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THE RELATION BETWEEN THE JUDICIARY AND THE LEGISLATIVE AND EXECUTIVE BRANCHES OF THE GOVERNMENT IN NORWAY*

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On March 31, 1981, the first Oscar and Amelia Fode Memorial Law Lecture was presented at the Chester Fritz Auditorium in Grand Forks, North Dakota. The person who delivered that first lecture was the Honorable Rolv Einar Ryssdal, Chief Justice of the Supreme Court of Norway. Chief Justice Ryssdal graciously accepted the arduous job of inaugurating this lecture series. He and his wife, Signe Marie Stray Ryssdal, came to the United States and devoted a busy week to lectures, class appearances, Bar Association meetings, meetings with public officials, and meetings with citizens of North Dakota.

Chief Justice Ryssdal began his legal career in a barrister's office in Oslo, Norway, and at the same time, served as Deputy Judge in the county legal circuit of Eiker, Modum, and Sigdal. He was later named Deputy Crown Prosecutor in the Attorney General's office. At the same time he began teaching jurisprudence at the University of Oslo. He continues to serve from time to time on that law faculty as an examination judge. He engaged in private practice as a Supreme Court Barrister until 1956 when he was appointed Under Secretary of Justice with the portfolio of Permanent Secretary, Ministry of Justice. In 1964 Chief Justice Ryssdal was named to the Norwegian Supreme Court. He assumed his role as Chief Justice in 1969. In addition to serving with the highest Court in Norway, Chief Justice Ryssdal is also the Vice President of the European Court of Human Rights.

No more distinguished person could have been selected to inaugurate the Fode Lecture Series. It was an honor for the University of North Dakota School of Law to be able to host the Chief Justice and Mrs. Ryssdal. It is with great pride that we present this transcript of his lecture.

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*First annual Oscar and Amelia Fode Law Lecture presented March 31, 1981, in Grand Forks, North Dakota.

It was an honor and a pleasure for me to be invited to the University of North Dakota to become the first Oscar and Amelia Fode Law Lecturer. In my lecture I will speak of the position of the judiciary in Norway and its relationship to the legislative and executive branches of the government. First, I will examine some questions concerning the right of Norwegian courts to try the constitutionality of statutory laws enacted by Parliament (Storting). Second, I will discuss the possibility for the courts to exercise control with actions of the executive department. Third I would like to say a little about the relation between the legislator's competence to pass laws and the judge as lawmaker.

I should perhaps begin by saying some words about the Norwegian constitution that was signed on May 17, 1814, at Eidsvoll, forty-five miles north of Oslo. The American Declaration of Independence of 1776, the American Federal Constitution of 1787, the French Declaration on the Rights of Man and Citizens of 1789, and the American Bill of Rights amendments adopted in 1791 were all well known to the authors of the Norwegian Constitution of 1814. Sovereignty of the people, separation of powers, and protection of human rights may be regarded as the three key concepts in framing both the American Constitution and the Norwegian Constitution. But the manner of presentation of these ideas were different in many respects.

As to human rights, the constitutional committee of the Constituent Assembly at Eidsvoll came to the conclusion that only principles — the necessity of which had been established by the experience of the Norwegian nation — were to be included. Instead of a collective declaration of rights, the Norwegian Constitution of 1814 contained only a small number of rules of the kind found in the declaration of rights in constitutions of other countries, for example, the ban on retroactive laws,[1] the guarantee of freedom of the press,[2] protection against arbitrary imprisonment[3] and search,[4] and the right to receive full compensation for expropriation.[5] Later a few amendments were made. Thus, a declaration of the principle of religious freedom was introduced by an amendment of 1964[6] and was adopted on the 150th anniversary of the Constitution.

As to the principles of sovereignty of the people and the separation of powers, two principles which may be somewhat

1. CONSTITUTION OF THE KINGDOM OF NORWAY art. 97.
2. *Id.* art. 100.
3. *Id.* art. 99, para. 1.
4. *Id.* art. 102.
5. *Id.* art. 105.
6. *Id.* art. 2, para. 1.

difficult to reconcile, there are both similarities and differences in the American and the Norwegian Constitutions. In both countries it was recognized that the powers should be divided between branches of government. The legislative power in the United States was entrusted to the Congress, and in Norway to the Storting. The American President and the Norwegian King had the executive power. An independent judiciary was established in both countries as the third branch of the government. There was, however, one major difference. In the United States the executive power was placed in the hands of a president elected by the people, whereas in Norway it was committed to a hereditary monarch. But personal royal power was unable to withstand the progress of democracy. Without any changes in the written Constitution of Noway, the system of separation of powers embodied within it has been replaced by a parliamentary system. Under this system, which was introduced in the 1880s, the Parliament (Storting) decides the composition of the Cabinet, while the Cabinet decides the actions of the Crown.

Contrary to the United Kingdom and some other countries with a parliamentary government, Norway has a written constitution which contains a number of rules for the protection of human rights, and which also is the constitutional basis for an independent judiciary as the third branch of the government. The American Constitution declares, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[7] The Norwegian Constitution states, "The Supreme Court pronounces judgment in the final instance."[8] It is not expressly stated in the two constitutions that the courts have the power to set aside a law as unconstitutional and that the courts have the power to exercise judicial control with the actions of the executive department, but the doctrine that the courts have such a power was developed in practice.

I will now report briefly on the Norwegian constitutional practice in this field, but such a report must necessarily be summary and selective. In deciding cases brought before them, the courts have to interpret and apply the law. If two laws conflict with each other, the Court must decide which law is to be given precedence. Should a conflict arise between a statutory law and the Constitution, it would seem to be reasonable that the Constitution should be given precedence, by virtue of being a higher source of

7. U.S. CONST. art. III, § 1.
8. CONSTITUTION OF THE KINGDOM OF NORWAY art. 88, para. 1.

law. But it is not obvious that the courts have the power to try the constitutionality of laws, and thus to set aside a law which, in the opinion of the Court, violates the Constitution. In the United States such a power for the courts was, however, established nearly 180 years ago in the well-known 1803 case of *Marbury v. Madison.*[9] Chief Justice John Marshall's argument in this early decision of the American Supreme Court may nowadays seem to be very logical and almost inevitable, but the establishment of such a power for the Court was in fact a constitutional revolution.

Norway is one of the few other countries where the same fundamental principle was established in the last century. It is not likely that the Norwegian founding fathers at Eidsvoll in 1814 had knowledge of the American decision of 1803. I do not think that they made up their mind as to whether Norwegian courts ought to have such a competence. The principle was not clearly accepted in Norway until the end of the century. In a judgment of 1890 the Norwegian Supreme Court set aside a commercial law because it had retroactive effect, and thus, in the opinion of the Court, violated the Constitution.[10] Unlike Chief Justice Marshall in the great case of *Marbury v. Madison,*[11] the Norwegian justices in the 1890 case did not give specific arguments for the Court's right to try the constitutionality of the law. But, all the same, the judgment was a clear precedent.

Later on, a number of judgments were pronounced in which the Supreme Court reversed laws which the Court found to be in violation of the Constitution. In the decision of an important case from 1918 the Supreme Court discussed the question of the Court's competence to try the constitutionality of laws enacted by Parliament (Storting), and all the justices were of the opinion that the Court had such competence.[12]

In a Supreme Court plenary decision of 1976, Justice Knut Blom, who delivered the majority opinion, said the following:

> Firstly, I consider it necessary to say a few words on the competence of the Courts of Law to try the constitutionality of laws.
>
> It is clear that if the application of an Act leads to results which are a breach of the Constitution, the Courts must base their decision on the rule which follows from the

9. 5 U.S. (1 Cranch) 137, 177 (1803).
10. Norsk Retstidende 455 (1890).
11. 5 U.S. (1 Cranch) 137 (1803).
12. Norsk Retstidende 401 (1918).

> Constitution and not on the provision contained in the Act itself. This has been expressly stated in a long series of Supreme Court judgments and it is confirmed in Section 2 of the Act of 25 June 1926, which prescribes special rules on the Supreme Court's handling of cases of conflict with constitutional law. What we are concerned with here is an established rule of constitutional customary law, and the competence of the Courts — the so-called right of review — has not been disputed by the municipality or the Ministry of Justice in this case. It is also beyond doubt that this right of review also involves a duty to review or try the constitutionality of laws, so that it is incumbent on the Courts, whenever the issue arises, to decide whether the Constitution has in fact been breached.[13]

The judgment was not unanimous, but all members of the Court agreed with this statement.

When a constitutional question is raised in a case, this question has to be tried by the ordinary courts. In Norway we have no special constitutional court. Not only the Supreme Court, but also the inferior courts have the competence to try the constitutionality of laws. If, however, a constitutional question is raised, it is likely that final decision in the case will be taken by the Supreme Court. We do not often have such cases.

The Supreme Court is ordinarily set with five judges, both in civil and criminal cases. But if a case is of extraordinary importance, it may be tried by the Supreme Court in plenary session (eighteen justices). This is prescribed in a law of 1926,[14] and according to this law, the Supreme Court in plenary session may set aside a law as unconstitutional.

The right of the courts to try the constitutionality of laws has certainly not played the same role in Norway as it has in the United States. A comparison between the two countries illustrates how the same legal principle may function differently under different circumstances.

Some of the most important constitutional provisions in the United States are worded in general terms, whereas the provisions contained in the Norwegian Constitution are more exact in their wording. We have no such vague and general clauses as the "due

13. Norsk Retstidende (as translated) 1, 5 (1976).
14. Act of June 25, 1926, No. 2, §§ 2, 4.

process'' clause and the ''equal protection'' clause of the fifth and fourteenth amendments.

Perhaps more important is the difference in the attitude of the judges. Norwegian judges have been more reluctant to follow their own personal views on what is just and reasonable. I think it can be said that the decisions of the Norwegian Supreme Court in constitutional cases are made only on legal grounds. Whatever one may say in that respect, I think it is certain that some of the most important decisions do not reflect the Court's view of the wisdom or desirability of the legislation in question.

In this connection I would like to quote some words from an early constitutional decision of the American Supreme Court. I refer to a decision of 1819 in the case of *McCulloch v. Maryland.*[15] The question involved in that case was whether Congress had the power to charter a national bank or whether the power to charter a bank was reserved to the states.[16] Chief Justice Marshall, writing for the unanimous Court, made reference to some special factors to be taken into account when interpreting a constitution and continued as follows:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.[17]

When both a law and a special provision of the Constitution apply to a particular case, it may be that the legislative assembly (Storting) in passing the law has carefully considered the constitutionality of the law and come to the conclusion that there is no conflict between the law and the Constitution. Some citizens

15. 17 U.S. (4 Wheat.) 316 (1819).
16. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819).
17. *Id.* at 423.

may, however, be of a different opinion, and the courts accordingly will have to decide whether the law violates the Constitution. The question could then arise whether the courts ought to attach special importance to the opinion expressed by the legislator.

In a Supreme Court plenary judgment of 1976, Justice Knut Blom, who delivered the majority opinion, said:

> However, there are differences of opinion as to how much is required before the Courts may set aside an Act of legislation as being a breach of the Constitution. I do not feel called upon to discuss this issue in general terms. The solution will to some extent depend on which constitutional provisions we are dealing with. If we are concerned with provisions protecting the personal freedom of the individual or his security, I assume that the supremacy of the Constitution must prevail. If, on the other hand, we are concerned with constitutional provisions regulating the way the other Powers of State have organized their administrative procedures or internal spheres of competence, I agree with the majority spokesman in the case tried in plenary session in 1952 . . . that the Courts must to a large extent respect the particular views of the Storting (Parliament) itself.
>
> Constitutional provisions protecting economic rights must by and large occupy a middle position between these two examples.
>
> It is quite clear to me that the Storting's understanding of the relationship of the Act to such constitutional provisions must be of particular importance when the Courts are to decide on the Act's constitutionality and the Courts must show great reticence in allowing their assessment to override that of the legislator. . . . On this basis I, for my part, would hesitate to assert that a breach of the Constitution had taken place in a case where there was cause for reasonable doubt and where the Storting had clearly given the matter due consideration and based itself on the view that the Act was not in conflict with the Constitution. But if the right to review the constitutionality of statutory law is to have any reality, the Courts must use this right in cases where they find

> that the Act leads to results which beyond any reasonable doubt conflict with the Constitution.[18]

The minority by and large agreed with this statement, but in deciding the case the minority, to which I myself belonged, would have granted the legislator more discretion as to what is to be considered as "full compensation" when private property is expropriated for public use.[19] From my own grounds in the judgment I quote:

> As regards the constitutional issue raised in this case, I should finally like to say:
>
> When deciding the expropriatee's claim for compensation, the Courts — as pointed out during the voting in the present case — have the duty to base themselves on the provision in Article 105 of the Constitution. But also in this field the Storting is entitled to enact statutory laws. The powers of the legislator are not unlimited. But Article 105 of the Constitution does not contain definitive limits for the Storting's right to regulate by statutory law questions which arise when the interests of the State require that the property-owner surrender his property. Nor are such definitive limits on the power of the legislator determined by constitutional practice. In this field of law then it must first and foremost be the task of the legislator to interpret the Constitution.[20]

Opinions have been divided as to whether a distinction could and should be made between constitutional provisions protecting personal freedom and provisions protecting economic rights. I think that the unanimous dictum in the plenary judgment of 1976 quoted above is well-founded. As to economic and commercial rights, the courts, in my opinion, should be careful not to adopt attitudes that could be liable to upset the delicate balance between the legislator and the judiciary. When, however, fundamental human rights are involved, the courts should exercise their power strictly for the protection of the individual person.

I would like to mention that some important human rights, which are not contained in the Norwegian Constitution, are now

18. Norsk Retstidende (as translated) 1, 5 (1976).
19. *Id.* at 22.
20. *Id.* at 36.

included in international binding conventions on human rights.[21] I am not aware of conflicts between existing national legislation and the provisions of the international conventions. If, however, such a conflict should arise, it would be for the courts to decide the conflict, and I think it could be argued that precedence should be given to the convention.

From the end of the Second World War and up to 1975, the Norwegian Supreme Court overruled a law only on two occasions.[22] But the above-mentioned Supreme Court plenary judgments of 1976[23] and also two plenary judgments of 1977 and 1979[24] clearly indicate that the Court's power to try the constitutionality of laws is still a reality which the legislative assembly has to take into consideration.

Moreover, the fact that only a few laws have been set aside does not mean that the power to try the constitutionality is of little importance. The content and value of some constitutional provisions are also of importance as means of interpretation of statutory laws. If there can be reasonable doubt regarding how a law is to be understood, the courts will always try to interpret the law in such a way that the law, as applied, is in conformity with the Constitution.

During the years between the two World Wars some attempts were made to abolish the right of the Norwegian courts to try the constitutionality of statutory laws. These attempts were unsuccessful, and it is not likely that any political party will now attack this right. Most people undoubtedly prefer that the courts have such a right, and the legislators accept it as a part of the ground rules under which they have to work.

More important than reviewing the constitutionality of statutory laws may be that the courts of justice have to exercise judicial control over the actions of the executive department. With the growing interference and regulations from executive authorities, it is essential that the courts are empowered to decide any question raised by citizens as to whether such authorities have exceeded their competence or handled a matter in a way that cannot be justified.

If I were to undertake a thorough examination of the judicial control that Norwegian courts exercise in this field, I would certainly have to give more than one lecture. Here and now my

21. *See* International Covenant on Civil and Political Rights of December 16, 1966; European Convention for the Protection of Human Rights of 1950.

22. Norsk Retstidende 1418 (1964); Norsk Retstidende 932 (1952).

23. Norsk Retstidende 1 (1976).

24. Norsk Retstidende 572 (1979); Norsk Retstidende 24 (1977).

comments on this subject necessarily must be very brief and fragmentary. In Norway we have no special administrative courts. When citizens bring actions against executive authorities, the cases are tried by the ordinary courts. Every year we have many cases between citizens on the one side and the State or a municipality on the other side.

There was nothing explicit in the Norwegian Constitution about the power of the courts to exercise judicial control over the activities of the executive branch of government. The legal basis is found in constitutional practice. In 1818 the Supreme Court invalidated an administrative decision,[25] and some other judgments followed in the next few years. In this way the doctrine that the courts have such a power was firmly founded a long time before. At the end of the last century it was established that the courts also have the right to try the constitutionality of statutory laws.[26] Later a great number of judgments were rendered, and it is now a well established constitutional rule that the courts have the competence to review administrative decisions.

I cannot go into details as to the content of this competence. Very briefly it may be said that the court may invalidate an administrative decision if the authorities concerned are not authorized by the statute on which they relied, have not interpreted the law correctly, have been mistaken about the plain facts on which the decision was taken, or have not handled the case in conformity with the prescribed procedure. Even if there is no such fault, the decision could be invalidated by reason of abuse of power, or it could be invalidated if the decision is found to be arbitrary or extremely unreasonable. On the other hand it is not sufficient that the court disagrees with the decision taken by a competent administrative authority. It should also be mentioned that an imperfection or shortcoming in the prescribed procedure may be left out of account if this defect, in the opinion of the court, has been of no importance to the outcome.

The right of the courts of judicial review comprises all administrative decisions, including the decisions taken by the highest administrative bodies. Under Norwegian law there is no general exception in this respect. In connection with a specific hydropower construction project, a debate has arisen on the power of the courts to try an administrative decision of the Storting. Some statutory acts expressly prescribe that an administrative decision is

25. Norway Supreme Court Judgment of October 28, 1818. *See generally* DEN DØMMENDE MAKT-DOMSTOLENE OG RETTSUTVIKLINGEN 1814-1964, at 164-65 (1967).

26. Norsk Retstidende 455 (1890).

to be adopted by the Storting. According to an act on the regulation of watercourses, the Storting must give its consent to projects of major importance.

In the dispute just mentioned it is asserted that several mistakes have been made, for example, that the interests of an ethnic minority and some environment problems are not sufficiently taken into account. On the other hand it is maintained that the view of the Storting must prevail. As the case is now before the Supreme Court, I will not comment upon the issues involved. Because of the extraordinary importance of the case I have decided that it shall be tried by the Supreme Court in plenary session.

In addition to the fact that administrative decisions may be brought before the courts, there are rules relating to appeals in administrative cases.[27] Furthermore, we have in Norway a system with a special Ombudsman for the Government Administration to whom an appeal may be lodged by anyone who feels he has suffered a wrong on the part of the public administration. The Ombudsman is chosen by the Storting for a four-year term of office. The choice is not political, and the Ombudsman conducts his activity entirely independently of the Storting. The Ombudsman is not entitled to make binding decisions, but only to express his opinion. However, the Ombudsmen we have had in Norway since the system entered into force in 1963 have enjoyed great prestige, and the Government Administration has practically always paid heed to their opinions.

In recent years new statutory laws about the procedure in administrative cases as well as the practice of the courts[28] have, to some extent, increased the authority of the judiciary over the activities of the executive branch. Even so, I should think that the state of affairs in this field is very different in Norway than in the United States. The Norwegian courts have not intervened in the administration in the same way as American courts have done, such as in the operation of school systems. I have been told that there is scarcely any sort of government action which is not subject to judicial review in the United States, and that you have moved in the direction of so-called "government by the judiciary."

In Norway it is not so. If an administrative decision is invalidated, the court must, of course, state in the judgment what has been done wrong, but on the whole, the courts cannot order the executive to do something a certain way, and thus become involved in the administrative problems of choice and implementation.

27. Administrative Procedure Act of Feb. 10, 1967, ch. VI.

28. *See* Act of Aug. 13, 1915, ch. 33 (rules of court procedure in civil cases). *See also* J. ANDENAES, STATSFORFATNINGEN I NORGE 305-51 (1981).

A judge is, of necessity, not only an interpreter but also a lawmaker. The role of the judge in this respect is certainly different from that of the legislator. The courts have to apply the law to particular cases, and the judiciary is instituted for keeping the law. On the other hand it is a main task for the legislature to enact new laws, and if citizens want the law to be changed, they can for that purpose submit petitions and elect representatives to the lawmaking body.

It should also be mentioned that the legislator — when it is necessary to introduce new rules of law — is able to take care of problems of transition from the old law to the new law. If a court gives a new interpretation to a certain rule of law, a problem as to the temporal effect of such a judicial ruling may arise, the problem of retroactivity or prospectivity. For these and some other reasons I would, at the outset, think that the courts ought to have judicial self-restraint. They should not be too active in lawmaking.

This being said I would, however, like to emphasize that it sometimes may be necessary for the courts to take the lead. The courts, particularly the final courts, should not refrain from making new law when, after careful consideration, they come to the conclusion that a change is needed.

If we refer to the law as something the courts should be faithful to, we are not only referring to rules of law which legislators have brought into the statute book, but also to those principles which form the backbone of the law. In a society where social conditions are constantly developing and changing, old principles of law will have to be applied to new and unforeseen situations. In this adjustment, legislative and judicial activities could come quite close. Principles of law may be adapted to the changed conditions by statutes, but also by judicial decisions, and to settle the adjustment in the best way, an interaction between the legislative and the judicial department may be necessary.

The relationship between the judiciary, the legislative, and the executive branches of government is of fundamental importance, having great influence both on the administration of justice and on government actions. The judiciary in the United States has assumed a far-reaching authority over the activities of the other two branches, and the Supreme Court of the United States has become the most powerful judicial body that the world has ever seen.

The position of the Norwegian courts is somewhat different. But the judiciary is, all the same, in a particular position, not because the courts have to take the most important decisions —

that is for the Parliament (Storting) and the Cabinet (Regjering) — but because the judiciary is in every way independent, and also because the Norwegian courts have to excercise judicial control over the activities of the other two branches of government.