INTRODUCTION – NORDIC RELUCTANCE TOWARDS JUDICIAL REVIEW UNDER SIEGE

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A. INTRODUCTION

Is the judicial review in accordance with our democratic sensibilities? In a Nordic context this is a question that has caused much public consternation in all five countries in recent years, most likely because you find courts and constitutionalism appearing almost everywhere you look and because judicial power seems to continue to increase. Not only has the European Court of Justice cemented its powers with the EU’s enlargement and with EU legislation on the rise and becoming increasingly open to interpretation; the Strasbourg court and other international dispute-settlement bodies have also become more powerful. In the Nordic countries, judicial review has generated a wide debate not only among specialists but equally among the wider public. Consider the following examples.

Danes are increasingly worried by the prospect of the ever expanding legal interpretations by the European Court of Justice (ECJ), challenging their strict immigration policy. In a few recent judgements the ECJ has interpreted the EU’s residence directive in favour of European freedom of movement, forcing Denmark to grant residence to non-approved asylum seekers married to EU citizens.

Swedes have equally debated the constraints imposed by the ECJ on attempts by labour unions to force foreign companies to sign collective agreements when operating in Sweden (Laval). Proposed changes to judicial review by an expert group for the Committee on Constitutional Reform have also been the subject of lively debates.

In Norway, a recent ‘Power and Democracy Study’ worried about international conventions which served to undermine and emasculate popular rule. Proposals to incorporate the

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1 “Unions fear ECJ ruling in Laval case could lead to social dumping” (http://www.eurofound.europa.eu/eiro/2008/01/articles/lu08010191i.htm) (accessed 1 June 2009).
2 SOU 2007:85: “Olika former av normkontroll”.
3 NOU 2003:19: “Makt- og demokratiutredningen”.

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Convention against Discrimination against Women (CEDAW) with legal standing above ordinary law in the Human Rights Act have met with strong criticism.

In Iceland, the public debated the legitimacy of judicial review after incorporating a new bill of rights into the constitution in 1995, and then after incorporating the EEA agreement. However, judicial review does not seem to cause as much dissent in Iceland as in the other Nordic states.

In Finland, the empowerment of courts and the adjudication of politics has proceeded rapidly in recent years, particularly after judicial review of legislation by courts was considered directly illegal until the constitutional change of 2000.4

Of central concern in this special issue however is the effect on the Nordic countries and what we refer to as European Judicial Review: review of domestic legislative acts on the basis of the European Convention on Human Rights and the European Union Treaties, on the basis of judgments by the European Court on Human Rights (ECtHR) and the European Court of Justice (ECJ). Constitutional and judicial review covers several other topics, and the two courts pose several further important challenges beyond our current concern, i.e. the normative legitimacy of European Judicial Review and the way judicial review by courts has been received in the Nordic democracies.

The Nordic states are normally considered to be well functioning, homogenous and stable democracies. They are anti-hierarchical welfare states uncomfortable with rigorous judicial review by courts. Accordingly, controversial and dynamic legal interpretations of vague European treaties and legislation by foreign judges are bound to fan the flames of debate. One of the questions most frequently asked is whether European judicial review can be justified.

Like other key mechanisms of legal harmonization in Europe, European judicial review also merits research as a symptom and cause of the reconfiguration of a world order of sovereign states as they move ever closer to a complex, multi-level political and legal regional and global order with fragmented sovereignty; indeed, we seem forced to reconsider traditional conceptions of ‘sovereignty’ and ‘democracy’. Understanding and assessing the variety of impacts of European Judicial Review on national institutions might also shed light on the normative legitimacy of these larger shifts.

B. SOME DISTINCTIONS

One may distinguish between constitutional review in general, and judicial review. The former may be done by various bodies, including parliamentary committees and specialized courts. The latter is performed by ordinary and specialized courts. Among reviews, it is again helpful to distinguish between the review of legislative acts and that of administrative acts and court decisions. As will be apparent, there are important differences between ex ante review of proposed legislation in the abstract, and ex post review of applications of the law in practice. The main focus of the contributions here is on judicial review of legislative acts, prima-

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rily ex-post though other forms of review are often described and assessed when relevant. We chose this focus because judicial review of legislative acts poses the gravest concerns. Critics find the procedures and results undemocratic and illegitimate.

In particular, review by domestic bodies ultimately accountable to parliament, such as parliamentary committees or ombudsmen, are not ‘undemocratic’ in the sense we are concerned with here. Nor can they be categorized as review bodies in the sense understood here.

The relative power of the legislature and courts is affected by at least three other not unrelated changes that merit normative scrutiny. Due to the international development and the increasing power of judicial bodies the Nordics are forced to shift their focus when it comes to sources of law. Judges increasingly substitute wider international perspectives, to which international and foreign sources of law are central, for the purely national legal perspective. They are also forced to pay less attention to travaux préparatoires, and thus give more weight to case law and teleological interpretations since this is prevailing procedure in international courts and many European constitutional courts. These trends tend to reduce the significance of the will of the legislature, and increase the weight of and the discretion given to the judgments of the judiciary.

A second development stems from the peculiar legal structure of the European Union, which affects not only the national supreme courts, but brings all domestic courts into direct relationship with the ECJ through the preliminary reference mechanism (art. 234). It introduces de facto judicial review of national legislation (and implementation) by national and supranational courts in unison and thus enhances the power of the judiciary. It challenges the classical vision of ‘no one over or above parliament’ which is well known not only in most Nordic countries but equally in Great Britain. As international and national judicial oversight widens its ambit, the role of an emerging multi-level – ‘vertical’ – network of judges is enhanced, stimulating processes of ‘judicial cross-fertilization’, as Joseph Weiler has observed. Networking by judges and other elites might, however, help redress the democratic deficit of globalisation: it offers one way for national governments to regain regulatory control. Others warn of the lack of accountability coupled with coercive power enjoyed by these networks, of which the European Union may be a good case.

There are at least two aspects of domestic and European judicial review that are of interest as we set out to understand and gauge how reluctant the Nordics feel about these phenomena. First, we may ask whether judicial review is practised in a given country and how we can see it when we find it. Does the country’s constitution allow for such review? Does it occur often enough for a pattern to emerge and expectations among parliamentarians and judges to form?

Another important distinction to make in comparing and assessing various forms of judicial review concerns its effects. Strong judicial review may make a piece of legislation inapplicable and even invalid. A court may even replace it. Weak judicial review, on the other hand, does not directly affect the validity or applicability of the law in the internal legal order, but it does give notice if the law is judged to be incompatible with treaty obligations.

Of course, these two European courts are different in function and impact. They represent judicial review in two different roles, both of which gain influence under Europeanisation, and both of which have met with resistance in the Nordic countries and elsewhere. One important role of judicial review found in most states is to maintain the constitutional division of power and protect individual rights against encroachment by the legislature. Generally, review seeks to protect the interests of citizens against abuse of power by the state. In federal and quasi-federal arrangements, however, a court serves a different role: to secure implementation of central decisions within each subunit, and to settle conflicts concerning competence allocation among the subunits and the central authorities. To this comes of course the almost daily task of settling conflicting interpretations of federal laws. This mechanism is justified largely by the interests of those outside the sub-unit itself, by alleviating fears of free riders. In several ways the ECtHR and the ECJ exemplify these two functions. Other relevant differences include how the EU, but not the ECHR, empowers all domestic courts to perform European judicial review.

C. THE CONTRIBUTIONS TO THIS SPECIAL ISSUE

The various contributions in this special issue serve to highlight the long, complex, and sometimes shared origin of the Nordic countries’ reluctance to embrace judicial review. European judicial review not only fans these old concerns, it may also hasten profound social, political and legal changes in these societies. The present special issue addresses these tensions, past, present and future.

A NOTE ON CONTESTED TERMS

The remainder of this introduction provides a brief overview of some of the more prevalent explanations for Nordic resistance to judicial review, and concludes with some changes in the Nordic communities, often tied to Europeanisation or globalisation, likely to affect the level and forms of resistance to judicial review. But a cautionary note is in order concerning the challenges of multi-disciplinarity and the use of common terms. Even a charitable reader could be confused by the use of central terms in such a multi-disciplinary endeavour. In particular, it may be appropriate to keep in mind that ‘democracy,’ ‘majoritarian democracy’, ‘rule of law’ or ‘constitutionalism’ come close to being ‘essentially contested concepts,’ in Gallie’s original sense: they are explicated in interestingly different ways as part of often competing theories; thus their ‘proper’ use is in part a matter of what the theory seeks to illuminate. A modest hope is that the different uses of these terms by this set of distinguished authors indeed lives up to Gallie’s expectations of “a marked raising of the level of quality of arguments in the disputes of the contestant parties”.

To enhance consistency across the contributions we might have been well advised to harmonize terminology. However, that would also hinder comprehension by others in each aca-

8 Gaillie (1956) 193.
demic community, be it law, political science or democratic theory. Since the latter audiences are equally important, we have chosen to not impose a common set of terms, beyond ‘European judicial review.’ Instead, each author takes unusual care to define their use of these central terms.

PART 1: STATUS PRESENS

Part 1 lays out the current national practices and debates about European judicial review in the Nordic countries. It includes reports and reflections from all Nordic countries on the historical backdrop and some of the salient legal cases. Some contributors explore recent political conflicts over European judicial review in parts of the Nordic countries.

Participants of public debates in the Nordics have tended to conflate legitimacy and majoritarian parliamentarianism. Parliament is seen as the site of legitimacy, as the privileged arena for the expression of the general will. The constitutions and constitutional conventions allow significant parliamentary discretion. This does not mean that there are no constraints on legislation at all, but it is for the parliaments themselves to decide whether legislation is within the bounds of the constitution. It marked a significant shift from earlier constitutional practice in Norway, for instance, the first country in Europe to acknowledge judicial review. In Sweden and Finland, the judiciary may still only intervene if legislation is in ‘obvious violation’ of the constitution. As the contributors to Part 1 make clear, the extent and form of judicial review, and resistance thereto, vary across the five countries, likewise the causes and forms taken by this sense of reluctance.

Joakim Nergelius reviews current legal status, salient cases, and some contemplated changes in Sweden. Sten Schaumburg-Müller accounts for the legal situation in Denmark and explores important cases. Toumas Ojanen presents the Finnish situation and Ragnhildur Helgadóttir pursues some of the most important cases to reach the courts in Iceland. Inger-Johanne discusses some of the salient issues in the Norwegian setting.

All five Nordic states have the *de jure* weak judicial review, but not all have a tradition of *judicial censure*: the number of cases has been low, at least until the European judicial review began proliferating.

VARIATIONS AND PUZZLES

The Nordic comparison shows that even though all the Nordic countries have long had some form of *de jure* judicial review, at least as a legal possibility if not in actual practice, they differ on important points. Any sound explanatory theory should seek to account for them. We review them here in succession.

HOW ARE THE EUROPEAN TREATIES TRANSFORMED INTO DOMESTIC LAW?

The Nordic states vary significantly in how they incorporate the treaties; in Norway some but not all human rights treaties have precedence over ordinary legislation. Most Nordic countries

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have a dualist legal order, however, and international law must therefore be transformed into national law to have legal effect.

**WHICH ISSUES RIGHTS?**
The domain of domestic laws subject to judicial review also varies across jurisdictions. It might be limited to rights held to be necessary components of or preconditions for a functioning democracy: political rights, freedom of organisation and speech, and possibly certain minimum survival rights to secure basic needs etc.

A wider list of rights would include such historically well-established rights such as religious freedom and components of rule of law. An even more ambitious list would include many cultural, social and economic rights, whose content and tradeoffs are often seen as more properly the task of democratically accountable representatives.

Finally, European judicial review often cuts across these distinctions, since the rights and directives may pertain to gender equality or non-discrimination, with implications even for the level of social security payments.

**WHAT IMPACT?**
All Nordic states today have a formal right to judicial review - i.e. some role for courts in checking parliaments. But none of them have the ‘strong’ powers of review by which a court can replace one piece of legislation with another, as enjoyed by US Supreme Court. In some countries the domestic courts refer only sparingly to European treaties when domestic laws are sufficient, and only in some jurisdictions do courts refer additionally to European case law.

**DO COUNTRIES CONSIDER INTERNATIONAL JUDICIAL REVIEW TO BE MORE PROBLEMATIC THAN DOMESTIC?**
In some jurisdictions the opposition may focus on worries about the supremacy of the legislature challenged by the judiciary, while in others it is the fear of national decisions being overruled by review. When national supreme courts find legislation to contravene the constitution, or European treaties, the reactions can vary depending on the country. Likewise, supreme courts in some countries may cite domestic or European sources in situations where both might be appropriate.

**PART 2: EXPLANATORY STRATEGIES AND NORMATIVE ASSESSMENTS OF RELUCTANCE TO EUROPEAN JUDICIAL REVIEW**
That countries are reluctant to embrace European judicial review and remain sceptical is neither new, nor exclusive to the Nordic countries - witness similar wariness in the UK leading up to the adoption of the Human Rights Act when the preliminary ruling procedure and British courts were scrutinized. Yet certain attributes of Nordic societies and states are often thought to inspire even greater reluctance about judicial review.

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There are at least seven clusters of hypotheses purporting to explain opposition to judicial review among politicians, the public, and government administrations that merit exploration. The first two may also be in flux, which makes explaining current shifts even more challenging. We examine the last four in more detail in this special issue.

UNITARY SELF-PERCEPTIONS
At least at first glance, the Nordic countries are close to the ideal-type of the unitary nation-state. This is not completely accurate - Greenland and the Faroe Islands are self-governing administrative divisions of Denmark. The Swedish-speaking minority in Finland, including inhabitants of Åland island, enjoy extensive self-rule, particularly regarding Swedish language and culture. Such details notwithstanding, the lack of a federal structure means there has never been a need for courts to settle conflicts over the competences of a sub-unit vis-à-vis central legislative bodies. To this comes the centralised form of government that lends credence to the view that parliament is the institutional embodiment of the ‘common will’ - unlike any parliament can be assumed to be in a federal state. Europeanisation in the form of EU membership has challenged the very foundation of this unitary conception, not least as the EU becomes increasingly federal.

PERCEPTIONS OF THE HOMOGENOUS NORDIC POPULATION
The Nordic countries have also had a self perception as ethnically and culturally homogenous populations, largely belonging to Lutheran state churches. This self-understanding may have reduced the perceived salience of deep conflicts between a majority and minorities. Of course, such political and cultural homogeneity is a misnomer. For instance, the Sámi people in Finland, Norway and Sweden have suffered from governments’ forced assimilatory policies, and have more recently claimed legal status as an indigenous people. Recent more visible immigrants, partly due to Europeanisation, make this description more obviously flawed. The prevalence of communitarian narratives of the Nordic nation states as culturally homogenous and normatively upright, egalitarian peoples with a strong emphasis on the value of grass-root movements and participatory democracy may help explain reluctance toward the elitist power of the (unelected) judiciary implied in judicial review in general. On top of this comes a strong scepticism toward international influence in particular – as by European courts staffed largely by foreigners.

NATIONALISM
While the horrors of World War II led many European countries to realise the necessity of constraining and checking the legislative branch to prevent the commission of future atrocities in the name of the ‘nation’, the Nordic peoples emerged with their national patriotism relatively unscathed. If anything, their experiences underscored the illegitimacy of foreign interference with the popular will.

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These three features may help explain the remarkable conflation of state and society in several of the Nordic states. In terms of political theory its strengths and weaknesses are discussed under the heading of ‘communitarianism’. It is typically coupled with a suspicion of individual rights, a privileging of the interests of ‘the’ (monolithic) community together with an overwhelming trust in the state. –All of which may account for the resistance to judicial review. In this special issue Uffe Jakobsen explores some of these elements.

EGALITARIAN WELFARE STATE REGIMES

By many standards the Nordic countries form an egalitarianist cluster with similar modes of public welfare provision. Norway, Sweden, Finland and Denmark are among the five countries with best scores in the UNDP Human Poverty Index, and they score low on standard poverty and inequality measures.12 The Nordic states tend to have both extensive public provision with egalitarian effects, and egalitarian income distribution. They are often said to subscribe to a ’Nordic welfare state model’, which the social scientists Walter Korpi and Gøsta Esping-Andersen call ‘social democratic’.13 Government policies seek more egalitarian ends than those of other welfare states, and tend to provide a high standard of universal coverage. While the Nordic countries are largely social democratic in this sense14, the categories are contested.15 Indeed, some regard it a mistake to speak of a Nordic model at all.16

What brought this welfare state regime into being remains17 a disputed topic, but scholars often point to long traditions of social democratic party dominance and corporatist arrangements between state, capital and labour. This heritage may help explain the relative robust nature of, and support for, welfare institutions even under economic downturns and liberal/conservative governments.

12 Such as ca 7 % of the population with less than 50% of median income; and on the share of income received by the richest versus the poorest 20% of the populations. Cf. UNDP - United Nations Development Programme Human Development Yearbook: Table 5 (New York 2000). Data on Iceland are not provided, nor are they easily found in the Luxembourg income and poverty studies.


14 Though Finland and Iceland do not fit neatly into this category, which also includes the Netherlands.


17 Though the Netherlands, Finland and Iceland do not fit this pattern. See Mjøset (1992) fn 16 for presentation and critique of attempts at identifying a Nordic model.
PARTICIPATORY, MAJORITARIAN DEMOCRACY: THE WESTMINSTER MODEL
Many of the Nordic states have had democratic traditions with inclusive or participatory elements that foster negotiation and compromise. In particular, the prevalence of minority governments and corporatist elements have encouraged the inclusion and co-opting of veto players. The result is a culture of policy making that aims for consensus, or at least tacit public acceptance of policies, of the people’s representatives and organizations. One effect is to internalize and domesticate many political conflicts; another may have been to foster a belief in the legislature’s ability to cater already to all legitimate concerns through mechanisms of hearings and participation. To have these negotiated pieces of legislation challenged by a court whose democratic credentials are unclear, has often appeared unnecessary at best, and contrary to the ‘popular will’ at worst. Palle Svenson explores some of the salient definitions of democracy, to help specify this hypothesis. Marlene Wind and Mats Lundström explore ‘democracy’ hypotheses further in their contributions.

NOT THE WESTMINSTER MODEL, BUT THE ‘YES, MINISTER’ MODEL
A detailed analysis of some of the resistance to European judicial review reveals its origin not in the public at large, nor politicians, but in the state administration. Eager to protect national sovereignty, political opportunity and space for elected, accountable governments and politicians, they seek to prevent domination by foreign judges. Marlene Wind describes its practice in Denmark and shows the reluctance of national judges to turn to international courts because they are unfamiliar with judicial review at the national level. They also dislike the risk that legislation adopted by a democratically elected majority could be overturned by an international judicial body.

SCANDINAVIAN LEGAL REALISM
Hägerström (1868-1939) founded with his devoted disciple Vilhelm Lundstedt (1882-1955) the ‘Uppsala School’ that came to enjoy great influence in Scandinavia.18 From it emerged the tradition in legal philosophy that has come to be known as Scandinavian legal realism.19 Hägerström maintained a version of moral non-cognitivism, rejecting the possibility of moral facts and instead endorsing ethical emotivism. His views influenced the Swedish legal scholar Karl Olivecrona (1897-1980) and, in Denmark, Alf Ross (1899–1979).20 Scandinavian legal realism rejected speculations over the metaphysical nature of law, rejected natural law, and held that the only meaningful content of law is that which can be verified. This was not to deny the need for politics and values, but that values could be the subject of scholarly arguments. One effect was to steer legal scholars away from open debates about political issues,

18 Finland was not influenced much, instead following German traditions.
placing such topics squarely within the domain of legislatures. Judicial review would therefore seem completely misguided, both reminiscent of natural law and a violation of the structure of professional. Both Mats Lundström and Marlene discuss Scandinavian legal realism, the plausibility of perceiving it as a unique Nordic legal tradition, located somewhere in between Continental and common law, and its causal impact.

IS EUROPEAN JUDICIAL REVIEW UNDEMOCRATIC AND ILLEGITIMATE?

Follesdal starts on the task of assessing the normative qualms raised by judicial review on the basis of democratic theory. He lays out some of the normatively salient features of the ECtHR, and argues that many, if not all of the concerns are misplaced, due to the way that court works.

D. CONCLUSION: RESEARCH CHALLENGES

The concluding section of this special issue will identify questions requiring further research study designs to emerge as a result of the volume’s general discussions and explanatory sketches. We points out there the necessity of assessing hypotheses on the emergence of present forms of judicial review, how to explore the option space, and how to test explanations of emerging Nordic responses to European Judicial Review.

Consider some of the complex research challenges. First, any observed changes in practices and attitudes toward judicial review in the Nordic countries could be due in part to judicial Europeanisation and partly to the federal elements of the European Union. Both stand in stark contrast to the unitary traditions of the Nordic countries. Are the Nordic democracies, and their largely majoritarian principles, destined to become constitutional democracies? Several things - also explored in this special issue – suggest an answer in the affirmative. It would be interesting to take a closer look at the judicial behaviour of Nordic courts and judges. Are cases increasingly submitted to supranational judicial bodies? Are national politicians gradually coming round to the idea that courts can - and sometimes should - exercise powers of judicial review and set aside what a majority in parliament has democratically decided? Or will we, on the contrary, see a succession of ‘Metoc cases’ for years to come, and cry out against international judicial bodies?

There is an urgent need for international judicial dispute settlement-systems. When twenty-seven members of the Union legislate together, they have to compromise. Legislation achieved through accommodation is often unclear and in need of judicial re-interpretation. One of the interesting issues meriting study is the degree to which EU enlargement increases the demand for judicial dispute settlement. Does enlargement per definition result in sloppier, unclear lawmaking? If so, will it automatically increase the juridification of politics?

Looking specifically at the Nordic states, the clusters of hypotheses and explanations have changed in other ways, often because of Europeanisation or globalisation. Importantly,
what is said to characterise the Nordic countries is changing. Increased awareness of ethnic and cultural heterogeneity within states has led to tensions and political debates over multiculturalism. Labour migration within the EU, combined with immigrants and asylum seekers from non-Western states, have changed the ethnic and cultural balance and character of the Nordic countries - particularly in urban areas. The ensuing policy challenges have wrought political conflicts and crises in several Nordic countries. This may mean the beginning of the end of perceptions of Nordic homogeneity, and could lead to increased demand for judicial review. Indigenous people’s demand for self-rule, clearly visible ethnic minorities and a changing political order in Europe require publics to reflect over the moral right of a majority to make decisions that affect minorities, and about the minorities’ need for protection.

Fourth, popular democratic theory may be changing, with a greater awareness of the need to regulate and constrain the legislature. Parliamentary supremacy is under siege, generating perhaps more concern for constitutional elements. This may partly be due to the emergence of democratic accountability mechanisms also at the European Union level, and partly to the increased attention to multiculturalism. The fact that judicial review and constitutional democracy have been seen as part and parcel of democratic rule in all those countries where dictatorships were replaced by democracies in Europe is a case in point. We know these countries have chosen judicial review, and limited government rather than the type of parliamentary supremacy and unconstrained government we know from the Nordic countries and Great Britain in particular, but we do not know why this has happened. Is it pressure from Brussels (Europeanisation push) or is it much more due to past experience (the pull factor) where all encroaching political systems saw no limits to their powers? We urgently need research-based answers to these questions.

Fifth, legal and constitutional culture also evolves, for at least two reasons. First, the role of parliament is being rethought, not only because of European integration. Iceland included human rights in the constitution in 1994-95 and the new Finnish constitution now includes a broad range of economic and social rights and judicial review, which before 2000 used to be strictly forbidden (see this issue for a description of both cases). Moreover, the legal and constitutional ties to the Continent foisted upon the Nordic countries by European integration, along with much scholarly interaction with the US, confront the Scandinavian legal realist tradition with other conceptions of constitutions and democracy. These competing legal theories include the widespread existence and acceptance of constitutional courts, a less hostile attitude to various forms of natural law, different attitudes towards the importance of travaux préparatoires in the interpretation of rules and regulations, and a shift towards ‘dynamic’ interpretation.

All in all, there are doubtless several reasons why attitudes towards judicial review have been changing in the Nordic countries. Only careful scrutiny of the paths, shared norms, values and beliefs that have led them to their present procedures, can help us to adjust to present and future challenges while remaining loyal to those norms and values that are worth keeping.

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23 cf. Smith fn. 10, 284-85; Arnason fn. 17.