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Europeanisation of the Proportionality Principle in Denmark, Finland and Sweden

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Abstract

Under the influence of EU law and the ECHR, proportionality has developed into a central feature of contemporary European administrative law, at both national and Union level. The article examines this development with respect to the three EU Member States, namely Denmark, Finland, and Sweden. These Nordic legal systems share certain fundamental conceptions of law, such as: the limited importance of legal formalities and the associated 'pragmatism'; the more limited role of all-embracing legal principles; and the central role of and trust in the legislator. These Nordic experiences may therefore differ from both continental ('civil law') and Anglo-Saxon ('common law') attitudes to proportionality, and may contribute to the bigger picture of some features of the Europeanisation phenomenon. The main question for the article is how the principle of proportionality in administrative law has developed and responded to this European influence in the three states.

1. Introduction

Proportionality in a broad sense is closely related to the very concept of law. We need only think of Iustitia – the personification of law – with her scales, balancing interests against each other.[1] Although the terms and concepts in this field have varied and developed over time, some requirements of reasonableness and similar notions have existed in Western legal thinking for a very long time.[2] Proportionality in the modern sense is also undoubtedly a central feature of contemporary European administrative law, at both national and Union level. Furthermore, the concept is enshrined on the constitutional level in many legal systems. The principle today is often described as consisting of three elements: a measure must be suitable for achieving its (legitimate)

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1 See, generally, B Schlink, 'Proportionality (1)' in M Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Law* (OUP 2012) 719.

2 J Schwarze, *European Administrative Law* (rev 1st edn, Sweet & Maxwell 2006) 678f.

purpose; it must be necessary in the sense that less restrictive measures are not sufficient for this purpose; and it must be proportional in the strict sense, i.e. that the general good outweighs the restriction involved.[3]

As is well known, the concept of proportionality relates to concrete decision-making in administrative matters, for example when an authority considers what coercive means to use to carry out a decision effectively. Already in this scenario, the use of a proportionality principle in individual cases could, of course, be a matter of discussion. However, even more importantly, proportionality has also a constitutional dimension, as it relates to questions on the division of constitutional powers. For instance, who should be primarily responsible for balancing interests to decide which ends to reach, and the means to be used to reach those ends – the court or the legislator? In the European Union context, this constitutional question has yet another dimension, *viz* the distribution of competences between the EU and the Member State institutions. Developing Europeanisation, therefore, has the potential of being very controversial when it comes to the principle of proportionality. This may be the case especially in legal systems which traditionally focus on the role of the legislator as the democratically legitimate *locus* of public power, with courts taking a more deferential role.

In this contribution, I will examine how Europeanisation of the concept of proportionality has developed with respect to three legal systems of precisely this kind, namely in Denmark, Finland and Sweden. These Nordic experiences may differ from both continental ('civil law') and Anglo-Saxon ('common law') attitudes to proportionality, which have been treated extensively in European legal literature,[4] and may therefore contribute to the bigger picture of some features of the Europeanisation phenomenon. By Europeanisation, I understand the continuous process of EU law and the European Convention on Human Rights (ECHR) influencing national administrative law.[5] The main question for this contribution is how the principle of proportionality has developed and responded to European influence in the three Nordic EU Member States.

As a background, some comments are made on the concept of Nordic legal systems, especially concerning administrative law. Research in comparative law often discusses the five Nordic states – Denmark, Finland, Iceland, Norway and Sweden – as a distinct group of the continental legal family, or even as a

3 Concerning EU law Schwarze (n 2) 854ff; cf, however, with the four-pronged description in A Barak, 'Proportionality (2)' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Law* (OUP 2012) 743ff.

4 Schwarze (n 2) 680ff. See, especially on English law, Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (OUP 2000) 285ff.

5 S Prechal, R Widdershoven and JH Jans, 'Introduction' in JH Jans, S Prechal and R Widdershoven (eds), *Europeanisation of Public Law* (2nd edn, Europa Law Publishing 2015) 4.

separate legal family.[6] The term 'Nordic' normally refers to these five states, whereas 'Scandinavian' refers only to Denmark, Norway and Sweden, although the usage is not entirely consistent in international discourse.[7] As Norway and Iceland are not members of the EU, they will not be dealt with in the following section. It should be borne in mind, however, that these states are parties to the EEA Agreement; therefore, they too are influenced by EU law principles, including the proportionality principle.[8]

Although Nordic legal thinking would be considered closer to continental law, not least German legal tradition, than to the common law originating from England, it has certain special features characteristic of the Nordic systems.[9] Among those special features, one can first mention the limited importance of legal formalities and the associated 'pragmatism' (implying a less conceptualised view of the law than in continental Europe). On a very general level, Nordic legal discourse prefers practical solutions to theoretical and abstract reasoning, although this preference may play out differently in different Nordic countries and in different fields of law. Furthermore, it has been argued that all-embracing legal principles have a more limited role in the Nordic legal systems, which rather seem to focus on solving legal problems on a lower level of abstraction. Generally, the Nordic countries have not adopted large codifications of the kind found in continental Europe. Finally, the high degree of trust in the legislator may be emphasised, whereas the courts have a more limited role.[10]

On this last point, one might use the legal historian van Caenegem's idea of judges, legislators or professors being 'the essential makers of the law' for a legal system at a certain point in time.[11] Taking this perspective, the Nordic systems traditionally have focused on democratically legitimised legislators, including such practices as the use of *travaux préparatoires* indicating the 'will

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6 K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 273; M Bogdan, *Concise Introduction to Comparative Law* (Europa Law Publishing 2013) 76; J Husa, *A New Introduction to Comparative Law* (Hart 2015) 228.

7 U Bernitz, 'What is Scandinavian Law?' (2007) 50 Scandinavian Studies in Law 14, 15f.

8 C Baudenbacher and Theresa Haas, 'Proportionality as a Fundamental Principle of EEA Law' in C Baudenbacher (ed), *The Fundamental Principles of EEA Law* (Springer 2017) 195ff. See, as regards Norwegian law, K Harald Søvig, 'Avslutning' in K Harald Søvig (ed), *Forholdsmessighets-vurderinger i forvaltningsretten* (Fagbokforlaget 2015) and C C Eriksen and H H Fredriksen, *Norges europeiske forvaltningsrett. EØS-avtalens krav til norske forvaltningsorganers organisering og saksbehandling* (Universitetsforlaget 2019) 75ff.

9 J Husa, K Nuotio and H Pihjalamäki, 'Nordic Law – between Tradition and Dynamism' in J Husa, K Nuotio and H Pihjalamäki (eds), *Nordic Law – between Tradition and Dynamism* (Intersentia 2007) 7ff.

10 Bernitz (n 7) 15ff; J Husa, 'Constitutional Mentality' in P Letto-Vanamo, D Tamm and B Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019) 58 and H Krunke and B Thorarensen, 'Introduction' in H Krunke and B Thorarensen (eds), *The Nordic Constitutions. A Comparative and Contextual Study* (Hart 2018) 7.

11 R C van Caenegem, *Judges, Legislators & Professors. Chapters in European Legal History* (CUP 1987) and P Koskelo, 'Domare, lagstiftare och professorer' [2014] Svensk Juristtidning 619.

of the legislator'.[12] Against this background, it comes as no surprise that none of the Nordic countries have established a constitutional court – a feature that could be seen as limiting the discretion of democratically elected and accountable politicians.[13]

Although there are strong common features, there are also important differences among the countries, owing to their differing historical and political developments. These differences are especially visible in the field of administrative law, where Denmark (as well as the other 'West-Nordic' states of Iceland and Norway) features a state administration mainly organised hierarchically under a minister in the governmental ministries. In the 'East-Nordic' states of Finland and Sweden, on the other hand, the central administration is organised as separate public bodies, which make decisions independently of the ministers to a considerable degree. These differences are linked to the varying legal structures for accountability and appeal of administrative decisions. Whereas Danish administrative decisions may be challenged before a general court, which conducts a rather strict legality review, the administrative courts of Finland and Sweden have a wider mandate, even including the possibility of amending the appealed decision in substance.[14] These differences provide slightly different preconditions for the influence of European law in these countries.

Another difference, which may be linked to the historical and political developments during the twentieth century, is the constitutional role of the courts. Although the legal thinking of all three countries is based on trust in the legislator, Sweden has had an exceptionally strong political tradition of limiting the influence of judges on decisions made by elected politicians. The background to this has been an uninterrupted constitutional development based on structures which in part predate the ideas on separation of powers. These ideas therefore never held a strong position in Swedish legal thinking.[15] Equally important was the sceptical stance taken by the Social Democratic party regarding the protection of individual rights in courts; the party was the dominant political force in Sweden during most of the twentieth century.[16] In combination with Scandinavian legal realism, the scepticism towards judicial power has affected

12 J Husa, *Nordic Reflections on Constitutional Law. A Comparative Nordic Perspective* (Peter Lang 2002) 158.

13 H Krunke and B Thorarensen, 'Concluding Thoughts' in H Krunke and B Thorarensen (eds), *The Nordic Constitutions. A Comparative and Contextual Study* (Hart 2018) 206f.

14 N Fenger and O Mäenpää, 'Public Administration and Good Governance' in P Letto-Vanamo, D Tamm and B Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019) 174ff.

15 H Wenander, 'Geschichte der Verwaltungsgerichtsbarkeit in Schweden' in K Sommermann and B Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2018) 1166.

16 I Cameron, 'Protection of Constitutional Rights in Sweden' [1997] Public Law 488, 504.

the constitutional thinking in the three countries.[17] Although the Swedish constitution protects the independence of the judiciary, the *Regeringsform* 1974 (Instrument of Government) – the central constitutional act – is not explicitly based on the idea of separation of powers. In comparison, the constitutions of Denmark and Finland, although also based on the idea of trust in the legislator, provide a slightly clearer role for the courts. In Finland, the experiences from Russian rule and the Finnish civil war meant that the *Hallitusmuoto/Regeringsform* 1919 (Instrument of Government, the central constitutional act of the newly independent Republic) provided substantial legal mechanisms for the protection of individual rights.[18] In Denmark, the *Danmarks Riges Grundlov* 1953 (the Constitution of Denmark) is also clearly based on a separation of powers, with a clear role for the judiciary in controlling the executive.[19] These differences are of some importance for the impact of the proportionality principle and the division of tasks between the courts and the legislator.

Concerning methodology, the article aims at describing the legal changes – labelled 'Europeanisation' – in the three countries, as those changes are manifested in constitutions, legislation, case-law and academic legal discourse. It should be noted that it is very difficult to establish clear causal relations in the field of law by such study. For example, other factors besides the influences of EU law and the ECHR may account for different national legal systems following similar paths.[20] Of course, legal research using socio-legal methods to explore 'legal cultures' and similar, as well as research in political science, may contribute to the bigger picture of Europeanisation. Given the format of the article, the focus here is on the more central legal discussions.

As to the material for the article, I have primarily used documents in Scandinavian languages, which are mutually understandable, and English. When it comes to Finland, I have used materials in English and Swedish (an official language in Finland)[21], as I do not read Finnish. Although the three legal systems resemble each other, I am grateful for the help from colleagues in assisting me in navigating these similar yet sometimes very different waters in the neighbouring countries.

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17 J Reichel, 'European Legal Method from a Swedish Perspective – Rights, Compensation and the Role of Courts' in Ulla Nergaard, Ruth Nielsen and Lynn Roseberry (eds), *European Legal Method – Paradoxes and Revitalisation* (DJØF 2011) 250ff.

18 L Ervo, 'Comparative Analysis Between East-Scandinavian Countries' (2015) 61 Scandinavian Studies in Law 135, 144 and H Wenander, 'Varför en rätt till domstolsprövning av förvaltningsbeslut? – Utvecklingslinjer i svensk och finsk rätt mot bakgrund av Europakonventionen' in Richard Arvidsson and others (eds), *Festskrift till Wiweka Warnling Conradson* (Jure 2019) 446.

19 cf the Constitution of Denmark 1953, art 63.

20 cf N Fenger, *Forvaltning og Fællesskab: Om EU-rettens betydning for den almindelige forvaltningsret: Konfrontation og frugtbar sakeksistens* (DJØF 2005) 153.

21 Suomen Perustuslaki/Finlands Grundlag (Constitution of Finland, 731/1999) art 17.

In the following section, I turn to the question of the Europeanised proportionality principle in the three Nordic EU states by first looking at the emergence of the principle in national law (Section 2). After this, I explore the tendencies of Europeanisation from around the beginning of the 1990s (Section 3). The developments in the early 1990s are central to the understanding of Europeanisation of Nordic public law, because this was when Finland and Sweden joined the EU. As will be dealt with there, this argument could also be made for Denmark, even though Denmark had been an EEC member since the early 1970s. In Section 4, I provide some concluding remarks and return to certain unresolved questions and possible future developments.

2. The Emergence of the Principle in National Law

To a certain extent, the Nordic legal systems have always been Europeanised. It is true that one of the defining features of Nordic law is the lack of a comprehensive reception of Roman law.[22] Still, nowadays the importance of legal concepts from continental Europe for the development of Nordic legal traditions since the Middle Ages is clear:[23] research in legal history has shown that there is no substance in nineteenth-century romantic ideas of a pure Nordic tradition without external influences.[24] For example, the medieval laws of Sweden (which at that time also included today's Finland) included provisions requiring fairness in the use of public (royal) power. Such rules were most likely inspired by canon law.[25] Later on, various kinds of administrative ordinances could require a balance between ends and means, also through inspiration from continental theories.[26] Needless to say, these kinds of – possible – limitations to public power could not be equalled to contemporary requirements of proportionality. However, they illustrate that Nordic law has always been interlinked with continental European developments.[27]

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22 Krunke and Thorarensen, 'Introduction' (n 10) 7.

23 P Letto-Vanamo and D Tamm, 'Cooperation in the Field of Law' in Johan Strang (ed), *Nordic Cooperation. A European Region in Transition* (Routledge 2016) 95f.

24 S Strömholm, 'General Features of Swedish Law' in M Bogdan (ed), *Swedish Legal System* (Norstedts Juridik 2010) 10.

25 Art. V § 3 Konungsbalken (The Book on the King) of Magnus Erikssons landslag (the Land Code of King Magnus Eriksson). Published in English in Ruth Donner (ed), *King Magnus Eriksson's Law of the Realm: a Medieval Swedish Code*, (Ius Gentium 2000).

26 See, on early modern Sweden (including today's Finland), T Kotkas, *Royal Police Ordinances in Early Modern Sweden. The Emergence of Voluntaristic Understanding of Law* (Brill 2014) 209ff; cf with the reference to a kind of proportionality requirement in the 1771 ordinances from the Governor of Stockholm (*Överståthållaren*) by Ingrid Helmius, 'Proportionalitetsprincipen' in L Marcusson (ed), *Offentligrättsliga principer* (3rd edn, Iustus 2017) 134.

27 D Tamm, 'How Nordic are the old Nordic Laws?' in D Tamm (ed), *The History of Danish Law. Selected Articles and Bibliograhy* (DJØF 2011).

To find the roots of today's proportionality principle in the EU Nordic countries, one has to look to much more recent history. As is well known, ideas of proportionality developed in German police law in the nineteenth century, and later expanded into other fields of administrative law as a separate principle. In the time after World War II, the principle also gained importance on a constitutional level in several legal systems.[28]

This development was reflected in the laws of the Nordic countries, which in the early twentieth century were under considerable influence from German law. Given the slightly different political and legal circumstances, the reception of the idea of proportionality was not identical in Denmark, Finland and Sweden. However, in all three countries, the idea of a principle of proportionality first appeared in the law regulating the police and their keeping of public order.

In Denmark, Poul Andersen – regarded as the founder of the academic study of administrative law in Denmark – concluded in 1936 that:

- the police may only use coercive means when it is necessary (that is, when other means are not sufficient);
- the limited use of force must be preferred over more far-reaching methods; and
- the use of force may not be disproportional, considering the public interest calling for protection.

Andersen referred here to previous legal discussions in Finland and Sweden, as well as to provisions in the police legislation of Prussia.[29]

In Finland, the leading scholar of early administrative law, Kaarlo Juhani Ståhlberg (also the first President of independent Finland in 1919), pointed out that the use of force was limited by the requirement of support in legislation. For situations not regulated in legislation, he referred to a general principle of proportionality limiting the use of coercive means.[30]

In Sweden, one of the early scholars of administrative law, Carl Axel Reuterskiöld, claimed already in 1919 that the public-sector use of force was limited by a requirement of necessity.[31] Later on, Nils Herlitz – one of the leading scholars of Swedish twentieth-century public law – acknowledged the existence of a proportionality principle, which limited the administrative authorities' use of discretion within the framework prescribed by legislation.[32] Various Swedish

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28 Schwarze (n 2) 685ff.

29 P Andersen, *Dansk Forvaltningsret. Almindelige emner* (Nyt Nordiskt Forlag – Arnold Busck 1936) 378f, with reference to the Preussisches Polizeiverwaltungsgesetz from 1931.

30 K J Ståhlberg, *Finlands förvaltningsrätt. Allmänna delen* (Norstedts 1940) 432.

31 CA Reuterskiöld, *Föreläsningar i svensk stats- och förvaltningsrätt. II. Förvaltningen, 1 Politiförvaltningsrätt* (Almqvist & Wiksell 1919) 15.

32 N Herlitz, *Föreläsningar i förvaltningsrätt III. Förvaltningsrättsliga plikter* (Norstedts 1949) 545f. See also Halvar GF Sundberg, *Allmän förvaltningsrätt* (Institutet för offentlig och internationell rätt 1955) 669.

terms were – and to some extent still are – used for the elements of proportionality, such as the principle of necessity (*behovsprincipen*) or the principle of the least interference (*det lindrigaste ingreppets princip*).[33]

As these references show, a principle of proportionality was clearly established in the administrative law of the three countries by the middle of the twentieth century. It should be noted that, since at least the late nineteenth century, Nordic legal scholarship had maintained contacts and discussions across borders, including the recurrent meetings of scholars and practitioners at the Nordic Lawyers' meetings (*Nordiska Juristmöten*) and other fora.[34] Therefore, to some extent, the developments in the three countries could be seen as a result of common Nordic discussions. In all three countries, references to proportionality in the works of this time were rather brief, and the principle was not frequently invoked in reported case-law.

It is possible that the wider scope of scrutiny available to parliamentary ombudsmen – an office established in all the three countries by the middle of the century – could have provided more room for considering the impact of the principle in individual matters.[35] In Sweden and Finland, the wide scope for assessment by the administrative courts may also have given room for pragmatic methods of coping with disproportionate measures.

When the principle of proportionality was established in this way in Denmark, Finland and Sweden, it was clearly a general principle of administrative law and not of constitutional law. The requirements of proportionality in the use of public power were not thought to generally limit the legislator by virtue of a general constitutional principle. There was, quite simply, no support for such a general principle in the written constitutions. Later, in the spirit of the developing welfare states of the 1960s and 1970s, it would have been problematic to think in terms of general principles limiting the scope for legislation. Rather, the focus was on the thorough process of democratically founded legislation, which was thought to provide reasonable results.[36] In this way, the legal culture of all three countries was based on a far-reaching trust in the mechanisms of the democratic system – in other words, an idea of 'the good state'.[37] In addition to this, the impact of Scandinavian Legal Realism in Denmark and Sweden meant that the very idea of legal principles existing beyond the written

33 H Strömberg and Bengt Lundell, *Allmän förvaltningsrätt* (27th edn, Liber 2018) 74.

34 P Letto-Vanamo and Ditlev Tamm, 'Nordic Legal Mind' in Pia Letto-Vanamo, Ditlev Tamm and Bent-Ole Gram Mortensen (eds), *Nordic Law in European Context* (Springer 2019) 2.

35 N Herlitz, *Nordic Public Law* (Norstedts 1969) 189ff.

36 Husa (n 10) 43. See, on the example of the Constitutional Law Committee of the *Eduskunta/Riksdag* (Parliament of Finland), M Hidén, 'Constitutional Rights in the Legislative Process' [1973] 17 Scandinavian Studies in Law 95, 123ff.

37 Letto-Vanamo and Tamm, 'Nordic Legal Mind' (n 34) 8.

legislation could be criticised as metaphysical speculations about natural law without any value.[38]

The use of the proportionality principle in administrative law was thus confined to the use of force, primarily by the police. The assessment of proportionality, then, concerned the use of discretion by the authorities within the scope provided by legislation.

Especially in the field of taxation, the demands of the expanding welfare state came to be at odds with ideas of fairness and proportionality in the 1970s: taking Sweden as a clear example, this tension was highlighted by certain events relating to tax law. In 1975, the world-famous director Ingmar Bergman was arrested for alleged tax fraud in front of his actors during rehearsals at the Royal Dramatic Theatre. He was later acquitted, but Bergman took offence and decided to emigrate. In the following year, the children's book author Astrid Lindgren found herself being taxed with 102 percent of her income, and wrote a satirical fairy-tale which spurred further political debate.[39] Although not necessarily acknowledged at the time, both situations actually encompassed aspects of proportionality, or rather the lack thereof, *viz* in the choice of means by the police and in the legislation.

From the 1970s and during the 1980s, there were tendencies to give more attention to matters of protection of individual rights and proportionality. This development was inspired in part by the developments in Western Europe, notably under the European Convention for Human Rights (ECHR) and under EU law.[40]

Concerning Denmark, the country had been a member of the EU since 1973. Despite this, EU law and the EU principle of proportionality seem to have had relatively little impact on Danish legal thinking in constitutional and general administrative law until the 1990s. When it comes to the proportionality principle, the focus was very much on the domestic variety of the principle in administrative law. This may be explained by both a possible tendency of reluctance towards Europeanisation in Danish law and by the fact that the concept of European administrative law was first established in the late 1980s, especially following Jürgen Schwarze's seminal work (published in German in 1988 and some years later in English).[41]

In Finland, the traditional scepticism to constitutional protection beyond legislation slowly gave way during the late 1980s to an emerging human rights

38 Reichel (n 17) 246ff and L Carlson, *The Fundamentals of Swedish Law* (2nd edn, Studentlitteratur 2012) 51ff.

39 K Östberg and J Andersson, *Sveriges historia 1965–2012* (Norstedts 2012) 248f.

40 For the sake of convenience, the contemporary term EU is used also for the time of the EEC and the EC.

41 On the attitudes in Danish Law, see Jürgen Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft* (Nomos 1988) and Jürgen Schwarze, *European Administrative Law* (Sweet & Maxwell 1992).

culture and to ideas of a 'rights-based constitutionalism'.[42] This development in academic discourse paved the way for subsequent changes in the written constitution (see below).

The Swedish constitutional reform of the 1970s included provisions on fundamental rights, with proportionality requirements for restrictions, similar to the provisions of the ECHR.[43] Slightly later, traditional Swedish administrative structures, with their limited access to the administrative courts in matters considered to be better suited for a political balancing of interests, were challenged by a series of judgments against Sweden in the European Court of Human Rights (ECtHR).[44] However, following the pattern of deference to the legislator that was common to all three countries, constitutional review on grounds of proportionality was still very limited in Sweden.[45] On the administrative level, there were references to proportionality in the legislation regulating special administrative fields. A prominent example from Swedish law is the 1984 Police Act, which requires that a police officer exercising an official duty shall intervene in a way that is justifiable in view of the object of the intervention and other circumstances, and that the use of force shall be limited to what is necessary to obtain the intended result.[46]

The Western European trend of awarding a greater degree of judicial and constitutional protection may be labelled constitutionalism or judicialisation; this development was not greeted with enthusiasm by all commentators in the Nordic countries. In 1990, Professor Bent Christensen, a leading scholar of Danish administrative law, concluded that the distribution of roles between the legislator and the courts was being challenged. He described how courts adjudicating administrative cases traditionally had taken a deferential position in relation to the legislator. Taking this view, it was not for the courts to put themselves in the place of the elected politicians and balance interests beyond what could be concluded from the established sources of law. However, Christensen noted, the development in Western Europe during the preceding decade – especially as regards the jurisprudence of the ECtHR – had gradually shifted the distribution of roles: courts, especially the constitutional courts in

42 Tuomas Ojanen,'The Europeanization of Finnish Law' in Kimmo Nuotio, Sakari Melander and Merita Huomo-Kettunen (eds), *Introduction to Finnish Law and Legal Culture* (Forum Iuris 2012) 102ff.

43 The provisions are now found in the Instrument of Government 1974, ch 2 art 21. See further Joakim Nergelius, *Constitutional Law in Sweden* (2nd edn, Wolters Kluwer 2015) 109f.

44 Henrik Wenander, 'Sweden: European Court of Human Rights Endorsement with some Reservations' in P Popelier, S Lambrecht and K Lemmens (eds), *Criticism of the European Court of Human Rights Shifting the Convention System: Counter-dynamics at the National and EU Level* (Intersentia 2017) 242.

45 Cameron, 'Protection of Constitutional Rights in Sweden' (n 16) 503ff.

46 *Polislag* (Police Act, Swedish Code of Statutes [*Svensk författningssamling, SFS*] 1984:387) s 8; H Ragnemalm, 'Administrative Justice in Sweden' in A Piras (ed), A*dministrative Law: the Problem of Justice. Vol. Io Anglo-American and Nordic systems* (Giuffrè 1991) 421.

some countries, no longer hesitated to assess the choices of the legislator in a way alien to traditional constitutional arrangements. He criticised this development, because he held that the political arena was better suited for solving societal conflicts than the courts.[47] In much the same way, Antero Jyränki, Professor of Public Law at Turku University, expressed concerns, describing the acceptance of the ECHR as a distrust of Finnish democracy.[48] In Sweden, the same kind of arguments were put forward in legal and political debate.[49]

This critique reflected the traditional far-reaching trust in the legislator to act within constitutional boundaries, and the scepticism to judicial power, existing in all three countries. It also relates to the separation of powers, or more pragmatic division of labour, between the legislator and the courts.

3. Tendencies of Europeanisation – from the 1990s onward

From the early 1990s, development continued, focusing on increased constitutional protection of individual rights towards the state and on judicial review. This development was spurred by the constitutional Europeanisation through the influence of the ECHR and EU law.[50] As is often the case in legal development, the direct causal relations are not easy to follow.

When it comes to the ECHR, Denmark and Sweden have been parties to the convention since the early 1950s.[51] However, in the dualist tradition of the two legal systems, the convention had not been considered as directly applicable in legal proceedings in national courts, and therefore its impact on case-law had been fairly limited.[52] In the 1990s, both Denmark and Sweden incorporated the convention as national acts of law.[53] For Sweden, the reason was its approaching accession to the EU: because the ECHR formed part of EU law, it was deemed necessary to award it a corresponding status under domestic Swedish

47 See, for this discussion, B Christensen, 'Domstolene of lovgivningsmagten' [1990] Ugeskrift for Retsvæsen B 73, 81ff.

48 A Jyränki, 'Taking Democracy Seriously. The Problem of the Control of the Constitutionality of Legislation. The Case of Finland' in M Sakslin (ed), *The Finnish Constitution in Transition. Finnish Contributions to the Third World Congress of the International Association of Constitutional Law, Warsaw, 2–5 September 1991* (The Finnish Society of Constitutional Law 1991) 14f.

49 Reichel (n 17) 258.

50 For an early account of the challenges of Europeanisation in Sweden, see H Vogel, 'Svensk allmän förvaltningsrätt och den västeuropeiska integrationen' [1989] Förvaltningsrättslig Tidskrift 159.

51 Sweden ratified the convention in 1952 and Denmark in 1953.

52 See, concerning Sweden, Wenander (n 44) 241f.

53 In Denmark: Lov nr. 285 af 29. april 1992 om Den Europæiske Menneskerettighedskonvention. In Sweden: Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.

law.[54] The incorporation made it easier for the Swedish Parliamentary Ombudsman, as well as for the courts, to refer to the articles of the convention in their decisions.[55]

In Denmark, the incorporation had a similar effect. Legal scholarship has subsequently observed how the Supreme Court used the wording from the European Court of Human Rights (ECtHR) case-law in a case relating to the proportionality of restrictions on the freedoms of speech, association and assembly, but adapted the reasoning to the context of the Constitution of Denmark.[56] This clearly indicates a certain extent of Europeanisation.

The Finnish experience is somewhat different, as Finland could not sign the convention until 1989. The reason for the late accession was the previous delicate relation to the Soviet Union; Finland later incorporated the ECHR in its domestic legal system in 1990.[57] The introduction of the convention into Finnish law was later labelled 'one of the most important turns in Finnish constitutional history'.[58] This change (as well as the EU accession, see below) coincided and was in interplay with a major constitutional reform strengthening the protection of individual rights under the new Constitution of Finland, which entered in force in 2000.[59]

Concerning the impact of EU law, Denmark, as mentioned, had been a member since 1973, whereas Sweden and Finland joined the union in 1995. At this time, the impact of EU law on national administrative law had not yet been acknowledged in the Nordic countries. However, the 1990s witnessed a rather drastic development in the three legal systems here discussed. This also applied to the proportionality principle, which gained more interest than it had held in previous years.

In Denmark, in 1994, Michael Hansen Jensen (later Professor of Constitutional Law at Aarhus University) highlighted the role of the proportionality principle under EU law as a limitation on the national legislator, parallel to the

54 I Cameron, *An Introduction to the European Convention on Human Rights* (8th edn, Iustus 2018) 195f.

55 Cameron, 'Protection of Constitutional Rights in Sweden' (n 16) 502, 512.

56 H Krunke and T Baumbach, 'The Role of the Danish Constitution in European and Transnational Governance' in A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) 283, with reference to the Danish Supreme Court Case U 1999.1798 H.

57 Laki ihmisoikeuksien ja perusvapauksien suojaamiseksi tehdyn yleissopimuksen ja siihen liittyvien lisäpöytäkirjojen eräiden määräysten hyväksymisestä/Lag om godkännande av vissa bestämmelser i konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna samt i tilläggsprotokollen till konventionen (438/1990).

58 T Ojanen and J Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' in A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) 363.

59 T Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' (2004) 10 European Public Law 531, 558.

limitations applicable to restrictions of fundamental rights. In this context, he also discussed whether there was a domestic Danish constitutional principle of proportionality, also limiting the legislator's choices beyond EU law and restriction of fundamental rights.[60] This was clearly a break from older traditions. Although the Danish Administrative Procedure Act lacked – and still lacks – a provision on the proportionality principle, it has seemingly been viewed as being rather unproblematic in the Danish legal discourse of the last few decades. In the case-law of the Supreme Court and of High Courts (appeal courts), there are several examples of proportionality assessments, also in situations when EU law or the ECHR are not applicable.[61]

It may be noted that the Danish and the European principle are not considered to be identical.[62] For example, legal scholarship has discussed the extent to which the Danish proportionality principle requires a measure to be suitable in the same way as the proportionality principle under EU law does (the first element of the traditional proportionality principle).[63]

In Finland, the EU accession (and the incorporation of the ECHR, see above) coincided with a constitutional reform, which reinforced protection of individual rights. In this way, the role of the courts under EU law meant that the traditional restrictive view on constitutional review had to be abandoned in purely internal situations as well. The new Constitution of 1999, which entered in force in 2000, introduced a written rule on constitutional review.[64] Finnish legal scholarship has, moreover, generally concluded that EU membership greatly strengthened the role of the courts.[65] Furthermore, in 1994, the Constitutional Committee of the *Eduskunta/Riksdag* (the Finnish Parliament) – the central body for interpreting the Constitution, in some respects parallel to a constitutional court – established the principle that restrictions on constitutional rights must fulfil a criterion of proportionality.[66] It should be noted that the Constitutional Committee regularly hears experts, including those from professors of

60 See, for this discussion, M Hansen Jensen, 'Proportionalitetsprincippet i forfatningsretlig belysning' [1994] Ugeskrift for Retsvæsen B 335, 340f.

61 See examples in N Fenger (ed), *Forvaltningsret* (DJØF 2018) 361f, with reference to the Supreme Court case U 2003.1660 H concerning public employment.

62 N Fenger, 'Europarettens indflydelse på nordisk forvaltningsret' in *Det 41 nordiska juristmötet i Helsingfors* (41 nordiska juristmötet 2018) 147f.

63 Fenger (ed), *Forvaltningsret* (n 61) 362.

64 Constitution of Finland 1999, art 106; Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law' (n 59) 558.

65 Ojanen and Salminen (n 58) 363.

66 GrUB (*Grundlagsutskottets betänkande*, Report of the Constitutional Law Committee) 25/1994 *om regeringens proposition med förslag till ändring av grundlagarnas stadganden om de grundläggande fri- och rättigheterna* 4 f; Ojanen and Salminen (n 58) 379f.

constitutional and administrative law, meaning that there is room for direct influence from academia on constitutional interpretation.[67]

In 2003, a provision on the principle of proportionality was introduced in the Finnish Administrative Procedure Act.[68] One of the main reasons for adopting a new act of law had to do with the requirements of EU law.[69] The Supreme Administrative Court has referred to the provision and the principle in several cases; notably, the Supreme Administrative Court has held that the use of the principle is limited by applicable legislation in the individual situation. In a case on an excess emissions penalty fee under the framework for greenhouse gas emission allowance trading (KHO 2009:78), the Supreme Administrative Court stated that the provision in the relevant Finnish Act was absolute, and did not support any adjustment of the fee.[70] The latter statement would seem to imply that the principle cannot be used to set aside requirements in Finnish legislation (save for situations where European law takes precedence). In contrast with Danish law, Finnish law does not seem to treat domestic and European proportionality principles as being different in substance.

Perhaps the clearest impact of the principle is found in Sweden, motivating a more detailed account in this article of the developments. A number of cases before the Supreme Administrative Court highlighted the growing importance of the proportionality principle from the mid-1990s. At this point in time, there was no general provision on proportionality in the Swedish Administrative Procedure Act, and although the principle was mentioned in legal literature (see Section 2), it was rarely used in case-law.[71] As stated above, the principle was primarily relevant in interventions for maintaining public order and safety. Legal scholarship therefore concluded that wider use of the principle constituted a challenge for the Swedish public administration.[72]

In 1996, however – one year after Sweden joined the EU – the Supreme Administrative Court expressly confirmed that a more general principle of

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67 J Lavapuro, T Ojanen, and M Scheinin, 'Rights-based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9 International Journal of Constitutional Law 505, 510f.

68 Hallintolaki/Förvaltningslag (Administrative Procedure Act, 434/2003) s 6. See further O Mäenpää, 'The Rule of Law and Administrative Implementation in Finland' in K Nuotio, S Melander and M Huomo-Kettunen (eds), *Introduction to Finnish Law and Legal Culture* (Forum Iuris 2012) 194f.

69 M Niemivuo, 'The Finnish Administrative Procedure Act' (2004) 10 European Public Law 461, 463.

70 A summary of the case has been published in Swedish as HFD (*Högsta förvaltningsdomstolens årsbok*, Yearbook of the Supreme Administrative Court) 2009:78, whereas the full judgment is published in the Finnish version *Korkein hallinto-oikeuden vuosikirja*, KHO. See also Heikki Kulla, *Förvaltningsförfarandets grunder* (Talentum 2014) 116ff.

71 X Groussot, 'Proportionality in Sweden: The Influence of European Law' (2006) 75 Nordic Journal of International Law 451, 452.

72 H Vogel, 'Förvaltningslagen, EG:s förvaltningsrätt och EG:s "allmänna rättsprinciper"' [1995] Förvaltningsrättslig Tidskrift 249, 258.

proportionality existed in Swedish law. The court based this finding on previous case-law and on the incorporation of the ECHR in Swedish law. In two of these cases, which concerned measures for the protection of nature, it quashed decisions that were too far-reaching in limiting the use of land in relation to the aims of the legislation.[73] In another such case, the court further held that a decision not to grant exemption from a statutory rule on land protection was disproportionate and should be changed.[74] In this way, the use of the proportionality principle, by force of both domestic law and the ECHR, had clearly moved beyond the traditional function of limiting the use of force by the police and similar authorities.[75]

The impact of a Europeanised proportionality principle (as well as several other public law principles) was highlighted further in the *Barsebäck* case, which dealt with the Governmental decision to close a nuclear plant. The background was that for decades, the use of nuclear energy had been a highly controversial matter in Swedish politics. In the case, the applicant energy company put forward a number of legal arguments relating to Swedish constitutional law, the ECHR and EU law. When assessing the legality of the Governmental decision in the matter, the Supreme Administrative Court conducted a proportionality test, explicitly discussing the three elements of proportionality – *viz* suitability, necessity, and proportionality in the strict sense. Concerning proportionality, the court held that it should only depart from the assessment by the Government if the relation between the public interest and the limitation on the individual was clearly disproportionate. The court concluded that this was not the case.[76] A significant number of leading Swedish public law scholars of the time were involved as experts on either side, and the case highlighted the commercial role of public law in Sweden. Moreover, the case serves as an example of how EU law and the proportionality principle bring about judicialisation, with legal discourse taking over fields previously considered as political in nature. The Supreme Administrative Court was criticised for its perceived deference to the Government.[77]

The impact of EU law also made it necessary for Swedish law to consider proportionality. Of particular interest here are the politically sensitive areas of monopolies for alcohol and gaming. In the *Franzén* and *Rosengren* cases (concerning the private selling of alcohol and the private import of wine, respectively), the Court of Justice of the European Union (CJEU) found various aspects of

73 RÅ (*Regeringsrättens Årsbok*, The Yearbook of the Supreme Administrative Court) 1996, ref 40 and RÅ 1996, ref 56.
74 RÅ 1996, ref 44.
75 See further on the cases Groussot (n 71) 466f.
76 RÅ 1999, ref 76 under the heading 5.5.
77 Groussot (n 71) 460ff and J Nergelius, 'Constitutional Law' in M Bogdan (ed), *Swedish Legal System* (Norstedts Juridik 2010) 62f.

Swedish alcohol legislation disproportionate.[78] In a few cases, the Supreme Administrative Court also assessed the proportionality of Swedish legislation under EU law. In the 2004 *Wermdö Krog* case on gaming monopoly, as well as in a 2009 case on the commercial import of alcohol, the Supreme Administrative Court – without reference to the CJEU – concluded that the Swedish measures were not violating the principle of proportionality. The Supreme Administrative Court took into account that the case-law of the CJEU allows for limitations of the freedoms under the EU Treaties in these sensitive fields.[79] The reasoning of the Court may be seen as opening for a form of sector-specific application of the principle of proportionality. Especially the assessment in the *Wermdö Krog* case concerning the gaming monopoly was critically discussed in legal discourse as an example of how Europeanisation blurs the traditional line between law and policy, and makes it necessary for courts to assess controversial matters previously seen as political questions.[80] In general, Swedish legal scholarship has noted that the proportionality principle, as well as other aspects of EU and ECHR law, requires a more complex balancing of interests than the traditional application of clear, written rules.[81] Taking this kind of role could be awkward for a judge who is accustomed to a clearer legal role of applying rules where the difficult balancing act is left to the politicians and machinery of legislative drafting.

Notably, the Swedish courts – still without a provision in written legislation – started to make proportionality assessments outside the traditional field of police law and the more recent fields of fundamental rights, the ECHR or EU law. Examples include decisions on repayment of housing allowance, the adoption of a local plan (for land-use planning), and the duty of a liquidator of a company to pay the company's remaining taxes. In all these cases, the Supreme Administrative Court could apply the principle by referring to the scope for discretion in the applicable legislation, with wordings such as 'special circumstances' etc.[82] Consequently, the link to the scope for discretion provided by the applicable legislation would seem to provide a basis for adapting the use of the principle to sector-specific considerations.

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78 Case C-189/95 *Franzén* [1997] EU:C:1997:504, para 76 and Case C-170/04 *Rosengren* [2007] EU:C:2007:313, para 58.

79 RÅ 2004, ref 45 ('Wermdö Krog', on gaming monopoly) and RÅ 2009, ref 83 (on the commercial import of alcohol).

80 N Wahl, 'Vad är oddsen för att det svenska spelmonopolet är förenligt med EG-rätten? – Regeringsrättens dom i Wermdö Krog' [2005] Europarättslig Tidskrift 119, 127*f* and O Wiklund and H Bergman, 'Europeiseringstendenser och domstolskritik i svensk rätt – Regeringsrättens domar i spelmålen' [2005] Europarättslig Tidskrift 713, 727.

81 cf C Moëll, *Proportionalitetsprincipen i skatterätten* (Juristförlaget i Lund 2003) 304f.

82 RÅ 2003, ref 41 and RÅ 2012, ref 12. See further Henrik Wenander, 'Proportionalitetsprincipen i 2017 års förvaltningslag' [2018] Förvaltningsrättslig Tidskrift 443, 447ff.

The limits of the principle were made clear in a case from 2015 on the revocation of a driving licence owing to drink-driving.[83] The relevant legislation allowed for the more lenient measure of requiring an alcolock instead of revoking the driving licence, provided that the driver did not also consume narcotics. This legislation did not lay down any exceptions to this rule. In the case, however, the applicant had taken medicines that were classified as narcotics, according to a physician's prescription. One judge held that, in such a case, the court could deviate from the written legislation with reference to the proportionality principle, particularly as the lack of exceptions in legislation was likely a mistake in the drafting of the relevant act of law. The majority of the court, contrastingly, did not comment on the proportionality principle and decided that the driving licence should be revoked.[84] The dissenting judge, writing extra-judicially, later concluded that the outcome of the case clarifies that the scope for proportionality assessments is limited by the relevant legislation, and the principle is therefore of limited use to courts as a constitutional principle.[85] In 2017, the legislation was amended so that an alcolock would be allowed in such situations,[86] and the Government referred to the Supreme Administrative Court judgment in its proposal.[87] This illustrates the traditional distribution of roles between the legislator and the courts.

In 2011, in the revision of the *Regeringsform* (Instrument of Government), Sweden introduced the proportionality principle in a new area on the constitutional level. Now, in a new chapter on the constitutional position of local government (municipalities and regions), a special provision on proportionality requires that restrictions in local self-government 'should not exceed what is necessary with regard to the purpose of the restriction'.[88] This proportionality assessment, however, is intended to be carried out by the *Riksdag*, and not in constitutional review by courts.[89]

Furthermore, the proportionality principle was also important for the new Swedish Administrative Procedure Act of 2017. One of the leading ideas behind

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83 HFD 2015, ref 16.

84 A Jonsson Cornell in cooperation with Thomas Bull, Lars Karlander and Anna-Sara Lind, 'Developments in Swedish Constitutional Law: The Year 2015 in Review' (*Blog of the International Journal of Constitutional Law*, 2 November 2016) <www.iconnectblog.com/2016/11/developments-in-swedish-constitutional-law-the-year-of-2015-in-review/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+I-CONnectBlog+%28I-CONnect+Blog%29> accessed 11 November 2019.

85 T Bull and A Jonsson Cornell, 'Sweden: Developments in Swedish Constitutional Law' in R Albert et al (eds), *The I-CONnect – Clough Center 2016 Global Review of Constitutional Law* (I-CONnect & The Clough Center for the Study of Constitutional Democracy at Boston College 2017) 202 <ssrn.com/abstract=3014378> accessed 11 November 2019.

86 Körkortslag (Driving Licence Act, SFS 1998:488), ch 5 s 19 as amended by SFS 2017:272.

87 Prop (*Proposition*, Government Bill) 2016/17:83 *Några körkortsfrågor*, 19f.

88 Instrument of Government 1974, ch 14 art 3.

89 SOU 2008:125 *En reformerad grundlag*, 539 and Prop 2008/09:80 *En reformerad grundlag*, 213.

this act was to adapt Swedish general administrative legislation to the requirements of EU law (and of the ECHR): in this way, it was thought, it would not be necessary to distinguish between cases that did or did not involve EU law.[90] Here, Sweden has taken a different path compared to Denmark (see above), since a provision on proportionality was introduced in the new act, thus following the Finnish example.[91] This requirement applies not only to the formal decision-making of the public authorities, but also to other, more practical administrative activities.[92] Interestingly, the provision was put under the heading *Good Administration*, an expression previously used only in relation to EU Administrative Law in Swedish legal discourse. Furthermore, the *travaux préparatoires* highlighted both the domestic development of the principle and the influence of the ECHR and EU law as reasons for this codification of the principle.[93]

4. Concluding Remarks

Undoubtedly, the three legal systems discussed in this article have undergone far-reaching changes owing to Europeanisation. This development has been especially visible since the 1990s, and the proportionality principle provides a good example of it. As was shown above, Swedish law has been particularly affected by these changes.

Relating to the proportionality principle – and, I dare say, to most other principles of public law – this Europeanisation did not mean the introduction of entirely new concepts for the Nordic legal systems. The European principles did not arrive on an empty shore. Rather, as shown above, the principle of proportionality had already been established in the first decades of the twentieth century. This development took place under strong inspiration from German public law, but it also related to even older conceptions of law and fairness. These concepts, in turn, may be traced far back in Nordic legal history, but are also linked to influence of European law. As stated above, and contrary to nationalist romantic beliefs, Nordic law has always been a part of European developments.

The principle of proportionality, as established by the mid-twentieth century, was limited in scope and intensity, since it related predominantly to the use of

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90 SOU (*Statens offentliga utredningar*, Swedish Government Official Reports Series) 2010:29 *En ny förvaltningslag*, 91ff and 589.

91 M Niemivuo, 'Har Sveriges förvaltningslag påverkat Finlands motsvarande lag – eller tvärtom?' [2018] Förvaltningsrättslig Tidskrift 623, 637.

92 Förvaltningslag (Administrative Procedure Act, 2017:900), s 5.

93 SOU 2010:29 (n 90) 181ff and Prop 2016/17:180 *En modern och rättssäker förvaltning – ny förvaltningslag*, 60ff.

force by the police and did not take a central place in descriptions of administrative law. Through the developments described above, the principle moved beyond the rather limited field of police law to administrative law in general, and to constitutional law concerning limitations on fundamental rights. Recently, it has even influenced the relations between the central state and local government in Sweden. Europeanisation, then, can be seen as the combined effects of the ECHR and EU law on existing domestic rules and principles. European law has thereby functioned as a catalyst, reinforcing the pre-existing national administrative legal concepts and expanding them well beyond administrative law.

The preceding account includes some examples of criticism of the changed balance between the legislator and the courts. Furthermore, Danish law has been clear on the distinction between domestic and European principles, and that they are applicable in different situations. The discussions on the possible differences between Danish law and EU law in terms of the suitability criterion (Section 3) may be seen as an indication of a traditional idea: it is normally not the courts' place to decide on the means to be used to reach an end, because this responsibility should lie on the political level. At the same time, it should be noted that this trust in the legislator may put the individual in a less favourable position, as compared to a wider scope of assessment for the courts.

To a certain extent, the principle of proportionality has been adopted in the national systems to a degree beyond what is required by European law. Once again, here the constitutional provision requiring proportionality for limitation of local self-government in Sweden is a clear example. In this way, the concept of proportionality has influenced legal thinking beyond EU and ECHR requirements. As was stated at the outset, the causal relations in legal developments are not easy to distinguish from general societal changes. It may only be noted here that the expansion of the principle coincided with a greater focus, in the three countries, on the position of the individual with respect to the public sector.

In light of the development during the last few decades, today the proportionality principle is undoubtedly well established as a general principle in Danish, Finnish and Swedish law. There are, however, unresolved questions as to the understanding of the principle and the effects of Europeanisation. Here, we also see certain differences among the three Nordic EU States.

First, a matter of discussion is the relation between the domestic proportionality principle and the principle as established under EU or ECHR law. This question has primarily been discussed in Danish and Swedish law, whereas Finnish law seemingly has not devoted as much attention to the matter. As mentioned, Danish legal discourse has underlined that the principles are not necessarily identical, whereas Swedish law has taken a different path, aiming for the Swedish principle to be adapted to the European one, also in situations outside the scope of European law. The Danish viewpoint fits with the idea of procedural autonomy, in the sense that national administrative rules and prin-

ciples should be applied in the absence of EU law on a certain matter. The Swedish position, in contrast, could be defended by emphasising the practical difficulties for national authorities and courts of applying different principles depending on whether or not the case falls within the scope of EU law.[94] In the perspective of the individual, the use of a single standard could be preferable. In this regard, the different positions of Denmark and Sweden could be explained by differences in legal culture, with Swedish law being more 'pragmatic' (or, indeed, primitive) in its conceptualisation of administrative law, and Danish law taking a more principled position, which also fits with a view of Danish law being more reluctant to Europeanisation.

Second, the more specific content of the principle may still need to be elaborated in the national legal systems, especially considering that the role of judges in assessing politically controversial matters is relatively new to the three legal systems. As has been touched upon, the content of the three elements of proportionality – suitability, necessity and proportionality in the strict sense – may be understood differently in different contexts. This highlights the question on the scope, especially as regards using the principle in a sector-specific way. The Swedish example of the *Barsebäck* and *Wermdö Krog* cases could be seen in this light, since they concerned special fields of law that were politically sensitive. At the same time, the idea of the principle as a protection for legal certainty would speak against such differentiation between different sectors.

Third, the constitutional position of the principle is still uncertain. As described above, the principle has moved from being relevant primarily to police law to being relevant to some aspects of constitutional law. In all three countries, Europeanisation has contributed to the establishment of proportionality as a central part of the constitutional protection for fundamental rights. Swedish constitutional law also uses a form of the proportionality requirement for legislation limiting local self-government. Further, The supremacy of EU law means that national acts of law shall be set aside if they do not fulfil proportionality requirements under EU law. These developments change the role of the judge and of the civil servant making the original administrative decision.

Despite these developments, Europeanisation has not led to the establishment of a general domestic constitutional principle on proportionality, limiting the choices of the legislator, in any of the countries. In Finland and Sweden, the Supreme Administrative Courts have held that the proportionality assessment needs to be carried out within the given legal framework, i.e. the written legislation. This was made clear in the Finnish case on the excess emissions penalty fee under the framework for greenhouse gas emission allowance trading (KHO 2009:78); also the Swedish alcolock case relies on this kind of reasoning

94 See further, on the principle of legitimate expectations in Swedish law under European influence, H Wenander, 'Skydd för berättigade förväntningar i svensk förvaltningsrätt? – Negativ rättskraft, EU-rätt och styrning av förvaltningen' [2017] Förvaltningsrättslig Tidskrift 637, 648f.

(HFD 2015 ref 16). In other words, the courts have not yet been ready to assess the general political choices using proportionality as a yardstick. This reluctance could be linked to the traditional Nordic scepticism as regards limiting the power of democratically elected and accountable legislators. At the same time, there are signs that this clear distinction between law and politics is breaking up: in Denmark, it has been discussed whether there is a general constitutional principle, requiring all legislation to be proportionate; in Sweden, the dissenting opinion in the alcolock case (HFD 2015 ref 16) may indicate that a change in attitude is taking place.

The development of the proportionality principle has meant that the distribution of roles between legislator and judges has changed, and the expanding role of the judiciary is a clear effect of Europeanisation in all three countries. This means that the traditional trust in the legislator – the elected politicians and the legislative machinery – has had to give way to a more complex situation, where the judges are also important societal actors. The categories 'law' and 'politics' have become more blurred since the 1980s, as have the roles of judges, legislators, and professors. This more complex landscape thus needs developed roadmaps for understanding what has come to replace earlier, clearer division of functions. In this changed landscape, legal scholarship has a central function in mapping the terrain and suggesting ways forward.