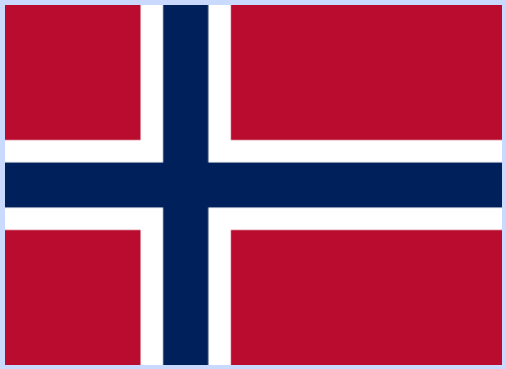
COUNTRY REPORT

NORWAY



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Constitution-making & Deliberative democracy

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The Constitution of Norway: Origin and Developments[1]

The Constitution of Norway ("Kongeriket Norges Grunnlov") was adopted in 1814. Today it is the third oldest written single-document national constitution in Europe, and the second oldest working constitution in the world, after the Constitution of the United States.

In 1814 the Constitution was very liberal and democratic for its time. One reason is that it came about as part of an "act of rebellion" against the Treaty of Kiel. In 1814 Norway had been in a union with Denmark for 434 years, and subject to the absolute monarchy of Denmark since 1660. However, Denmark was on the losing side in the Napoleonic wars and as a result Denmark was forced to cede Norway to Sweden in the Treaty of Kiel.

The Danish Crown Prince Cristian Frederick was resident viceroy in Norway and called for a Norwegian national assembly, apparently in the hope of keeping his position. The representatives for the national constitutional assembly were chosen by the congregations of the Norwegian State Church and by military units from all parts of Norway. The Constitution was written within five weeks in April-May 1814 and signed on the 17th of May. On the same day Christian Frederick was elected as King of Norway by the assembly. Thus, Norway became a constitutional monarchy. Nevertheless, later the same year Denmark was forced to cede Norway to Sweden. Christian Fredrick then abdicated and transferred his powers to the newly created Norwegian Parliament ("Stortinget"). To avoid a prolonged war with Norway, Sweden entered into a personal union with Norway under Charles III John (Karl Johan), while letting Norway keep an amended version of its Constitution and also its Parliament.

The Constitution came into being in a period of tension between the constitutional ideals of the French revolution, which saw constitutions as instruments for ensuring popular sovereignty, and the constitutional ideals of the later restoration era, that attempted to restore elements of monarchical sovereignty (Holmøyvik, 2018). The Norwegian 1814 constitution of May 17th was among the most democratic and liberal constitutions in Europe, strongly emphasizing the sovereignty of the people. Over the coming years Charles III John tried install more monarchical sovereignty and a royal veto, but this was rejected by the Norwegian Parliament (Holmøyvik, 2018). In this period Norway became one of the first countries to develop a lasting system of judicial review, and the Norwegian Supreme court used its review powers to entrench the Constitution in the constitutional ideals of the French revolution (Holmøyvik, 2018). However, for the next 60 years two parallel interpretations of the constitution were prominent in the legal and public debate: one based on monarchical sovereignty and the other based on the sovereignty of the people. Parliamentarianism was gradually introduced after 1884, but without formal amendments being made to the Constitution.

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Tensions over Charles III John's veto powers eventually triggered a dissolution of the union in 1905. With independence a range of new constitutional practices emerged, yet few of these were written into the Constitution. In a consultatory national referendum the people voted in favor of the Government's decision to invite Prince Carl of Denmark to become King of Norway. With this Norway became a parliamentary democracy and constitutional monarchy, with the King as Head of State and the Prime Minister as the political leader. Norway practices negative parliamentarianism, whereby the Government emerges from Parliament (without voting or investiture by Parliament) and where the Government sits as long as it has support from a majority in Parliament.

The Constitution's role in the political culture: from a skeleton to a ghost?

From the start, The Constitution of Norway was closely interweaved with the independence movement, taking on an important function as a symbol of the free Norwegian nation. The date the Constitution was signed in 1814 –the 17th of May– is the Norwegian Constitution Day, a public holiday with nation-wide parades and celebrations. The bicentenary anniversary celebration of the Constitution in 2014 included televised celebrations, academic and more popularized seminars, and the publication of several books on the Constitution, especially on its history and development. The occasion was also used to modernize the language of the constitution, and to make several constitutional amendments.

The important national symbolic role of the Constitution has, however, not been matched by widespread political awareness of, nor public debate and civic engagement with, the content of the written Constitution. One factor here is that until recently the text of the Constitution (as well as all later amendments) was written in 1814 style Norwegian-Danish. This is a language that in later years has become more or less incomprehensible for non-specialists. Another reason for the Constitution's peripheral public role has been that the written Constitution for a long time contained outdated antiquarian phrases, such as the statement in Article 5 that the "King's person is holy" – a phrase that was first removed in 2018. The Constitution also contained several outdated or sleeping articles. This is partly explained by the early emergence of a very pragmatic and flexible way of interpreting the Constitution, and not least by the early development of constitutional customary law in Norway. Parliamentarism, for example, gradually became state practice from 1884, and was long considered to be constitutional law that could only be changed by using the formal constitutional amendment procedure, but was first included in the Constitution in 2007 (Smith 2017). The practice of judicial review also emerged very early (1822), but was first included in the Constitution in 2015 (Smith 2017). Writing in 1968 the constitutional scholar Torkel Opsahl stated;

> "The Constitution lives through the state's organs and what they do. It seems fair to say that the (written) Constitution (...) has never been more than a skeleton, and today it looks like it is on its way to become a ghost." (Opsahl, 1968, p.58, our translation)

In 2014 the Attorney General of Norway, Fredrik Sejersted, wrote in a national newspaper that Norwegians are very proud of their Constitution, but dare not show the text of the Constitution to foreigners because it gives a misleading impression of Norway as a constitutional democracy (Sejersted 2014). One example is that many of the Constitution's paragraphs speak of the King and his powers, giving the impression that the King has actual political power. Article 26, for example, says that "The King has the right to call up troops, to engage in war in defense of the realm and to make peace, to conclude and denounce treaties, to send and receive diplomatic envoys".2 The Norwegian Monarch, however, does not have any of these powers, and many of the paragraphs in reality refer to the Council of State gathered with the King present ("King-in-Council").

The mismatch between the constitutional text and de facto constitutional practice has also meant that Norwegian politicians and citizens who wanted to know what the constitution said could not use the text as a reliable guide. However, the oddities of the written Constitution have rarely caused serious problems, widespread conflict, or even public debate about the Constitution. The reason seems to be that a well-functioning state with high levels of trust has prevented political conflicts from escalating, and that it has seldom seemed necessary to consider the underlying constitutional basis. A related reason is the distinctly pragmatic and flexible constitutional practice. Another relevant factor may be that although the Norwegian Supreme Court has wide powers of judicial review, it has largely limited its review of legislation to specific laws and administrative decisions, consequently limiting its engagement in abstract constitutional review. The courts also consider the preparatory works of the Government and Parliament as important sources of law when interpreting laws, further reducing tensions between the branches. Yet, a consequence of the long-standing mismatch between the written Constitution and the flexible and pragmatic interpretation of the Constitution, may have been that the Constitution has been seen as less important politically and less at the forefront of political thinking

It is important to notice that the discrepancy between the written Constitution and de facto constitutional practice has been reduced in later years. In the years leading up to the 200th anniversary celebration of the Constitution in 2014, several amendments were proposed and adopted that made the written Constitution more reflective of actual constitutional practice in Norway. Many of these amendments were adopted in 2014 and the following years. In recent years there has also been critical scrutiny of various aspects of the written Constitution that are of particular importance from the perspective of deliberative-democratic constitution-making. One such aspect is the formal amendment procedures for changing the Constitution itself.

[2] Available at https://lovdata.no/dokument/NLE/lov/1814-05-17

The formal amendment procedure: Deliberative-democracy qualities and problems

The formal procedure for amending the Constitution is for the most part outlined in Article 121.[3] It requires that:

a) There must be a general election between the submitting of a constitutional amendment proposal and the adoption of the proposal by Parliament.

b) Amendments must be accepted by 2/3 of Parliament. Proposals can only be considered if at least 2/3 of the representatives are present (Article 73).

c) The amendments cannot contradict the principles of the Constitution.

Only Members of Parliament and Government can formally propose an amendment to the Constitution. There are no institutionalized procedures for lay input, but citizens and civil society organizations can petition members of Parliament or ministers to present a proposal.

Amendments to the Constitution only need a one-time adoption in Parliament, whereas ordinary legislation needs a two-time adoption, with at least three days in between.

Compared to many other constitutions, and the US Constitution in particular, the Constitution of Norway is not particularly rigid or hard to amend (Ginsburg, 2014; Langford 2019). Approximately 315 amendments have been made since 1814, not counting purely linguistic amendments. Every year between 30-50 amendment proposals are presented to Parliament.

Several features of this formal amendment procedure seem intended to secure deliberative and democratic concerns. The requirement of an intermediary general election before a proposal can be adopted ensures that amendments are not adopted on a whim or without allowing time for deliberation and public debate. The requirement that amendments must be adopted by at least 2/3 of Parliament also invites deliberation

[3] «If experience shows that any part of this Constitution of the Kingdom of Norway ought to be amended, the proposal to this effect shall be submitted to the first, second or third Storting after a new parliamentary election and be publicly announced in print. But it shall be left to the first, second or third Storting after the following parliamentary election to decide whether or not the proposed amendment shall be adopted. Such an 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, and two thirds of the Storting must agree with such an amendment. An amendment to the Constitution adopted in the manner aforesaid shall be signed by the President and the Secretary of the Storting, and shall be sent to the King for public announcement in print as an applicable provision of the Constitution of the Kingdom of Norway." Article 121 The Constitution of Norway.

and negotiations in Parliament to forge the sufficient supermajority. The requirement of an intermediary election is also a feature that should allow for more direct electoral control over constitutional amendments than what is the case for ordinary legislation.

However, it has been argued that these deliberative-democratic aspects of the amendment procedure do not work so well in practice. (Taube 2007, Holmøyvik 2018). Having an intermediary general election before adopting a proposal delays the decision and can increase electoral control. Yet, it is not common for the political parties in Norway to take a clear stance on constitutional amendment proposals in their party programs, nor making such proposals an issue in their election campaigns. This means that it is rarely possible for voters to affect which constitutional amendments are adopted and rejected through the general elections (Kristoffersen & Reinertsen, 2021).

The intermediary election requirement also means that amendment proposals cannot be changed once they have been proposed in Parliament. This has several unfortunate consequences. One is that when the amendment proposals are finally voted over, adjustments cannot be made, for example if a legal-technical mistake or even linguistic mistake is discovered. The Parliament must then either adopt a flawed proposal, using the formal amendment procedure to correct the mistake later on, or reject the proposal and suggest a new version (Holmøyvik 2018). In practice, this means that it will take at least a year, and typically longer, before the "correct" version of the amendment can be adopted. As a result of this rigidity, amendments are often proposed in a wide range of different formulations, or with somewhat different content and linguistic formulations, in the hope that one of these versions will be acceptable to 2/3 of the Parliament. This in turn further reduces electoral control, because even when political parties signal that they will support a type of amendment, they typically do not commit themselves to a particular version of the amendment proposal.

The prohibition on changing amendment proposals before adoption also hinders deliberation and discussion of the proposal in Parliament. Legal scholar Eirik Holmøyvik (2018, p. 7) argues that Parliament's treatment of constitutional amendment proposals becomes purely mechanical and not deliberative, as Parliament’s function is merely to say yes or no to proposals. Parliament does not have sufficient incentive to discuss and scrutinize constitutional amendment proposals, because it cannot adjust the text in ways that would improve it from a political or technical-legal point of view. This, as Holmøyvik points out, contrasts with the ordinary legislative process in Norway in which proposals for new laws are thoroughly prepared by expert commissions and in the ministries – a process that includes hearings where experts and affected groups are invited to submit their views – before the proposal is debated and adjusted in Parliamentary committees and hearings, and finally presented and debated in Parliament before adoption or rejection. If the law is controversial or complex, the Government or a ministry can also create an expert commission who prepare an Official Norwegian Report (NOU) on the issue.

As we have seen, both members of Parliament and members of the Government can propose amendments. The Government has a sophisticated system for law making, which also involves public hearings and legal quality checks. Yet, the Government very

rarely proposes constitutional amendments,[4] and amendment initiatives almost always come from Parliament. The problem is that few members of Parliament have any constitutional legal training, and Parliament has limited administrative resources for developing the proposals and ensuring their technical-legal quality. Many amendment proposals fall through because they are insufficiently prepared. Formally there is nothing preventing Parliament from discussing constitutional amendment proposals when they are first presented, but there is no tradition of doing so. As result, public discussion of constitutional amendment proposals becomes more limited.

Controversial constitutional reforms, however, sometimes lead the Government or Parliament to adopt a more comprehensive process before a formal proposal is presented. The amendment of Article 100 in the Constitution, on free speech, is one such example (Taube, 2007). In this case, the Government appointed a public inquiry commission which presented a 400-page Official Norwegian Report (NOU) (Lønning, 2011) that was sent out for public hearing to a wide range of consultative bodies. To bring more clarity to the implications of the various amendment proposals, and also to help Parliament in its choice, the Government also prepared a White Paper (*stortingsmelding*) on the issue for Parliament. After this Parliament's Standing Committee on Scrutiny and Constitutional Affairs made a recommendation, before the varieties of the proposals were put to the vote.

Similarly, Parliament created a commission to prepare a report on how a human rights catalogue could be incorporated into the Constitution (now section E. in the Constitution), as part of the preparations for the major 2014 overhaul of the Constitution. This report generated some public debate. Yet, even in these two cases there were multiple versions of the amendments circulating, and the political parties did not commit themselves to any particular version of these amendment proposals. This may be said to have reduced transparency vis-a-vis the electorate and the electoral control, and it was also a missed opportunity for having a focused Parliamentary and public deliberation over concrete amendment proposals.

Holmøyvik (2018) contends that a better control mechanism is needed to detect political problems and technical-legal flaws of amendment proposals in a way that also enhances the deliberative and democratic qualities of the constitution-making. His proposal is to introduce double voting on constitutional amendment proposals in Parliament, with a preliminary vote after the proposal is first submitted and a final vote after the general election. The advantage of having a preliminary vote, he argues, is that this would prompt Parliament to develop and scrutinize the proposal at an early stage, in the Standing Committee on Control and Constitutional Matters. The idea is that this committee's discussion and development of the proposal can then facilitate a better deliberation on the proposal in Parliament and in the public sphere. A preliminary vote

[4] This practice traces back to conflicts over the division of powers between the branches of government in Norway in the 1880s. After these conflicts Government has been restrictive with proposing new constitutional amendments, while proposing most of the ordinary legislation.

in Parliament will also give the electorate a better idea of where the political parties stand on these issues before they cast their vote in the general election

At the same time, the requirement of two votes in Parliament with an intermediary election could make it much more difficult to make constitutional changes in Norway. To avoid making the amendment procedure too rigid, Holmøyvik suggests that the first vote may only require a simple majority, not a supermajority of 2/3, and that the quorum rules can also be relaxed. He also flouts the idea that minority support of 1/3 may be enough for an amendment proposal to be developed and put to a second vote. The second vote, he argues, should have a 2/3 majority with 2/3 quorum (Holmøyvik 2018, p. 28-29). This proposal is similar to the Finnish constitutional amendment procedure.

No referendum is required for constitutional amendments in Norway. Referendums are not mentioned in the Constitution and cannot be required for new legislation. Still, there have been a few consultatory referendums on constitutional issues. In 1905 there were two referendums, one on whether Norway should leave the personal union with Sweden (184 persons voted against, and 368 208 voted for leaving), and one on whether Norway should become a republic or a monarchy (majority was in favor of a monarchy). In 1972 there was a consultatory referendum on whether Norway should become a member of the European Economic Community (EEC), and in 1994 a referendum on whether Norway should join the European Union (EU). Before both referendums there was widespread public political debate and wide citizen mobilization. In both cases the people dismissed membership with a narrow margin, while a majority among members of Parliament favored membership. Parliament respected the result of both referendums.

Incremental constitution-making

The Constitution is seldom referred to or discussed in broader Norwegian public debates. However, there are some important recent exceptions:

The Norwegian Constitution and International Human rights.

From 1814 the Norwegian Constitution included only a few human rights provisions, and only a few were later added though amendments. Moreover, international human rights treaties which Norway signed onto did not have full effect in Norwegian law, because they had not been incorporated into law by an act of Parliament. In 1999 Parliament passed the Human Rights Act, which elevated five international human rights conventions to a special status of Norwegian law. In preparation for the bicentenary anniversary of the Constitution, Parliament also created a commission whose task was to figure out how "international human rights could be incorporated into the Constitution".

This triggered a public debate about whether social, economic and cultural rights should be included in addition to the more "traditional" civil and political human rights. Those arguing against claimed that such inclusion would curtail democratic politics too much, and result in a "juridification" and "judicialization" of politics. In

2014 Parliament added a new human rights chapter to the Constitution which included the right to life, liberty, equality, privacy, fair trial, freedom of expression, freedom of assembly and movement, as well as rights related to children, work, the environment, and the Sámi people. The new Article 92 also stated that "The authorities of the State shall respect and ensure human rights as they are expressed in this Constitution and in the treaties concerning human rights that are binding for Norway."

For a while, there was uncertainty about how to interpret the new Article 92. Norway had signed a wide range of human rights treaties, including those on social, cultural, and economic rights, but all these rights where not explicitly mentioned in the Constitution. Did the new paragraph mean that these international treaties had priority over Norwegian law? In a decision from 2016, the Supreme Court held that Article 92 strengthens the position of constitutional rights, but still leaves the domestic incorporation of international human rights treaties to the discretion of Parliament (Supreme Court of Norway, 2016).

This decision notwithstanding, the exact relation between Norwegian human rights law and practices, and the European Convention on Human Rights, remains a contested issue in Norway, especially in questions concerning the Norwegian Child Welfare Services. Numerous cases have been brought to the Strasbourg court by parents who have had their children removed by the agency, with the ECtHR finding several violations. The Strasbourg court seems to emphasize parents' and children's human right to family life and maintaining family relationships, whereas Norway claims that removal in these cases has been necessary to ensure the child's human right to protection against neglect and abuse (NIM, 2021).

The Environmental paragraph in the Norwegian Constitution

A widely discussed constitutional issue in Norway in recent years has been the question of how to interpret Article 112 of the Constitution, the so-called Environmental paragraph. This paragraph states that

> "Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well. In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out. The authorities of the state shall take measures for the implementation of these principles."

The first version of this paragraph was adopted in 1992. In 2014 it was amended in a way that was perceived to be more binding and less declaratory. It was also moved to the new human rights chapter of the Constitution. Did this mean that Article 112 had become an enforceable human right?

This was brought to the test when two environmental organizations sued the Norwegian state for its 2016 decision to allow companies to search for petroleum in the southeastern Barents Sea. The case reached the Norwegian Supreme Court in 2020, receiving broad public attention.[5] Many hoped that this paragraph in the Constitution could be used to stop oil and gas production. Others, including the Attorney General during the court proceedings, warned against politicizing the Constitution and shifting power from democratic bodies to the courts.

The State won. The Supreme Court decision stated that Article 112 does not give enforceable rights when Parliament has considered the environmental question and made a decision, unless Parliament has gravely failed to protect the environment in its decision (Supreme Court of Norway, 2020). The judgement did not specify what a grave failure would amount to or how far the courts can go in setting Parliamentary decisions aside.

The Norwegian Constitution and EU/EEA law - legislation without representation?

Norway is not a member of the EU, but part of the EU Internal Market through the Agreement on the European Economic Area (EEA) between the EU and the three EFTA-countries, Norway, Iceland and Lichtenstein.

Since Norway first joined the EEA agreement in 1994, every Norwegian government has brought Norway closer to the EU. Today, Norway has over 70 cooperation agreements with the EU, including the Schengen Agreement ensuring free movement of people within the Schengen area, as well as major parts of the justice and home affairs cooperation. In a comprehensive mapping of Norway's many agreements with the EU, the Government-appointed EEA review committee found that 3/4 of EU law applies to Norway. In other words, even if not a full member, Norway is highly integrated and Europeanised, and is simultaneously both outside and inside the EU (NOU, 2012: 2, p. 838). Norway is an insider to the extent that Norwegian actors can participate on an equal footing in those policy areas where Norway is affiliated through cooperation agreements with the EU, but as a non-member Norway is an outsider as it has neither a seat nor a vote in the formal decision-making settings.[6]

Participating in the EU's internal market or in other EU cooperation requires that the EEA states must be subjected to the same type of (supranational) control as the EU members. However, as a non-member of the EU, it is constitutionally and politically impossible for the EEA states to be subjected to the control of the European Commission and the Court of Justice of the European Union (CJEU). Instead, relations between the EU and the EEA states are organized in a two-pillar structure where the EU represents one pillar and the EEA states represent the other. In between, and formally independent of both the EU and EEA sides, are two institutions replicating the functions of, on the one hand, the European Commission, i.e. the EFTA Surveillance

[5] See also Graver (2020) and Sunde (2017).

[6] Norwegian civil servants can work as national experts in the Commission and Norway has a right to meet in the Schengen Council, but has no representation in the European Council, Council of Ministers, the European Parliament, the European Court of Justice etc.

Authority (ESA), and, on the other, the CJEU, i.e. the EFTA Court. This formal independence notwithstanding, to ensure *legal homogeneity*, or that the rules are interpreted and applied in the same manner across the participating states, both ESA and the EFTA Court closely consider and take heed of the practice of the European Commission and the CJEU (Fredriksen, 2015). Moreover, the EEA states are not only in practice subjected to the control of the EU institutions, they receive EU legislation *after* the EU decision-making processes are over (Fossum, 2015: 154).[7] Whereas EU member states have full access to and voting rights in the Union's decision-making arenas, Norway is excluded from these arenas. Instead, EU legal acts are routinely incorporated in Norwegian law after what has been characterized as a rubber stamp procedure in the Norwegian parliament (Fossum and Holst, 2014; Fossum, 2019).[8]

Some see the incorporation of EU law in Norway as a major democratic and constitutional problem. The Norwegian Constitution has not been set aside formally, because Norway can in theory withdraw from the EEA and the other agreements. However, it has been argued that the practical reality is that Norwegian citizens are subject to both taxation and legislation without having any representation in these processes (Eriksen, 2014; Fossum, 2015). Others argue that the EEA is in Norway's best interest – a pragmatic solution to ensure access to the internal market for Norwegian actors and that Norway retains the liberty to both oppose EU directives and may also leave the EEA agreement altogether. While this is true, Norway is so functionally integrated in the EU that it would be very difficult to abandon the EEA. Furthermore, opposing specific EU directives may jeopardize the agreement.

Some legal scholars and political scientists have furthermore argued that the Norwegian government has developed a tradition of transferring sovereignty to the EU in a way that is unconstitutional. Since the EEA agreement entailed a transfer of competences and sovereignty from Norway to the EFTA Surveillance Authority (ESA) and the EFTA-court, it was necessary for Norway to use Article 115 of the Constitution, which regulates transfer of powers and competencies to international organizations which Norway is part of. Article 115 requires a 3/4 majority and a 2/3 quorum in Parliament for transfer of powers. However, the only time the procedure described in this paragraph has been used was prior to entering the EEA Agreement in 1992. The other instances of transferring sovereignty to the EU have subsequently relied on the general treaty-making rules in the second paragraph in Article 26 of the Constitution, which only requires a simple majority. Using Article 26 instead of Article 115 has been justified on the grounds that only "treaties on matters of special importance" need a 3/4 majority and that a simple majority in Parliament is sufficient in cases where transfer

[7] Norway has the possibility to try to influence EU decision-making in the preparatory phases through its national experts in various EU committees or through other informal means. However, in practice it is very difficult for a non-member to heard if the EU members are of a different opinion.

[8] "An analysis of the Norwegian committee's written transcripts revealed that there were very few debates: executives simply briefed the legislators on what was taking place; and the committee's work and deliberations were marked by a clear "system-enforced consensus" and absence of debate on principled and constitutional issues" (Fossum, 2019: 18).

of authority is of "minimal impact" for constitutional powers[9]. Yet, while each decision separately might be deemed of "minimal impact", the practice of applying Article 26 in a number of cases seems more constitutionally and democratically problematic. This situation is exacerbated by the dynamic nature of the EEA model, obliging Norway to incorporate new EEA-relevant EU legislation consecutively into national law. Hence, in addition to all the new policy areas in which Norway has signed cooperation agreements with the EU since entering EEA in 1994, the cumulative effect of sovereign powers transferred to the EU is significant.

Incorporation of the EU's fourth railway package (Directive 2012/34/EU) into Norwegian law was particularly controversial, and in 2020 Parliament therefore asked the Supreme Court to issue an advisory opinion. Although such advisory opinions are provided for in the Constitution, this was the first time it had been used since 1945. The Supreme Court accepted the request, and also welcomed input from the public. Among those who provided input were two constitutional scholars arguing that incorporating this directive into Norwegian law with a simple majority in Parliament (Article 26, second paragraph) amounted to "constitutional acrobatics", and that Article 115 ought to be used instead (Holmøyvik and Eriksen, 2021).[10] The Office of the Attorney General, on the other hand, defended the use of simple majority as sound constitutional practice. The Supreme Court's advisory opinion on this matter stated that the transfer of power to the European Railway Agency "cannot be considered radical", and that adoption under Article 115 was not necessary (Supreme Court of Norway, 2021).

One may argue that this last process illustrates a willingness of the branches of government in Norway to consult and deliberate with each other on constitutional issues, and also to receive input from academics and the public. Yet, when it comes to constitutional amendments there are no institutionalized procedures for lay input, and constitutional issues in general seldom generate broader public debate. The organizational structure of receiving and being obligated to incorporate legislation after the decision-making process in the EU is over, greatly inhibits national public debate on constitutional matters relating to the EU. Public debate is also obstructed by the fact that the political parties are deeply (some also internally) divided on EU issues in general.[11]

The Constitution and the "Corona law"

The Norwegian Government's response to the covid-19 situation has triggered both public and academic debate over the legality and constitutionality of some of the early measures the Government took in response to the crisis, and also discussions about constitutional issues such as whether the measures have skewed the division of powers between the executive branch and the legislative branch, as well as between national and local authorities (Holmøyvik et al., 2021).

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[9] See Holmøyvik (2015) for an elaboration of the practice of the "minimal impact" doctrine. For an opposing view, see Sejersted (2013).
[10] See also Holmøyvik (2015) for a more thorough analysis.
[11] See Fossum (2010) for a discussion.

Norway does not have a formal constitutional procedure for declaring a national state of emergency, and Norwegian law does not have a concept of emergency law (Holmøyvik et al., 2018). Still, on the 18th of March 2020 the Government presented a first draft for a law that should help coping with the consequences of the covid-19 situation, one that had many similarities to an emergency law. The proposed law gave the Government permission to temporarily set aside a wide range of laws, with the possibility of renewing this indefinitely. The Government's reasoning was that the corona virus crisis made it impossible to follow the provisions in the Constitution for enacting legislation, because these would be too time-consuming, e.g. because new legislation requires two approvals from Parliament with three days apart.

The Parliament responded by appointing a special commission consisting of the leaders of all the political parties. This commission asked the Government to send the draft proposal on a brief hearing, and invited the association of lawyers, the association of judges, a national human rights institution, as well as a few constitutional scholars, to assess the draft proposal. Most of these responses were quite critical of the proposed law. As a result of the Government's negotiations with Parliament, and the hearing, the final version of the law strengthened parliamentary and judicial control. It also had a more limited scope and specified which laws could be limited or derogated from, and it had a limited time frame. This version of the law was adopted unanimously in Parliament.

The Government's early handling of the corona crisis may suggest that constitutional issues have not been sufficiently at the forefront of political decision-making, or that Norwegian politicians may have had insufficient constitutional knowledge and weak constitutional reflexes. However, the process of adopting the Corona Act also seems to be an example of the different branches of government in Norway being able and willing to engage in discussion and deliberation over constitutional issues, while also receiving input from legal academics. Input from the broader public was largely missing, however. Could use of deliberative mini-publics and other forms of deliberative-democratic instances help broaden such deliberative processes over constitutional issues in Norway? And would this, or would this not, also energize and politicize these discussions in ways that would be detrimental to the deliberations across the branches of government?

Deliberative-democratic instances in Norway

As we have seen, deliberative-democratic instances and experiments such as deliberative mini-publics (citizens' assemblies and conventions, citizens' juries, deliberative opinion polls, etc.) is not a feature of how the Constitution has been adopted, amended, or of how constitutional law has incrementally been developed in Norway. Thus far, there have been no such deliberative-democratic instances or experiments in connection with formal constitutional amendments or on constitutional issues.

There have been a few deliberative-democratic instances in Norway on other topics. In 1996 there was a national Consensus conference on Genetically modified

food, with a follow-up in 2000, set up by the National Committees for Research Ethics and the Norwegian Biotechnology Advisory (Mørkrid, 2001). At the local level there have been some deliberative-democratic instances, most recently a representative online deliberative polling in the city of Bergen focusing on local political issues.

- Consensus conference on Genetically modified food in 1996 and 2000. National Committees for Research Ethics and the Norwegian Biotechnology Advisory, http://www.oecd.org/norway/2537449.pdf
- A deliberative hearing in Nordland county on environmental issues such as energy consumption, https://www.oecd.org/norway/2537449.pdf
- Bergen Citizen panel, https://www.bergen.kommune.no/politikere-utvalg/api/fil/991763/Bergen-byborgerpanel-
- Borgerkraft Trondheim Kommune, https://borgerkraft.trondheim.kommune.no/
- Citizen panel in local areas of Oslo on New Water Ways,. https://newwaterways.no/
- Online deliberative polling in Bergen 2021, https://www.uib.no/en/digsscore/144791/sveinung-arnesen-online-deliberative-polling-bergen
- Citizen involvement in the "Norwegian Smart Cities" (at the planning stage), https://sites.google.com/trondheim.kommune.no/smartbynettverket/forsiden

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