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The Use of Preparatory Works as a Source of Law in the Norwegian Legal System

Arnulf Tverberg*

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* Deputy Director General , The Norwegian Ministry of Justice and Public Security

I. Introduction

1. Overview

In Norway, legislation from the Parliament ("Stortinget") forms the backbone of the legal system, and legislation has for a very long time served as a vehicle for legal reform and social progress, with an active legislator. Norwegian courts have a very long standing tradition for using the *preparatory works (travaux preparatoires) as a source of law* when interpreting this parliamentary legislation. Even if the preparatory works do not by themselves have the force of binding law, they have a special kind of authority as an important tool to understand the intention of the legislator.

After a short historical introduction (II), I will try to see the special significance of preparatory works of parliamentary legislation in connection with certain characteristics of the Norwegian society in general as well as the Norwegian legal system (III and IV).

The status of preparatory works as a "source of law" must be seen in connection with the open system of what can be recognized as a source of law in the Norwegian system (V). The role of preparatory works as a source of law is impossible to understanding without knowing some of the features of the Norwegian legislative process. I will therefore describe the most important preparatory works, their typical content and how they play a vital role as documents leading up to the adoption of the parliamentary legislation (VI).

Relying on preparatory works to the extent one does in the Norwegian system might seem counterintuitive to persons who have their training in other legal systems. It is therefore important to know the possible justifications for today's practice (VII), and also to give some more specific indications as to how the courts take preparatory works into account when interpreting parliamentary legislation

(VIII). In this connection I will also show how the preparatory works, as a kind of soft law, fosters interplay and dialogue between the legislator and the courts. Some challenges to the traditional approach to the use of preparatory works are discussed, particularly as a result of international influence (IX). These sections of the article might be of particularly relevance when in the end I ask whether there is a potential for a more extensive use of preparatory works as a source of law also in other systems (X).

2. The Nordic perspective

I will focus on the Norwegian legal system. However, giving weight to the preparatory works is a *Nordic* tradition. For instance, the legal writer Niels Fenger sums up the position in Danish law like this:[1)]

"In recent Danish legal literature it is assumed, and quite rightly so, that preparatory works in a wide sense is the practically most important source of law after the text of the legislation itself."

Similar statements can be found regarding the status of preparatory works also in the Swedish legal system.[2)] In Finland, the role of the preparatory works is said to play a considerable less prominent role than in Sweden (and thus the other Nordic countries as well).[3)]

The Nordic tradition can, at least in part, be traced back to the systematic co-operation over long time – from 1872 – between the Scandinavian, and later on all the Nordic, countries in preparing legislative reforms or codifications in important fields such as the law of contracts, maritime law and family law. Even if the co-operation today is somewhat in decline, it has had a lasting impact on

1) Niels Fenger, Forvaltning & fællesskab, Jurist- og økonomforbundets forlag (2004) at 524.
2) See, for instance, *Id*. at 528.
3) Allan Rosas, Tolknings- och tillämpningsproblem i mötet mellan nordisk och international juridisk metod, Forhandlingerne ved det 37. nordiske juristmøde, Reykjavik 18.–20. august 2005, Volume I, 319-345 at 336.

the way legislation is prepared and drafted.

3. Manifestations in practice

The prominent place of the preparatory works is manifested in various ways: by the way the courts actually apply them in their legal reasoning, by the way administrative agencies rely heavily on them in their day to day work and in the way their role is presented in leading textbooks on legal methodology. For instance, in the textbook on practical legal methodology that has been the dominant for generations of Norwegian law students, the chapter on "preparatory works" is given at very prominent place.[4)]

A thorough documentation of the role of the preparatory works in practice is found in an academic thesis of almost 1000 pages, printed in 2002, named «The Supreme Court's use of preparatory works».[5)] That book contains an in-depth presentation of how the Norwegian Supreme Court actually has used the preparatory works as a means of interpretation in its case law, particularly in the period 1967–1999.

II. Historical background

Today there is a clear distinction between the legislation itself and its motives in the form of preparatory works. This hasn't always been the case. Under the autocratic rule in the Danish-Norwegian state until 1814, the motives or reasons leading up to the legislation were an expression of the supreme will of the monarch as good as the legislation itself.[6)] In this respect, the royal decrees from before 1814 have similarities with for instance EU legislation and some international treaties, as their preambles serve a similar function.

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4) Torstein Eckhoff, Rettskildelære, Universitetsforlaget, 5th ed. by Jan E. Helgesen (2001), Chapter 3.
5) Knut Bergo, Høyesteretts forarbeidsbruk, Cappelen Akademisk forlag (2002).
6) Jon Vislie, Lovmotivers betydning for lovfortolkningen, Olaf Norlis forlag (1932) at 38.

There has for a long time been a consciousness among legal scholars about the potential of preparatory works used as a tool of interpreting parliamentary legislation. In his Commentary on the new Criminal Code of 1842, Professor A.M. Schweigaard dedicated several pages to the subject of how the preparatory works could shed light on the meaning of the adopted legislation. [7] He undoubtedly attributed a certain normative force to the preparatory works. Schweigaard himself was the driving force in the production of the preparatory works of this Code.

Also the courts made use of preparatory works throughout the 19th century. They early on found useful information in the preparatory works. It is less clear when the courts went from looking at the preparatory works as merely a source of information to also looking at them as a source of law. This must be seen in connection with the fact that there was at the time no conceptual framework that allowed preparatory works to be looked at as a source of law. The courts might in any case de facto have given the preparatory works status as a source of law.

The fact that important pieces of legislation in the 19th century were prepared by outstanding jurists, have probably contributed to the high quality of preparatory works from the start, and also their high status. This has made it easier to accept the preparatory works as a source of law. The same jurists afterwards wrote law commentaries or other literature, and naturally took advantage of the preparatory works when expressing their view on what was the law.

In any case, it was only in the 20th century that the courts developed a more systematic approach to the use of preparatory works as a source of law.[8] This development runs parallel to the strengthening of the Norwegian Parliament in the same period and the development of parliamentary legislation as a much-used tool of social engineering. The status of preparatory works has developed gradually through the courts' acceptance and active use of them, without there being one

7) Anton Martin Schweigaard, Commentar over Den norske Criminallov, published by Johan Dahl, (1st ed. Volume 1) (1844), at 116–123, particularly 122–123.

8) Torstein Eckhoff, Rettskildelære, Universitetsforlaget, 5th ed. by Jan E. Helgesen (2001) at 149.

moment in time authorizing this practice. Rather, one could talk about organic growth.

III. Some observations on the Norwegian society and legal system

1. Trust, transparency and homogeneity

A keyword to understand the Norwegian society – including the legal system – is *"trust"*. This can be substantiated by OECD surveys.[9] In Norway, 88 per cent of the people asked express high level of trust in others.[10] The figure for Korea is 46 percent, quite similar to USA (49 per cent), and the OECD average is 59 per cent.

In Norway, there is a relatively high degree of trust between the Government and the public. There is also a relatively high degree of trust between the various branches of Government. This is true for the relationship between the Parliament and the Executive Branch led by the Prime Minister and her cabinet of ministers. This is also true for the relationship between the legislator, primarily the Parliament, and the courts.

Without such a level of trust it would probably be more difficult to have the division of tasks between the executive branch and the Parliament that exists today (III.C below). Furthermore, the style of drafting legislation (see IV.B below) would be different, and it would in any case be more difficult to leave to courts the wide discretion that they enjoy today (see III.E below). These are all preconditions for today's system of preparatory works as a source of law. Thus, the value of trust

9) Society at a glance 2011: OECD social indicators, OECD (2011) at 91. (The report is also available online at www.oecd.org)

10) The figures for Denmark, Sweden and Finland are similar, ranging from 84 per cent (Sweden) to 89 per cent (Denmark) (*Id.* at 91).

cannot be underestimated when it comes to the functioning of preparatory works in the Norwegian legal system.

There is an also great deal of *transparency* in how the government in Norway operates. In Transparency International's Corruption Perceptions Index of 2014, Norway ranks as no. 5 out of 175 listed countries, beaten only by Sweden, Finland, New Zealand and Denmark.[11] In this index the countries are scored on how corrupt their public sectors are seen to be.

In general, the public including the media have relatively wide rights of access to the case documents of the Government, primarily due to the 2006 Freedom of Information Act. The various preparatory works, as well as the process of public consultation (see VI below) contribute to a relatively transparent legislative process. As a very broad generalization, it is probably also correct to say that the Norwegian society is quite *homogenous*. This is not least the case for key players in the legal community. This facilitates a common understanding and trust in each other, and makes it possible with flexibility in various respects.

2. The prominent position of Parliament

Norway is a stable constitutional democracy that has developed step by step since the adoption of the Constitution of 1814.[12] This Constitution is still in force (being the second oldest in the world). Over the lifespan of the Constitution of 1814, there has been a relatively harmonious development of the system of government and of law. This development has led to the present day situation, with robust legal institutions, a high degree of interplay between them, as well as the present legal methodology where the preparatory works play an important role.

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11) Transparency International's Corruption Perceptions Index for 2014 (available online at www.transparency.org)

12) The Norwegian Constitution is avaiable in English: https://www.stortinget.no/globalassets/pdf/constitutionenglish.pdf

The Constitution of 1814 was based on a system of separation of powers. But the Constitution of 1814 had also a relatively strong emphasis on the idea of popular sovereignty, resulting in the development into a *parliamentary* system of Government in the late 19th century. This system is now part of the written Constitution, most clearly expressed in Section15. Even though the King formally speaking is head of state, his role is described as a ceremonial one. The government is led by a Prime Minister, and today the Cabinet in addition consists of 18 ministers.

The Norwegian Parliament had from the outset the potential to play an important role in developing the law. This potential was taken into use particularly since the second half of the 19th Century, the result being that parliamentary legislation today forms a very important part of the Norwegian legal system.

The strong position of Parliament is important in order to understand the role of preparatory works in the Norwegian legal system. It has been said that that idea of giving preparatory works status as a source of law and thus giving weight to them as legal arguments reflects the constitutional theory that the role of the democratically chosen legislator, i.e., a national Parliament, is particularly importan t.[13)]

3. Division of tasks in the legislative process

In Norway, most of the Parliamentary legislation is proposed by the Government after also having been prepared there (in the various Ministries). In 2015, a total of 133 pieces of legislation were adopted by the Parliament. Out of these 133, only 5 had been proposed by Members of the Parliament. The rest – 128 – were proposed by the Cabinet.

Members of Parliament propose quite a number of laws every year. However, the vast majority of those proposals are rejected by the Parliament after summary

13) Jaakko Husa, Kimmo Nuotio, Heikki Pihlajamäki (eds.), Nordic law – Between Tradition and Dynamism, Intersentia (2007) at 34.

deliberations. Quite often, those proposals from the outset have a very slim chance to be adopted. To put it somewhat disrespectful: Such proposals could often be seen more as "political speech", trying to draw attention towards a political issue, than actual proposal for legislation.

Alternatively, proposals forwarded by MPs are sent over from the Parliament to the Government for further consideration, or the Government is asked to make a proposal based on the MPs proposal or a modified version of it. This procedure, that has developed in parliamentary practice, ensures that most proposals for legislation undergo a more thorough preparation, including those steps that are mentioned in VI.

Proposals for legislation that are forwarded by the Government in the form of a governmental bill (proposition), may be adjusted during the legislative process in Parliament. Most often there will only be minor modifications. In a few cases, bills are rejected by the Parliament in their entirety, sometimes with a request from the Parliament to come back with a revised bill.

When presenting a governmental bill (proposition) to the Parliament, the Government is under a constitutional obligation to give adequate and objective information about the proposal and its consequences. According to Section 82 of the Constitution «The Government is to provide the Storting with all information that is necessary for the proceedings on the matters it submits. No Member of the Council of State may submit incorrect or misleading information to the Storting or its bodies.» This provision must be seen in the connection with the fact that most of the expertise is found in the Ministries and other parts of the central administration (governmental agencies etc.). The Parliament must be able to trust that the necessary analyses etc. have been carried out by the Government before a bill is passed, and that the bill, when it comes to facts and policy issues, presents both arguments for and against the proposed legislation.

As a broad generalization, one could say that in the legislative process, the

Government side offers its expertise and sheer capacity, and the Parliament offers its democratic legitimacy as well as its political insight. This division of tasks is conducive to the quality of legislation and its preparatory works.

4. Delegated law making powers

According to Section 75 of the Constitution, the legislative power lies with the Parliament (the "Storting"). All major legislation is passed by the Parliament.

The Constitution still allows for the Parliament to delegate its legislative powers – to the Council of State,[14] the Ministries, subordinate regulatory bodies of the state, local government bodies etc., so that those bodies can pass secondary legislation. In practice, by far the greatest amount of regulations is then passed by other bodies than the Parliament as secondary legislation. The strong position of Parliament has not prevented such a practice, which has been seen merely as a practical division of tasks between the Parliament and the executive branch. Parliament can then spend its limited time to concentrate on the most important pieces of legislation.

5. The role of the courts

The courts are independent of the legislative and executive branch. Norway has quite a simple unitary system of courts of general jurisdiction. There is no separate constitutional or administrative court or separate courts for criminal or family law matters. The court system basically consists of three levels with the Supreme Court on top. There is no strict *stare decisis* doctrine in Norwegian law. However, lower courts will but in very exceptional circumstances follow precedents from the Supreme Court. The Supreme Court has stated that its main task is "to ensure clarity and

14) The Council of State is the supreme body of the executive branch, consisting of the King, the prime minister and the rest of the cabinet of ministers.

development of the law".[15]

In Norwegian legal thinking, there has been a tendency towards a positive attitude to leaving to judges quite a wide discretion to decide cases, both when they decide cases according to written and unwritten law. Critics talk derogatory about "court romantics". The main tendency must, of course, be seen in connection with the the similarly positive attitude towards deciding cases according to what is reasonable in the circumstances.

6. Neither common law nor civil law system

The Norwegian legal system could neither be described as a common law or a civil law system. It has elements of both, but also distinct features of its own. The influence from European Union legislation and human rights law also makes it difficult to say that there is one "system" of law.

7. Pragmatism, open-endedness and individual fairness

The Norwegian legal system could be characterized as "an open system of sources that permits the judge to balance all the interests involved in the specific case and to evaluate all the circumstances and arguments".[16] This approach could definitely be called "pragmatic". It has also been commented that "Norwegian jurisprudence and application of the law has been characterized by a healthy moderate skepticism, a trying attitude, a willingness to take into consideration all relevant factors – not least to take into consideration the general norm – and an orientation towards society and other sciences."[17]

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15) See, for instance, http://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/

16) Giuditta Cordero Moss, A comparision of Italian, English and Norwegian inheritance rules as an illustration of different legal methods, Tidsskrift for rettsvitenskap, Universitetsforlaget (1999 Volume) pp. 884–903 at 902.

17) Sverre Blandhol, Pragmatismens aktualitet i rettsvitenskap og rettsanvendelse, Tidsskrift for

Another expression of this characteristic is the weight given to individual fairness:[18)]

"The word "rimelig" (meaning "fair" or "equitable") is a key word in Norwegian legislation, both in public and private law. Norwegians put more faith in the wisdom of their courts than in their own ability to observe formalities."

This sense of individual fairness is important both when cases are decided according to written and unwritten law.

Even though statements like these are very broad generalizations and thus over-simplistic, they still are important in order to understand the essence of the Norwegian legal system. Critics claim that the Norwegian system is too pragmatic, and that it goes too far in prioritizing individual fairness over foreseeability and legal certainty.

The application of preparatory works, as described later, fits nicely into this picture: They give considerable guidance as a source of law, but they are at the same time open-ended, they are the bearer of authority, but they can also yield to other sources of authority. This might seem frustrating, but gives room for an appropriate mix of flexibility on the one hand and clarity and rigidity on the other hand.

IV. The role of legislation in the Norwegian legal system

1. Individual statutes, not codes

Looking at the big picture the last 200 years, legislation in Norway has been in the form of individual statutes instead of grand, overarching codes. [19)] This is

rettsvitenskap, Universitetsforlaget, Volume 117 (2004) pp. 365–391 at 389.

18) Henrik Bull, European Law and Norwegian Legislation, Peter-Christian Müller-Graff and Erling Selvig (eds.), The approach to European Law in Germany and Norway, Berliner Wissenschafts-Verlag (2004), pp. 43–56 at 44.

different from the tradition of continental Europe, with their great codes. The difference has been explained with the fact that the fragmentation of the law that was found in for instance in Germany, was not such a problem in Norway.[20] Already with the introduction of "Magnus Lagabøtes landslov"[21] in 1273, there were strong elements of a unitary legal system in Norway.

Even an obligation in the Norwegian Constitution from 1814 to prepare and adopt a new Civil Code, was ignored in the years that followed.

This has allowed for a kind of co-operation or interaction between the legislator, primarily the Parliament, and the courts, in those individual statutes are more easily supplied and developed by the courts through their case law. As delegation of law-making powers to the executive branch became more common particularly after 1950, this interaction includes also that branch.

2. Legal drafting style

The legislation is traditionally kept in a brief wording, an important aim being that the law is accessible to the general public. Ideally, the language is kept as simple as possible. In surveys that have been conducted, resulting in a "statutory specificity index" among 15 European countries, Norway had the lowest score of all countries, indicating the brevity of the legislation in question. Denmark, Sweden and Finland ranked as number 2, 4 and 5 on this index.[22]

The legislation focuses on expressing the main rules and the important exceptions or modifications, but leaves considerable discretion to the courts (and administrative

19) *Id.* at 44.

20) Fredrik Stang, Innledning til formueretten, Aschehoug, 3rd ed. (1935) at 87.

21) "Magnus" is the name of the king who introduced this law, and his nickname, "Lagabøte", means "he who improves the law". This extensive piece of legislation, which applied in the entire Norwegian territory, was an early European example of written legislation given by a central government.

22) Robert Cooter, Tom Ginsberg, Leximetrics: Why the Same Laws are Longer in Some Countries than Others (revised 8-4-06), available online at http://home.uchicago.edu/~tginsburg/pdf/workingpapers/Leximetrics.pdf

agencies) to apply the law.

3. Relationship between drafting style and judicial law making

The legal historian Jørn Øyrehagen Sunde has described the Norwegian written law as "clay in the hands of the courts - … often referred to as Nordic pragmatism or Nordic realism". This might be going a bit far to talk about the law as such clay. However, I agree with him when he says that the "core idea" is "that life is too complex to be captured by written law, and you hence have to give the courts a great deal of discretion to fit law and life together".

To a considerable extent, the law is formed through its application in practice. In such a system, there is no sharp distinction between legislation and judicial law making. On the contrary, the style of legislation presupposed that the courts fill in where the legislation leaves discretion to them.[23] The law is in the end a product of the interplay between the legislator and the courts (and, in the regulatory state, also the administrative agencies).

4. How to fill in the gaps left by the legislation?

In any legal system the legislation itself cannot beforehand give the answer to all questions that will arise. That is neither possible nor desirable. The question, then, is how to fill the gaps. *Who* shall do it, in what *form*, *when*, in how great *detail*, and *how binding*?

More detailed primary legislation might fill the gaps, but it might also lead to unsatisfactory results in the individual case, and – paradoxically some would say –

23) Hans Petter Graver, Ødelegger europeiseringen en god norsk lovtradisjon?, Hva kjennetegner en god lov? Report published by the Norwegian Ministry of Justice (2006) pp. @@-@@ at 33.

make the legislation less accessible. In this connection, experience shows that more detailed provisions also create new questions of interpretation. Every word of a legislative act begs to be interpreted.

One option could be to give more detailed provisions once new problems are unveiled in practice. This, however, will over time make for a patchwork of legislation that is quite undesirable.

As mentioned earlier (III.D), Parliament to a large extent delegates powers to administrative agencies to give *secondary legislation*. The use of delegated powers can greatly reduce the need to fill in the gaps in other ways. This opportunity is often used, and the volume of secondary legislation is far greater than that of the Parliamentary legislation itself. This is not least a result of the transposition of international legal obligations, which are often very detailed. In the Ministry of Justice's "Guidelines on Legislative drafting technique and preparing legislation", this alternative is pointed to as an option particularly when there is a need to give detailed regulations.[24)]

Still, the use of delegated law making powers and secondary legislation does not prevent that interpretative questions arise. For instance, there will be the question of what the scope is of the powers that are delegated.

Case law, and in particular precedents from the Supreme Court, can also be an important way to clarify that content of Parliamentary legislation. However, very few cases will be decided by the Supreme Court every year.[25)] In this connection it might also be mentioned that in Norway, courts have general jurisdiction. There is no system with administrative courts, like for instance in Sweden and Finland.

In this setting the preparatory works of parliamentary legislation plays an important role filling the gaps that is left by the legislation itself.

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24) Lovteknikk og lovforberedelse. Veiledning om lov- og forskriftsarbeid, Guidelines issued by the Norwegian Ministry of Justice (2000) at 26–27.

25) According its business statistics, the Supreme Court in 2015 decided 63 civil cases and 54 criminal cases.

V. Preparatory works as a «source of law»

The Norwegian legal system is based on both *uritten* law (primarily parliamentary legislation), and *unwritten* law based on precedent, custom etc. In traditional textbooks on legal methodology, it was common to say that there were two sources of law: legislation and custom (or customary law). The term "source of law" is a translation from the German term "Rechtsquelle".

Today it is common, in the Norwegian system, not to speak strictly about "sources of law", but to point to various "factors" that can or must be taken into consideration when determining the correct interpretation of legislation (or when determining what the unwritten law says). This modern terminology reflects the diversity of inputs when courts interpret and apply the law, and it is an attempt to give a more realistic description of what actually happens in practice. Among those "factors" are the following:[26)]

The text of the legislation

Preparatory works

Case law (court precedent)

Practice of other authorities (administrative agencies, certain kinds of parliamentary practice etc.)

Practice of private persons (custom)

Legal opinion (particularly those of legal scholars)

Considerations concerning fairness/reasonableness of the outcome (Norwegian: "reelle hensyn")

This list of "factors" also reflects the flexible approach of Norwegian courts when interpreting and applying the law.

The prominent position of preparatory works as a source of law, combined with

26) Torstein Eckhoff, Rettskildelære, Universitetsforlaget, 5th ed. by Jan E. Helgesen (2001) at 23. There is, of course, debate over this list, but it is not necessary to discuss it here. The status of other official documents as a source of law is briefly discussed.

the generally "open" system of sources of law, has naturally led to a debate over whether *other official documents than preparatory works* could be looked at as sources of law, and what weight could be given to them.[27] Typically it would be official documents that have been produced *after* the adoption of the legislation in question. An example could be white papers (Norwegian: "stortingsmelding") from the Government to the Parliament. They might for instance contain information about how the legislation has been applied in practice in a certain policy area. The courts have not rejected the relevance of statements in such documents altogether.[28] This is hardly surprising in the Norwegian system. However, such documents are in practice seldom referred to by the courts, and as a matter of principle, they are more problematic to use as a source of law than the preparatory works, as they are not linked to a legislative act in the same way.

The prominent role of explanatory works mainly concerns parliamentary (primary) legislation. It is striking how preparatory works has played a very minor role in the case law of the Supreme Court when interpreting *secondary legislation*. This difference is at the same time enlightening: Preparation of secondary legislation seldom involves expert committees. Studies or other preparatory works of secondary legislation are more often commissioned or produced at a lower level of government, they are not as thorough, and they do on average not have the same quality as preparatory works of parliamentary legislation. Based on such premises, relying on preparatory works could in the long run be a threat to the quality of the text of the secondary legislation itself. The preparatory works of secondary legislation further do not have the same "official" character as those of the Parliamentary legislation, and they are not published systematically in the same way. Finally, they are not the bearer of democratic legitimacy in the same way as preparatory works of parliamentary legislation.

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27) *Id.* at 95–100.

28) In Norway, there is no strict system for rejecting as inadmissible certain statements or documents relating to the legislative process.

Therefore, it is for very good reasons that courts hardly rely on such preparatory works as a proper source of law. Hardly anyone has argued for extending the current practice relating to preparatory works of parliamentary legislation into the sphere of secondary legislation.

VI. The most important preparatory works and their functions

1. Definition of preparatory works. "The big four"

The process of adopting parliamentary legislation is only to a very limited extent regulated in the Constitution itself. However, the legislative process in practice follows certain important steps, each of them resulting in preparatory works. Rather than describing all the formalities and steps of the legislative procedure in Norway, I will focus on some important steps that are of particular relevance for the production of preparatory works.[29)]

There is no definition laid down in law of what "preparatory works" are. However, the preparatory works of parliamentary legislation could be defined as all official documents that are produced leading up to adoption of the legislation in question. In practice, we could talk about "the big four", each of them the result of important steps in the legislative process:[30)]

The report from an expert committee (or a consultation paper prepared by the government)

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29) A flowchart showing the various steps of the legislative process and the documents produces in that connection, is found (in English) on the website of the Parliament: https://www.stortinget.no/en/In-English/About-the-Storting/Parliamentary-procedure/. Please note that this chart includes more than the legislative process.

30) There is also a number of other steps taking place, but they are mostly of an internal nature, securing the need for coordination, quality control and political approval within the various ministries and the cabinet of the government.

The governmental bill (proposition) and

The recommendation of the relevant Standing Committee of the Parliament.

An official report consisting of the minutes of the discussions of the plenary of the Parliament

Each of these documents make public and manifest the meaning of the proposed legislation. They are steps in quite a "linear" legislative process, all leading up to the final expression of the legislative intent through Parliament, based on the adopted legislation. Each step builds on the previous document. Seen in this way, the various institutions taking part in the legislative process could all be seeing as "legislators" or at least participants in the legislative process.

2. First step: Consultation document

The first major step is to produce a study, intended to be used as a document for public consultation.

There is a well-developed tradition for the establishment of *expert committees* in order to perform major studies for legal reform. Such expert committees are typically appointed by Royal Decree in the Council of State and their work is based on terms of reference given then. An expert committee is typically led by a renowned law professor. The number of members of the committee varies, typically from 5 to 12. In most cases, the expert committees do not have representation from political parties. The aim is rather to make use of the expertise in the field, as well as to have various interest groups represented where appropriate. This ensures legitimacy to the work that is carried out by the expert committee, as well as ensuring a high quality product.

50 years ago around 20 per cent of the government's bills were based on a study by such an expert committee. The use of such expert committees are on the decline. In a ten year period between 2002 and 2011, on average 114 acts were passed

every year by Parliament. In the same period, on average, 9,9 studies by expert committees were completed. This means that less than 9 per cent of the acts passed by Parliament were based on a study performed by this kind of expert committee.[31] However, such committees may still be considered as a backbone of the preparatory work when it comes to major legal reforms. They are vital in order to ensure the quality of major pieces of new legislation.

The expert committee's work normally results in a study including a proposal for legislation. The document might, depending on the circumstances, be extensive (typically ranging from less than 100 pages up to more than 1000 pages). These studies are published in a special series of official documents, called "Norges offentlige utredninger", commonly known by the acronym "NOU" ("Norwegian Official Studies").[32]

When an expert committee is not appointed, a consultation paper is prepared by the relevant Ministry itself (or as a result of cooperation between various ministries) of by one or more external experts (for instance a law professor or in some cases even a law firm). Such a work will normally be commissioned by the relevant Ministry. The length of such a paper will vary with the circumstances, from very few to hundreds of pages.

The structure of the consultation document is it an expert committee study or of another kind, will typically be similar to the structure of the later governmental bill (proposition), with the exception that this stage does not include a section describing the stakeholders' views. Their views will be expressed at a later stage, during public consultation (see below).

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31) These figures are based on my own counting.

32) This publication series has existed since 1972. Before 1972 the studies were still printed and published in a similar manner as today. – An example of a report would be "NOU 2009: 9 Lov om offentlige undersøkelseskommisjoner ("Law on public enquiry commissions"), see https://www.regjeringen.no/contentassets/40fc91e0e22d4694b70d80527288b1c3/no/pdfs/nou200920090009000dddpdfs.pdf (Norwegian only).

3. Public consultation

The study (consultation document) forms the basis for a public consultation arranged by the relevant Ministry. In most cases this consultation invites interested stakeholders, addressed individually, to submit their comments in writing within a specified time limit, which shall not be shorter than six weeks. The stakeholders would typically be various governmental institutions and non-governmental organizations representing the interests of the stakeholders. In addition the consultation paper is published on the internet. The consultation is open in the sense that anyone, be it private persons or organizations, can submit their comments to the Ministry, regardless of whether they have been addressed directly in the first place.

According to the Freedom of Information Act, the comments that have been submitted in writing, are available for everyone to read in practice, the comments are also published on the internet as soon as the time limit for submitting comments has run out, or even consecutively as they are submitted to the Ministry.

There is a high degree of participation from the major stakeholders. They see it as an important opportunity to influence decision-making. This must be seen in connection with the fact that the stakeholders' views are also submitted to the Parliament as part of the governmental bill (se VI.D below).

Together, the production of a consultation document (especially when an expert committee is appointed) as well as the public consultation are very important in order to secure expertise, representation of stakeholder's interests and more generally the participation of civil society in the legislative process.

4. Second step: Governmental bill (proposition)

After public consultation the next major step will be to produce a governmental

bill (proposition, Norwegian: “Proposisjon”), inviting the Parliament to adopt the proposed piece of legislation. Most of the work takes place in the relevant ministry. Each ministry is responsible for drafting legislation within their specific areas of competence.

According to the current “Guidelines on Legislative drafting technique and preparing legislation”, the governmental bill should follow a certain basic structur e:[33)]

Main contents of the proposition

Background for the proposition

Current state of the law

Foreign law (where appropriate)

The proposal of the consultation document

The views of the stakeholders (as expressed in the public consultation)

The view of the Ministry

Administrative, economic and other relevant consequences

Explanatory remarks (or «specific remarks») to each of the proposed legislative provisions

The proposal for legislative amendments

Of course this basic scheme must be adapted to the circumstances.[34)] Looking at the bigger picture, we can simplify like this:

No. 1) –8) is commonly referred to as the “general motives” of the governmental bill.

No. 9) is, due to their special function, singled out as “special motives” (as opposed to the “general motives”). The “special motives” are also referred to as “explanatory remarks”, and I will use that term in this article.

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33) Lovteknikk og lovforberedelse. Veiledning om lov- og forskriftsarbeid, Guidelines issued by the Norwegian Ministry of Justice (2000) at 32 –33.

34) An example could be “Prop. 62 L (2015–2016) Amendments to the Public Administration Act etc. (administrative sanctions etc.”, see https://www.regjeringen.no/no/dokumenter/prop.-62-l-20152016/id2476333/ (Norwegian only).

No. 10 is the proposed legislation, which of course is the crucial text that the Parliament is invited to adopt.

The division between no. 1–8 and no. 9 underscore the fact that the governmental bills to Parliament (proposition) basically serve a *dual* function:[35]

The basic aim of the proposition is, after all, to present the proposal of the Government, inviting the Parliament to adopt it. As such the proposition is *addressed to the Parliament*.

However, the proposition also serves the special function as a tool of interpretation and as such *a source of law* (or a source of clarifying the law). As such the governmental bill also has other addressees that the Parliament.

This *dual function* of the preparatory works is to some extent reflected in the division between "general motives" and "explanatory remarks", as we will see below (VI.G).

5. Third step: Recommendation of the Parliamentary Standing Committee

Based on the governmental bill the relevant standing committee of the Parliamen t[36] will prepare the matter for final consideration in the plenary of the Parliament in the form a Recommendation of the Standing Committee (Norwegian: "komitéinnstilling").[37]

This document will always contain quite an extensive summary of the

35) Such a dual function is also present in the consultation document, in that it is structured in a similar manner as the governmental bill, but the point is clearest made speaking about the governmental bill. When it comes to the recommendation of the Standing Committee in Parliament, the distinction is not so clear.

36) For the time being there are 12 Standing Committees in the Parliament, all of which can be given the task to give a recommendation to the plenary of the Parliament.

37) An example could be "Innst. 243 L (2015–2016) Recommendation from the Standing Committee on Justice concerning amendments to the Public Administration Act etc. (administrative sanctions etc.), see https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2015-2016/inns-201516-243.pdf (Norwegian only).

governmental bill, sometimes referred to as the "technical summary", since it is not intended to alter the meaning of what has been expressed in the governmental bill (proposition). This summary might easily be the most extensive part of the document.

This document (recommendation) relatively seldom expresses views on the proposed legislation that are of particular interest when interpreting the enacted legislation. Rather, the recommendation tends to focus on general policy issues. This must be seen in connection with the fact that the Parliament seldom makes major changes compared with the governmental bills.

However, particularly if the Committee amends the proposal for legislation, the remarks made in this connection might be of great interest. This is not least the case because the Committee's view has a particular democratic legitimacy.[38)]

6. Fourth step: Plenary of the Parliament

Based on the recommendation of the relevant standing committee in the Parliament, the proposed legislation is then discussed in the plenary of the Parliament, normally in two readings (never less). The minutes of the discussion is made into an official report that is printed and published.

The debate can on individual occasions be lengthy, especially if there is something or real political interest in the proposed legislation. However, in the many cases there is little or no debate. This must be seen in connection with the fact that normally, all positions have been set as a result of the negotiations in the standing committee. Only very seldom there are remarks during these debates that add anything relevant for the courts when they later apply the law. The second reading

38) It might also happen that mistakes are found in the governmental bill, and that the Standing Committee takes the opportunity to correct this mistake (perhaps after the Ministry has drawn the Committee's attention to the mistake). To be sure, the same could happen with the legislative proposal itself, if the mistake is of such a nature.

in Parliament is in almost any case a pure formality.

7. Content of the preparatory works – in particular statements that are relevant for interpreting the legislation

Certain elements of the governmental bill, and similarly of the expert committee's report, have special significance as statements that are relevant for the interpretation of the adopted legislation. It would hardly be possible to give an exhaustive list of different types of such statements. Among the important ones would statements concern:

The purpose of the proposed legislation or specific provisions of it. New major pieces of legislation will frequently introduce a provision in the legislative text itself, stating what the purpose (or purposes) of the legislation is. However, this is not always the case, particularly when minor (but perhaps still important) amendments are proposed. In any case, the preparatory works can give very much more detailed information about the purpose.

Whether the intention with a certain provision (or a set of rules) is to uphold the current state of the law (be it written or unwritten law) or to change it, and what the change consists of. Similarly, preparatory works stemming from a late stage of the legislative process can give information about whether a reformulation of the draft legislative text is intended to change the meaning that is expressed in the preparatory works of an earlier stage (typically an expert committee report), or if the intention on the contrary only is to give a improved formulation of what was intended earlier.

Other clarifications in detail about the content of the prosed legislation, for instance the more detailed content of broadly formulated or vague criteria. An example could be taken from the Danish case that is mentioned below (IX.C): The

preparatory works might state that the criterion "same work" is meant be understood in a broad sense, so that it also includes "work to which equal value is attributed".

Often the legislation delegates powers to administrative agencies to decide matters in the individual case (for instance by issuing licenses, grants, permits or exemptions), or he legislation delegates power to pass secondary legislation. In such cases discretion is often left to the agencies. The preparatory works might then give directives concerning what arguments that legally can of must be taken into account when exercising that discretion, and perhaps even directives on what weight then can be given. To give an example: Are grounds related to environmental impact permissible when setting speed limits in secondary legislation, or could only ground related to road safety be taken into consideration? The preparatory works might well give a precise answer to this.

The relationship with other parts of the legal system (for instance general principles of law or human rights obligations). For instance, is the provision in question meant to deviate from a more general rule, or is it meant to be in conformity with it?

How wide discretion is left to the courts to *develop* the law as time goes by? This is particularly relevant if the wording of a legal provision is open-ended, and preparatory works from time to time contain statements about this.

These are all statements that could shed light on how the legislation in question should be interpreted. Like with other kinds of interpretation, also implied statements in the preparatory works can be relied on. Even silence in the preparatory matters on a matter can give indications as to the meaning of the legislation in question. From time to time courts remark that the preparatory works are silent on a matter, and the question is then what this silence tells about the meaning of the provision in question.

Most statements of particular relevance for the precise understanding of the adopted legislation are found in the *explanatory remarks*. One could even say that

statements in the explanatory remarks are a particularly reliable source in order to understand the meaning of the legislation, as the *purpose* of those remarks is exactly to say something about this, and they are drafted according to this purpose. Over time the explanatory remarks have developed into the style almost of a typical scholarly law commentary, explaining in detail the content of the law as well as identifying or pointing to factors that may be relevant when new questions of interpretation arise. They have been refined into serving the particular function as *interpretative guidance for the courts and other who later will apply the law.*

However, relevant statements could be found also in the *general motives* of the preparatory works, even if that part of them has as a primary function to discuss the policy issues that lie behind the legislative choices that are made, the explanatory remarks. In the end, there are no hard and fast rules on where the relevant statements are found. Statements of the purpose of the proposed legislation is a typical example of something that could be found either place.

The contents of the explanatory remarks in Norway could be compared with preambles of European Union legislation or documents leading up to that legislation. A comparison shows that the explanatory remarks in Norway are very much more detailed than the preambles of the legal instruments of the EU (be it EU directives or EU regulations). The remarks also have more thorough descriptions of the desired state of the law than the reports, green papers etc. that the EU Commission might issue in connection with at legislative initiative.[39)]

8. Publication of preparatory works. Accessibility in practice

The preparatory works mentioned above are quite easily available on the internet. It is easier for the general public to get access to them than it is to get access

39) Niels Fenger, Forvaltning & fællesskab, Jurist- og økonomforbundets forlag (2004) at 536.

to precedents from the Supreme Court.

To the general public, it is difficult to understand the legal significance of preparatory works and apply them in a correct manner. However, this would also be the case with relevant case law. This, of course, speaks in favor of more detailed legislation. However, not everything can be put into the legislative text itself (see IV.D above).

VII. Reasons to rely on preparatory works as a source of law

1. Introduction

How is then the extensive use of preparatory works *as a source of law* defended in the Norwegian system?[40)]

2. Reasons related to democracy

The basic argument is that loyalty to the statements of legislators are *democracy-enhancing*. Even though, as we shall see, there are other reasons as well to rely on the preparatory works, this argument can be looked at as *a condition sine qua non* for the current practice. In the Norwegian system, *the preparatory works form part and parcel of the adopted legislation*, and thus the will of Parliament. This also shows if the proposed legislation in question is *not* adopted: The preparatory works also lose their function (or most of it, anyway) as a source of law

The argument is easiest to understand and defend when it relates to statements

40) The structure of this section is to a large extent based on the standard textbook on legal methodology: Torstein Eckhoff, Rettskildelære, Universitetsforlaget, 5th ed. by Jan E. Helgesen (2001) at 70–74. However, I have also supplemented with my own views on the matter.

in the preparatory works that come from *Parliament itself* (typically the relevant Standing Committee giving its recommendation to the plenary of the Parliament). However, one could see the whole system for preparing Parliamentary legislations as part of a broader conception of democracy: The executive branch with its Ministries has, not least because of the parliamentary system in Norway, considerable democratic legitimacy, albeit in an indirect manner. The expert committees that are commissioned by the executive branch are also a part of this system. In addition, those committee often have a composition that makes them representative for the various societal interests that are at stake. Finally, the system of public consultations ensures a broad partipation from civil society.

It is also pointed out that the legislator itself – the Parliament – always has the opportunity to reject statements in the earlier preparatory works, like the report from the expert committee or the relevant Ministry, if it does not agree on it. This argument is to some extent based on a presumption that Parliament is in agreement if it does not say against what has been stated earlier in the process.

In any case, statements in the preparatory works, be it from an expert committee or from the relevant Ministry, have more of a link to democratic processes than what is the case with a court trying to free-guess what is the intention of the legislator.

Some writers reject the use of preparatory works as a source of law, or they are skeptical, based on the argument that it is not conceivable to speak about «the intention of the legislator". For instance, the legislator might not have considered the case in question. Or the legislator might have thought about it, but it is not possible to find out what was thought. And there might be several opinions among the individual legislators as to what the intention was, or it might be difficult to know whether those having thought of the problem, are representative of the parliamentary assembly at large. These are objections that could be found against other theories of interpretation that are based on «original intent» or similar.

3. Uniform and foreseeable application of the law

Even if the basic argument related to democracy has its limits, the practice could be defended on other grounds.

Reliance on the preparatory works ensures *a more uniform and foreseeable interpretation and application of the law*. This must be seen in connection with that fact that important parts of the preparatory works are written exactly with the purpose of clarifying the content of the adopted legislation. This is particularly true for the explanatory remarks of the preparatory works.

Some would argue that also the courts could secure these goals of uniform and foreseeable understanding of the law. However, one advantage of relying on the preparatory works lies in the more instant effect of the preparatory works: They are available as sources of law right from the time of the adoption of the legislation (and even before, as soon as they have been produced). It must also be taken into consideration that very few cases ever reach the courts in Norway.

In addition, the preparatory works are suitable for expressing nuances and to give underlying reasons that could not easily be expressed in the legislation itself. It could be argued that the functions of preparatory works as a source of law fits well with a modern understanding of law, whose legitimacy not only rests on command but also on the ability to justify the law in real terms.

When assessing justifications relating to uniformity and foreseeability, the limits for the use of preparatory works as a source of law should be borne in mind: Most interpretative results would the probably be the same without the use of preparatory works. The preparatory works still serve an important function, in that they *confirm* this interpretation and thus reduce uncertainty of interpretative outputs. A justification based on uniformity and foreseeability of course becomes more problematic if the preparatory works are used as a tool to *deviate from* the wording of the legislation, especially if this were done to the detriment of any individual.

However, courts are aware of this objection, and therefore they do that unless there are other, overriding reasons to do so.

4. Simpler legislation

Third, reliance on the preparatory works makes it possible to *draft legislation in a simpler style*. The discretion that is left to the courts through the brief and relatively open-ended drafting style in the Norwegian system would simply not be possible if the legislator could not trust that the courts to a large extent followed the statements in the preparatory works. To be sure, there is no universal agreement on whether simpler legislation in the sense mentioned above is synonymous with *better* legislation.

5. Improved quality of legislative processes as well as outputs

Fourth, it could be added that relying on the preparatory work does not only enhances democracy, secures uniform understanding and application of the law and makes for simpler legislation; it also in the end *enhances the substantive quality of the law*: The chain of preparatory works, from the expert committee with the subsequent inputs from the public consultation, via the governmental bill (proposition), to the preparatory works of the Parliament (mainly the recommendation of the relevant Standing Committee), secures a thorough legislative process based on considerable expertise as well as inputs from all relevant stakeholders and civil society.

In this connection it is also important to note that the preparatory works are written by persons who have been very deeply involved in the legislative process, and who know its inns and outs.

It could be added that the quality of procedures and outputs are linked to each

other: A thorough, transparent , non-biased and inclusive process with the right mix of expertise and political insight will contribute to high quality legislation. Such a process will also increase the legitimacy of the resulting legislation, and it will be easier for the stakeholders to respect the outcome.

Critical voices might raise the objection that the quality of preparatory works is not always up to standard, and that they therefore do not in any case deserve status as a source of law. There is certainly variation in the quality of preparatory works depending on whether the right kind of expertise has been available (both external expertise as well as expertise in the Ministries) when producing them, the time available to produce them, the extent of participation of stakeholders etc. It should be added that the same factors will also influence the quality of the resulting legislation itself. In general, it is probably fair to say that the quality of the governmental bills prepared by the Ministry of Justice and Public Security, concerning the core legislation of the legal system, has on average a higher quality than the rest of the bills.

In the long run, the status of preparatory works as a source of law is dependent on their quality. However, if there is a problem in this respect, the solution should rather be to improve the quality of the bills (and other preparatory works), and not to disregard explanatory works as a source of law.

6. Does the use of preparatory works make for sloppier legislative texts?

Against the current practice it is sometimes argued that it has the unfortunate consequence that the *drafting of the legislation is sloppier* than it would otherwise have been. This might be the case sometimes. However, I think the effect in real life normally is rather the opposite: The fact that the legal drafter is forced to explicate, in the preparatory works, the content of the proposed legislation, makes for a more

thorough preparation of the legislation in question. Writing the preparatory works is an important check on whether the drafted legislation really includes what should be included and leaves out what should be left out.

Of course, one could argue that a similar kind of check could be performed without it being made part of any official document. However, the definitive character of such official, publically available documents that the courts will look to for guidance, makes for a higher quality product.

VIII. Weigth of preparatory works

1. "Rules" or "principles" of legislative interpretation?

The role of preparatory works as a source of law must be seen in connection with the question whether there are any basic "rules of interpretation" of the legislation itself.

In the context of the Norwegian legal system there have been discussions as to whether statutory interpretation should be based on a "subjective" or "objective" principle. There is no common agreement on this. Those preferring the "objective" principle would tend to be skeptical towards the use of preparatory works as a means of statutory interpretation.

Courts and other institutions entrusted with the task of ensuring compliance with the law have avoided this kind of theoretical discussions. This is well in line with the pragmatic approach in general in the Norwegian legal system. Hardly any legal system could operate with a single "principle" or "rule" of interpretation.

Instead, it has been pointed out that Norwegian courts, when interpreting parliamentary statutes, have focused on at least two aims:[41]

One aim is to show *loyalty to the legislators*. This must be seen in connection with

41) *Id.* at 152–153.

the strong position of Parliament and emphasis on the idea of "democratic legitimacy" in the Norwegian system.[42)]

The other aim is to *reach good results* – preferably so that one can both be satisfied with the rule or general principle on which the determination of the case is based, as well as with the outcome of the individual case.

Normally there will be no conflict between these two main aims of loyalty to the legislator and of reaching good results.

In any case, a further note of caution, borrowed from the field of public international law, might be a reminder about the universality of the challenge:[43)]

"Care must be taken to ensure that such 'rules' [of interpretation] do not become rigid and unwieldy instruments that might force a preliminary choice of meaning rather than acting as a flexible guide."

Bearing this very clearly in mind, I will now try to indicate something about the weight of statements in preparatory works as a source of law.

2. The weight of preparatory works – some indications

The basic reference point when using preparatory works as a source of law, must always be the wording of the legislation in question. Explanatory remarks should clarify concepts in the legislative text itself, and not extend them further. Even with such a reference point, statements in the preparatory works can play a major role as a source of determining the interpretative result. This is not least the case in the Norwegian legal system, where the legislation focuses on expressing the main rules and the important exceptions or modifications, but leaves considerable

42) Dag Michalsen, Dannelsen av de moderne rettskildeteorier – juss, politikk og kultur, Jussens venner, Universitetsforlaget, Volume 38 (2003) pp. 228–247 at 239.

43) Ian Brownlie, Ian Brownlie's Principles of Public International law, Oxford University Press, 8th ed. by James Crawford (2012) at 380.

discretion to the courts (and other law-applying bodies). Bearing this basic reference point in mind, the weight of statements found in the preparatory works will depend on a variety of factors, for instance: How clear are they, how well thought-through, and are they still relevant in present-day circumstances (see VIII.C below)?

As mentioned earlier, a *condition sine qua non* for the normative force of preparatory works is the intimate link between the legislation itself and its preparatory works. This link is, of course, clearest when it comes to the preparatory works that are produced in Parliament itself. However, all documents mentioned in VI ("the big four") have the potential to have the sufficient link, and they can therefore be given considerable weight. The rationale behind this can be expressed as follows:[44)]

"Comments made by a commission in its report and not contradicted by the government or parliament, or comments made by the government in its bill, and [not] contradicted by spokesmen of the parliamentary majority, will be treated by the courts as authentic expressions of the intentions of "the legislator"."

Provided that there is no issue as to the clarity etc. with the statement in the preparatory works, one could probably say the following:

Content specific remarks (se VI.G above) will normally be respected if they express a sound understanding of the legal provision in question, and they are not contravened by other important sources of law (such as for instance a precedent from the Supreme Court).

A statement about the purpose of the legislation in question will almost always be respected, unless it is contradicted by other relevant factors. The same goes for expressions of what are permissible grounds when exercising discretion in cases where power is delegated to administrative agencies (see also VI.G above).

Even if the wording of the legislation includes the case in question, the preparatory works might contain clear statements or indications of restrictive interpretation.[45)]

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44) Henrik Bull, European Law and Norwegian Legislation, Peter-Christian Müller-Graff and Erling Selvig (eds.), The approach to European Law in Germany and Norway, Berliner Wissenschafts-Verlag (2004), pp. 43–56 at 45.

As long as this does not raise weighty issues regarding for instance legal certainty of the individual, the courts will be able to give considerable weight to such statements. Courts might in any case – regardless of the preparatory works – practice such a restrictive interpretation.

3. As time goes by

Explanatory remarks will, depending on the circumstances, lose their importance as the years go by. This happens simply because other relevant developments may enter the scene: new court decisions, changes in other surrounding legislation relevant to the understanding of the provision in question, changes in society etc.

Thus, a possible claim that the preparatory works might serve as a brake on the dynamic development of the law, does not really hold true. If anything, it will be the text of the legislation itself that serves as a brake. This could also be expressed as follows: The *wording of a statute* cannot be ignored, but explanatory remarks that do not "fit in", can be ignored, as long as there are sufficient reasons to do so.

A possible disadvantage particularly with older preparatory works could be that they, because of developments in the law, become misleading. This is very seldom looked at as a serious problem. As long as one in general is aware of how the system of preparatory works functions, one will be prepared that statements in preparatory works are not final answers to legal questions. Those who are not aware of this system will seldom consult preparatory works directly for guidance in the first place.

45) By this I mean that the legislation in question is interpreted so as to cover fewer instances than what the wording of it indicates.

4. Interplay between legislation, preparatory works and the courts – an illustration

Below I will give one specific example of interplay between a broadly formulated legislative provision, its preparatory works and the courts' application of that provision.

The wording of Section 36 of the 1918 Contracts Act reads as follows:

«(1) An agreement can be set aside or revised in as far as it would be unfair or contrary to good business standards to rely on the contract. …

(2) When deciding on the matter, regard should be taken not only of the terms of the contract, the status of the parties and the circumstances at the time of the conclusion of the contract, but also of circumstances that have occurred after the conclusion of the contract as well as other relevant circumstances. …"

Section 36 was added to the Contracts Act In 1983. This provision says quite a bit about the Norwegian (and Nordic) legal system. Firstly, an important aim is to protect the weaker party of the contract, thus including a certain social dimension into contract law. Secondly, it is striking how wide the scope of application is, and how open-ended both the criteria for revision is – unfairness – and what could be the result of the unfairness – the contract could either be "set aside" or "revised". This leaves a very wide discretion to the courts. This kind of provision could only work in a system where there is a great deal of trust between the legislator and the courts. The legislator – first and foremost the Parliament – has faith in the courts' ability to apply the law in a sensible manner. One could, for instance, fear that the courts would apply this provision so that the basic distribution of risks in hard core commercial contracts were altered. However, this has turned out to be no problem; the courts have shown the necessary restraint.

How should one reconcile this provision with the basic principle of pacta sunt

servanda, which (of course) is a part of the Norwegian legal system? The Supreme Court soon after the adoption of the provision in 1983 had to decide cases based on it. I will here quote one opinion from a case decided in 1988:[46)]

«In my view the preparatory works must be given considerable weight when the reach of Article 36 of the Contracts Act is to be decided. The provision is meant to be a "safety valve" in order to include unfairness of various kinds in all areas of the law of contracts …. For this to be achieved the provision necessarily had to be given a very broad formulation with the use of general and imprecise terms. When a provision is drafted in this way, the wording might easily also cover situations which it is not the intention to include. The courts therefore have special reasons to take into account the intentions of the legislator such as those intentions, as I understand them, have been expressed in the preparatory works."

IX. Particular challenges

1. Introduction

The increased influence from international legal instruments into the Norwegian legal system has to some extent challenged the Norwegian (and Nordic) tradition of legislation drafted in a brief style in combination with extensive use of preparatory works as a source of law. Below I will mention two particular fields of law.

2. Criminal law

In the field on criminal law, the principle *nulla poena sine lege* naturally limits the extent to which preparatory works can determine the outcome of cases. The

46) Norsk Retstidende 1988 pp. 276 at. 289–290). This was part of a minority opinion in that case, but still illustrative of the courts' attitude.

principle was one of the few basic rights that were finding right from the outset in the 1814 Constitution (Section 96). Put simply, an offence must be covered by the wording of the relevant provision for the offence to be punishable. The wording of the legislation thus becomes more of an absolute barrier to the use of preparatory works as a source of law than in other fields of the legal system. In recent years there has been a marked development in direction of a more restrictive approach than earlier. The result has been expressed clearly in recent case law from the Supreme Court, for instance in 2012:[47)]

«In any case, what the legislator might have intended is not decisive when such a possible legislative intent is not clearly expressed in the legislation. ⋯ The punish ability must follow from the legislation, and lack of support in the wording cannot be replaced by the fact that the {act} clearly should be punishable, and the fact that the legislator clearly intended to cover it."

In the leading treatise on principles of criminal law, and after having referred to a judgment from the Supreme Court containing a similar statement, the current state of the law is commented on in as follows:[48)]

«[S]tatements in the preparatory works that give support to an extensive interpretation of the law to the detriment of the accused, are given considerably less weight that earlier – that is to such a degree that such statements tend to be irrelevant."

However, the preparatory works are not without functions also in the field of criminal law.

For instance, the preparatory works might support a restrictive interpretation of provisions defining the criminal offences, in favor of the accused.

Furthermore, the preparatory works can give meaning to the more exact content for instance where the wording of the provision is broad or vague. For instance,

47) Norsk Retstidende 2012 pp. 313, section 29.

48) Johs. Andenæs, Alminnelig strafferett, Universitetsforlaget, 6th ed. (2016) by Georg Fredrik Rieber-Mohn and Knut Erik Sæther at 122.

the new Criminal Code from 2005 in Section 15 has a general provision that makes "participation" in crime punishable. The preparatory works go into great detail (approximately 2600 words!) explaining the content of this very broad concept of criminal "participation", with further references to other preparatory works and precedents from the Supreme Court. The text could very easily be mistaken for being a textbook aimed at law students.

A more recent development has been that the legislator has made use of statements in the preparatory works to give quite detailed directives about *the level of sentencing for various crimes*. The wording of the provisions defining the various offences and the relevant penalties to be applied normally give courts a very large degree of discretion to fix the penalty in the individual case. For instance, section 283 of the Criminal Code, concerning gross violation of the prohibition of domestic violence, simply says that the offence is punishable with imprisonment "up to 15 years". However, as the level of sentencing has become more of a political question for certain types of crimes (in particular acts of violence and sexual offences), the preparatory works have served as a tool to give detailed directions concerning the level of sentencing.

Applying this legislation and its preparatory works, the Grand Chamber of the Norwegian Supreme Court has, in a case from 2009, stated the following:[49)]

"(21) The courts regularly give statements in the preparatory works great weight when interpreting legislation. The same goes for statements concerning the level of sentencing in the preparatory works of legislation concerning sentencing. In the aforementioned preparatory works from 2009 the legislators have given a great number of such statements. This is partly done in the form on general statements, often concerning the length of the sentence or about the level of it, se for instance Innst. O. nr. 73 (2008–2009) p. 6, where it is said that the sentencing level for "the gravest infringements" shall be increased with around one third. And partly

49) Norsk Retstidende 2009 pp. 1412, section 21 and 22.

this is done by giving examples from case law. In those cases, information is given about what the sentence was, followed by a statement about what would be the appropriate level according to the new legislation.

(22) By proceeding in this way, the legislators have gone a long way in giving in part detailed directions for sentencing practice in the preparatory works. When the new criminal code enters into force, the courts will undoubtedly have a duty to practice a level of sentencing as it has been expressed in the preparatory works. The sentencing must be based on this level and with regard to the special circumstances in the individual case."

Thus, the Supreme Court expressed no doubt as to a "duty to practice a level of sentencing as it has been expressed in the preparatory works". Still, the directives given in the preparatory works are applied "with regard to the special circumstances in the individual case". The preparatory works in this way are a flexible tool that still gives the courts leeway according to the circumstances of the individual case. It hardly needs saying that the consequence of the courts disregarding those directives would call for a completely different way of drafting the legislation itself to fulfill the intentions of the legislator. It would be hard to draft legal texts that are sufficiently flexible to catch the particularities of the individual case.

In sum, I think it is correct to say that within the field of criminal law, the courts recently have been very aware that the use of preparatory works must not undermine the general principle of nulla poene sine lege. Practised in this way, the preparatory works can still be of great help for the courts without harming the legal certainty of the individual.

3. The use of preparatory works in implementation of EEA law

More and more of the legislation in Norway is a result of international legal

obligations. This is especially the case in the field of human rights and economic law. The international treaty which has had the greatest impact on the Norwegian legal system, is undoubtedly The Agreement on the European Economic Area. This treaty brings together the EU Member States and the three EEA EFTA States — Iceland, Liechtenstein and Norway — in a single market, referred to as the "Internal Market". Around 170 out of the 600 consolidated Parliamentary laws in force to a greater or lesser extent contain EU/EEA law.[50] This says something about the influence this international agreement has had on the Norwegian legal system.

Norway's participation in the Internal Market, through the EEA Agreement, has challenged the Norwegian (and Nordic) tradition of how to draft legislation. This challenge has been common to all the Nordic countries, due to the similar traditions also when it comes to the existence and functions of preparatory works of legislatio n.[51] There are, however, somewhat differing views on how to meet this challenge.

The first major challenge arises from the fact that European Union law sets up strict requirements on how to implement EU law into the national legal systems. As a party to the EEA Agreement Norway is bound by similar principles.

The European Court of Justice has formulated the requirements as follows (concerning implementation of EU directives):[52]

"It should be borne in mind in that respect that, according to the case-law of the Court (see, in particular, the judgment in Case C-131/88 Commission v Germany [1991] ECR I-825), the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose, provided that it does indeed guarantee

50) NOU 2012: 2 Utenfor og innenfor – Norges avtaler med EU at 17–18.

51) See, for references to debates in Danish and Swedish law, Niels Fenger, Forvaltning & fællesskab, Jurist- og økonomforbundets forlag (2004) at 454 (Denmark) and 457 (Sweden). Denmark, having been a member of the European Union since 1973, has the longest experience among the Nordic countries with these problems.

52) Case C-361/88 Commission v. Germany, European Court Reports 1991 I-02567.

the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts."

This has been commented on in the following way:[53]

"This means that it is, in fact, quite difficult to depart from the exact wording of the directive – how else, other than by quoting more or less verbatim, can one "guarantee the full application of the directive" and be sure that national legislation makes it possible for the citizens concerned to "ascertain the full extent of their rights [under the directive] and, where appropriate, rely on them before national courts"?"

The consequence is that the traditional Norwegian style of drafting parliamentary legislation quite often would be ruled out. A well-known example that illustrates that the Nordic tradition might not fulfill the strict requirements of the ECJ is case 143/83 against Denmark: An EU Directive (75/117) on equal pay for men and women defined the principle of equal pay as follows:

"The principle of equal pay for men and women … means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration."

The Danish Parliament chose to implement the formulation "same work or … work to which equal value is attributed" in the legislation simply by saying that equal pay meant "equal pay for the same work". According to the ECJ this did not fulfill the requirements for transposition into the national legal order. The fact that in the Government in the preparatory works had stated that the expression "same work" was interpreted in Denmark in so broad a sense that the addition of the expression "work to which equal value is attributed" would not entail any real

53) Henrik Bull, European Law and Norwegian Legislation, Peter-Christian Müller-Graff and Erling Selvig (eds.), The approach to European Law in Germany and Norway, Berliner Wissenschafts-Verlag (2004), pp. 43–56 at 47.

extension of the wording of the legislation was, according to the ECJ, not sufficient to ensure that the persons concerned were adequately informed of their rights. 54)

Another challenge from Norway's participation in the EEA Agreement flows from the fact that EU and EEA law has *its own sources of law and its own legal methodology*, mainly developed by the European Court of Justice (ECJ). When interpreting EU law, the ECJ will hardly take into consideration what a national legislator meant was the content of the legal obligation stemming from EU law. There is no duty on part of the ECJ to show loyalty to the national legislator. The same goes for the EFTA Court, which has jurisdiction to rule in certain cases concerning EEA law under the EEA Agreement where the EFTA States are involved.

In order to secure compliance with EU/EEA law, national courts, when interpreting and applying EU/EEA law, will also have to apply the same legal methodology as the ECJ and the EFTA Court. The result is that the national courts could hardly give any normative force to Norwegian preparatory works explaining the content of the EU/EEA law. If they did so, Norway would run the risk of breaching its EU/EEA law obligations.

The result of this is that preparatory works concerning legislation that is intended to transpose EU/EEA law back-to-back with the obligations stemming from the EU/EEA law, are written with a more limited function in mind – that of *giving information*. They are normally not intended to have normative force. If the information turns out to an incorrect expression of the state of the law, typically because a later judgment from the ECJ or the EFTA Court says something else, Norwegian courts will ignore the statement in the preparatory works. There are several examples of this from the Norwegian Supreme Court.55)

The information given in such preparatory works can still be helpful for those

54) See, for a more detailed discussion of these questions, *Id*. at 44.

55) It should be noted that the EU/EEA law might lead to the courts disregarding not only the preparatory works, but *the legislation itself*: It might be (re)interpreted to such an extent that the wording of it will be misleading.

who apply the law, be it lawyers, courts or administrative agencies. As long as they take into account that such information can be outdated (or incorrect from the start), most people would agree that such information is preferable to leaving it out of the preparatory works altogether.

Even if the preparatory works have more limited use when EU/EEA law is involved, they can serve important normative functions: EU/EEA law still leaves discretion to the national legislator in many cases, typically because the EU/EEA law is limited to imposing minimum obligations on the member states. If this is the case, preparatory works will, within the sphere of discretion that is left to the states, still be able to serve all their traditional functions as long as the minimum obligations are fulfilled.

4. Is the role of preparatory works generally in decline?

It could be asked whether the particular challenges mentioned above have had the consequence that preparatory works in general are given a less prominent role as a tool of interpretation. So far it is hard to say so.[56] The preparatory works will still be a mandatory source of law for the courts and others who apply legislation. But it might be in the future that they in more cases will ignore the preparatory works or at least have a more critical attitude towards them.

It might also be asked whether the general trend of greater mobility across national borders will influence the status of preparatory works in the Norwegian legal system. Increased mobility also leads to an increased need for legal systems to be understandable across national borders. The tradition with heavy reliance on preparatory works as a source of law might seem at odds with other systems, and an outsider might think that such a system is a threat to legal certainty. Possible

56) See, for some further references, Niels Fenger, Forvaltning & fællesskab, Jurist- og økonomforbundets forlag (2004) at 543. At least in the Norwegian system the situation has not, in my view, changed in any particular direction since then, at least not as a result from the EU/EEA law.

changes due to this kind of influence cannot be ruled out, but it will in any case go slowly. Each legal system has its peculiarities. Even though adjustments might take place, it is hard to believe that the long standing tradition of making use of preparatory works will be fundamentally changed.

X. Concluding remarks

The extensive use of preparatory works as a source of law in the Norwegian legal system, particularly when interpreting parliamentary legislation, is based on a long standing tradition. It must be seen in connection with important characteristics of the Norwegian legal system, such as a the prominent position of Parliament as legislator, how the entire legislative process works, the production of preparatory works that are suited to function as a source of law, the fact that the legislation itself is normally kept in a brief style, a pragmatic approach including a willingness to accept flexibility and individual fairness when applying the law, an open attitude to what should be accepted as sources of law, and not least a high level of trust between the legislator and the courts.

Even if the Norwegian practice is tied to certain characteristics of the Norwegian legal system, it could be defended on basis of arguments that have more of a universal character. As long as one does not lose of sight certain basic values that the legal system should build on, such as democratic legitimacy and legal certainty, the Norwegian practice should not been looked at as problematic.

The strengths of preparatory works could also be turned to weaknesses. Their success is therefore really a question of *fine-tuning* the use of them and to avoid excesses in any direction: The preparatory works give considerable guidance as a source of law, but they are at the same time open-ended; they are the bearer of authority, but they can also yield to other sources of authority. This might seem frustrating, but gives room for an appropriate mix of flexibility on the one hand

and clarity and rigidity on the other hand.

Looked at this way, the preparatory works have similarities with *soft law*, albeit *soft law with a particular authority*. As long as the players – the legislator, the courts and the public – know that this is the function of the preparatory works, the preparatory works can be a good tool in between the binding and non-binding. The legislation and the preparatory works *combined* have the potential to give at least the same level of foreseeability and legal certainty as if one relied more exclusively on the wording of the legislation itself (even if that legislation were drafted in a more detailed manner that what is done in Norway today).

One could still argue that the practice undermines legislation itself as a legal source, in that fewer answers could be read out of the text of the legislation, and that the use of preparatory works as a source of law is unfortunate. However, I think that is too easy an answer. It is in no way obvious that more detailed legislation makes the law more accessible to its users.

It could also be claimed that the use of preparatory works fosters *dialogue between the legislator and the courts*, in that the courts very respectfully take into account what the preparatory works say, without being bound by it: If the courts want to deviate from something that is expressed in the preparatory works, they have to defend – give reasons for – this deviation. Sometimes the simple reason might be that the understanding that was expressed in the preparatory works, did not have any foundation in the wording of the legislation and therefore has to be rejected; other times the situation might be more complex. On the other hand, the legislator could always adjust to the courts' analyses of the legislation with its preparatory works by amending the law.

Is there potential for a more extensive use of preparatory works in statutory interpretation in other legal systems than the Norwegian (and Nordic)? And does a positive answer hinge on whether the other legal systems are very similar to the Norwegian?

I think there is a potential for a more extensive use of preparatory works as a source of law also in other systems. The European Union could be an example to illustrate this: The European Court of Justice might seem more willing to rely on preparatory works of EU legislation today than a couple of decades ago.[57] This might be a result of several Nordic countries (first Denmark, and later Sweden and Finland) having become members of the European Union.

The example of the European Union also indicates that the legal system does not have to be very similar in order to be able to make use of preparatory works as a source of law in some sense. At the same time, the preconditions for a more systematic use of preparatory works, when interpreting EU law, akin to the Nordic tradition, are probably not in place, at least not for the time being.[58]

Perhaps the most important lesson – or reminder – from the Norwegian experience is that a good legislative process, including features such as use of expertise, transparency, willingness to listen to stakeholders and thoroughness also is conducive to good legislation. This is hardly surprising. The point of particular importance in my context is that a system with production of high quality preparatory works contributes to the quality of the legislative process and in the end the quality of the legislation, regardless of whether the legislation in question is drafted in a brief or more detailed style.

57) Halvard Haukeland Fredriksen and Gjermund Mathisen, EØS-rett, Fagbokforlaget, 2nd. ed. (2014) at 229.

58) *Id*. at 229.

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59) "NOU" is an acronym for "Norges offentlige utredninger" (meaning literally "Norwegian public studies"), which is a publication series containing expert committee reports that are published by the Norwegian government. The studies are available online at www.regjeringen.no.

60) These are guidelines on preparation of legislation and on legislative drafting technique, issued by The Ministry of Justice.

61) This has for a long time in practice been the Norwegian Supreme Court reporter, reporting the important cases from the Norwegian Supreme Court.

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Abstract

In Norway there is a long standing tradition for the Parliament, the Ministry in charge of the relevant bill, as well as expert committees performing studies for legislative reform, to give explanatory remarks to proposed legislation, as well as to give other statements in preparatory works (travaux preparatoires) that can shed light on the meaning of the proposals. Particularly the explanatory remarks are drafted almost like a scholarly law commentary in connection with each of the draft provisions of the law, explaining in more detail what is the content of the law. The preparatory works form part and parcel of the proposed parliamentary legislation. These explanatory remarks or other parts of the preparatory works do not themselves have the force of binding law, but they have a special kind of authority as an important tool to understand the intention of the legislator. Hence the courts will normally give great weight to them as a source of law as long as they express a sound understanding of the legal provision in question and they do not contravene other important sources of law. Similar traditions are found in other Nordic countries. The article describes this practice further. The importance of this particular source of law in the Norwegian legal system is explained, as well as the reasons behind this tradition. The article also explores the merits of this practice and sheds light on the possibilities of for other legal systems to be inspired by this practice. Some challenges to this practice, particularly in the light of the principle of legality and the continuing influence from international sources of law, are also explored.

Key Words

Legislation, Preparatory works, Nordic legal systems, Norwegian Legal System

국문초록

노르웨이 법시스템에서의 법원(法源)으로서 예비적 연구의 활용

Arnulf Tverberg

(노르웨이 법무부 부국장)

노르웨이에는 의회와 관련 법안을 담당하는 행정 부처 외에도 법제 개혁을 연구하는 전문가위원회가 입법안에 대한 주석적 견해를 제시하고 법안의 의미를 밝힐 수 있는 예비적 연구(travaux preparatoires)에 관한 보고가 오랜 전통으로 자리하고 있다. 특히 주석적 견해는 각 법조문의 초안과 관련하여 법률의 내용을 상세히 설명하는 학술적 주석서 같은 유사한 방식으로 작성된다. 예비적 연구는 의회가 제출한 입법안의 요지를 이룬다. 이러한 주석서 기타 예비적 연구들은 그 자체로 법적 구속력을 가지는 것은 아니지만, 입법자의 입법 의도를 이해하는 데 있어서 중요한 도구로서 특별한 권위를 가진다. 이에 따라 법원은 이들 주석이 쟁점이 된 당해 법조문에 대한 유의미한 해석을 표명하는 한 통상 주요 법원(法源)으로서 비중을 두게 될 것이다. 이와 유사한 전통은 다른 북유럽 국가들에도 존재한다. 본 논문은 이 같은 관행을 좀 더 면밀히 살펴보고자 한다. 이 글은 이러한 관행이 존재하는 배경은 물론, 노르웨이 법제에서 이처럼 특별한 법원(法源)이 가지는 중요성을 논의한다. 본 논문은 이러한 관행의 장점과 다른 법제도들이 이러한 관행에 영감을 받을 가능성이 있는지 여부를 분석한다. 특히 적법성 원리나 지속적인 국제적인 법원(法源)의 영향을 고려하여 제기되는 문제점들을 제시한다.

주제어

입법, 예비적 연구, 북유럽 법제, 노르웨이 법시스템