Institutions that define the policymaking role of courts: A comparative analysis of the supreme courts of Scandinavia

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Scandinavian supreme courts have been described as deferential to the elected branches of government and reluctant to exercise their limited review powers. However, in recent years, these courts have increasingly decided cases impacting public policy making. Yet we lack comprehensive, comparative knowledge about the legal rules and judicial practices that govern the policymaking role of courts in Denmark, Norway, and Sweden. Addressing this gap, this article develops an analytical framework and systematically compares the evolving laws, rules, and practices that regulate the supreme courts' constitutional review powers and court administration, the appointment and tenure of judges, access to the supreme courts, and their decision-making procedures over the last fifty years. The comparison reveals notable institutional differences across these judiciaries and finds that judicial expansion in Scandinavia has coincided with institutional changes that enhance judicial autonomy. This suggests that consequential reforms of domestic origin may have played a larger part in this development than previously appreciated.

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1. Introduction

Existing literature describes the supreme courts (SCs) of Scandinavia as traditionally disposed to defer to elected majoritarian branches, and inherently reluctant to exercise their limited review powers. Conventional wisdom on the role of the judiciary in the legal orders of this region suggests that values deeply rooted in the political and legal culture result in cautious justices,[1] in a reluctance to engage in judicial review, and in weak constitutional protection for fundamental rights.[2] Similarly, empirical research on the impact of European and international law has found that Scandinavian courts, and the supreme courts in particular, are hesitant to interact with European Union (EU) courts, or to engage with international treaties and case law.[3] Returning the favor—and testifying to the view common in the region that courts are neither political arenas nor political actors—recent research handbooks on Scandinavian politics are apparently oblivious to the third branch of government.[4]

However, recent supreme court decisions in Scandinavia challenge this notion of deferential and apolitical courts. For instance, the Swedish SC and Supreme Administrative Court (SAC) have balanced the criminalization of child pornography against the freedom of expression, expanded the tort law liability of public authorities for fundamental rights violations, upheld local bans on begging, and reduced penalties for serious drug offences.[5] The Norwegian SC has overturned parliament's decision to tax ship owners NOK 21 billion, changed policies on the expulsion of foreign nationals, reasserted public rights to backwoods resources in Sami homelands, and ruled that the constitutional right to a healthy climate does not prevent continued

[1] Pia Letto-Vanamo, *Courts and Proceedings: Some Nordic Characteristics*, *in* Rethinking Nordic Courts 21, 90 (Laura Ervo, Pia Letto-Vanamo, & Anna Nylund eds., 2021).

[2] Andreas Føllesdal & Marlene Wind, *Nordic Reluctance towards Judicial Review under Siege*, 27 Nordic J. Hum. Rts. 131 (2009); Ran Hirschl, *The Nordic Counternarrative: Democracy, Human Development, and Judicial Review*, 9 Int'l J. Const. L. 449 (2011); Jaakko Husa, *Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective*, 48 Am. J. Comp. L. 345 (2000); Jaakko Husa, *Nordic Constitutionalism and European Human Rights: —Mixing Oil and Water?*, 55 Scandinavian Stud. in L. 101 (2011); Jens Elo Rytter & Marlene Wind, *In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms*, 9 Int'l J. Const. L. 470 (2011); Marlene Wind, *The Nordics, the EU and the Reluctance Towards Supranational Judicial Review*, 48 J. Common Mkt. Stud. 1039 (2010).

[3] Karin Leijon & Christer Karlsson, *Nationella domstolar som politiska aktörer:—Främjare av rättslig integration eller försvarare av nationella intressen?*, 115 Statsvetenskaplig Tidskrift. 5 (2013); Anna Wallerman, *Referring Court Influence in the Preliminary Ruling Procedure: The Swedish Example*, *in* The Court of Justice of the European Union: Multidisciplinary Perspectives 153 (Mattias Derlén & Johan Lindholm eds., 2018); Wind, *supra* note 2.

[4] The Nordic Models in Political Science: Challenged, But Still Viable? (Oddbjørn Knutsen ed., 2017); The Routledge Handbook of Scandinavian Politics (Peter Nedergaard & Anders Wivel eds., 2018); The Oxford Handbook of Swedish Politics (Jon Pierre ed., 2015).

[5] Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2012 p. 400, B 990-11 (Swed.); NJA 2005 p. 462 Finanschefen på ICS [The CFO at ICS], T 72-04 (Swed.); NJA 2007 p. 295, Ö 2572-04.(Swed.); NJA 2007 p. 584, T 672-06 (Swed.); NJA 2014 p. 323 Medborgarskapet I [Citizenship I], T 5516-12 (Swed.); Högsta Förvaltningsdomstolens årsbok (HFD) [Supreme Administrative Court Yearbook] 2018 ref. 75 (Swed.); NJA 2011 p. 357 Mefedrondomen [The Mephedrone Judgment], B 5412-10 (Swed.).

petrol extraction in the Barents Sea.[6] Even the Danish SC—often seen as the most deferential among Scandinavian SCs—has decided controversial cases on the extradition of convicted non-citizens, the revocation of citizenship for foreign fighters, and the supremacy of EU law.[7] This brief and inexhaustive list of decisions illustrates that the Scandinavian SCs are now deciding politically contentious cases and thereby participating in policymaking. Indeed, some observers claim that the courts are engaging in judicial activism.[8]

The changing role of supreme courts reflect a profound constitutional transition in the Nordic states, sometimes described as a constitutional "revolution or paradigm shift."[9] Scholars have described the Nordic countries as a "final frontier" for rights-based constitutionalism and judicial review,[10] or as an exceptional case in terms of the *Sonderweg* they took to liberal constitutionalism.[11] A decade ago, Hirschl claimed that few if any other regions of the world have experienced "such a transformative constitutional change in such a short period of time" without "any change of regime type or. . . a major economic transformation."[12] He observed that "the Nordic countries' unique constitutional scenery is a largely unexplored paradise for theory building in the field of comparative constitutional law and politics."[13] Hirschl invited researchers to contribute to a better understanding of how and why the Scandinavian SCs have taken on a more assertive policymaking role in the public life of the region. Case studies of constitutionalism, judicialization, and judicial review in the Nordic countries have provided important insights.[14] Yet we lack studies that rigorously compare the Nordic cases and connect them together. Reviewing a study of judicial review

[6] The Shipowner Taxation Judgment, Rt-2010–143 (Nor.); The Internal Displacement Judgment, Rt-2015-1388 (Nor.); The Finnmark Estate Agency Judgment, HR-2018-456-P (Nor.); The Climate Case Judgment, HR-2020-2472-P (Nor.).

[7] Ugeskrift for Retsvæsen [U] [Weekly Law Reports] 2016.2325 H (Den.); U. 2018.769 H (Den.); U. 1998.800 H (Den.); U. 2013.1451 H (Den.); U. 2017.824 H (Den.).

[8] Morten Kinander, *Fra tilbakeholdenhet til aktivisme—Nyere utviklingslinjer i forholdet mellom rett og politikk i Høyesterett*, 55 Lov Og Rett 141 (2016); Ulla Neergaard & Karsten Engsig Sørensen, *Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the* Ajos *Case*, 36 Y.B. Eur. L. 275 (2017); Fredrik Wersäll, *En offensiv Högsta domstol. Några reflektioner kring HD:s rättsbildning*, 99 Svensk Juristtidning 1 (2014).

[9] Martin Scheinin, *Constitutionalism and Approaches to Rights in the Nordic Countries*, *in* Constitutionalism: New challenges. European Law from a Nordic Perspective 135, 139 (Joakim Nergelius ed., 2008) [hereinafter Constitutionalism].

[10] Joakim Nergelius, *Between Collectivism and Constitutionalism: The Nordic Countries and Constitutionalism—A "Final Frontier" or a Period of Transition?*, *in* Constitutionalism, *supra* note 9, at 119.

[11] The Limits of the Legal Complex: Nordic Lawyers and Political Liberalism (Malcolm M. Feeley & Malcolm Langford eds., 2021) [hereinafter The Limits of the Legal Complex].

[12] Hirschl, *supra* note 2, at 460.

[13] *Id.* at 469.

[14] Ragnhildur Helgadóttir, *Nonproblematic Judicial Review: A Case Study*, 9 Int'l J. Const. L. 532 (2011); Juha Lavapuro, Tuomas Ojanen, & Martin Scheinin, *Rights-based Constitutionalism in Finland and the Development of Pluralist Constitutional Review*, 9 Int'l J. Const. L. 505 (2011); Rytter & Wind, *supra* note 2; Mattias Derlén & Johan Lindholm, *Judiciell aktivism eller prejudikatbildning? En empirisk granskning av Högsta domstolen*, 101 Svensk Juristtidning 143 (2016); Henrik Wenander, *Administrative Constitutional Review in Sweden: Between Subordination and Independence*, 26 Eur. Pub. L. 987 (2020); Constitutionalism, *supra* note 9; Jørn Øyrehagen Sunde, Høgsteretts historie 1965–2015: At dømme i sidste instans (2015).

in Norway, Husa observed even Nordic specialists tend to know US law and jurisprudence better than they know the neighboring Scandinavian systems.[15]

As Hirschl pointed out, the expansion of judicial power in the region has been the result of evolution rather than revolution. Our goal in this article is to undertake a systematic comparison of how evolving rules, practices, and laws have shaped the strategic environment of the supreme courts in Denmark, Norway, and Sweden. By examining changes in constitutional, legal, and administrative institutions, we throw light on a key facet of the conditions which has enabled the expansion of judicial power that has taken place in recent decades. By "institutions," we mean the rules and processes that impact the organization of supreme courts, and which constrain and enable judicial decision-making, incentivizing the behavior of justices. We find that the judicial expansion in Scandinavia has coincided with institutional changes strengthening judicial autonomy in the region. We thereby contribute to answering Hirschl's call for "more concrete" explanations for the timing of judicial empowerment in Scandinavia.[16]

Drawing on theories of judicial independence,[17] our comparative framework for analyzing the Scandinavian SCs includes three distinct categories: the SCs within the changing constitutional and administrative systems; the appointment and tenure of justices to the SCs; and gatekeeping and decision-making on the SCs. Employing a broad range of new data, we analyze and compare how key institutional frameworks that govern Scandinavian SCs have evolved over the past half-century. Our analysis underscores that, while the Scandinavian SCs have followed similar trajectories—diffusion, after all, takes place more readily between similar countries[18]—the result has been somewhat different national configurations and policymaking roles for the different SCs, because of historical junctures and strategic decisions. Appreciating this important point can help analysts distinguish between exogenous and endogenous forces.

The main contribution of this article is a systematic comparison. We develop a framework for assessing the institutions governing the changing policymaking role of SCs in Denmark, Norway, and Sweden. We demonstrate that domestic administrative and legislative reforms during the last fifty years have been consequential and may well have played a larger part in this development than previous scholarship has suggested. In so doing, we provide a rich empirical account of how the different SCs have developed in Scandinavia over recent decades, and how the laws, rules, and practices that govern them have evolved. Our systematic comparison is not aiming for

[15] *Judicial Review in Norway: A Bicentennial Debate*, 17 Int'l J. Const. L. 1345, 1346 (2019).

[16] Hirschl, *supra* note 2, at 463.

[17] John Ferejohn, Frances Rosenbluth, & Charles R. Shipan, *Comparative Judicial Politics*, *in* The Oxford Handbook of Comparative Politics 727 (Carles Boix & Susan C. Stokes eds., 2009); Kevin T. McGuire, *The Institutionalization of the U.S. Supreme Court*, 12 Pol. Analysis 128 (2004); Lydia F. Muller, *Judicial Independence as a Council of Europe Standard*, 52 Ger. Y.B. Int'l L. 461 (2009).

[18] Zachary Elkins & Beth Simmons, *On Waves, Clusters, and Diffusion: A Conceptual Framework*, 598 Annals Am. Acad. Pol. Soc. Sci. 33 (2005); Tom Ginsburg, *The Global Spread of Constitutional Review*, *in* The Oxford Handbook of Law and Politics 81 (Gregory A. Caldeira, R. Daniel Kelemen, & Keith E. Whittington eds., 2008).

any rigorous causal claims, but we hope to facilitate and to invite further theoretical-comparative studies of judicial politics—a field that gets easily snagged on incompatible judicial oddments.

This article is divided into seven sections. Section 2 sets out our analytical framework, focusing on the decision-making of court justices and on the institutions that regulate supreme courts in the Scandinavian political systems. Section 3 provides historical context on the SCs in the legal and political systems of the three countries. We proceed then to analyze the evolving institutions which govern SCs in Scandinavia, centering on constitutional review powers and court administrations (Section 4); judicial appointments and professional autonomy (Section 5); and gatekeeping, docket control, and case processing (Section 6). In Section 7 we discuss several possible avenues for further comparative research on SCs in Scandinavia.

2. Analytical framework: How institutions shape the policymaking role of courts

Like many parts of the world, Scandinavia has experienced a process of judicialization since the 1980s.[19] This entails a shift in the constitutional balance of power: from elected branches of government to unelected judges in courts, and from majoritarian decision-making to a reliance on judicial methods for addressing policy questions and political controversies.[20] Judicialization usually implies an empowered judiciary that constrains the legislature and the government, thus weakening parliamentary democracy.

Judicialization in Scandinavia has been partly driven by the Europeanization of law and politics, but it also has domestic origins in the juridification of the welfare state and in the successive functional differentiation of governance systems.[21] While scholars and commentators have routinely attributed causes of judicialization to the impact of EU law and of the European Convention on Human Rights (ECHR) on Scandinavian politico-legal systems,[22] important drivers for change have also come from within domestic politics—indeed, even from within the judiciary itself. Notably, moreover, some reforms that changed the policymaking role of courts predated the impact of European

[19] C. Neal Tate & Torbjorn Vallinder, The Global Expansion of Judicial Power (1997).

[20] Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 Ann. Rev. Pol. Sci. 93 (2008).

[21] The judicialization of politics was a key topic in three parallel commissions of inquiry that investigated the state of democracy at the turn of the millennium. The Norwegian commission warned that the increasing juridification of society moves power from parliament to unelected courts. The Danish commission, by contrast, pointed out that judicial channels also offer citizens new opportunities for protecting their interests. The Swedish commission actually welcomed judicialization—as a way to strengthen the ethics of popular government. *See* Øyvind Østerud, Fredrik Engelstad, & Per Selle, Makten og demokratiet: En sluttbok fra Makt- og demokratiutredningen (2003); Jørgen Goul Andersen et al., Magt og demokrati i Danmark: Hovedresultater fra Magtudredningen (2003); Kulturdepartementet, *En uthållig demokrati! Politik för folkstyrelse på 2000-talet*, SOU 2000:1 (2000).

[22] Øyvind Østerud & Per Selle, *Power and Democracy in Norway: The Transformation of Norwegian Politics1*, 29 Scandinavian Pol. Stud. 25 (2006); Rytter & Wind, *supra* note 2; Wersäll, *supra* note 8.

law. Furthermore, while it may be tempting to interpret judicialization as evidence of "judicial activism," or as part of a larger scheme whereby unelected judges encroach on the power of the elected branches of government, some reforms have in fact had a rather mundane origin, as discussed below. Take the relegation of original jurisdiction for criminal cases from courts of appeal to district courts, or the introduction of docket-control reforms to relieve SCs of an ever-expanding case load. These have helped develop and refine the SCs as courts of precedent, making them more relevant to public policy-making.

To analyze how institutions shape the policymaking role of SCs, we adopt a multidimensional understanding of judicial independence. The value of judicial independence has been widely recognized in academic scholarship, in international law treaties, and in standard-defining documents promulgated by the United Nations, the Council of Europe, and international associations of judges.[23] Basically, judicial independence means "autonomy from other actors": i.e., the ability of a court or a judge to make decisions "free of influence from other political actors," and without suffering or fearing "consequences from other institutions."[24] And since there are multiple ways by which external actors can unduly influence a court or a judge, judicial independence must be understood as a multidimensional concept.[25]

Legal scholarship and practice distinguish between external and internal independence. The external dimension concerns the judiciary's independence from other powerful institutions and actors; the internal dimension concerns the independence of individual judges from other judges.[26] Another key distinction is between objective and subjective independence. The objective dimension relates to institutional safeguards for judicial independence; the subjective dimension concerns whether other external observers (e.g., the public) perceive the court as independent.[27] Relatedly, literature and practice often distinguish between de jure and de facto independence—the former being a matter of the formal rules and institutions that safeguard independence, the latter a matter of how much courts are actually able to resist pressure and to have their judgments implemented despite resistance from political actors.[28] These distinctions help endow the concept of judicial independence with analytical precision.

Our analytical framework focuses on the external, objective, and de jure dimensions of judicial independence. Institutions that regulate the independence of SC decision-making operate at multiple levels, ranging from constitutional provisions on courts and judicial review through administrative regulation of the court system to procedural rules on access and standing.

To capture how the institutions defining judicial independence in Scandinavia have evolved in the past half-century and allowed courts a more policy-relevant role, we

[23] Frans Van Dijk & Geoffrey Vos, *A Method for Assessment of the Independence and Accountability of the Judiciary*, 9 Int'l J. Ct. Admin. 1 (2018).
[24] Ferejohn, Rosenbluth, & Shipan, *supra* note 17, at 729.
[25] Dijk & Vos, *supra* note 23.
[26] Joost Sillen, *The Concept of "Internal Judicial Independence" in the Case Law of the European Court of Human Rights*, 15 Eur. Const. L. Rev. 104 (2019).
[27] Dijk & Vos, *supra* note 23.
[28] *Id.*

analyze institutions in three different categories. The first concerns institutions that regulate the SC within the constitutional and administrative system of the state in question. This category includes constitutional provisions that establish courts and specify their powers within the overall political and legal order, as well as laws and regulations on the governance of the judiciary within the state apparatus. This level is often the target of institutional reforms and interventions to expand the independence or accountability of the judiciary.[29] The second category concerns institutions that regulate how SC justices are selected, appointed, paid, and discharged. Such institutions are critical for the independence and professional autonomy of judges. The third category relates to institutions that regulate how cases percolate to the top of the judicial hierarchy. How, for example, do the SCs select and process appeals? What are the rules on access, standing, and docket control? Procedures of this kind, if structured in a certain way, make it possible for SCs to determine their own agenda and to play a more proactive and policymaking role.

3. The legal systems of Scandinavia

Before turning to these three institutional categories, we briefly outline the changing role of Scandinavian SCs in recent decades. These changes have taken place against a backdrop of historically rooted legal cultures and jurisprudential ideologies, intra-Nordic policy coordination, and influence from European law since the 1980s. The five Nordic countries—Denmark, Finland, Iceland, Norway, and Sweden—make up a distinct region within Europe, of which Scandinavia, consisting of Denmark, Norway, and Sweden, forms a part. The Nordic countries' intertwined histories were long shaped by the dominance and rivalry of Denmark and Sweden. While broadly similar in terms of their political and legal systems, the five countries display notable differences in their judicial systems.[30] On the one hand, Denmark, Norway, and Iceland, with their westward orientation, were more influenced by British common law. Finland and Sweden, on the other, were more exposed to influence from the civil law system of continental Europe, especially German law.[31]

Yet the Danish, Norwegian, and Swedish jurisdictions all have traits in common with both civil and common law traditions. Legislative codification, a hallmark of civil law systems, was implemented unevenly in the Nordic region; while precedents, a hallmark of common law systems, have been "accepted as a source of law in legal doctrine since the 18th century."[32] Unlike many continental European countries, the five Nordic nations all lack separate constitutional courts. Although Finland and Sweden have separate administrative courts, while Denmark, Iceland, and Norway have unitary court structures, the Nordic legal systems are nevertheless sufficiently similar as

[29] *Id.*
[30] Jørn Øyrehagen Sunde, *From Courts of Appeal to Courts of Precedent: Access to the Highest Courts in the Nordic Countries*, *in* Supreme Courts in Transition in China and the West: Adjudication at the Service of Public Goals 53 (Cornelis Hendrik (Remco) van Rhee & Yulin Fu eds., 2017); Letto-Vanamo, *supra* note 1.
[31] Husa, *supra* note 2.
[32] Sunde, *supra* note 30, at 57.

to make it possible to speak of a Nordic family of law distinct from common law and civil law,[33] but displaying characteristics similar to both.[34]

Furthermore, far-reaching intra-Nordic collaborations among lawmakers and legal elites have promoted legal homogeneity in the region. Nordic jurists have convened on a regular basis since the late nineteenth century.[35] In the twentieth century, ministries of justice coordinated legislation[36] to the point that "the laws of the Scandinavian states are closer to each other than are the laws of the forty-eight states of the United States."[37] Since the 1990s, furthermore, Nordic supreme courts have organized regular meetings between their justices.[38] Explicit intra-Nordic legal coordination may have declined in recent decades, but legal scholars and legislators throughout the region still find essential points of reference in their Nordic neighbors.

The Nordic states also share a history of jurisprudential ideologies, particularly the predominant philosophy of Scandinavian legal realism which permeated legal education, government, and the judicial branch by the mid-twentieth century.[39] Inspired by Uppsala philosopher Axel Hägerström's value nihilism, Scandinavian legal realism saw jurists as social engineers executing the legislator's intentions and dismissed natural rights as metaphysical nonsense and international law as superstition.[40] Law professors such as Alf Ross in Denmark, Vilhelm Lundstedt and Karl Olivecrona in Sweden, and Thorstein Eckhoff in Norway became important advocates of this pragmatic legal philosophy, and some of them also practiced it as judges or lawmakers. Law students had been schooled in legal realism since the 1930s, and by the 1960s they had reached the higher echelons of the justice departments, which expanded in step with the legislative ambitions of the welfare state.[41] Realism had strong influence in Denmark, where it arguably still holds sway in legal education and research, and Sweden, but less so in Norway with its stronger traditions of constitutionalism.[42] However, the dominance of legal

[33] Martin Sunnqvist, Konstitutionellt kritiskt dömande: Förändringen av nordiska domares attityder under två sekel 47–8 (2014).
[34] Hirschl, *supra* note 2, at 450.
[35] Henrik Tamm, De nordiske Juristmøder 1872–1972: Nordisk retssamvirke gennem 100 år (1972).
[36] William E. von Eyben, *Inter-Nordic Legislative Co-operation*, 6 Scand. Stud. in L. 63 (1962).
[37] Lester B. Orfield, *Uniform Scandinavian Laws*, 38 A.B.A. J. 773 (1952) (quoting Henrik de Kaufman).
[38] Sunde, *supra* note 14.
[39] This paragraph draws on Johan Karlsson Schaffer, *Mellan aktivism och ambivalens: Norden och de mänskliga rättigheterna* [*Between Activism and Ambivalence: The Nordic States and Human Rights*], 40 Retfærd: Nordic J. L. & Justice 55 (2017); Johan Karlsson Schaffer, *The Self-Exempting Activist: Sweden and the International Human Rights Regime*, 38 Nord. J. Hum. Rts. 40 (2020).
[40] Jes Bjarup, *The Philosophy of Scandinavian Legal Realism*, 18 Ratio Juris 1 (2005); Johan Strang, *Two Generations of Scandinavian Legal Realists*, 32 Retfærd: Nordic J. L. & Justice 62 (2009).
[41] Kjell Å. Modéer, *From "Rechtsstaat" to "Welfare-State": Swedish Judicial Culture in Transition 1870–1970*, *in* Lawyers and Vampires: Cultural Histories of Legal Professions 151, 163 (W. Wesley Pue & David Sugarman eds., 2003).
[42] In Norway, the natural law tradition had a strident advocate in professor Frede Castberg. *See* Alessandro Serpe, *Realismo vs Idealismo: Ross and Castberg. Senderos de una Disputa acerca de la Ley y los Derechos Humanos*, 16 Frónesis 125 (2009); Svein Eng, *Legal Philosophy in Norway in the Twentieth Century*, *in* Legal Philosophy in the Twentieth Century: The Civil Law World 761 (Enrico Pattaro & Corrado Roversi eds., 2016).

realism has eroded in recent decades, as lawyers and judges today must engage in complex, principled interpretation of pluralistic legal sources—a development that previous scholarship has attributed to the overall globalization and especially Europeanization of law.[43]

Denmark, Norway, and Sweden have all been integrated into the European legal order, albeit at varying speeds and in differing depths. All three states were among the first to ratify the ECHR, which they did in the 1950s; however, it was only in the 1990s that they incorporated the Convention into their domestic law.[44] In the 1970s, all three states sought accession to the European Economic Communities, but only Denmark joined (in 1973). Sweden joined the EU in 1995, at which point Norway again chose to remain outside, while continuing its association with the EU through the European Economic Area (EEA) Agreement of 1992. All three states are still nominally dualist, but all are bound to give direct effect to both EU and EEA law over any conflicting domestic provisions. Norway, for its part, is subject not to the jurisdiction of the Court of Justice of the European Union (CJEU), but to that of the EFTA (European Free Trade Association) Court.[45] The impact of European integration on Scandinavian law can hardly be exaggerated.

The Scandinavian legal systems are three-tiered judiciaries.[46] The SCs of Sweden and Norway are established, and thereby protected, by each country's constitution.[47] The Danish constitution foresees courts, and implies they should be hierarchically organized; but it does not specifically establish an SC.[48] The Danish and Norwegian SCs have no formal restrictions on their competencies, which include civil, criminal, administrative, and constitutional law. In Sweden, on the other hand, administrative cases are reviewed by a separate court system that peaks in the Supreme Administrative Court, while civil and criminal law cases are tried by the ordinary courts, with the Supreme Court as the last instance; with the effect that the country effectively has two supreme courts working in parallel. None of the three countries accepts abstract judicial review; however, their ordinary courts are entitled to review administrative and legislative acts in connection with the adjudication of concrete cases.

In the next three sections, we analyze the evolving institutions that govern SCs in Denmark, Norway, and Sweden. These are divided into three categories, which involve: constitutional review powers and court administrations (Section 4); judicial appointments and professional autonomy (Section 5); and gatekeeping, docket control, and decision-making (Section 6).

[43] Ola Wiklund, *Juristokratin och den skandinaviska rättsrealismens uppgång och fall*, *in* Regeringsrätten 100 år 585 (Anna-Karin Lundin ed., 2009).

[44] Schaffer, *supra* note 39.

[45] On Norway's occasional recalcitrance to international laws, see Tommaso Pavone & Øyvind Stiansen, *The Shadow Effect of Courts: Judicial Review and the Politics of Preemptive Reform*, Am. Pol. Sci. Rev. 1 (2021).

[46] Except for some specialized courts that we will not discuss here.

[47] Regeringsformen (Svensk författningssamling [SFS] 1974:151) [instrument of government] § 11 ch. 1 (Swed.); Kongeriket Noregs Grunnlov [Nor. Const.], LOV-1814-05-17, § 88.

[48] Danmarks Riges Grundlov [Constitutional Act of Denmark], Law No. 169 of June 5, 1953, §§ 59, 63, 78.

4. Constitutional review powers and governance of the courts

The first institutional category we analyze relates to how the SCs are regulated within the constitutional and administrative system of each state. Over the past half-century, the Scandinavian constitutional orders have seen remarkable changes in the powers of courts in connection with judicial review. At the same time, the governance of the judiciary has been made more autonomous from the executive branch. While the overall constitutional paradigm shift reflects the influence of EU and ECHR law since the 1990s, the impetus for expanding judicial review and creating more autonomous judicial governance systems has also come from within the Scandinavian legal-political setting. Indeed, as we will demonstrate, the impact of this trend partly predates that of European law in the 1990s. Moreover, emerging international standards on judicial independence have often been as decisive in this regard as the rules of European law.

4.1. Judicial review: Increasing decisional independence

The historical origins of judicial review differ between the three countries. Norway tested the waters by establishing judicial review already in the mid-nineteenth century; Denmark and Sweden, by contrast, followed suit much later.[49]

While some legal historians claim the Norwegian Supreme Court initiated judicial review as early as 1822, scholars agree that the Court finally declared its authority to review the constitutionality of legislation in 1866. Then, over subsequent decades, judicial review became established in Norwegian legal theory, and politically accepted as constitutional practice.[50] With a few but significant exceptions, the Court refrained over several decades from exercising its power of judicial review. This helped keep the issue out of the public eye. However, two landmark decisions awakened the public.[51] The first was the 1976 *Kløfta* decision,[52] when the justices found by a slim majority (9 to 8) that a 1973 act on expropriation violated the prohibition in the country's constitution of expropriation without full compensation.[53] The second was the 2010 *Ship Owners' Taxation* decision,[54] in which the Court narrowly (6 to 5) struck down a statute on taxation as unconstitutional, on the grounds that it violated the constitutional ban on retroactive laws.[55] Not until 2015 was the power of constitutional review codified in Norway's constitution—a fitting gesture at the Court's bicentenary. According to the provision in question, the country's courts have the right (i.e., the competence) as well as the duty to review whether laws and administrative decisions violate the

[49] Sunnqvist, *supra* note 33, at 1024–5.
[50] Eirik Holmøyvik, *Årsaker til utviklinga av prøvingsretten i Noreg og Danmark*, 120 Tidsskrift for Rettsvitenskap 718 (2008); Anine Kierulf, Judicial Review in Norway (2018); Eivind Smith, Høyesterett og folkestyret: Prøvingsretten overfor lover (1993).
[51] Gunnar Grendstad, William R. Shaffer, & Eric N. Waltenburg, Policy Making in an Independent Judiciary: The Norwegian Supreme Court (2015).
[52] Supreme Court Decision of Jan. 27, 1976 (Rt-1976-1), *Kløfta* (Nor.).
[53] Kongeriket Noregs Grunnlov [Nor. Const.], LOV-1814-05-17, § 105.
[54] Supreme Court Decision of Feb. 12, 2010 (Rt-2010-143), *Ship Owners' Taxation* (Nor.).
[55] Kongeriket Noregs Grunnlov [Nor. Const.], LOV-1814-05-17, § 97 (Nor.).

constitution.[56] In 2020, the legislature amended section 89, in a move intended to guard against the possibility of the SC's morphing into a constitutional court, which it was feared it might do if it took its review powers at face value.[57] This amendment clarified, among other things, that the Court is only empowered to disapply unconstitutional acts—not to invalidate them.

In Sweden, a constitutionally unregulated practice of judicial review began emerging in the 1920s, and the SC reviewed the constitutionality of legal acts on several occasions in the 1940s and 1950s. However, judicial review remained controversial. Östen Undén, a leading law professor and long-serving foreign minister, famously denied, as late as in 1956, the very existence of a judicial right to set aside acts of parliament or of the executive on grounds of incompatibility with the constitution.[58] By 1974, when the new Constitution was adopted, it was universally recognized in Sweden that courts had the competence to exercise judicial review as a matter of constitutional principle; however, they practiced this competence very restrictively.[59] For its part, the legislature, while not abolishing the practice, refrained from codifying judicial review in the new constitution, on the expectation it would remain of little or no practical importance.[60] In 1979, parliament enacted a constitutional provision laying down the right and duty of courts to disapply as unconstitutional any legal provision found to be contrary to a higher-ranking legal norm—but on the condition that acts of parliament and of the government would be set aside only in cases where their unconstitutionality was "manifest."[61] This limitation was removed in 2010, at least partially to bring the constitutional provision into line with the supremacy of EU law, which does not recognize the threshold of manifest infringement. At the same time, the provision was amended to include a second subparagraph, reminding the courts, on the one hand, that the constitution ranks above ordinary law—seemingly underscoring the importance of judicial review against constitutional benchmarks—but on the other, that "parliament is the foremost representative of the people"—a not-so-subtle reminder to the courts of the merits of judicial restraint. Thus, while the legislatures in Norway and Sweden have explicitly accepted judicial review, they have yanked the chain more recently, introducing constitutional modifications which have limited the room for too expansive interpretations of the courts' powers.

As for the power of the Danish SC to conduct constitutional review, the country's constitution has not provided for it to this day. Said power is based, rather, on a

[56] *Id.* § 89; Kierulf, *supra* note 48.

[57] Stortinget [The Parliament of Norway], *Innstilling fra kontroll- og konstitusjonskomiteen om Grunnlovsforslag fra Michael Tetzschner, Erik Skutle og Per Olaf Lundteigen om endring i § 89 (domstolskontroll med lover mv.)*, Innst. 258 S (2019–2020) (Nor.).

[58] Östen Undén, *Några ord om domstolskontroll av lagars grundlagsenlighet*, Svensk Juristtidning 260 (1956); Uta Bindreiter, Lagprövningsdebatten 1955–1966: I skärningsfältet mellan juridik och politik (2009); Kjell Å. Modéer, *Laggranskningen och Lagrådet*, Förvaltningsrättslig. Tidskrift 274 (2009).

[59] Johan Hirschfeldt, *Domstolarna som statsmakt—några utvecklingslinjer*, 23 Juridisk Tidskrift 3, 17 (2011).

[60] Proposition [Prop.] 1973:90 Kungl. Maj:ts proposition med förslag till ny regeringsform och ny riksdagsordning m. m. [government bill] (Swed.).

[61] Sunnqvist, *supra* note 33.

tradition developed by the Court itself since the 1920s.[62] The SC's assertion of its authority to engage in judicial review has been accepted as a matter of principle by the other branches of government in Denmark, and it is now widely recognized. To date, however, only on one single occasion has the Danish SC struck down an act of parliament as incompatible with the country's constitution. In the 1999 *Tvind decision*,[63] namely, the SC ruled that an act of parliament which had excluded several private schools from receiving public funding constituted a legislative encroachment on the judicial competence to decide concrete legal disputes.[64] However, the SC has been particularly active in defending the Danish constitution from the influence of EU law. This has meant reviewing the constitutionality (although ultimately finding no violation) of the Danish ratification of both the Maastricht and Lisbon treaties; as well as issuing the 2016 *Ajos judgment*,[65] which found a binding judgment of the ECJ to be incompatible with the Danish Accession Act.[66] The Norwegian and Swedish SCs, by comparison, have been more receptive to the principle of the primacy of EU and EEA law. Finally, the SCs in all three countries have engaged in judicial review of national rules against the benchmark of EU/EEA law.

Thus, judicial review developed in the three countries at different times and for different reasons. The Norwegian Constitution of 1814, with its identification of the distinct branches of government and its enumeration of rights and freedoms, gave birth to a new sovereign state.[67] By contrast, the Swedish Constitution of 1809 and the Danish Constitution of 1849 replaced autocracy with constitutional monarchy within continuous states.[68] Norway established judicial review as early as 1866, and built a legal tradition upon it. The Danish and Swedish SCs, on the other hand, remained "very reluctant to apply their own constitutions until the late twentieth century."[69] They displayed a "strong loyalty to the legislator," in part due to "the comparatively weaker constitutional basis" for judicial review in the two countries.[70]

[62] Jens Peter Christensen, *The Supreme Court in Today's Society*, *in* The Supreme Court of Denmark 11 (Jens Peter Christensen, John Erichsen, & Ditlev Tamm eds., 2015).

[63] Ugeskrift for Retsvæsen [U] [Weekly L. Rep.] 1999.841 H (Den.).

[64] Jens Peter Christensen & Michael Hansen Jensen, *Højesterets dom i Tvind-sagen*, Ugeskrift for Retsvæsen 223 (1999).

[65] Ugeskrift for Retsvæsen [U] [Weekly L. Rep.] 2017.824 H (Den.).

[66] Helle Krunke & Sune Klinge, *The Danish Ajos Case: The Missing Case from Maastricht and Lisbon*, 3 Eur. Papers J. L. & Integration 157 (2018); Mikael Rask Madsen, Henrik Palmer Olsen, & Urška Šadl, *Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation*, 23 Eur. L.J. 140 (2017); Neergaard & Sørensen, *supra* note 8.

[67] Malcolm Langford, *Norwegian Lawyers and Political Mobilization: 1623–2015*, *in* The Limits of the Legal Complex, *supra* note 11, at 147, 153–5.

[68] Mikael Rask Madsen, *Denmark: Between the Law-State and Welfare State*, *in* The Limits of the Legal Complex, *supra* note 11, at 114, 116–22; Johan Karlsson Schaffer, *The Legal Complex in Struggles for Political Liberalism in Sweden*, *in* The Limits of the Legal Complex, *supra* note 11, at 68, 70–4.

[69] Martin Sunnqvist, *The Changing Role of Nordic Courts*, *in* Rethinking Nordic Courts 167, 169 (Laura Ervo, Pia Letto-Vanamo, & Anna Nylund eds., 2021).

[70] Sunnqvist, *supra* note 33, at 1087.

4.2. Gaining administrative independence

Historically, in all three countries, the judiciary was administered by the ministry of justice. Since the courts and their judges constituted the third branch of government, the proximity between the executive and the judiciary—indeed, their administrative cohabitation—could seem too close for comfort. The basic impetus for the shake-up of the "ministry of justice"[71] cohabitation model lay in the emerging European and international standards on judicial independence. The eventual result was greater "judicial [self-]governance": "the set of institutions, rules, and practices in a jurisdiction that organize, facilitate, and regulate the exercise by the judicial branch of its function of the application of law to concrete cases."[72]

The fall of communism in Eastern Europe at the end of the Cold War laid bare some instances of unprincipled intermingling between the executive and judicial branches of government. These served as a reminder of some of the issues stressed in the 1985 UN report, *Basic Principles on the Independence of the Judiciary*.[73] The UN report was complemented by the Venice Commission in 1990, as well as by such documents as the Council of Europe's *Recommendations on the Independence, Efficiency and Role of Judges*, from 1994;[74] the European Association of Judges' *Judges Charter in Europe*, from 1997;[75] and article 6(1) ECHR, which states that "everyone is entitled to a fair and public hearing. . . by an independent and impartial tribunal established by law." Then, in the 1990s and subsequently, the European Union's enlargement underlined the need for greater awareness of the need for independent courts and judges,[76] pursued most actively in recent years by the CJEU on the basis of article 19 of the Treaty on European Union.[77]

Political and judicial elites in Scandinavia were distressed that their own judicial institutions seemed to be no more independent than those of authoritarian regimes with which they did not wish to be associated.[78] Reforms became necessary, and today the Scandinavian SCs are administered by independent bodies. Bobek and Kosar classify the new cohabitation as a "court service" model, in which "the primary function

[71] Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 Ger. L.J. 1257 (2014).

[72] Pablo Castillo-Ortiz, *The Politics of Implementation of the Judicial Council Model in Europe*, 11 Eur. Pol. Sci. Rev. 503, 503 (2019).

[73] G.A. Res. 40/32 (Nov. 25, 1985); G.A. Res. 40/146 (Dec. 15, 1985).

[74] Council of Europe, Venice Comm'n Res. (90)6: On a Partial Agreement Establishing the European Commission for Democracy through Law, Venice Commission (May 10, 1990); Council of Europe Recommendation R (94)12 on the Independence, Efficiency and Role of Judges (Oct. 13, 1994).

[75] Eur. Ass'n Judges, Judges' Charter in Europe (Nov. 4, 1997), www.icj.org/wp-content/uploads/2014/10/Judges-charter-in-europe.pdf.

[76] Muller, *supra* note 17.

[77] Consolidated version of the Treaty on European Union art. 19, June 7, 2016, 2016 O.J. (C 202) 13. For a recent overview of the CJEU case law, see Laurent Pech & Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (Swed. Inst. for Eur. Pol'y Stud. Report No. 3, 2021).

[78] See, for instance, the Norwegian commission of inquiry on the administration of the judiciary, which makes *sotto voce* comparisons with former authoritarian regimes: Norges Offentlige Utredninger (NOU) 1999:19 Domstolene i samfunnet: Administrativ styring av domstolene. Utnevnelser, sidegjøremål, disiplinærtiltak. Midlertidige dommere, [government report series] (Nor.).

of an independent intermediary organization is in the area of administration, court management, and budgeting"; and where the new court administrations have but "a limited role in [the] appointment and promotion of judges," since judicial appointment boards are organized separately.[79]

The transition from the "ministry of justice" model to the "court service" model had different starting points in the three countries. In Sweden, the government established the National Courts Administration (Domstolsverket) in 1975, in order to streamline the interaction of courts with other organs of public administration.[80] The new agency pooled administrative tasks which had previously been carried out either by courts themselves or by the Ministry of Justice.[81] Judicial elites strongly criticized the reform, fearing it would undermine judicial independence, and parliament sought to limit it by confining the new authority to a role as a service provider rather than as a central directing agency. For the most part, however, the government ignored such criticisms.[82]

Denmark and Norway, by contrast, established their independent court administrations almost thirty years later: in 1999 in the case of Denmark (Domstolsstyrelsen); in 2002 in the case of Norway (Domstoladministrasjonen).[83] These bodies appear to better safeguard judicial independence than does their counterpart in Sweden. In both Denmark and Norway, the agency is governed by a board of directors, which in turn appoints a managing director for the day-to-day administration. In Denmark, the board consists of judges from the three levels of the judiciary, alongside representatives of other categories of court professionals, including barristers and administrators. In Norway, the members of the board are selected by parliament and the government, with members chosen by the latter being in the majority. In Sweden, by contrast, the National Courts Administration is managed by a government-appointed director-general and his/her management team. Democratic legitimacy is supplied by a transparency council consisting of representatives of the parliamentary parties and of certain other executive agencies. The council has advisory powers only.

While these organs of court administration still formally belong to the executive branch, the national governments—except under exceptional circumstances in Norway—are prevented by statute (in Denmark and Norway) or the constitution (in Sweden) to issue instructions on how these bodies are to execute their responsibilities.

[79] Bobek & Kosař, *supra* note 65, at 1266.

[80] Proposition (Prop.) 1974:149 Kungl. Maj:ts proposition med förslag till organisation av den nya centralmyndigheten för domstolsväsendet m. m. [government bill] (Swed.).

[81] Joakim Nergelius & Dominik Zimmermann, *Judicial Independence in Sweden*, *in* Judicial Independence in Transition 185 (Anja Seibert-Fohr ed., 2012).

[82] Gustaf Petrén, *Domstolsverket och domstolsväsendet: en studie i regeringsteknik*, 59 Svensk Juristtidning 651 (1975); Barbro Thorblad & Martin Holmgren, *Domstolsverket: Från starten till våra dagar*, 103 Svensk Juristtidning 16 (2018).

[83] The report of the Norwegian commission of inquiry on judicial appointments and new structures for court administration split right down the middle, with an "independent judiciary" faction squaring off against a "democratic accountability" faction. The independence faction won in the legislature, leading to the establishment of new administrative arrangements. Grendstad, Shaffer, & Waltenburg, *supra* note 51, at 45–7.

5. Judicial appointments, leadership, and professional autonomy

The second category of institutions we analyze relates to the appointment, leadership, and professional autonomy of justices on the SCs. In recent decades, all three of the Scandinavian states have made appointment procedures more transparent as well as independent of the executive, thereby moving away from the ministry of justice model and toward autonomous judicial appointment boards. As for the professional autonomy of judges, it is affected by rules on leadership, retirement, removal, and salary level, which are variously regulated and formalized across the three countries.

5.1. Appointment of SC justices

The rules on judicial appointments and professional autonomy are key elements affecting judicial independence. In all three countries, the government appoints the justices to the supreme court.[84] Norway's constitution states that a justice must be a Norwegian citizen and at least thirty years old.[85] The constitutions of Denmark and Sweden do not set out any similar criteria, but they do underline the apolitical nature of judicial appointments. According to the Danish Constitution, courts are to be kept separate from the administrative authority;[86] according to the Swedish Constitution, appointments must be based on objective criteria, such as competence and merit.[87]

The number of justices on the SCs is roughly similar: currently eighteen in Denmark, twenty in Norway, and sixteen in Sweden.[88] In Denmark and Sweden, the number of justices on the SC is laid down in ordinary statute. In Denmark, the precise number of justices is stipulated; in Sweden, only a minimum number is given (currently there must be at least fourteen). In Norway, the country's constitution states that the Supreme Court shall consist of a chief justice and "at least four other members,"[89] but the total number of justices is not fixed, and the government may decide unilaterally to alter the size of the Court through its budget. In practice, when the government has adjusted the number of justices, it has done so in dialogue with—or even at the request of—the SC.

The last four to five decades have seen a trend toward institutional convergence across the three countries when it comes to appointment procedures. Until the turn of the twenty-first century, candidates to the Scandinavian SCs were assessed using procedures internal to the ministries of justice. Parliaments were kept out of the loop and given little or no meaningful insight into the decision-making process.

[84] In Denmark and Norway, the appointments are formally carried out by the cabinet when it sits as the "Queen/King in the Council of State." The Monarch leads these sessions, which give official sanction to government decisions. In Sweden, the Monarch's formal powers in the Council of State were abolished in 1974.

[85] Kongeriket Noregs Grunnlov [Nor. Const.], LOV-1814-05-17, §§ 91, 114 (Nor.).

[86] Danmarks Riges Grundlov [Constitutional Act of Denmark], Law No. 169 of June 5, 1953, §§ 62.

[87] Regeringsformen [RF] [Constitution] 11:6 (Swed.).

[88] The Swedish SAC also has sixteen justices, making the total number of Swedish Supreme Court justices significantly higher than that of its neighbors (but equal if seen in proportion to population size).

[89] Kongeriket Noregs Grunnlov [Nor. Const.], LOV-1814-05-17, § 88.

In Denmark, candidates were typically recommended to the Minister of Justice by the Supreme Court itself. In Sweden, suitable candidates were identified in informal contacts between the Ministry of Justice, the SC, retired justices, and representatives of the legal profession. In Norway, the appointment of justices to the SC "remained the near exclusive prerogative of the Ministry of Justice,"[90] with only the Chief Justice of the Court being able to offer their views to the minister (at a point late in the appointment process).[91]

Over the last twenty years, however, governments have successively made appointment procedures more transparent and more independent from the executive branch, broadly in line with the court service model. They have also tried to broaden judicial recruitment and to increase diversity among SC justices.

Sweden was the first of the three countries to change its appointment procedures in order to ensure greater judicial independence from the executive branch. In 1975, Sweden established an independent judicial appointment board (Tjänsteförslagsnämnden för domstolsväsendet), the remit of which did not, however, extend to appointing justices to the country's highest courts; instead, SC justices were appointed by the government through the informal procedure described above. Sweden thereby furnished an example for Denmark and Norway; in the latter two countries, however, the impetus for change came from emerging international standards on judicial independence, as discussed above. In 1990, Norway established the Advisory Committee on the Appointment of Judges (Rådgivende organ for dommerutnevnelser), which, however, was non-statutory and internal to the Ministry of Justice; and its remit did not extend to making appointments to the SC. Later on, Denmark and Norway did fully reorganize their recruitment procedures, with the establishment of judicial appointment boards in 1999 (Dommerudnævnelsesrådet) and in 2002 (Innstillingsrådet for dommere), respectively. In Sweden, it was only in 2011—when the 1975 board was replaced with a new appointment board (Domarnämnden)—that the procedure came to include the appointment of justices to the SC and the SAC.

The judicial appointment boards are tasked with vetting applicants according to stated criteria and with making a recommendation to their respective ministries of justice. We can assess the boards and their effects on judicial independence by studying their composition, the recruitment procedures they follow, and the way their recommendations are handled. As to composition, in Sweden, five of the board's nine members are to be current or former judges, two must be lawyers working outside the courts, and two are to represent the population at large (these last two are appointed by parliament, and they tend to be current or former members of parliament). In Denmark, three of the six members are to be judges (including a supreme court justice as the board's chair), another one must an extrajudicial lawyer, and two members are to represent the population at large. In case of a tie, the chair casts the deciding vote. In Norway, three of the board's seven members are to be judges, two must be lawyers in other professions, and two are to represent the population at large.

[90] Grendstad, Shaffer, & Waltenburg, *supra* note 51, at 42.
[91] Sunde, *supra* note 14.

Vetting procedures differ between the three countries. In Sweden, the judicial appointment board vets applicants by gathering extensive references from their current employers. Interviews with all suitable candidates follow, and psychological tests are employed.[92] The interviews are conducted by a member of the board, with the chair (*ordförande*) of the SC (or, as the case may be, SAC) taking part. The tests are conducted by an external consultancy firm, which delivers a report on each applicant. The chair of the recruiting court reviews the applications, references, and test results, and presents a ranking of the candidates to the board. The board then decides, on the basis of these inputs, on a ranked list of candidates and presents it to the government.

In Norway, the Court Act prescribes the qualifications for justices and the procedures of the appointment process.[93] The justices must meet high professional and personal standards, and they are to be recruited from lawyers of varied professional backgrounds. The statutes that set out this process are complemented by the Judicial Appointment Board's policy paper, which details its recruitment practices. If the top applicants are equal on the statutory requirements, the board can take their ethnic, cultural, social, and demographic characteristics into account. The board assigns three of its members to interview the shortlisted applicants, with the SC's Chief Justice (*Justitiarius*) and its second most senior justice participating. After the board assesses the shortlisted candidates, all of its members sign off on a ranked list of three justices. In accordance with the Court Act, the Chief Justice then informs the Minister of Justice of the Court's opinion on the candidates before the appointment is formalized by the King in Council.

In Denmark, following the vetting of the applicants to the SC, the board recommends a single candidate to the Ministry of Justice. The Minister has the option of accepting or rejecting the sole recommendation, but history is on the side of accepting it. The subsequent ritual, bordering on hazing, is unique to Denmark: the successful candidate must participate in at least four real cases before the Court. In each of the four cases, the candidate must cast a trial vote and present a justification for it, prior to the actual casting of votes by the sitting justices.[94] If the sitting justices like what they see, the candidate will be appointed by the Queen in Council.[95]

The positions of the appointment boards vis-à-vis their respective governments are virtually identical throughout Scandinavia. The governments are not bound by the boards' proposals, but they follow them almost without exception. When it comes to recruitment, the Danish SC comes closest to having control over it.[96] Half of the members of the judicial appointment board in Denmark are judges—including its chair, who is a Supreme Court justice and who casts the deciding vote in case of a tie. In

[92] Statens Offentliga Utredningar (SOU) 2017:85 Rekrytering av framtidens domare [government report series] (Swed.).

[93] Lov om domstolene (domstolloven) [Court Act], LOV-1915-08-13-5, § 55 (Nor.).

[94] Lov om rettens pleje (retsplejeloven) [Administration of Justice Act], Law No. 90 of Apr. 11, 1916, §§ 42–5 (Den.).

[95] Børge Dahl & Jens Peter Christensen, *Højesteret og retsplejen*, *in* Retsplejeloven 100 år 613, 619–22 (Ulrik Rammeskow Bang-Pedersen et al. eds., 2019).

[96] Balder Blinkenberg, Prosedyre, praksis og politikk: Utnevnelse av høyesterettsdommere i Norge, Sverige og Danmark (May 14, 2023) (unpublished manuscript) (on file with the authors).

Norway and Sweden, there is no requirement of SC inclusion, and indeed, to date, no SC justices have served on the boards. In Sweden, judges form a majority of the board, whereas in Norway they do not. Whereas the Danish board presents the Ministry of Justice with the name of just one candidate (which the Supreme Court in turn has the right to veto), the Swedish and Norwegian boards present several candidates.[97]

5.2. Judicial leadership

The decision of whom to appoint to the SC leadership is a strategic one.[98] The leadership of the Court must balance the unique basis of the Court's position with its judicial culture, with mundane budget constraints, and with its institutional powers of gatekeeping and decision-making.

In Denmark, the procedure for appointing a new president (højesteretspræsident) is not codified. It is left altogether to the sitting justices themselves to choose the SC's new president. A couple of months before the sitting president steps down, the names of the justices who have thrown their hats into the ring are made known. Two of the justices who have not entered the competition walk through the Court and collect all of the ballots. The winner needs a majority of votes. Runoffs have never been needed. The name of the justice chosen is forwarded to the Minister of Justice, who endorses the selection and makes a public announcement.[99] The new President serves until he/she reaches retirement age.

In Norway, the procedure for appointing a Chief Justice (*Justitiarius*) is not codified. It is handled at the sole discretion of the government and the Ministry of Justice, which publicly announces a vacancy. For decades, the new Chief Justice has been recruited from the sitting justices, save in a single case. In that one case, in 1991, the government dismissed the Court's preferred (and internal) candidate, and thereupon proposed Carsten Smith, a law professor, as the new Chief Justice—knowing full well that in so doing it was adopting Smith's stated agenda of judicial reform, rigorous docket control, and transformation of the institution into a court of precedent.[100] The Chief Justice serves until mandatory or voluntary retirement.

In Sweden, the appointment of a new chair (*ordförande*) for the SC follows the same rules as the appointment of SC justices. The position is advertised when it becomes vacant, and applicants are vetted and ranked as described above. Since the application system was introduced in 2010, the successful candidate has always been a sitting SC justice. The two SAC chairs serving since 2010 were both former justices who left the

[97] The Norwegian government has always followed the appointment board's ranking of SC applicants; however, it has statutory cover—subject to certain procedures—to prefer a different candidate. Domstolloven [Court Act] § 55(c) (Nor.). In Sweden in 2017, the then-chairs of the SC and the SAC mentioned the same risk and expressed a preference for the Danish model of recommending a single candidate. Mats Melin & Stefan Lindskog, *Domstolarnas oberoende behöver stärkas*, 102 Svensk Juristtidning 345 (2017).

[98] Melin & Lindskog, *supra* note 97.

[99] Dahl & Christensen, *supra* note 95; Email from Jens Peter Christensen to Gunnar Grendstad (Dec. 30, 2021).

[100] Grendstad, Shaffer, & Waltenburg, *supra* note 51; Sunde, *supra* note 14; Carsten Smith, *Domstolene og rettsutviklingen*, 11 Lov Og Rett 292 (1975).

court for other appointments (as chief parliamentary ombudsman and judge at the European Court of Human Rights, respectively) and returned to the SAC to take up the position of chair.

5.3. Professional autonomy

Not only rules on judicial tenure and procedures for making appointments affect the autonomy of the courts. The same can be said of procedures for dismissing judges and for setting their salaries. Where tenure is concerned, the legislation is very similar in all three countries. Appointments are permanent, but SC justices are obliged to step down at the mandatory retirement age, which at the time of writing is sixty-seven in Sweden and seventy in Denmark and Norway. The obligation to retire is laid down in the Constitution in Sweden, and by ordinary law in Denmark and Norway. As for dismissal, judges in Denmark and Norway can only be removed from office prior to reaching retirement age if they have been convicted in a trial.[101] The Swedish Constitution allows for the dismissal of judges who have proven themselves manifestly unfit for office, either through criminal actions or through gross or repeated neglect of official duty, but a conviction is not required. However, since judges in Sweden are constitutionally guaranteed access to judicial remedies against any decision to remove them, the importance of this difference should not be exaggerated.[102] All three constitutions prohibit transferring judges against their will, except (in Denmark and Sweden) in the case of judicial reorganization, which is unlikely to affect SCs.[103]

Since serving as a SC justice is considered a natural end point to a long and distinguished legal career, early exits or voluntary resignations other than for death or poor health are rare. SC justices in Sweden have resigned to take up positions such as Prosecutor General (Justice Wersäll in 2004) or Chancellor of Justice (Justice Skarhed in 2009). Norwegian SC justices have resigned to take up positions like Permanent Secretary to the Government (Justice Frisak in 2001), or to return to the ivory tower (Justice Skoghøy in 2017).[104] Danish SC justices have seemed content in their secure posts and have completed their careers on the SC.[105]

Judicial salaries, finally, are decided centrally in Denmark and Norway. In Denmark, salaries for judges—as for all public servants—are negotiated between the employer and trade unions. Judicial salaries include a basic component based on a classification of positions into salary brackets, together with a supplement based on objective criteria relating to such matters as the location and case load of the court. In Norway,

[101] Danmarks Riges Grundlov [Constitutional Act of Denmark], Law No. 169 of June, 5, 1953, §§ 64; Kongeriket Noregs Grunnlov [Nor. Const.], LOV-1814-05-17, § 22.

[102] Regeringsformen [RF] [Constitution] 11:7 and 9 (Swed.).

[103] In Sweden, however, the presidents of the SC and the SAC have proposed merging the two highest courts when cases of exceptional societal importance are to be decided. *See* Melin & Lindskog, *supra* note 97; *see also* Johan Hirschfeldt, *En enda högsta domstol: Ett första steg?*, 102 Svensk Juristtidning 257 (2017).

[104] Justice Skoghøy missed being a judge, applied for a later opening, and was reappointed in 2020.

[105] Per Magid & Mikael Rekling, *Højesteret og advokaterne*, *in* Højesteret 350 år 217 (Per Magid et al. eds., 2011).

the salary for SC justices is decided by parliament following a recommendation by the presidium of the parliament.

Sweden differs from its neighbors in having introduced, in 2011, individual salaries based on performance and responsibilities. The new arrangement replaced a system of centrally negotiated salaries similar to the current Danish model. Salaries are negotiated annually in meetings between the employer and the individual justices, and finally decided by the chair of the SC, with "significant support on practical matters" from the National Courts Administration; the first salary upon recruitment, however, is decided by the National Courts Administration after consultations with the chair.[106] The central agreement between the National Courts Administration and the main employee organization makes clear that decisions on salary can never be allowed to conflict with the independence of judges. In particular, it stipulates that salaries cannot be based on the judicial activities of judges, including their case management, their application of law in individual cases, or the number of cases they decide.[107] Instead "softer" factors are considered, such as communication skills, vocational training, ability to support colleagues, and contributions to positive workplace development. While there are no measures in place guaranteeing that irrelevant factors or judicial activities are excluded from the determination of salaries, the chair of the main judges' trade union has said there is little differentiation in judicial salaries.[108]

6. Gatekeeping and decision-making

The third and last category of institutions in our analysis relates to the regulations that govern how cases reach the SC, and how the SC is to select and to process them. From the standpoint of judicial independence, such regulations help the court control its own agenda. In this section, we demonstrate how an expanding caseload and a political will to refine the precedential role of the SCs have been driving docket reforms. However, while the Scandinavian SCs have all been transformed from courts of appeal into courts of precedent, their gatekeeping functions are regulated in somewhat different ways. Meanwhile, the procedures and internal operations of the SCs have remained largely invariant over the past half-century—a constancy that may seem surprising, given the changes on other institutional parameters.

6.1. Access to the supreme courts

Historically, the Scandinavian SCs were open to all appeals, reflecting a long tradition originating in the medieval right to "petition the king" as a last recourse against perceived injustices. The general understanding was that the SCs should in fact and in law be the final arbiters of disputes. Over the last fifty years, however, the Scandinavian SCs have evolved from reactive courts of appeal into de facto, proactive

[106] Thorblad & Holmgren, *supra* note 82.
[107] Statens offentliga utredningar (SOU) 2011:42 En reformerad domstolslagstiftning: betänkande [government report series] (Swed).
[108] Email from Elisabeth Åberg, chair of Saco-S Domstol, to Johanna Oellig (Jan. 28, 2021).

courts of precedent.[109] The key drivers of this shift have been the expansion of law, the increase in the workload, the rise in the number of appeals, and the heightening of judicial ambitions. However, the relative importance of these factors has varied between the different Scandinavian countries.

During the first half of the twentieth century, Norway battled high case balances through increasing the number of justices, installing two parallel decision-making merit panels, reducing the number of justices serving on the gatekeeping committee, and reducing the number of justices on the merit panels.[110] By 1960, minor statutory mechanisms were also in place for fending off inconsequential appeals moving forward. When a rising number of appeals again stretched the capacity of the Court, during the 1980s and 1990s, the problem was solved in two ways. First, a reform known as the institutional two-tier reform (*toinstansreformen*) made trial courts the courts of origin for all grave criminal cases, thereby making courts of appeal the default second instance, and relieving the Supreme Court of the need to serve as the default court of appeal for criminal cases that used to originate in courts of appeal. Second, new gatekeeping mechanisms for criminal and civil procedures were implemented, in 1995 and 2008 respectively. The right of litigants to appeal was flipped to the SC's default right to deny an appeal, meaning that the "burden of proof" was shifted from the SC to the litigants.[111] Promised a reduced caseload, the old guard of justices accepted the new gatekeeping regime. Henceforth the SC would only allow appeals to proceed on a rigorous basis, and primarily in cases with precedential value.[112] The Norwegian SC has had complete discretion over its own docket for criminal cases since 1995. For civil cases it has had more and more discretion since the early 1990s, and fully and formally since 2008.

The motivations for court reform were similar in Denmark. The Danish legal system is also based on a two-tier principle (*toinstansprincippet*), meaning that the parties to a case are entitled to have it examined by at least two instances. This has made it possible to curtail access to the SC for cases originating in district courts. A reform in 1995, for example, limited access to the SC to appeals with importance beyond the individual case. Due to legislation that was in place until 2007, however, many cases were heard in first instance by specialized courts or conventional appeals courts—meaning that access to the Supreme Court was granted as a matter of right. Reforms introduced in 2007 and 2014 gradually changed this, reallocating most cases to district courts in the first instance. The effect was to curtail access to the SC considerably, thereby reducing unmanageable caseloads and shortening long lead times.[113]

In Sweden, the transformation of the SC started earlier. Some limitations on access to the Court were introduced already in 1915. Then, in 1948, a judicial reform

[109] Anna Nylund, *Rethinking Nordic Courts: An Introduction*, *in* Rethinking Nordic Courts 1 (Ervo, Laura, Pia Letto-Vanamo, & Anna Nylund eds., 2021).
[110] Erling Sandmo, Siste ord: Høyesterett i norsk historie 1905–1965 (2005).
[111] Gunnar Grendstad et al., Proactive and Powerful: Law Clerks and the Institutionalization of the Norwegian Supreme Court (2020).
[112] Sunde, *supra* note 14.
[113] Dahl & Christensen, *supra* note 95.

introduced by the legislature emphasized the SC's precedent-setting function, but without curtailing access further.[114] The current restrictive rules on docket control were introduced in 1971, when the conditions for granting review were significantly tightened.[115] Unlike in Denmark and Norway, however, the workload of the SC in Sweden appears to have been only of marginal importance for the initial reform, which in fact was coupled with a reduction in the number of justices. Rather, the main explicit objective of the reform was to turn the SC into a court of precedent. However, while the reform was expected to reduce the number of appeals, their number drastically increased instead. This prompted additional reforms: one in 1981, which simplified review decisions; and another in 1989, which made it possible to grant partial review to elicit the legal issue(s) of greatest interest from a case.[116]

This historical comparison demonstrates that, whereas stricter control of access to the SCs in Denmark and Norway was chiefly justified as a mechanism for reducing heavy workloads, the justification in Sweden was initially to ensure uniformity and quality in the administration of justice. To some degree, this suggests the transformation has been more transparent and less controversial in Sweden. Interestingly, the chronology of these changes to some extent argues against previous suppositions that the Europeanization of law played a decisive role in this development. For instance, Sunde notes that the impact of international law has been to expand the judicial review conducted by Scandinavian courts from traditional constitutional issues to cases relating to EU/EEA law and to ECHR law, and that this in turn has prompted the high courts to sharpen docket control, regarding both the volume and the type of appeals.[117] However, while the impact of European law may of course have been to make the caseloads of the SCs heavier, it is striking that the decisive reforms in Denmark were only introduced thirty-five years *after* the country's accession to the EU; while in Sweden, the most important reforms were introduced two decades *before* EU accession and the country's incorporation of the ECHR.

In qualitative terms, access to the SC in Norway is codified separately in civil and in criminal law. In Denmark and Sweden, one set of codes covers both types of procedure. In Sweden, however, this code is complemented by a separate code for the procedure before the administrative courts. In all three countries, the parties do not—with a few exceptions (mainly in the case of specialized procedures that bypass the first instance courts)—have access to the SCs as a matter of right.

The main criterion for granting review in the three countries—which varies in its phrasing but is similar in its core meaning—is that an appeal must have importance beyond the immediate case at hand. Stated differently, while the controversy or conflict involved in a denied appeal may be important to the parties, it may be unimportant to everybody else. Hence, for any appeal granted SC review, the impact of

[114] Kjell Å. Modéer, *Den stora reformen: Rättegångsbalkens förebilder och förverkligande*, 84 Sven. Juristtidning 400 (1999).
[115] Proposition (Prop.) 1971:45 Kungl. Maj:ts proposition till riksdagen med förslag till lag om ändring i rättegångsbalken, m.m. [government bill] (Swed.).
[116] Proposition (Prop.) 1988/89:78 Om högsta domstolen och rättsbildningen [government bill] (Swed.).
[117] Sunde, *supra* note 30, at 61.

the final decision must have larger ramifications. However, as with all consequential guidelines for decision-making, unanticipated factors must also be accounted for. A "safety valve" is therefore needed,[118] to provide gatekeepers at the SCs with the power to grant review to important appeals which fail to meet the first criterion. At the same time, for gatekeepers at all of the Scandinavian SCs, review can still be denied at the discretion of the justices, even if it seems evident the appeal in question does fulfill the explicitly stated criteria for granting review.[119]

There are also notable differences between the gatekeeping procedures for granting review. In Denmark, it is not the SC that decides whether an appeal may proceed, but rather a review board: the Danish Appeals Permission Board (Procesbevillingsnævnet). This body consists of five members appointed for a two-year term that can be renewed once: a lawyer, a law professor, a district court judge, an appeals court judge, and a Supreme Court justice (who takes a leave of absence while serving on the board).[120] In Norway, decisions on whether to grant review are made by the Court's own three-justice Appeals Selection Committee (Ankeutvalget; until 2008: Kjæremålsutvalget). In Sweden, gatekeeping decisions are made by the SC justices themselves, sitting in panels with no more than seven members (depending on the nature of the case). In practice, formations of either one or three justices are most common.

Finally, while courts can grant review (or refuse to do so) to cases that are appealed, they have no control over which cases are appealed—beyond being able to invite litigants and parties to ponder whether to appeal by signaling in the reasoning of their judgments which cases they (the courts) would like to hear. In the absence of a perfect appeal, an auxiliary procedure for a court to address the legal questions which it identifies in a more complex appeal is to grant review to the appeal, and then to trim it and to carve out the legal question of interest. This option has a relatively long tradition in Sweden, a much shorter history in Norway, and does not exist in Denmark.[121]

6.2. Procedures and internal workings

The general principles of law that govern the procedures and internal workings of the SCs have remained relatively invariant throughout the period discussed here. Decision-making on the SCs of all three of the countries takes place in two chambers of equal rank, wherein most cases are heard by panels of five justices. There is little transparency in the procedures for allocating cases to panels or for allocating justices to panels.[122] For the more important cases, Danish legislation provides for panels of "seven judges or more"; Swedish legislation stipulates that important cases are to

[118] Arnfinn Bårdsen, *Anketillatelse til Norges Høyesterett*, 53 Lov Og Rett 529, 540 (2014).
[119] For example, see discussion in Grendstad et al., *supra* note 111, at 69–73.
[120] Jon Kåre Skiple, Henrik Litleré Bentsen, & Mark Jonathan McKenzie, *How Docket Control Shapes Judicial Behavior: A Comparative Analysis of the Norwegian and Danish Supreme Courts*, 9 J. L. & Cts. 111 (2021).
[121] Sunde, *supra* note 30, at 64–5.
[122] On the allocation of cases to panels and the allocation of justices to panels on the Norwegian Supreme Court, i.e., the so-called "principle of randomness," see the discussion and test in Gunnar Grendstad & Jon Kåre Skiple, *Tilfeldighetsprinsippet i Norges Høyesterett*, 124 Tidsskrift for Rettsvitenskap 46 (2021).

be heard by the full court; and Norwegian legislation provides for a Grand Chamber consisting of eleven justices as well as for the justices sitting en banc.

All three SCs include a pool of clerks.[123] Clerks are required to have law degrees, topped off with some years of work experience. Clerks in Norway and Sweden are hired on fixed-term contracts, while those in Denmark have life tenure (but with opportunities to transfer to other courts, since their job contracts are linked to the Court Administration). Swedish clerks may be specialists in certain areas of law; the specialization of Norwegian clerks is weak and informal; and Danish clerks are generalists. The Danish Supreme Court also allocates some clerks to the independent external gatekeeping body (Procesbevillingsnævnet).[124] In all three courts, clerks present written memos to the justices; they may interact with the parties on formal matters; and they are at liberty to add legal arguments to the documents submitted by the parties. In all three countries, finally, clerks may be present at the justices' deliberations, and they may be requested to draft their judgments in part.

Across the three SCs, the decisional norm is for justices to fall into line behind the opinion of the court. In Denmark and Sweden, once a majority of justices have agreed on their opinion, the justices who do not fully agree with the majority opinion have an opportunity to write individual dissents or concurrences. In the absence of separate opinions, however, the votes of individual justices are not disclosed. On the Norwegian Supreme Court, the majority opinion is penned by the "first-voting justice," while the other justices are permitted to write dissents or concurrences. Finally, each participating justice casts an individual vote in every decision. The opinions of Norwegian justices are more comprehensive, and they are written in the first-person singular; Danish and Swedish justices write more tersely on behalf of the whole court.[125]

The possible outcomes of cases are also determined to some extent by procedural rules that set out the scope of the examination. None of the Scandinavian SCs are courts of cassation properly speaking; i.e., they are not restricted to ruling upon matters of law. They are also competent to assess evidence, and they can even, under certain circumstances, allow new evidence to be presented before the SC. (The SCs in Denmark and Norway are bound by lower courts' determination of the defendant's guilt in criminal cases, whereas the Swedish SC can, depending on the nature of the appeal, rule on that issue as well.) Interestingly, the Norwegian SC has also ruled that Norwegian criminal procedure does not recognize the prohibition of *reformatio in pejus*, meaning that neither the judgments of lower courts nor the pleas of the parties constrain the SC. In Denmark and Sweden, the *reformatio in pejus* principle applies in both criminal and civil cases, meaning that the SCs are restricted either to upholding the ruling of the lower court or to granting, in full or in part, the plea of the appealing party; however, the possibility of counterappeal renders this difference less important in practice.

[123] Grendstad et al., *supra* note 111, at 8.
[124] Skiple, Bentsen, & McKenzie, *supra* note 120.
[125] Sunnqvist, *supra* note 33 at 1023.

Scandinavian courts generally allow parties to represent themselves in litigation, even before the SCs. Parties that choose to engage legal counsel before the Swedish SC and SAC are free to retain a representative of any qualification (who need not even a member of the bar). In Denmark and Norway, by contrast, only lawyers who have obtained a special qualification or passed the bar exam are permitted to appear before the SCs. Norway is the only country that explicitly allows any form of *amicus curiae* intervention. The Dispute Act allows for associations, foundations, or public bodies to submit written documents (i.e., litigation letters) regarding public interests in the case.[126] In Denmark and Sweden, this opportunity does not exist.[127]

7. Conclusion

In this article, we have analyzed how institutional changes have transformed the policymaking role of SCs in Denmark, Norway, and Sweden. We have examined and compared laws and rules that regulate SCs in the constitutional and administrative system. Our results suggest that overall—but not uniformly—successive reforms have enhanced the formal judicial independence of the SCs. The SCs have gained stronger review powers (except in Denmark), their administration has become more independent of the government (albeit less so in Sweden), their appointment procedures have become more independent and transparent, and docket reforms have transformed them from courts of appeal to courts of precedent. To summarize our findings, in terms of institutionalization,[128] the SCs today are more *differentiated*, in that they are more prominently defined in the political and legal system, more *durable* in their capacity to persist and to pursue their goals in the face of changing political environments, and more *autonomous* in making independent decisions with reduced interference from others.

Of course, the policymaking role of the SCs is not defined just by the institutions that govern them. It is also influenced by the environment in which they are embedded. For one thing, these institutions have evolved alongside a successive but uneven decline in the influence of Scandinavian legal realism on legal professionals in recent decades.[129] Jurisprudential philosophies influence not only how judges decide cases, but also how they and other actors in the legal sphere interpret the laws and rules that govern the courts and their relationship to other actors. If legal realism increasingly faces competition from alternative legal ideologies, an important task for future research is to

[126] Lov om mekling og rettergang i sivile tvister (Tvisteloven) [Dispute Act], LOV-2005-06-17-90, §§ 15–18 (Nor.).

[127] The ability to intervene, which is found in all three countries, cannot fulfill this function, because it is available only to parties directly concerned by the specific dispute at hand. It is worth noting, however, that public authorities in Denmark may intervene if the outcome of a case would be of substantial importance for the processing of other issues of the same kind. *Retsplejeloven* [Administration of Justice Act] § 252-2 (Den.).

[128] McGuire, *supra* note 17; Robert O. Keohane, *Institutionalization in the United Nations General Assembly*, 23 Int'l Org. 859 (1969).

[129] Wiklund, *supra* note 43; Johan Strang, *Scandinavian Legal Realism and Human Rights: Axel Hägerström, Alf Ross and the Persistent Attack on Natural Law*, 36 Nordic J. Hum. Rts. 202 (2018).

assess the relative importance of ideas and institutions in shaping the policymaking role of courts and SC decision making.

Furthermore, if we are to understand the independence and policymaking role of courts fully, we must also look at their interaction with other actors. The fact that SCs seem increasingly to be deciding politically controversial cases may also be due to retreat or increased fragmentation on the part of the elected branches of government,[130] because of weaker political majorities. Courts may furthermore need to fill in the gaps in legislation left by other policymakers. In Sweden, for instance, legislative practices have contributed to the growing importance of courts by conferring increasing discretion upon them;[131] and SC justices have recently signaled frustration with the poor quality of legislation in government bills. In Denmark, parliament has been criticized for failing to fulfill Denmark's ECHR obligations in legislation, making it harder for the SC to practice the self-restraint imposed on it when Denmark incorporated the ECHR into its national law.[132]

Our analysis has established spatial and temporal variations that suggest several issues for further research. One set of questions concerns the drivers of change. Previous research has somewhat sweepingly explained judicialization in Scandinavia as being propelled by the impact of EU and ECHR law on national legal systems, wherein the three states' incorporation of the ECHR and their varied integration into the EU in the 1990s form a watershed. However, our analysis shows that many of the reforms which have increased the institutional and decisional independence of SCs in Scandinavia have not coincided with the impact of European law. Docket reforms in Sweden, for instance, began already in the 1970s, at a time when Sweden had withdrawn its application for accession to the EEC and its courts had declared the ECHR to be virtually irrelevant in national law.[133] Rather, the motive for reform was to refine the SC's precedential function. Likewise, European law played no part when law-professor-later-turned-chief-justice Carsten Smith in 1975 called for greater judicial activism and when the Norwegian SC reasserted its judicial review powers in 1976. Moreover, where international influences do seem to have mattered, it is not just the force of EU or ECHR "hard law" that has changed the role of courts in Scandinavia. A need to comply with soft-law standards on judicial independence also seems to have supplied a motivation, as for instance in the case of judicial council reforms. Future research should seek to establish with greater precision the relative importance of international norms on the one hand, and of purely domestic policy processes on the other, for the judicialization of politics in Scandinavia.

Furthermore, future research should address the contention over judicial reforms in Scandinavia. Scandinavian policymaking is often described as exceptionally oriented

[130] Christoph Hönnige, *Beyond Judicialization: Why We Need More Comparative Research About Constitutional Courts*, 10 Eur. Pol. Sci. 346 (2011).

[131] Anna Wallerman, Om fakultativa regler: En studie av svensk och unionsrättslig reglering av skönsmässigt beslutsfattande i processrättsliga frågor (2015).

[132] Jonas Christoffersen & Mikael Rask Madsen, *The End of Virtue? Denmark and the Internationalisation of Human Rights*, 80 Nordic J. Int'l L. 257 (2011).

[133] Schaffer, *supra* note 39.

to consensus. However, several of the reforms we have analyzed here have occasioned quite contentious debate. For instance, the judicial review powers of courts were the object of a long-standing political controversy in Sweden.[134] The debate on these powers flared up in the 1970s, the 1990s, and the 2010s. It was resolved—repeatedly—through cross-partisan compromises. At times, moreover, reforms have met resistance from within the judiciary; such was the case, for example, in connection with the court administration reform in Sweden in the 1970s, the docket reforms in Denmark and Norway in the 1990s, and the salary reforms in Sweden in the 2000s. This may seem surprising, given that the norm is for members of the judicial professions in Scandinavia to act as deferential civil servants. Future research should explore how political and judicial elites have mobilized in connection with institutional reforms.[135]

Another set of questions for further study concerns how institutions shape the policymaking role of SCs. In contrast to sweeping arguments about Europeanization, our analysis captures institutional changes at a more detailed level. This granularity may help scholars to formulate and to test more precise hypotheses about the causes of the increased independent policymaking role of Scandinavian SCs. Previous research has showed that giving SCs in Norway and Sweden (less so in Denmark) control of their own dockets has transformed their agenda, and that different types of docket control have shaped justices' behavior.[136] Future studies should exploit the opportunities for comparative research afforded by the fact that the politico-legal systems of the three Scandinavian countries show substantial overall similarities on the one hand, and notable variations in their institutional evolution on the other.

Finally, our comparative analysis can also inform current debates about judicial reform in Scandinavia. The institutional developments we have analyzed are, in a sense, unfinished processes. Recent and ongoing public commissions of inquiry continue to put reforms on the national agenda.[137] Yet commentators have argued that developments in other European states, where judicial independence has recently come under stress, provide an unflattering mirror for Scandinavian judicial systems.[138] Judicial elites have claimed that—recent reforms notwithstanding—Scandinavian constitutions still provide insufficient institutional safeguards for the independence of courts. The Norwegian Association of Judges (Dommerforeningen), for instance,

[134] *See, e.g.*, Karl-Göran Algotsson, Medborgarrätten och regeringsformen: Debatten om grundläggande fri- och rättigheter i regeringsformen under 1970-talet (1987).

[135] For a recent contribution on collective action by legal professionals in the Nordic region, *see*: The Limits of the Legal Complex, *supra* note 11.

[136] Henrik Litleré Bentsen, *Court Leadership, Agenda Transformation, and Judicial Dissent: A European Case of a "Mysterious Demise of Consensual Norms,"* 6 J. L. & Cts. 189 (2018); Derlén & Lindholm, *supra* note 14; Skiple, Bentsen, & McKenzie, *supra* note 120.

[137] Norges Offentlige Utredninger (NOU) 2020:11 Den tredje statsmakt: Domstolene i endring, [government report series] (Nor.); Direktiv (Dir.) 2020:11 Förstärkt skydd för demokratin och domstolarnas oberoende [government commission directive] (Swed.).

[138] Thomas Hermansson, *Polens politiserade domstolar en spegel för Sverige*, Barometern (July 21, 2017), https://www.barometern.se/nyheter/polens-politiserade-domstolar-en-spegel-for-sverige-829897e6/.

recently claimed that, compared with the situation in Poland, "the independence of Norwegian courts is formally less secured against the will of an elected majority to override traditional norms."[139] We hope our comparative analysis of the institutions that shape the policymaking independence of supreme courts can provide valuable contributions to future debates about judicial reform.

[139] Kjetil Kolsrud, *Norske domstolers uavhengighet dårligere sikret enn i Polen*, Rett24 (Jan. 24, 2020), https://rett24.no/articles/-norske-domstolers-uavhengighet-darligere-sikret-enn-i-polen.