Constitutional Unamendability in the Nordic Countries

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Abstract

With the exception of the Constitution of Norway, the Constitutions of Denmark, Finland, Iceland and Sweden are silent on any substantive limits to the power of constitutional amendment. Until now, the topic of constitutional unamendability has also attracted very little attention in Nordic constitutional scholarship.

However, some idiosyncrasies making up the identity of the Nordic constitutions, as well as constitutional limits to Nordic participation in European integration, may implicate the existence of some implicit limits to amendment powers. Similarly, international human rights obligations binding upon the Nordic countries, as well as European Union law and European Economic Area law, may impose some external, supra-constitutional limitations on the powers of Nordic constitutional amenders. However, the existence of any implicit or supra-constitutional unamendability is speculative in the current state of evolution of Nordic constitutionalism. This is even more so since the use of constitutional amendment powers are beyond judicial review by the Nordic courts.

Keywords: the Nordic constitutions, constitutional unamendability, explicit limits, implicit limits, supra-constitutional limits, review of constitutional amendments.

A Introduction

The topic of constitutional unamendability appears anomaly, even weird, in the Nordic constitutional context. With the exception of the Constitution of Norway, the Constitutions of Denmark, Finland, Iceland and Sweden are silent on any limits to the power of constitutional amendment. Until now, the topic of constitutional unamendability has also attracted very little attention in Nordic constitutional scholarship.[1] Although the topic has become one of the central problems of

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1 For exceptions to the rule, *see* E. Smith, 'Old and Protected? On the "Supra-Constitutional" Clause in the Constitution of Norway', *Israel Law Review*, Vol. 44, 2011, pp. 369-388. *See also* M. Suksi, 'Finland', *in* D. Oliver and C. Fusaro (Eds.), *How Constitutions Change – A Comparative Study*, Hart Publishing, 2011, pp. 87-105.

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contemporary constitutionalism in the other corners of the world,[2] the Nordic disinterest in limitations on amendment powers may be yet another indication of the Nordic constitutional exceptionalism.[3]

The Nordic understanding of constitutional amendment powers is essentially shaped by the traditional Nordic deference to parliamentary supremacy and popular sovereignty, on the one hand, and the traditional Nordic reluctance to judicial review and a strong role of courts in general, on the other hand.[4] Hence, constitutional amendment powers remain in the hands of Parliaments and other political actors entrusted with the amendment power in all five Nordic countries. By contrast, the Nordic courts cannot 'tie the hands' of constitutional amenders.[5] All Nordic countries lack a constitutional court, and courts still play a secondary role on the Nordic scene of constitutionalism. Given also the strong tradition of judicial self-restraint in the Nordic countries, it is quite excluded that any Nordic court would start enforcing substantial limits to amendment powers.

Despite the absence of explicit constitutional limitations on the amendment powers and judicial review of constitutional amendments, it is possible to enquire in the context of the Nordic constitutions into question to what extent, if any, may certain fundamental principles and values of the Nordic constitutions remain beyond the reach of the Nordic constitutional amenders. There seem to be two distinct, yet inter-related, directions where one can start looking for such limitations from the Nordic constitutions. On the one hand, the academic discussion of the constitutional identity of the Nordic countries,[6] including constitutional limitations on the Nordic participation in European integration and international co-operation,[7] may at least tacitly and by implication, throw into relief some limits to amendment powers. On the other hand, international human rights obligations binding upon the Nordic countries as well as obligations stemming from European Union (EU) law or European Economic Area (EEA) law may

2 *See* especially Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, London, Oxford University Press, 2017.

3 R. Hirschl, 'The Nordic Counternarrative: Democracy, Human Development and Judicial Review', *International Journal of Constitutional Law*, Vol. 9, 2011, pp. 449-469.

4 For the limited role of courts and other characteristics of Nordic constitutionalism, *see* E. Smith, 'Judicial Review of Legislation', *in* H. Krunke & B. Thorarensen (Eds.), *The Nordic Constitutions: A Comparative and Contextual Study*, Hart Publishing, 2018, pp. 107-132; J. Lavapuro, T. Ojanen & M. Scheinin, 'Rights-based Constitutionalism in Finland and the Development of Pluralist Constitutionalist Review', International Journal of Constitutional Law, Vol. 9, 2011, pp. 505-531; and J.O. Rytter & M. Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms', *International Journal of Constitutional Law*, Vol. 9, 2011, pp. 470-504. *See also* J. Nergelius, 'The Nordic States and Continental Europe: A Two-Fold Story', *in* J. Nergelius (Ed.), *Nordic and Other European Constitutional Traditions,* Leiden, Martinus Nijhoff, 2006, pp. 3-4.

5 Even in Norway, where the Constitution includes 'eternity clause', it is not the role of courts to enforce substantive limits to amendments. *See* E. Smith, 'Old and Protected? On the "Supra-Constitutional" Clause in the Constitution of Norway', *Israel Law Review*, Vol. 44, 2011, p. 369.

6 For overview of the Nordic constitutional identity, *see* special issue of *Nordisk juridisk tidskrift*, 37, 2014.

7 *See* H. Krunke, 'Impact of the EU/EEA on the Nordic Countries', *in* Krunke & Thorarensen, 2018.

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feature as a source of external 'supra-constitutional' limitations on Nordic constitutional amendment powers.[8]

The following will be an attempt to probe the topic of constitutional unamendability in the Nordic constitutional setting. Given the lack of constitutional provisions, case law and Nordic scholarship on the topic, the account will be tentative and speculative, rather than conclusive and exhaustive. The discussion will be structured as follows: Section B will set the scene by outlining key features of amendment powers and procedures in the Nordic countries, as well as by lifting into attention some idiosyncrasies of Nordic constitutionalism. After all, any understanding of constitutional unamendability in the Nordic countries must appreciate certain characteristics of the Nordic constitutional systems and societies in general. By taking advantage of *Yaniv Roznai*'s[9] theoretical account of unconstitutional constitutional amendments as a framework for analysis, the next three sections will then focus on explicit constitutional unamendability (Section C), implicit constitutional unamendability (Section D) and supra-constitutional unamendability (Section E) so as to trace the (possible) unamendability in the Nordic constitutional. Section E will address judicial review of constitutional amendments, while Section F will briefly conclude.

B Setting the Scene: Key Features of Constitutional Amendment Procedures and Their Constitutional-Political Context in the Nordic Countries

Nordic countries have a long history of written constitutions with explicit provisions on constitutional amendment.[10] Since the early 1990s, all other Nordic constitutions have been subject to more or less substantive amendments or even reforms, except the Danish Constitution which is very difficult to revise.

By and large, the Nordic constitutional amendment procedures are similar to the passage of any other legislation. A common denominator is that amendment powers are essentially in the hands of Parliaments, except in Denmark where the role of the people is also significant through the requirement of a referendum. It is also distinctive for the Nordic constitutional amendment procedures that they are designed to guarantee in various ways enough time for reflection and debate, for instance by requiring two decisions by the legislature, with an election in between, to amend the constitution. Except in Denmark, referendums are not a mandatory requirement for constitutional amendments in the Nordic countries.

8 T. Ojanen, 'Human Rights in Nordic Constitutions and Impact of International Obligations', in H. Krunke & B. Thorarensen (Eds.), *The Nordic Constitutions: A Comparative and Contextual Study*, Hart Publishing, 2018.

9 Roznai, 2017.

10 For overview of constitutional amendment in the Nordic countries, *see* T. Bull, 'Institutions and Divisions of Power', *in* Krunke & Thorarensen, 2018, pp. 52-54. For constitutional amendment in more detail in Denmark, Finland and Sweden, *see* H. Krunke, 'Formal and Informal Methods of Constitutional Change', *in* X. Contiades (Ed.), *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA*, Routledge, 2013, pp. 73-92; T. Ojanen, 'Constitutional amendment in Finland', *in* Contiades, 2013, pp. 93-113; L.-G. Malmberg, 'Constitutional amendment in Sweden', *in* Contiades, 2013, pp. 325-336.

On a scale of the ease/difficulty of a constitutional amendment, the Constitution of Sweden[11] stands out as the easiest one to amend: The Swedish Constitution can be enacted, amended or changed by the means of two majority decisions by Parliament so that the second decision may not be taken until elections have been held and the newly elected Parliament has been convened. As a rule, at least nine months shall elapse between the time when the matter was first submitted to Parliament and the date of the election.[12] Constitutional amendments have been a commonplace in Sweden as more than 200 changes to four constitutional enactments making up the Swedish Constitution have been adopted since 1974.[13] Although most of these amendments are of technical nature, some of them have been substantial in a constitutional and political sense.[14]

The Constitution of Denmark of 1954,[15] in turn, represents the other extreme since it is extremely difficult, if not totally impossible,[16] to amend. According to Article 88 of the Danish Constitution, Parliament must first pass a constitutional amendment. Then the Government calls an election if it wishes to 'proceed with the matter'. After the election, Parliament must again pass unaltered the constitutional amendment. Finally, the constitutional amendment must be subjected to a referendum, which must take place no later than six months after the constitutional Bill was passed by Parliament. If a majority, and at least 40 per cent of those entitled to vote, vote in favour of the constitutional amendment, it takes effect when the Queen has signed it (Art. 88). In practice, it has turned out to be very difficult to engage such a large proportion of the electorate to participate in the referendum, including vote in favour of a constitutional amendment. The Constitution of Denmark has been amended only a few times, and it has gradually become increasingly misleading and outmoded in terms of its content and language.[17]

The Constitutions of Finland, Iceland and Norway lie in between these two extremes. Both the Constitution of Finland of 2000[18] and the Constitution of

11 In Sweden, there are four enactments enjoying constitutional status and making up the Constitution of Swedish Constitution: the Instrument of Government (1974), the Act of Succession (1810); and the Freedom of the Press Act (1949) and the Fundamental Law on Freedom of Expression (1991). *See* Malmberg, 2013, p. 328. The Swedish Constitution is available with a short introduction in English at: www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf (last accessed 6 April 2019).

12 *See* in detail formal constitutional amendment process in Sweden, Malmberg, 2013, pp. 329-333.

13 J. Nergelius, '*Constitutional Law in Sweden'*, Alphen aan den Rijn, Kluwer Law International, 2015, p. 25.

14 Malmberg, 2013, p. 333. *See also* Bull, 2018, p. 52.

15 The Constitution of Denmark is available in English at: https://www.thedanishparliament.dk/~/media/pdf/publikationer/english/the_constitutional_act_of_denmark_2013,-d-,pdf.ashx.

16 The latest amendment was made in 2009 when the succession rule under the Constitution was changed so as to introduce gender equality in accession to the throne. Krunke, 2013, 82.

17 Krunke, 2013, pp. 80-83.

18 The Constitution of Finland is available in English at: www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf (last accessed on 6 April 2019).

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Norway of 1814[19] include a requirement of a two-thirds majority in parliamentary decision-making for the purpose of achieving a broad consensus. Both in Finland and Norway, the constitutional amendment procedures provide an opportunity for the electorate to have its say through the election of the new Parliament. However, the Constitution of Finland allows the possibility of declaring the proposal for constitutional amendment urgent by a decision that has been supported by at least five-sixths of the votes cast. In this event, the proposal is not left in abeyance over elections, and it can be adopted by a decision supported by at least two-thirds of the votes cast (Section 73, para. 2).[20] A constitutional amendment designed to allow the enactment of legislative package on civilian and military intelligence, including their legal and parliamentary oversight, entered into force on 15 October 2018 because the legislative package had required changes to Section 10 of the Constitution on the right to privacy.[21] The amendment was fast-tracked through Parliament in accordance with the procedure under Section 73(2) of the Constitution. The urgency of the constitutional amendment provoked relatively much discussion and debate among the MPs. The primary authority of constitutional review and interpretation in Finland, the Constitutional Law Committee of Parliament, had earlier adopted the interpretation that the urgent amendment procedure can only be used on occasions on which the urgent amendment is deemed absolutely necessary and compelling. Now, the Committee took the view that the Constitution permitted the possibility of declaring the proposal for constitutional amendment of Section 10 urgent in accordance with Section 73(2) of the Constitution.[22]

According to Article 79 of the Icelandic Constitution of 1944,[23] proposals to amend or supplement the Constitution may be introduced at regular as well as extraordinary sessions of Parliament. If the proposal is adopted, Parliament shall immediately be dissolved and a general election is held. If Parliament then passes the proposal unchanged, it shall be confirmed by the President of the Republic and come into force as constitutional law. Since its entry into force in 1944, the Constitution of Iceland has been subject to several amendments. In 1995, for instance, the chapter on human rights was amended by inserting a range of new rights in the Constitution, as well as by rephrasing and modernizing existing human rights provisions. Until this amendment, constitutional provisions on human rights had remained unaltered since the entry into force of Iceland's first

19 The Constitution of Norway is available in English at: www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf (last accessed on 6 April 2019).

20 Ojanen, 2013, pp. 104.

21 Government Bills 198-202/2018. A Brief Overview of this Legislative Package is available in English at: https://valtioneuvosto.fi/en/article/-/asset_publisher/10616/tiedustelulakikokonaisuus-eteni-eduskunnan-kasiteltavaksi (last accessed on 6 April 2019).

22 *See* Report 4/2018 by the Constitutional Law Committee of Parliament. *See also* Reports 5/2005, 10/2006 and 4/2018 by the Constitutional Law Committee of Parliament.

23 The Constitution of Iceland is available in English at: www.government.is/publications/legislation/lex/?newsid=89fc6038-fd28-11e7-9423-005056bc4d74 (last accessed on 6 April 2019).

Constitution in 1874.[24] After the financial crises with the collapse of the Icelandic banks in 2008, a total reform of the Icelandic Constitution was initiated with an ambitious attempt to engage the citizens better in the making of a new constitution, partly through the so-called method of crowd-sourcing. A proposal for a new Constitution of Iceland was approved by a consultative referendum in 2012 with 67 per cent voting in favour. However, the Icelandic Parliament did not even vote on the proposal as the bill on a new Icelandic constitution was blocked in Parliament. Although the attempt to adopt a new Constitution of Iceland failed, it has been regarded as increasing public awareness regarding the Constitution and its core principles in Iceland.[25]

A distinctive feature of Nordic constitutional-political cultures is their adaptability, flexibility and a degree of pragmatism. The Nordic constitutions recognize a number of ways for responding to changing conditions and pressing political and societal demands. Although the Danish Constitution as such is very difficult to amend, *de facto* amendments may occur by such informal methods as constitutional conventions and constitutional interpretation by the political actors.[26] The Finnish Constitution, in turn, has traditionally been described as 'rigid but flexible'[27]: While the constitutional system was characterized by rigid formalities and procedural matters, it could simultaneously be adapted to changing conditions and demands through the so-called institution of exceptive enactments, allowing the adoption of legislation that in substance derogated from the Constitution without amending the text thereof, subject to the proviso that such legislation was approved in accordance with the procedure for constitutional enactments. Between 1919 and 2000, 888 exceptive enactments were adopted with the outcome that some constitutional provisions actually became 'empty shells' as they were hollowed out by numerous exceptive enactments.[28] Since the comprehensive reform of the constitutional system for the protection of fundamental and human rights in 1995, the constitutional doctrine has been that exceptive enactments should only be used for the incorporation of international treaties that conflict with the Constitution. As a consequence, the use of exceptive enactments

24 For the revision of the Icelandic Constitution and the constitutional reform process in more detail, *see* B. Thorarensen, 'The Impact of the Crisis on Icelandic Constitutional Law: Legislative Reforms, Judicial Review and Revision of the Constitution', paper presented at the Workshop on Global Financial Crisis and the Constitutions, Athens, 4 May 2012, 13-24, available at: www.researchgate.net/profile/Bjoerg_Thorarensen/publication/289949295_The_impact_of_the_financial_crisis_on_Icelandic_constitutional_law_Legislative_reforms_judicial_review_and_revision_of_the_constitution/links/57865a2d08aec5c2e4e2e96c.pdf?origin=publication_list (last accessed on 6 April 2019).

25 B. Thorarensen, 'Why the Making of a Crowd-Sourced Constitution in Iceland Failed', *Constitution Making & Constitutional Change*, 26 February 2014, available at: http://constitutional-change.com/why-the-making-of-a-crowd-sourced-constitution-in-iceland-failed (last accessed on 6 April 2019).

26 Krunke, 2013, pp. 78-80.

27 P. Kastari, *Valtiojärjestyksemme oikeudelliset perusteet* (WS 1969) XII.

28 For the origins and evolution of the institution of exceptive enactments, *see* Ojanen, 2013, pp. 104-106. According to the established constitutional doctrine, exceptive enactments remain in force notwithstanding the amendments to the Constitution.

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has drastically diminished in the context of domestic legislation since the late 1990s. In addition, the new Constitution of Finland of 2000 introduced a substantial limit for exceptive enactments by requiring that the derogation from the Constitution must remain 'limited' (see in more detail Section D below).

Finally, certain idiosyncrasies of Nordic constitutional and political systems, including societies, deserve attention since they largely, if not exclusively, coalesce to explain the lack of explicit limitations on constitutional amendment powers in the Nordic constitutions, including Nordic disinterest so far regarding the topic of constitutional unamendability. To start with, Nordic countries are still relatively homogenous in terms of culture, religion and community values, although such trends as immigration have increasingly brought about diversity in recent decades.

Furthermore, 'consensual pathos' has traditionally characterized Nordic political and constitutional cultures. For instance, frequent constitutional amendments in Sweden are not an indication of political-societal struggles in Swedish society where consensus between almost all parties of Parliament has been a very entrenched tradition.[29] Indeed, Sweden overrules the presumption that stable democracy requires constitutional stability: Sweden is a very long-lasting and stable democracy, despite the hectic amendment rate of its Constitution. In Finland, too, both a comprehensive reform of constitutional catalogue on fundamental rights in 1995 and the new Constitution of Finland of 2000 that replaced the earlier four constitutional enactments originating in the 1910s and the 1920s were supported by a very broad consensus across the political leftist-rightist spectrum.[30] However, it remains to be seen whether the Nordic tradition of consensual decision-making will continue as the Nordic countries are rapidly becoming more diverse in terms of culture, politics and religion. In addition, such issues as immigration and European integration have leapt to politics in Denmark, Finland and Sweden in a manner that is increasingly causing friction between political parties and different sections of society. The latest amendment of the Constitution of Finland in 2012 may indicate a turning point insofar as consensual constitutional amendments are concerned, for the amendment was opposed by a relatively broad minority with 40 MPs voting against it and 40 of the 200 MPs being absent from the vote.[31]

Last, but not least, all five Nordic countries share well-proven record of democracy, good governance, political stability and prosperity.[32] The Nordic con-

29 T. Bull, 'Constitutional Identity – A View from Sweden', *Nordisk Juridisk Tidskrift*, Vol. 37, 2014, pp. 12-13. In Sweden, the unwritten practice was until the 1990s that all of the five or six parties in Parliament, except the communists, should accept the change of the Constitution. Since then, the communist party has had a 'makeover' into a more general 'leftish' party that has made it both larger and more included in constitutional affairs. A small 'green' party and a growing right-wing nationalist party have also entered the scene and have put some strain on the idea of a general consensus in Sweden. Bull, 2013, p. 52.

30 Ojanen, 2013, p. 95.

31 *Ibid.*

32 Hirschl, 2011, pp. 452-458.

cept of the welfare state[33] posits the state and public authorities in general in a central role in protecting and securing the well-being of the individuals from 'cradle to grave'.[34] The state assumes the primary – and ultimate – responsibility for the maintenance of a social safety net that extends from comprehensive social security in accordance with the principle of universalism in the allocation of benefits and services and free education and public day-care for children to all-encompassing services for the elderly and a wide range of employment services to responsiveness to needs of people with disabilities.[35] Given also that the Nordic countries have no recent experience of totalitarian regimes, the outcome has been the flourishing of such fundamental principles of Nordic constitutionalism as parliamentary supremacy, popular sovereignty, democracy as a majority rule and reluctance to strong forms of judicial review. Correspondingly, there has at least so far been a lack of compelling reasons for constitutional concern about the limits of amendment powers. Indeed, as the evolution of the Nordic constitutions has been smooth and undramatic, the topic of constitutional amendment has remained under-developed in Nordic constitutional scholarship, let alone the question of constitutional unamendability.[36]

C Explicit Constitutional Unamendability

The notion of explicit constitutional unamendability denotes to explicit substantive limitations on constitutional amendments that are stipulated in the text of the written constitutions. According to *Yaniv Roznai*, provisions on explicit constitutional unamendability can be found from 212 former and current written national constitutions.[37] The Constitution of Norway is among them insofar as its Article 112 provides in the last phrase of the first paragraph as follows:

> Such amendment must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution ....

Hence, the 'spirit' and 'principles' of the Constitution of Norway of 1814 cannot be amended. The origins, meaning and scope, including who has the final word regarding constitutional amendments, have already been examined in detail by Norwegian constitutional scholars to obviate the need of further discussion here.[38] Suffice is to say that while reference to the 'spirit and principles' clause contributed to constitutional integrity in the course of the 19th century by impel-

33 For the central features of the Nordic welfare state model in the context of Nordic constitutionalism, *see* M. Scheinin, 'Introduction', *in* M. Scheinin (Ed), *The Welfare State and Constitutionalism in the Nordic Countries,* Copenhagen, Nordic Council of Ministers, 2001, pp. 17-21.
34 Rytter & Wind, 2011, p. 498.
35 Scheinin, 2001, p. 19.
36 See *e.g.,* Malmberg, 2013, p. 325.
37 Roznai, 2017, p. 15.
38 For overview, *see* Smith, 2011.

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ling to reformulate some amendment proposals or even occasionally completely blocking proposed constitutional amendments, the relevance of this 'eternity clause' has later weakened. Yet, the overall significance of Article 112 has probably related to the way in which it has, together with several other factors, contributed to "the smoothness of Norway's long-term constitutional development and – by the same token – the continuity of the constitutional order".[39]

Article 112 of the Constitution of Norway stands out as anomaly among the Nordic Constitutions – and even in Norway, constitutional scholars have been puzzled why the 'eternity clause' was included in the Norwegian Constitution in the first place in the early 1810s.[40] Beyond the Norwegian Constitution, it remains just to say that the Danish, Finnish, Icelandic and Swedish Constitutions are silent on any limits of amendment powers. Even if there have been a number of significant constitutional amendments or even reforms in Finland, Iceland and Sweden since the 1970s, the issue of constitutional unamendability has been conspicuous by its absence. For instance, when the four constitutional enactments from the 1910s and the 1920s making up the Finnish Constitution were replaced by the Constitution of Finland in 2000, there was no discussion whatsoever about the topic.[41] The potential reasons for the Nordic unconcern for the limits of amendment powers were discussed above in Section B.

D Implicit Constitutional Unamendability

The notion of implicit constitutional unamendability denotes "the idea that even in the absence of explicit limitations on the amendment power, there are certain principles which are beyond the reach of the constitutional amender".[42] As the topic of constitutional unamendability in general has so far remained almost totally uncharted territory of Nordic constitutionalism, the following observations on implicit constitutional unamendability are essentially speculative and tentative. Besides, what makes the topic even more complicated is the lack of judicial review of constitutional amendments in the Nordic countries. Hence, even if there were some implicit limits of amendment powers, it would be practically impossible to try to enforce such limits through the Nordic courts.

If one presumes that certain implied or implicit limitations may be imposed upon amendment powers in order to preserve 'the identity of the constitution,' then the Nordic discussion on the identity of the Nordic constitutions warrants attention. As this Nordic discussion is triggered by Article 4(2) of the Treaty on the European Union, according to which the Union respects the national identity of the Member States, the topic of Nordic constitutional identity is intertwined in the discussion of the constitutional limits to European integration, which may

39 Smith, 2011, p. 388.
40 *Ibid.*, p. 372.
41 For similar observation in Sweden, *see* Malmberg, 2013, p. 333.
42 Roznai, 2017, p. 70.

also be understood as signaling by implication the existence of implicit limitations on constitutional amendments.[43]

By and large, it can be argued that implicit limits to constitutional amendment powers revolve around such fundamental principles and values of the Nordic constitutions as popular sovereignty and democratic form of government and democracy in general. As the Nordic constitutional systems are also built on the principle of separation of powers, parliamentarism, the rule of law, and the protection of human rights, these may also feature as a source of implicit limitations on constitutional amendment powers alongside those originating in democratic foundations of the Nordic constitutions.

For instance, the nature of Nordic constitutionalism overlaps with the notion of the rule of law, basically requiring that all exercise of public authority must be governed by the law, particularly to the extent that public authorities interfere with the rights of the individuals and other private parties.[44] Hence, it can be argued that the rule of law is among those fundamental principles that form the Nordic constitutional identity and, accordingly, are beyond the reach of Nordic constitutional amenders.

To provide another example, the Constitution of Finland of 2000 introduced a substantial limitation on the use of exceptive enactments by requiring that the derogation from the Constitution must remain 'limited'. This requirement has been interpreted as prohibiting such derogations that would abolish the democratic foundations of the Constitution, the constitutional system for the protection of fundamental and human rights and the other fundamental principles enshrined in Chapter 1 of the Finnish Constitution, such as the inviolability of human dignity, the rule of law, parliamentarism and the separation of powers.[45]

Similarly, Chapter 1 of the Instrument of Government of Sweden, which is one of the four Swedish enactments making up the Swedish Constitution, sets out such basic principles of the form of government as popular sovereignty, democracy, rule of law and the separation of powers. Also, the world's second oldest written Constitution still in existence, the Norwegian Constitution, has been founded on the principles of popular sovereignty, the separation of powers and respect of human rights since its adoption in 1814. For instance, the principle of popular sovereignty is enshrined in Article 49 and Article 75 of the Norwegian Constitution to the extent that these provisions provide that the people issue laws, grant state funding, impose taxes and supervise the Government through Parliament. Popular sovereignty, democracy, rule of law and the protection of human rights also emerge from the maze of the Danish and Icelandic Constitu-

43 *See* J. Salminen, 'Den konstitutionalla identiteten, förändingar och Finland,' *Nordisk Juridisk Tidskrift*, Vol. 37, 2014, pp. 58-61. *See also* Bull, 2014, pp. 18-19 and Krunke, 2014, 35-39.

44 Scheinin, 2001, p. 18.

45 *See e.g.* the report by the Constitutional Law Committee of Parliament on the Constitution of Finland where it is noted that a derogation by an exceptive enactment cannot touch the fundamental principles of the Constitution. Report 10/1998, p. 22.

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tions as such elementary principles on which the Danish and the Icelandic constitutional systems are based.[46]

Aside from these constitutional provisions setting out basic principles of Nordic constitutional systems, constitutional limits to European integration and international co-operation in general may implicate some limits to amendment powers.[47] For instance, Section 94(3) of the Finnish Constitution explicitly provides that "(a)n international obligation shall not endanger the democratic foundations of the Constitution," thereby limiting the scope of the transfer of powers to the European Union and the participation of Finland in international co-operation in general. In Finland, the domestic standard of protection of constitutional and human rights has occasionally qualified the primacy of EU law over Finnish law when implementing EU measures.[48]

The Swedish Constitution, in turn, provides that the transfer of decision-making powers to the European Union can only take place subject to the proviso that "the basic principles by which Sweden are governed must not be affected" and that the protection for rights and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Chapter 10, Art. 6 of the Instrument of Government).[49]

As already mentioned, the basic principles by which Sweden is governed are enshrined in Chapter 1 of the Instrument of Government, explicitly entitled as "Basic principles of the form of government." For instance, the predominant view is that such basic principle of the Swedish Constitution as the requirement that the country is ruled by the King and Parliament cannot be altered or abolished.[50] The Constitutions of Denmark, Iceland and Norway also set a number of limits on the transfer of powers to the EU or the EEA.[51]

Moreover, there are some specific idiosyncrasies of Nordic constitutionalism that may amount to the limits of amendment powers. Especially, Sweden has a very strong tradition of safeguarding freedom of expression, including freedom of press. The Swedish history of the constitutional protection of freedom of expression and press goes as far back as 1766 when the Freedom of the Press Act of 1766, prohibiting censorship and providing access to documents of public authorities, was adopted. Currently, two enactments enjoying constitutional status – the

46 For a concise overview of the fundamental principles and values of the Nordic constitutions, *see* H. Krunke & B. Thorarensen, 'Concluding Thoughts', *in* Krunke & Thorarensen, 2018, pp. 203-205.

47 For overview, *see* Krunke, 2018

48 See in more detail T Ojanen, 'The European Constitution in the Far North, in a Country Called *Suomi*', *in* A. Albi & J. Ziller (Eds.), *The European Constitutions and National Constitutions. Ratification and Beyond*, Kluwer Law International, The Hague, 2007, pp. 98-100.

49 *See* J. Nergelius, 'Constitutional reform in Sweden. Some important remarks', *Tijdschrift voor Constitutioneel Recht*, 2013, p. 378. This provision has existed since the 1970s, but it was amended in 1994 when Sweden joined the EU and once again in 2002.

50 Malmberg, 2013, p. 329.

51 Krunke, 2018, pp. 179-184.

Freedom of Press Act of 1949 and the Fundamental Law on Freedom of Expression of 1991 – continue to guarantee this particularly distinctive and entrenched dimension of Swedish constitutionalism. While the other Nordic countries have also strong constitutional traditions of safeguarding freedom of expression and access to public documents, there is a good case to make, especially regarding Sweden that freedom of expression and press constitute such celebrated hallmarks of Swedish constitutional identity which are nowadays even beyond the reach of Swedish constitutional amender.[52]

Gender equality may also constitute such distinctive feature of Nordic constitutional identity, which may fall within the scope of the Nordic understanding of constitutional unamendability.[53] All Nordic countries share a strong constitutional, including cultural and political, tradition of gender equality as is, for instance, concretely shown by the fact that Finland was the first country in the world to give full voting and parliamentary rights to women in 1906. Today, gender equality with strong female participation in different areas of life from work and education to politics, economy and business is characteristic for all five Nordic countries, which regularly occupy top rankings in various gender equality index measurements.[54]

Finally, the Nordic welfare state model and the Nordic labour market system, in which the trade unions and the employers organizations play a key role in negotiating solutions to labour markets, have been mentioned as generating Nordic constitutional identity.[55] Hence, it can be speculated, thought with caution, whether the Nordic welfare state or at least some of its fundamental premises fall beyond the reach of Nordic constitutional amenders. However, this case is not necessarily very strongly grounded since the Nordic welfare states have largely, if not exclusively, been built and developed through decision-making by democratically elected bodies, without anchoring strongly and comprehensively the fundamentals of the welfare state to the Nordic constitutions. The fact that tendencies towards privatization and marketization have increasingly taken place in the Nordic countries in recent decades also weakens the case that amendment powers would be profoundly curtailed insofar as the Nordic welfare state model is concerned.

52 T. Bull, 'Constitutional identity – a view from Sweden', *Nordisk Juridisk Tidskrift*, Vol. 37, 2014, pp. 18-19.

53 H. Krunke, 'Constitutional identity – seen through a Danish lens', *Nordisk Juridisk Tidskrift*, Vol. 37, 2014, pp. 37-38.

54 For instance, Sweden, Denmark and Finland ranked the top three places in gender equality index measuring among the 28 EU Member States by the European Institute for Gender Equality (EIGE) in 2017. *See* Gender Equality Index 2017, available at: http://eige.europa.eu/rdc/eige-publications/gender-equality-index-2017-measuring-gender-equality-european-union-2005-2015-report. In the World Economic Forum's 2015 Gender Gap Index, an annual ranking that measures the gap between the sexes in health, education, economic opportunity and political representation, the top four spots are taken by Iceland, Norway, Finland and Sweden with Denmark languishing in the relatively" low" 14th place. World Economic Forum, Rankings, available at: http://reports.weforum.org/global-gender-gap-report-2015/rankings/?doing_wp_cron=1531837449.8298599720001220703125 (last accessed on 6 April 2019).

55 Bull, 2014, p. 19.

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E Supra-Constitutional Unamendability

The notion of supra-constitutional unamendability refers to "principles and rules that might be placed *above* the domestic constitutional order, such as … supranational international or regional law".[56] In the Nordic constitutional setting, such supra-constitutional unamendability may basically stem from international human rights obligations binding upon the Nordic countries, as well as EU law and EEA law. All five Nordic countries have signed and ratified almost without exception all human rights treaties adopted within the Council of Europe (CoE), the United Nations (UN) and the International Labour Organisation (ILO).[57] Denmark, Finland and Sweden are Member States of the European Union, while Iceland and Norway are Member States of the European Economic Area. This is even more so since the most profound dynamics in the Nordic constitutions since the late 1980s can be traced to the impact of international human rights treaties with the European Convention on Human Rights (ECHR) at their apex, EU law and EEA law on the Nordic constitutions.

The constitutional transformations within the Nordic constitutional systems for the protection of fundamental rights and human rights serve to illustrate this impact.[58] The protection of rights in the Nordic countries has essentially become a matter of multi-layered protection where it is no longer meaningful, or even possible, to distinguish sharply between constitutional, European and international systems of human rights protection. The tendency has increasingly been towards the *harmonization* of the constitutional and international protection of human rights, partly through the significant impact of the ECHR and other international human rights treaties on the reforms of constitutional systems of rights protection, and partly through the influence of international human rights norms, as seen in light of practice of international treaty bodies, on the interpretation of constitutional provisions on fundamental rights. Moreover, the Nordic Constitutions nowadays include distinct provisions that oblige state organs or public authorities in general to observe international human rights norms. Such provisions can be found from the Finnish Constitution (Chapter 2, Section 22), the Norwegian Constitution (Part E, Art. 92) and the Swedish Constitution (Chapter 2, Section 23). In Finland and Sweden, such constitutional provisions have even been regarded as giving a semi-constitutional status to international human rights norms, thereby rendering them constitutionally something special among international treaty obligations. The premise of the Nordic constitutions also is that international human rights norms feature as minimum standards of

56 Roznai, 2017, s. 71.

57 The exception is the *I*LO's Convention *No*. 169 concerning Indigenous and Tribal Peoples in Independent Countries. While Norway (1990) and Denmark (1996) have ratified this Convention, Finland and Sweden are still struggling since they have so far failed to solve fully the rights of the indigenous Sámi People, particularly insofar as their land rights are concerned. The Sámi are living across Norway, Finland, Sweden and Russia, with the majority of them living in Norway.

58 For the impact of international human rights obligations on the Nordic constitutions, *see* Ojanen, 2018, *passim*.

rights protection, thereby not preventing domestic constitutions providing more extensive protection.

However, the significance of European law and international human rights law as sources of constitutional unamendability must not be exaggerated. All five Nordic constitutions adhere to a dualist approach to international law, including international human rights treaties. Hence, international treaties do not enter into force in the Nordic legal orders by means of their ratification only. In addition, incorporation or some other domestic implementation measure is needed for making international treaties formally part of the Nordic legal orders. Moreover, Nordic constitutions lack explicit constitutional clauses on the domestic status of international law, EU law and EEA law. One looks in vain for constitutional provisions on the primacy or supremacy of international treaties or EU/EEA law. However, the Swedish Constitution adopts a kind of a halfway solution insofar as the ECHR is concerned by explicitly prohibiting the adoption of "act of law or other provision ... which contravenes Sweden's undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms" (Art. 19 of the IG). In Norway, the need for giving human rights treaties the status of constitutional law was pondered in the early 1990s, but the outcome was the adoption of Section 3 of the Human Rights Act providing that "(t)he provisions of the conventions and protocols mentioned in Section 2 shall take precedence over any other legislative provisions that conflict with them".[59] The Constitutions of Finland and Sweden also include explicit constitutional provisions on Finnish and Swedish memberships in the EU.[60]

However, even if some Nordic constitutions acknowledge the capacity of the ECHR or international human rights treaties to have priority over conflicting domestic law, this priority does not, as a matter of domestic constitutional law, cover the Nordic constitutions themselves. After all, the Nordic constitutions themselves eventually regulate the domestic validity, status and effects of international law, including international human rights treaties, as well as EU law and EEA law. Since these constitutional regulations can be altered or even replaced by new constitutional regulations, international law and European law can hardly be seen as featuring as *independent* sources of constitutional unamendability.

59 The Norwegian Supreme Court held in 2000 that it is primarily for the ECtHR to interpret the ECHR and that Norwegian courts should not be too active and dynamic in their interpretations of the ECHR. Especially, the Supreme Court emphasized the need to take account of traditional Norwegian priorities in cases involving balancing of various interests, and all the more on occasions on which the domestic legislator has considered the domestic enactment to be in harmony with the ECHR. The implications of the Supreme Court's judgment on the relationship between the ECHR and Norwegian law are still subject to domestic discussion. *See e.g.,* M. Andenas & E. Bjorge, 'National Implementation of ECHR Rights', *in* A. Follesdal, B. Peters & G. Ulfstein (Eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge University Press, 2013, pp. 199-201. *See also* I. J. Sand, 'Judicial Review in Norway under Recent Conditions of European Law and International Human Rights Law – A Comment', *Nordisk tidskrift for menneskerettigheter*, Vol. 27, No. 2, 2009, pp. 160-169; and E. Bjørge, 'The Status of the ECHR in Norway: Should Norwegian Courts Interpret the Convention Dynamically?' *European Public Law*, Vol. 16, No. 1, 2010, pp. 45-50.

60 Smith, 2018, pp. 129-131. *See also* Ojanen, 2018, pp. 151-154 and Krunke, 2018, pp. 179-185.

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Rather, it seems more justified to regard international human rights obligations binding upon the Nordic countries, as well EU law and EEA law, as *complementing* and *reinforcing* (potential) constitutional unamendability originating in the Nordic constitutions themselves. For instance, Section 10 of the Constitution of Finland was recently amended so that the secrecy of communications can be limited if this is necessary for 'obtaining information about military operations or other such activities that seriously threaten national security'. In practice, the amendment allowed the enactment of legislation on civilian and military intelligence gathering powers. When considering the Government's proposal for the amendment, the Constitutional Law Committee of Parliament took constitutional notice of, among others, human rights obligations binding upon Finland, as well as EU law, including case law by the European Court of Human Rights and the Court of Justice of the European Union, especially to the extent that surveillance of electronic communications is concerned. The Committee emphasized that the necessity requirement contained in the constitutional amendment would prohibit the enactment of intelligence legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications.[61] As the prohibition of so-called 'mass surveillance' essentially originates in the case law by the European Courts, notably the EU Court of Justice,[62] it can be said that obligations under EU law and the European Convention on Human Rights, if not limited, at least significantly shaped what the amendment of constitutional provision on the secrecy of confidential communications for the purposes of protecting national security can be all about.

Moreover, it is plausible to argue that Nordic amendment powers are substantially limited by such absolute, non-derogable rights as the prohibition of torture, slavery and the prohibition against refoulement *(the principle of non-refoulement*). As absolute, non-derogable rights are not only enshrined in the Nordic constitutions, but simultaneously also in various international human rights treaties to which the Nordic countries are bound, the standard of protection of such a right must inevitably be taken from the ECHR and other international human rights treaties, as seen in light of the interpretive practice of their monitoring bodies, alongside the domestic constitutional systems of rights protection. Against this background, constitutional unamendability originating in absolute rights can be understood as inevitably transcending the Nordic constitutions to include international human rights obligations.

61 See Report 4/2018 by the Constitutional Law Committee of the Finnish Parliament. A brief overview of this constitutional amendment is available in English at: https://oikeusministerio.fi/artikkeli/-/asset_publisher/esitys-luottamuksellisen-viestin-suojaa-koskevan-perustuslain-saannoksen-muuttamisesta-eduskunnalle?_101_INSTANCE_0tW6d2FGlU8O_languageId=en_US (last accessed 6 April 2019).

62 See especially the judgment of the European Court of Justice of 6 October 2015 in Case C-362/14, *Maximillian Schrems v. Data Protection Commissioner*, ECLI:EU:C:2015:650; and the judgment of the European Court of Justice of 21 December 2016 in Joined Cases C-203/15, *Tele2 Sverige AB v. Post- och telestyrelsen*, and C-698/15, *Secretary of State for the Home Department v. Tom Watson and Others*, ECLI:EU:C:2016:970.

Similarly, if the amending powers are regarded as being limited by such fundamental principles and values as democracy and the rule of law, European law can at least enhance constitutional unamendability under the Nordic constitutions themselves. Denmark, Finland and Sweden are Member States of the European Union, which is founded on such shared values as democracy, the rule of law and respect for fundamental rights (Art. 2 TEU). As members of the Council of Europe, all five Nordic countries are also obliged by Article 3 of the Statute of the Council of Europe, demanding all Member States to accept "the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms". These kinds of obligations under European law may be understood as at least reinforcing constitutional unamendability originating in such fundamental principles and values of the Nordic constitutions as democracy, the rule of law and the protection of human rights.

F Enforcement of (Potential) Constitutional Unamendability

The Nordic countries have traditionally been agnostic towards judicial review and strong courts in general. Even if the tendency has been towards rights-based judicial review since the late 1980s, the Nordic countries are still very far from a juristocracy or adoption of a full-edged judicial review typical for Continental constitutional courts and their counterpart in the United States. With the exception of Norway perhaps, the Nordic constitutions are characterized by *ex ante* parliamentary preview (Finland) and more or less restrained *ex post* judicial review (Denmark, Finland, Iceland and Sweden). Given also the absence of explicit constitutional unamendability beyond the Norwegian Constitution, as well as the speculativity of the existence of implicit and supra-constitutional unamendability in the Nordic constitutional systems, it is quite clear that Nordic courts cannot enforce (potential) limits to amendment powers even if such limitations exist. Even in Norway, where there is an explicit constitutional provision on unamendability and where the institution of judicial review is by far the oldest and is probably still the most active of the five countries, the 'eternity clause' of the Constitution of Norway is not subject to judicial review.[63] Indeed, any Nordic court daring to review constitutional amendment powers would probably be regarded as 'running wild' and, accordingly, would most likely be accused for usurping the constitutional amendment powers and flouting the principle democracy, including straying far beyond the appropriate judicial role into the realm of politics.

Although judicial review of the use of constitutional amendment powers thus seems to be 'out of the question' at least in the current state of evolution of Nordic constitutionalism, two supplementary observations must be made. On the one hand, the significance of European-level judicial review as exercised by the European Court of Human Rights (ECtHR), the European Court of Justice (ECJ)

63 Smith, 2011, pp. 386-387. *See also* Bull, 2018, pp. 53-54.

and the EFTA Court,[64] as well as by national courts enforcing European law, deserves a mention. To the extent that the ECHR, EU law and EEA law can be seen as restricting constitutional amendments, they carry with them judicial review through both European courts and the Nordic courts. After all, European law grants to Nordic courts the authority to review national law for its compatibility with the ECHR, EU law and EEA law.

On the other hand, the following peculiarity of the Finnish system of constitutional review warrants attention: Finland has a pluralist system of constitutional review that involves *ex ante* review by the Constitutional Law Committee of Parliament and *ex post* review by courts at a level of concrete court cases.[65] In this model, the *ex ante* review by the Constitutional Law Committee is supposed to remain primary, whereas judicial review is designed to plug loopholes left in the abstract *ex ante* review of the constitutionality of government bills, inasmuch as unforeseen constitutional problems would arise in applying the law by the courts in particular cases. The constitutional position of the Constitutional Law Committee of Parliament bears many resemblances to centralized judicial review models with constitutional courts at their apex. However, the main difference is that the Constitutional Law Committee is a political organ comprising members of Parliament, albeit with a distinct constitutional mandate for *ex ante review* of the constitutionality of "legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties" under Section 74 of the Constitution of Finland. The opinions issued by the Constitutional Law Committee are treated as binding and they provide authoritative interpretations of the Constitution. As the Constitutional Law Committee also plays a key role insofar as the handling of proposals for constitutional amendments are concerned, the Committee can effectively suggest limits to constitutional amendments even if the Constitution of Finland is silent on such limitations.[66]

G Concluding Observations

Unconstitutional constitutional amendments have rapidly become the centre of attention of modern constitutionalism almost everywhere in the world, but Nordic constitutionalism provides a counter-narrative: Except for the Constitution of Norway, one looks in vain for expressed limitations on amendment powers in the Nordic constitutions, and the existence of implicit or supra-constitutional unamendability is also speculative and disputable question in the current state of evolution of the Nordic constitutions. Besides, even to the extent the powers of Nordic constitutional amenders may be implicitly limited, it would not be the role of the Nordic courts to enforce such limits. The (potential) supra-constitutional

64 The EFTA Court fulfils the judicial function within the EFTA system, interpreting the Agreement on the European Economic Area with regard to the EFTA States party to the Agreement (at present Iceland, Liechtenstein and Norway).

65 Lavapuro *et al*., 2011, pp. 510-518.

66 Ojanen, 2013, pp. 109-110.

unamendability originating in European law carries with it judicial review through the European courts and domestic courts reviewing the compatibility with national law with the ECHR, EU law and EEA law, but limits by European law to the Nordic amendment powers more likely remain only complementary to (possible) limitations originating in the Nordic constitutional systems themselves.

Several idiosyncrasies of the Nordic constitutions, including political systems and societies, combine to explain the Nordic unconcern regarding the limits to amendment powers. However, Nordic constitutionalism must be careful not lull into the naive sense of security and self-sufficiency because of their renowned democracy, respect for human rights, political stability, prosperity and welfare. In recent years, the Nordic countries have also witnessed the rise of populism, including neo-nazi and anti-immigration movements, which may at worst even mutate into such authoritarianism and illiberal constitutional amendments that could eventually endanger the very foundations of the Nordic constitutions based on democracy, rule of law and the protection of human rights. However, the idea of limited amendment powers, whether explicit, implicit or supra-constitutional, is among such constitutional and legal solutions that enable to counter such a dreadful scenario. Therefore, it is high time for Nordic constitutionalism to seize on the idea of constitutional unamendability and, accordingly, start looking for such constitutional core or set of fundamental principles and values of the Nordic constitutions that cannot even be abrogated through the processes of constitutional amendment.

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