaning of both of them (and of course the meaning of one – as well as the outcome it would normally entail – may influence the interpretation of the other).

In cases of abstract review, these operations must take place – in principle at least – in complete abstraction from individual facts likely to elucidate how the contested norm is actually applied. It is the constitutionality of the norm itself that is at stake; in this sense, the constitutional judge is the judge of norms, not of persons. In cases of concrete review, the point of departure is the opposite one.

The first kind of function may give the constitutional judge considerably more discretion for figuring out the main advantages or disadvantages of different interpretations of the relevant norm when it comes to it relationship with the Constitution than the latitude enjoyed by judges of individual complaints, but with the risk of leaving unimagined complications aside. Among the merits of the second is the opportunities it gives to depart from "facts of life" more than from abstract reasoning and to study the constitutional implications of a piece of ordinary legislation in the light of unique insight into a specific set of such facts, a technique that may even provide constellations that "abstract" imagination might not have imagined. The price to pay, however, may be a tendency to overestimate the weight of these same facts (and of the interest of the individual parties), a tendency that might be detrimental to the discovery of other types of complications to which the relevant piece of ordinary legislation may give rise.

Such series of considerations are well known from the literature on the subject. What remains in the present context is the observation that the relations between specific facts and law tend to be far tighter in instances of concrete than of abstract review of the constitutionality of ordinary legislation. This feature is likely to influence not only the interpretation of the ordinary legal norm and the outcome for the individual parties. It may also determine the judge's establishment of the (general) meaning of the constitutional norms at stake.

At the same time this assumption should be tempered, of course, by recalling our previous remarks about the tendency of the two sorts of review to coincide, namely as a result of the

way even supreme courts of general or administrative jurisdiction tend to produce more general statements and legal effects as to the meaning of the Constitution than the "concrete" background of the review might lead us to think.

Even the distinction between adversarial and inquisitorial systems of procedure tends to fade out when we move from questions of fact to questions of law. According to both procedural principles, the basic assumption is of course that it is for the judge to "say the law" and to apply it correctly on the facts (abstract or concrete) that they are asked to deal with. In this respect, the distinction between constitutional courts and courts of general or administrative jurisdiction seems of little importance if any at all.

The Constitution as "law"

The latter statement would be largely incomplete, however, if we did not return to some of my initial remarks regarding the constitution as "law".

First of all, the mandate of the judge in constitutional matters is far less clear in some of the systems involved than in others. As a matter of fact, the two oldest systems of judicial review in the World (those of the United States, as far as federal legislation is concerned, and Norway) have never been based upon an explicit mandate in the Constitution and therefore derives their legitimacy from practice and tradition. For different reasons, some of the same may be said about the quite peculiar "constitutional court" of France. But generally speaking, the mandate in constitutional matters of the many specialised constitutional courts are quite clearly established by the respective constitutions and therefore even enjoy a better established role when it comes to the function of defining the meaning of norms of a constitutional rank.

In particular, the role of the Constitution as positive law to be applied (even) by independent courts is more firmly recognised in such systems than in systems lending much more towards custom or tradition. Such differences are likely to influence the readiness of the constitutional judge to intervene in constitutional matters notwithstanding political stress or protest – not because the judges are of one type or of another, but because it influences their legitimacy as actors on the constitutional scene.

Quite evidently, however, a number of other factors will influence judicial behaviour as well, like the age and symbolic value of the relevant Constitution and the way the txt of the Constitution can be amended. In order fully to grasp different systems, the notion of *constitutional cultures* may be of great use albeit its complexity.[8] At present, only a few comlementary observations can be admitted, focusing on the role of different kinds of constitutional judges.

As a point of departure, it is important to recall that if the judges – constitutional or not – are not the masters of which cases to be faced with (but to some extent certainly that of which cases to select for further scrutiny), they will nevertheless have to decide for themselves which questions of a constitutional character to discuss and which weight with which to bestow each of them. An intimate part of this process will have to be the determination of the relevance of the different parts of the Constitution as positive law in the sense just indicated.

[8] See further in my "Constitutional Cultures: The Constitution between Politics and Law", in E. Smith (ed.): *The Constitution as an Instrument of Change,* op.cit. p. 21-51.

In this respect, there are crucial differences between courts: Whereas genuine "constitutional courts" will normally depart from the assumption that the totality of the constitutional text should be taken into account,[9] others will have had the time (or the willingness) to cultivate internal distinctions. A few examples: Since the famous New Deal struggle of the 1930s, the U.S. Supreme Court has generally steered away from questions of, i.a. property and takings. The Supreme Court of Norway has generally adopted the stand that constitutional norms regarding the relations between Parliament and the executive have lost most of their force as positive law. And in later years, the French *Conseil constitutionnel* tend to be far less preoccupied with keeping Parliament away from the business of government than general de Gaulle (and indeed the Constitution of 1958) had planned.

The same goes for the intensity of constitutional scrutiny. Sweden provides an illuminating example: The Constitution (the "Form of government" of 1974) itself states explicitly that norms of constitutional rank shall prevail only if the ordinary legislation at stake is "manifestly" unconstitutional, and it is generally admitted that the courts of judicial and administrative act accordingly.[10] In Denmark, the Supreme Court has developed a similar doctrine of its own.[11] And in the United States, the "preferred freedoms" doctrine developed as a part of the efforts to theorise the "New Deal" modifications in the jurisprudence of the Supreme Court is still of some relevance as an argument for paying less attention to some of the constitutional rights and freedoms than to others.

Even when it comes to the crucial question on how to interpret or construe constitutional norms that clearly enjoys a status as positive law within the cognizance of judges, the interpretive style and traditions clearly differ. Not only when courts of different kinds are compared, but among courts specialised in constitutional matters as well, some appear to be far more "creative" than others. At this occasion, we can not move further into this quite difficult terrain.[12] But a small contribution to efforts of mapping differences of such kinds may be sought in the distinction between different categories of judges and of judicial training ("judges" vs. "academics", etc.). It seems reasonable to argue that this distinction is of relevance not only *a propos* questions of fact, as already suggested, but also when it comes to the way questions of law are handled: If it is true that the use of "ordinary" judges may favour the proper assessment of facts, the use of judges specialised in questions of a constitutional nature (like we typically find them in constitutional courts) may enhance more independent assessment of the law in this particular sphere.

But even here, there seems to be many differences, e.g. between the relatively down-to-earth jurisprudence of some of the special constitutional courts (like Spain or France, perhaps) as opposed to the more "activist" profile of some of the others (probably including Lithuania). As a matter of fact, this looks pretty much alike the contrast between the relative reluctance of the Scandinavian constitutional judges as opposed to the much more active style developed by the U.S. Supreme Court (or at least by a certain amount of its members) in constitutional matters.

[9] This goes as far as the text contains commands, not only programmatic statements, of course.

[10] Form of Government chapter 11 art. 14.

[11] The first clear statement of this doctrine is to be found in the Supreme Court judgment in UfR 1921 644 H.

[12] For instance, which attitudes could properly be characterised as "activist"?

But taking a closer look may make us discover that this observation does not necessarily contradict the hypothesis of the importance of different staffing: Quite simply, the recruitment to the U.S. Supreme Court is highly political even compared to some of the genuine constitutional courts in Europe, that of the Norwegian Supreme court tends to be more open than its counterparts in other Scandinavian countries.[13] In other words, one should not pay too much attention to common-place distinctions between different systems of courts and of judicial review. All the formal criteria do not go the same way, and a multitude of others need our attention as well.

Final remarks

Perhaps then, the importance of constitutional norms in adjudication depends more of *the functions* to be accomplished and of *the legitimacy* of the given court or judges than of the formal organisation of the system along distinctions like the one between specialised constitutional courts and courts of general or administrative jurisdiction? This brings us back to the notion of *constitutional cultures* as the bottom line.

[13] See some of the remarks in my "Courts and the Parliament: The Norwegian System of judicial review of legislation", op.cit.