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Sisällys

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Frede Castberg and the Invention of State of Emergency in Norwegian Constitutional Law in the Twentieth Century

1 STATE OF EMERGENCY AND THE NORWEGIAN CONSTITUTION OF 1814

Few constitutions have as stable a history as does the Norwegian Constitution of 1814, a fact supported by its existence as a living document for 200 years.[1] It shares this tangible stability with the constitutions of some other countries, particularly Great Britain with its unwritten constitution and the United States with the world's oldest existing written constitution, from 1787. The Netherlands, Sweden and Denmark have new constitutions, but they are for the most part based on constitutions that date from 1815, 1809 and 1849, respectively. Most other states have replaced entire constitutions through major government upheavals. Whether or not there is any point in retaining an old constitution depends on the quality and character of the constitution, and its general political support. It can be argued that Norway has not adopted a new constitution since 1814 due to the peculiar constitutional ideologies that developed during the nineteenth century as a result of the union with Sweden, and the successful dissolution of that union in 1905. Moreover, the Constitution was flexible enough to absorb, and certainly not legally prevent, the remarkable transformation towards democracy and the welfare state that characterised the twentieth century.

Equally important for the longevity of the Constitution is the absence of any dramatic change of regime in Norway (with the exception of the German occupation in the years 1940-1945), which could have precipitated an entirely new constitution. This demonstrates stability, compared with

[1] The following text is to some extent based on *Michalsen, Dag* (red.): Unntakstilstand og forfatning. Brudd og kontituitet i konstitusjonell rett. Oslo 2013, chapters 1 and 5. I am most grateful to research coordinator Nora Naguib Leerberg (Oslo) and Professor Marit Halvorsen (Oslo) for important help and critical reading.

for example France's twelve constitutions (between 1791 and 1958) or Argentina's seven. On the other hand, this stability has resulted in a situation where a number of changes, for example in the realm of human rights that have been incorporated in newer constitutions of other countries have not been incorporated in the Norwegian Constitution.

At this very moment (May 2014), *Stortinget* (the Norwegian Parliament) is debating a long list of proposed amendments regarding human rights. Consequently, Norwegian constitutional jurisprudence is experiencing significant discrepancies between the text-system of the Constitution on the one hand, and state practice and international treaty law and practices on the other. No dramatic event – a state of emergency – has forced *Stortinget* to adopt a new constitution. The most profound changes in the Constitution will as mentioned likely take place in the spring of 2014.

As a typical revolutionary constitution, the 1814 Constitution did not comprise any general authorisation for governmental bodies to suspend the Constitution itself, neither its system of separation of powers nor the catalogue of civil rights. The Constitution did not (and still does not) include any term in that direction. Not even the mild form of state of emergency in the Cadiz Constitution of 1812 (Article 172) was introduced, and state of emergency was not then – and is not today – a dogmatic constitutional concept with a basis in the constitutional language. The idea was that the constitution should establish a legal standard for government and society; the constitution was supposed to be so solid that it could meet any extraordinary situation without having to be repealed. The fundamental idea was that the formal and substantial content of the Constitution should express the normal political order, and that it would be unnecessary to consider it repealed or put out of action, even in times of crisis. By virtue of the Constitution's unrivalled political, legal and ethical qualities, it was meant to function normally in various social situations, also because the Constitution's normative power itself would create a suitable political order. This was of course ideology, but it was one of the most important ideas of liberal constitutional thought – that constitutions were to last for a very long time, deal with all kinds of situations and eventually reshape society in their image.

This ideology was central in Norwegian constitutional life until the dissolution of the union with Sweden in 1905. The idea that the Constitution was the same throughout the nineteenth century was maintained because there were very few textual amendments. Consequently, constitutional changes were shaped through constitutional practice. Even the result of the most

dramatic constitutional moment of that century – the impeachment trial of the conservative government in 1884, which resulted in the introduction of parlamentarism – was made through practice. In 1905, *Stortinget* unilaterally dissolved the union with Sweden, and the crisis between the two countries escalated almost to the point of war. As *Stortinget* regarded the dissolution as being within the scope of law through its Act of June 7 1905, the constitutional text from November 1814 on which the union with Sweden was founded, had to be changed almost immediately. The majority accepted that there was no time to change the Constitution according to Article 112 (that would have taken several years), but rather according to 'the mandate of necessity', as it was called. This enactment took place before the end of 1905. In addition, there were the indirect changes that concerned all subsequent constitutional interpretation by this radical rupture in 1905. The dissolution of the union meant the loss of certain union-related considerations that had influenced constitutional interpretation up to that point. The active role of *Stortinget* in 1905 strengthened the relationship between popular sovereignty and parlamentarism that from then on became the general norm in all constitutional interpretation. Also, the new national dimension that was strengthened after 1905 created a more national constitution that would have consequences for constitutional interpretation concerning external relations. Thus, an unwritten state of emergency practice in 1905, debates on formal constitutional changes, dramatic political events and new ideological values were closely interwoven in 1905.

2 FREDE CASTBERG AND THE INTERWAR YEARS

The First World War triggered a massive shift in legislative authority, from national parliaments to governments. This happened on the legal basis of emergency laws that were enacted during the war. Such was also the case in Norway, particularly through certain provisional arrangements during the summer of 1914. Many states acquired new constitutions with explicit state of emergency clauses that then triggered intense constitutional debate, the Weimar Constitution of 1919 being the most famous of the new constitutions. This was however not the case in Norway. Here, there was surprisingly little debate concerning the connection between state of emergency laws and constitutional questions during the First World War and in the immediate

post-war years.[2]

The impeachment trial (*Riksrettsak*) in 1926-1927 of Abraham Berge (1851-1936) represented a significant change in Norwegian constitutional law in this respect.[3] In part, the indictment built on the fact that Berge as Minister of Finance had given secret support to a private bank (*Handelsbanken*) contrary to the appropriative authority of *Stortinget*, and in part based on the fact that when he later asked *Stortinget* for additional funds for the same bank, he failed to make clear that the former contribution had taken place. The crucial issue here is that Berge claimed *constitutional necessity* as one of the reasons for his actions. The Court of Impeachment did not decide the case on this legal basis, but a majority of the judges assumed that there was such a principle in Norwegian constitutional law. The unusual depth in the argumentation presented by Defence attorney Per Rygh, which filled close to a hundred pages of the Court of Impeachment's journal, was of great importance.[4] The extensive documentation of Norwegian state practice and not least the experiences from foreign constitutional practices brought the topic into the Norwegian public sphere in earnest. Rygh's summary of the legal content of a possible Norwegian doctrine on constitutional necessity was formulated precisely. The requirement of proportionality was a particularly important dimension:

> 'First, there must be a risk of vital social interests. Second, for the risk to be avoided, it is necessary to deviate from normal rules concerning the relevant constitutional bodies' authority, and third, the means used to avoid the danger must be expedient for the object and proportionate to the danger to be avoided ... [and fourth, it is] irrelevant whether or not the intended purpose actually is achieved'.[5]

It seemed impossible to derive the concept of constitutional necessity as a new constitutional principle solely on the basis of the judgment of the Court of Impeachment. However, when professor of constitutional law Frede Castberg (1893–1977) published the first edition of the textbook on constitutional law – *Norges statsforfatning* – fewer than ten years later, in 1935, he presented the concept of constitutional necessity as current constitutional law.[6] Frede Castberg was the son of one of the most famous of the left-wing

[2] I rely on my own review of registers of publications, legal journals and public debates.

[3] For the following, see Riksrettstidende 1926/1927 [Impeachment protocol].

[4] Riksrettstidende 1926/1927, pp. 1537–1614 cfr. Register pp. 19–22.

[5] Riksrettstidende 1926/1927, pp. 1578–1579.

[6] *Castberg, Frede*: Norges statsforfatning [The Constitutional Law of Norway.] Vol II (1935), pp. 470-483.

1905 men, Johan Castberg, who was later Minister of Justice and a Supreme Court judge. Frede Castberg was therefore a well-connected man at the time he became a professor of constitutional law. Politically, Frede Castberg was more centre-oriented, and regarded himself as a neutral law professor rather than a politician. He had been at odds with the prevailing attitude towards certain legal doctrinal questions during the interwar years. Partly, he was then in favour of the so-called constructive legal method in legal science that had been out of fashion for some time, partly he was inclined to give the notion of natural law some relevance in contemporary legal thinking, very much contrary to the legal realism then being formed in the Scandinavian countries. Neither of these legal models was invoked in his argumentation for a concept of constitutional necessity. His line of reasoning was that of positive law. But given the modest and indeed unambiguous sources of law on the issue, it is certainly surprising that he so unreservedly wrote that the constitutional principle of necessity 'is effectively recognised in Norwegian constitutional law'.[7] Castberg's main legal argument was essentially based on a general assumption: that 'In reality, no governmental existence is conceivable without such a possibility for state organs under certain conditions to safeguard the interests of society also by actions that are beyond the usual limits of authority'. Stated in this way, one could of course suspect that there were hidden agendas of natural law elements included in the reasoning. If so, they were however certainly not revealed.

Henceforth, Castberg systematically developed a constitutional doctrine of necessity, and thereby adopted a number of constitutional rules that lay far outside the premises of the written Constitution and established state practice. Deviation from the Constitution's rules on separation of power was one thing for which there might be some good arguments. The same could be said of deviations from the formal regulations on the constitutional amendments according to Article 112 of the Constitution. But Castberg's assumption that the constitutional principle of necessity also might justify the disregard of civil rights was something entirely different, and had no foundation whatsoever in constitutional practice.[8] In the constitutions that warranted extraordinary competence during states of emergency, such competence was often explicitly specified and enumerated, as in the Weimar Constitution. But Castberg interpreted similar qualifications solely on the basis of what he called constitutional necessity: 'in a critical situation,

[7] *Castberg,* Norges statsforfatning II (1935), p. 470.

[8] See *Castberg*, Norges statsforfatning II (1935, pp. 481–482

individual rights can be set aside to a greater or lesser extent, if the vital interests of the state demand so'. In 1935, this was certainly a bold – and poorly justified – stance.

3 FREDE CASTBERG'S RESPONSE TO THE GERMAN OCCUPATION 1940–1945

For all that Castberg was bold; he seems perhaps to have been prophetic as well. Five years later, the most dramatic state of emergency in Norwegian history occurred through the German occupation from 1940 to 1945. As early as in the evening of April 9, *Stortinget*, which had fled some miles north of Oslo, enacted (if that word can be used in a rather chaotic situation) the famous Elverum-authorisation. This document became the legal foundation for a complete transfer of constitutional authority from *Stortinget* to the Government ('to safeguard the Kingdom's interests and make decisions and issue commands on behalf of *Stortinget* and the Government, if deemed necessary in the interests of the nation's security and future' my translation). Without going into the many discussions on the legal character of this authorisation, it seems obvious that *Stortinget*'s rational legal basis was a certain idea of constitutional necessity. However, the Government's comprehensive legislation from London during the war was formally built for the most part on the Elverum-authorisation (which was always invoked) and not the principle of constitutional necessity (which was not mentioned). For an understanding of the constitutional law, however, the principle of constitutional necessity was certainly very much in focus.

Other enactments that were contrary to the Constitution were also carried out by legitimate state organs in the early days of the German occupation. These enactments could only find a plausible rationality in the principle of constitutional necessity. Most famous is the Supreme Court's role in the creation of the new Administrative Council of April 15 1940. It was obviously contrary to the Constitution, and was justified by formulations of necessity, but not specifically by the constitutional principle of necessity.[9] Far more problematic and impossible to justify as constitutional loyal argumentation of necessity were the negotiations between the Presidency of *Stortinget* and the German occupation authorities in the period June–September 1940,

[9] Sandmo, Erling: Siste ord. Høyesterett i norsk historie 1905–2005 (2005), pp. 250–272.

which aimed to establish a so-called *Riksråd*, and thereby dismiss the exiled King and executive power now located in London. Later, in 1945, the issue of constitutional necessity played an important role as one of several constitutional justifications for the London-Government's issuance of provisional arrangements during the war according to the Constitution's article 17 and the Elverum-authorisation. Particularly the areas where this issue intervened with civil rights were later decided by the Supreme Court in a number of cases, especially in the so-called Klinge case of 1946.

During these years, Frede Castberg was not only an observer, but also a participant.[10] Among other things, he participated as a legal expert in the prolonged negotiations about the *Riksråd*, where he voiced the opinion that constitutional necessity could hardly justify the dismissal of the King and his government, and replace them with a *Riksråd* acceptable to the Germans. But if this regrettably was done, he stated in the summer 1940, the people would surely accept the new regime and its legislation: 'Another point of view would be tantamount to inviting civil war'.[11] Thus, the notion of the principle of constitutional necessity was invoked in order to maintain the *new* political stability, indeed an ambiguous argument in the tradition of state of emergency. Eventually, Castberg was forced to leave Norway for Sweden.

Upon his return to Oslo in 1945, he became one of the most active participants in legal and political debates, especially concerning the legal foundation of the regulations of the Norwegian government in London. It is therefore somewhat surprising that his treatment of constitutional necessity in the second edition of his textbook on constitutional law from 1946 echoed the first edition almost verbatim.[12] Only occasionally does he refer to the decisions that followed the extraordinary events of 1940–1945, and nowhere does he state that these decisions strengthened necessity law by virtue of state practices. He went only so far as to say that it concerned 'a particularly authoritative application of necessity law', meaning that sufficient legal basis already existed in 1940.[13] Castberg published a more systematic account on constitutional necessity first in 1953, also this time as a report to *Stortinget*.[14] This happened in connection with the extensive

[10] *Castberg*, Minner [Memories] (1971), pp. 41–131.

[11] *Castberg*, Norge under okkupasjonen. Rettslige utredninger 1940–1943 (1945), p. 56.

[12] *Castberg,* Norges statsforfatning II (1946), pp. 493–508.

[13] *Castberg,* Norges statsforfatning II (1946), p. 500.

[14] Dokument nr. 2 (1953). Konstitusjonell nødrett. [Quoted as *Castberg*, Konstitusjonell nødrett (1953).]

debates that surfaced in the wake of a proposal for a new emergency law in 1950, which occurred as a result of the cold war.

4 THE MAKING OF A NEW DOCTRINE: FREDE CASTBERG'S *KONSTITUSJONELL NØDRETT*

In his report to *Stortinget*, Castberg undertook two noteworthy measures: one systematic, another historical. The systematic measure was a typical dogmatisation of the doctrine of constitutional necessity by way of splitting it into four questions: one concerning the conditions for exercising constitutional necessity, the second concerning the requirements for a state organ's intervention in another organ's area of competence, the third concerning the situation when constitutional necessity justifies setting aside absolute constitutional prohibitions (which Castberg could not entirely rule out), and finally concerning constitutional necessity's disregard of the formal regulations of the amendments of the Constitution, particularly Article 112. The historical element was nonetheless the most striking; Castberg virtually invented a new constitutional past by reconstructing Norwegian constitutional history, modelling it according to the new doctrine of constitutional necessity. Castberg presupposed the use of constitutional necessity in 1814, and interpreted this dogmatic figure accordingly from the Constitution's birth. Thus, a more extensive state practice than that which had been invoked in previous descriptions on the subject was put in place.

The substance of constitutional necessity in Castberg's treatment can be summarised in selected points.[15] (1) Its existence followed the classic doctrine of necessity, namely that the authority was only applicable in emergency situations. (2) The existence of this doctrine was also the result of the limits of the principles of constitutional interpretation, although it was probably the case that some of the results of an expansive interpretation of the Constitution coincided with those one could adopt according to the rules of constitutional necessity, constitutional interpretation was clearly not sufficient to address several issues of necessity far outside the text of the constitution. (3) Furthermore, the constitutional necessity was derived from the very absence of a formal constitutional legal basis for declaring states of emergency in Norwegian law. (4) This led to the close connection

[15] What follows is summary of *Castberg*, Konstitusjonell nødrett (1953), pp. 13 sq.

between the constitutional principle of necessity and judicial review. Since the Court was competent to try actions by state organs that could be deemed contrary to the Constitution, it followed that the courts had a duty to find alternative legal sources, which in these cases had to be that of constitutional necessity. (5) This understanding also followed from the fact that Norwegian constitutional law had no rules concerning indemnity.

(6) After having constitutionally sanctioned the legal figure of constitutional necessity, Castberg emphasised the differences to other countries' constitutional practice in the field. One must distinguish between the legal forms of state of emergency law where certain conditions must be met for actions of necessity where predetermined, and constitutional necessity where state organs could make individual decisions without any previous specific declaration of a state of emergency by any other state organs, such as *Stortinget*. In Norwegian law, the last form was adequate. Thus, in Norwegian law, the competence that arises from a state of emergency is *ipso jure*. (7) Finally, Castberg stressed that the constitutional principle of necessity was positive law and part of constitutional law. References to natural law, for which he otherwise often argued, had therefore no relevance. On the other hand, when reading Castberg's other contributions, we clearly see that situations existed where considerations of natural law could be relevant, especially concerning violations of fundamental human rights. He was however careful to keep this out of the current applicable constitutional law.

The third edition of Castberg's textbook on constitutional law in 1964 followed the outline from 1935 in form and substance for the most part, supplemented by some of the debate of the 1950s.[16] Meanwhile, in 1953, the European Convention on Human Rights (ECHR) was ratified by Norway. Its Article 15 was a statutory basis of derogation for treaty states to waive any of the rights under specific conditions. For those countries that did not possess similar provisions in their national legislations (as Norway), this meant that the international state of emergency regulation had an indirect effect. However, the implication of the ECHR Article 15 for Norwegian law was not mentioned by Castberg at the time, and only later did legal science bring the ECHR more systematically in connection with national constitutional law.[17] In the latest standard work on Norwegian constitutional law, Eivind Smith's *Konstitusjonelt demokrati* (2009), a rather critical adherence to the

[16] *Castberg*, Norges statsforfatning II (1964), pp. 346–359.

[17] Article 15 was first thoroughly examined by Ola Rambjør Heide in 1998, see *Rambjør Heide, Ola*: Konstitusjonell nødrett (1998).

doctrine of constitutional necessity is formulated, and Smith is sceptical to its status as constitutional customary law, mainly because of the modest state practice.[18] While the understanding of the constitutional principle of necessity and its constitutional function during the immediate post-war period was likely more expansive, it seems that in recent decades the tendency is reversed. The effect since the 1980s of a stronger liberal constitutionalism and a new inclination to reflect on human rights has undoubtedly played a significant role.

It is pertinent at this point to highlight Jørgen Aall and Eirik Holmøyvik's proposal of 2010 to introduce a wider catalogue of human rights into the Norwegian Constitution.[19] The two argued for this in part because the Constitution's catalogue, which dates for the most part from 1814, is clearly insufficient by today's standards. This is partly because the law of incorporating the ECHR only binds the court, not the legislator. Beneath the proposal lies an open anxiety about what might happen to human rights in Norway in the event of crises that would put the Constitution's normal procedures out of function. It does not require 'much imagination to envision a situation where the legislator feels forced to create laws that violate the more basic human rights under the ECHR, such as the prohibition against inhuman treatment in Article 3 or the protection against limitation of liberty in Article 5'.[20] They were in addition concerned about the duality of the state of emergency. In part, one must elevate human rights to a constitutional level to protect citizens against any possible misuse by the legislator of states of emergency, and in part a constitutional system must accept that there is a legitimate distinction between a normal state and a state of emergency.

This contradiction of interests is resolved in Aall and Holmøyvik's proposal to establish a written constitutional rule on state of emergency, building further on Article 15 of the ECHR. The structure is that of a liberal constitutional government's understanding of the relationship between a constitution and derogation of rights: (1) The Constitution may be temporarily waived by a state of emergency, (2) the state of emergency is defined as an 'imminent and exceptional emergency that threatens the organisation of society or the normal exercise of power'; (3) there are requirements for proportionality between the situation and the measures; (4) certain rights

[18] See *Smith, Eivind*: Konstitusjonelt demokrati (2009), pp. 340–342.

[19] *Holmøyvik, Eirik – Aall, Jørgen*: Grunnlovsfesting av menneskerettane. Tidsskrift for Rettsvtenskap 2010, pp, 327–374, for the following pp. 362 sq.

[20] *Holmøyvik – Aall* 2010, p. 337.

can never be waived; (5) any dispute arising as a result of derogation can be tried by civilian courts; (6) the government passes derogation, but requires parliamentary approval for three months at a time, after nine months it requires a two-thirds majority.

The proposal was meant to introduce a general derogation sanction for the entire Constitution. Contrary to the constitutional principle of necessity in the form of Castberg, distinct limitations were proposed and – particularly interesting – a requirement for the consent of *Stortinget*. Thus, Norwegian constitutional state of emergency would become more in line with that of other European constitutions.

5 EPILOGUE: THE ROLE OF STATE OF EMERGENCY IN NORWEGIAN CONSTITUTIONAL LAW, ANNO 2014

A notorious terrorist attack took place in Norway on July 22, 2011. For a few minutes after the explosion at the government building in Oslo, the extent and scale of the attack was unclear: what kind of attack had actually been directed against the centre of Norwegian government? At that moment, the constitutional principle of necessity transpired, which immediately gave the Norwegian authorities the competence to exercise an extraordinary authority, since the authority of constitutional necessity arises *ipso jure*, without prior approval. As soon as one realises that the actual situation does not satisfy the requirements for constitutional necessity, however, that authority ceases. This was the case on the 22nd of July, since the authorities quickly realised that the situation was limited, that the government was not in a control crisis. This may be the reason why the government has not applied the term constitutional necessity to the situation that arose on July 22.[21] On the other hand, words such as 'crisis' and 'attack' were common, and the King used the phrase 'state of emergency' in his speech on August 21.[22] In the Human Rights Commission's report published a few months later on December 19, the government's handling of the terrorist act became an expression of the close relationship that seems to exist between nation and Constitution:

[21] Rapport fra 22. juli-kommisjonen [Report from the July 22 Commission]. NOU 2012:14, pp. 224–225.

[22] H.M. Kongens tale ved den nasjonale minnemarkeringen for 22. juli 2011. Oslo Spektrum, 21. august 2011. – http://www.nrk.no/nyheter/norge/1.7758237.

> 'In order for the Constitution and constitutional customary law to be set aside, the country must be thrown into a crisis, which seriously threatens a greater part of the population, the basic structures of society or the kingdom's existence. The political and popular handling of the terrorist attacks of July 22, 2011 also shows that the nation is capable of dealing with deeply tragic and shocking experiences without jeopardising the Constitution'.[23]

The July 22 attack is part of the contemporary international history's thematic structures on terror and state of emergency. The impact of international debate on state of emergency after 9/11 2001 has shaped the attention of Norwegian authorities on the topic. As already stated, the expression 'state of emergency' is not to be found in Norwegian legal sources or legal literature as a legal concept, but it is nevertheless in more frequent use.

The Human Rights Commission's report of December 19 2011 has proposed a new constitutional amendment regarding state of emergency, anchoring it in the constitutional text.[24] To this end, the Commission tabled the proposal for an exclusionary provision (derogation), which only applies to the catalogue of human rights, not other parts of the Constitution, which will continue to be governed by the principle of constitutional necessity. Thus, Castberg's invention prevails in Norwegian constitutional law, with the possible exception of the new derogation clause concerning human rights.

[23] Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven. Dokument 16 (2011–2012) [Report from the Human Right Committee], p. 92.

[24] Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven. Dokument 16 (2011–2012), pp. 90–98.