

Norwegian police law, crime prevention and its (need for more) democratic legitimacy

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Abstract

There is reason to question whether parts of contemporary Norwegian police law can be challenged regarding its democratic legitimacy. The historical background of the Police Act combined with a review of the lack of precise regulation of the police's competences in general and lack of regulation of preventive work in particular, show that this ideal is not met in contemporary Norwegian police law.

1. Introduction¹

The police's so-called *general customary law-based police power of authority*, in the following referred to as *custom-based power of authority*, refers to the competence that the Norwegian police invoked as legal basis for the right to use necessary and proportionate intrusive police authority, including force, to solve the tasks that the police were set to administer, cf. section 2 of the Police Act.²

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1 With a few exceptions references to Norwegian sources in quotation marks are translated into English by the author. All web-pages referred to are last accessed on 22 December 2022.

2 See Ot.prp. nr. 22 (1994-1995) *Om lov om politiet* (The Police Act), chapter I.

Until the adoption of the Police Act of 1995,³ the custom-based power of authority was the primary legal basis for the Norwegian police's use of intrusive measures as means for maintaining public peace, order and protecting persons and the community's security.⁴ The rationale behind the custom-based power of authority has been that if the police were given the task of maintaining public peace, order and security, as well as enforcing punitive behavior, the necessary and proportionate use of force to do so must have been presupposed. With the enactment of the Police Act of 1995, the custom-based power of authority was codified, cf. section 7 of the Police Act. This provided a codified legal basis for the police's competences, cf. the custom-based principle of legality.

Nineteen years later, in connection with the Constitutional reform in 2014, the principle of legality was codified, cf. section 113 of The Constitution of the Kingdom of Norway ('Constitution').⁵ This prescribes that '[i]nfringement of the authorities against the individual must be founded on the law', highlighting the principle of legality 'as a basic substantive legal certainty for the citizens.'⁶

The enactment of the Police Act suggests that the legality principle's demand for the police's intrusive exercise of authority to have basis in law, is now well taken care of. However, despite this development, there is still - as the article's title indicates - reason to question the current state of Norwegian police law. Even if the current regulation cannot be viewed as in conflict with the Constitution or the European Convention of Human Rights, this does not mean that the situation cannot be improved. On the contrary, and this is the central claim of the article, *given the intrusive nature of police law, we should strive to further improve it in view of the ideas and values behind the legality principle.*

More specifically, in this article, I will claim that parts of contemporary Norwegian police law can be challenged in regard to its democratic legitimacy: A central aim of the legality principle is to make sure that the competences of the police are decided by the democratically elected legislator, not by the police itself. The historical background of the contemporary Police Act combined with a review of the lack of precise regulation of the police's competences in regard to preventive work, show that this ideal is not met in contemporary Norwegian police law.

This central claim of the article, it should be stressed, does not amount to a legal doctrinal claim relating to, for instance, contemporary police law being void in regard

3 See Lov-1995-08-04-53 *Lov om politiet* (The Police Act).

4 See Ot.prp. nr. 22 (1994-1995) *Om lov om politiet* (The Police Act) pp. 16-17, and Auglend, *Handleplikt, kommandomyndighet og lydighetsplikt i operativt politiarbeid* (Gyldendal 2016) p. 526.

5 See the English version: <https://lovdata.no/pro/#document/NLE/lov/1814-05-17>.

6 See Skoghøy, *Rett og rettsanvendelse* (Universitetsforlaget 2018) pp. 54-58.

to, for instance, the Norwegian Constitution section 113. Rather, the article provides a *normative principled analysis*, subjecting contemporary Norwegian police law to the critical perspective of democratic legitimacy, in terms of an informed legislator making decisions on the competences of the police. The overarching aim may be described as to create increased awareness of the importance of the legality principle in Norwegian police law. The article is also a contribution to police science and the development of police education.⁷

Furthermore, the analysis is focused on police activities in regard to crime prevention, that is, in regard to the police's responsibility to maintain public order and security and to protect the safety of the individual and the public in general, if necessary, by using force – that is, referring to what in Norwegian is known as 'polisiær virksomhet'.⁸ Consequently, the police activities related to criminal investigations and procedures will not be discussed.⁹

To understand the need to improve the democratic legitimacy of this part of police law, it is, however, important to understand the historical background of the contemporary police law. Therefore, the article starts out with explaining the custom-based power of authority from a historical point of view.¹⁰ This has influenced, and still exerts

7 *Police science* can, in this context be understood as 'a system of scientific findings on policing, on the conditions, means and methods of its performance; on the police as an institution, its functioning, organisation and management as well as professional training and education of police officers', see 2004 CEPOL European Police Research & Science Conference, www.cepoleuropa.eu. In other words, police science is a practical science or applied science with a clear normative purpose: to create a bridge between research, education/training and practice to inform the police about good-practice concepts.

8 See Nilsen 2022 p. 37. According to section 225, first para. of the Criminal Procedure Act (Lov-1981-05-22-25), the criminal investigation 'is instituted and carried out by the police'. The term 'police' refers here to the prosecuting authority in the police, cf. section 55 a) first para., number 3, although the use of police methods for investigative purposes is not the subject of this article.

9 See Heivoll, *Lovens lange arm? En studie av politibetjentes rolle som rettshåndhevere* (Cappelen Damm Akademiske 2018) pp. 32-34, where he, in his study of the police's role as law enforcers, assumes a broad understanding of *law enforcement* that includes activities aimed at intervening against persons who are in the process of, or are at risk of committing crime, as well as persons who have already committed crime. 'Polisiær virksomhet', in this article, does not include law enforcement which is directed solely at crimes that are committed.

10 The custom-based power of authority as a historical norm of police competence is generally recognised in Norwegian legal scholarship. See Auglend 2016 pp. 526-534, where a detailed historical overview is given of its content and importance. But this approach has been challenged in recent theory, see Heivoll, *Den norske forfatningsstatens politimyndighet – fremvekst ev en apori?* in *Unntakstilstand og forfatning* ed. Michalsen (Pax forlag 2013) pp. 299-346 (chapter 1.1). With the exception of Heivoll's works, much of the discussion is, however, mainly of a legal dogmatic character without normative and critical perspectives being developed. See e.g. Heivoll 2018, who discusses the question of legality and the custom-based power of authority from a value perspective, relating to police officials' assessment of whether less serious criminal offenses should be prosecuted or not.

influence on the Norwegian police law and its legal culture – in the meaning of ‘ideas of and expectations to law made operational by institutional (-like) practices’.¹¹ By looking closer at the history of the custom-based power of authority, we will to a greater extent, ‘be able to analyse and understand today’s [legal situation as] a social reality’.¹² In other words, legal culture can be understood as a map we can study to find relations between different factors to gain a higher level of understanding.¹³ This historical-cultural view provides a good starting point for subjecting contemporary police law to a principled analysis of its need for more democratic legitimacy.¹⁴

The article has the following structure: In section 2, I will begin by giving a brief presentation of the legal regulation of policing and its legitimacy from a legal historical perspective, to explain the custom-based power of authority’s position in Norwegian police law. In section 3, I will look closer at the custom-based power of authority and how this, as an expression of a legal culture, came to affect the Police Act from 1995. In section 4, I will discuss the democratic legitimacy of the Police Act and Police actions in general in detail, and especially in relation to the police’s crime prevention activities. In section 5, I will question the relevance of the Supreme Court’s recent acceptance of the use of non-statutory investigative methods in criminal cases to the topic of this article, that is: the police’s use of intrusive methods in preventive work. In section 6, I will summarise by highlighting the connections between the legality principle’s qualitative requirements for legislation authorising the intrusive exercise of authority, democratic control and democratic legitimacy, as mutual prerequisites for the police’s exercise of authority to be able to win the citizens’ trust.

11 The quotation is from Sunde, *Managing the Unmanageable – An Essay Concerning Legal Culture as an Analytical Tool*, in *Comparing Legal Cultures* eds. Koch and Sunde (Fagbokforlaget 2020) p. 27. For another understanding of the concept of *legal culture*, see Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing Limited 2006) p. 88: ‘On the other hand, the concept of culture – and perhaps legal culture – remains useful as a way of referring to clusters of social phenomena ... coexisting in certain social environments, where the exact relationships existing among elements in the cluster are not clear or are not of concern.’ The concept of legal culture then becomes a ‘link’ between the individual’s expectation of legal norms that regulate access to the intervening exercise of authority, and how the executive authority – in this case, the police – exercises the authority. In such a context, a legal culture will be considered good when the executive’s practice of the law corresponds to the expectations of the individual.

12 See Sunde 2020 pp. 26-27.

13 See Sunde 2020 pp. 26-27.

14 Choosing the legal culture perspective is, however, without the intention to discuss legal culture as a concept or as a legal historical topic. Furthermore, the presentation does not aim to address all aspects of the police law culture, which would not be possible within the scope of this article. For a general description of the culture in the Norwegian police, see Johannessen, *Politikultur – identitet, makt og forandring i politiet* (Akademika forlag 2013).

2. The emergence of police legislation in (Denmark-)Norway

In 1660, the King's autocracy was introduced in Denmark-Norway,¹⁵ where *politirett* – 'police law' – was used as a term for the King's autocratic form of government.¹⁶ In Norway, the first chief of police was appointed in Trondheim in 1686, followed by Bergen in 1692. Kristiania (now Oslo) got its first chief of police in 1744 and Kristiansand in 1776.¹⁷ In 1738, the Copenhagen police ordinance of 1701 was applied to all Norwegian trading places, except for Bergen, which received its own police ordinance in 1710.¹⁸ The Police Ordinance of 1701 concerned the police's tasks related to the enforcement of honour, manners, cleanliness, order and peace in public places as well as trade, to name a few.¹⁹ Generally, the regulations were widely stated.²⁰

As early as the 19th century, it was assumed that the officials who had been given police functions had also the power to give orders that had to be obeyed immediately, even if the orders had no direct legal basis.²¹ According to the constitutional law theorist *Aschehoug*, this competence was derived from 'the Nature of the matter'.²² The rationale behind this statement - which was based on the fact that the police had an unwritten authority to take the necessary measures to remove any threat to public order and security - must be regarded as an expression of the prevailing view in legal theory in the 19th century, and was the forerunner to the more formalised doctrine of the power of authority as a custom-based police competence norm, which took place

15 See Heivoll 2018 pp. 87-90, see also Gjeruldsen, *Hæren og eneveldet i Norge 1660-1675* (Forsvarsmuseet 2000) p. 8. Also called the beginning of 'the Danish absolutism', see Mührmann-Lund, *Good order and the Police' – Policing in the towns and the countryside during Danish absolutism*, *Scandinavian Journal of History* 4 (1) 2016 pp. 71-90.

16 See Rystad, *Cappelens verdenshistorie, bind 11 – Religionskriger og enevælde* (J. W Cappelens forlag 1985) pp. 36-37; As part of state-building, the King alone was given the right to exercise power. The King's monopoly of power helped to reduce the risk of violence by others.

17 See Ertresvaag and Fossen, *Til indvohnernes større sikkerhed* (Centraltrykkeriet Bergen 1992) p. 25.

18 See Auglend 2016 pp. 306–325.

19 See Mührmann-Lunds description of the King's instructions of 1691 to Copenhagen's first chief of police: 'an instruction with 12 chapters on religious matters, holidays, morality, vagrants, excessive consumption, markets, streets, waterways, trading, guilds, fire precaution and public transport' 2016 p. 74.

20 See Heivoll 2018 p. 93.

21 See Eriksen 2017 p. 158 ff.

22 See Aschehoug, *Aschehoug's admistrationsret*, 2. Deel, Forelesning No. 90b (1858) p. 236, Nasjonalbiblioteket, <https://www.nb.no/items/25324d14766ab827ebabcbe0c9c1c858?page=5&searchText=>.

in the early 1900s.²³ Despite the end of the King's autocracy, the period from 1814 to 1995 is marked by a lack of legal regulation of the police's tasks and powers.²⁴ With the adoption of the Penal Code of 1902,²⁵ the Danish-Norwegian autocratic royal police ordinances were repealed.²⁶ What was forbidden in a public place because it disturbed public order or threatened security, and what the police otherwise had to observe and enforce, were subjects now deduced from the Penal Code.²⁷ As a result, the Penal Code was now seen as the prerequisite legal basis for the exercise of police authority.

During the 20th century, increased attention was paid to public administration and legal regulation regarding their tasks, competencies and procedural rights and guarantees for the individual.²⁸ In stark contrast to this development, the competence to exercise intrusive police authority remained rooted in the custom-based power of authority.²⁹

In 1912, a police committee was appointed and given the task of drafting a new police act.³⁰ In addition to the new Police Act, which was passed in 1927, the committee also

23 For more about the emergence of custom-based police power of authority, see Heivoll, Om det historiske grunnlag for læren om politiet generalfullmakt, in *Politi, magt og historie, festskrift til Henrik Stevnsborg* (Jurist- og Økonomiforbundets Forlag 2018). See also Heivoll 2013 pp. 299-346.

24 See *Indstilling fra den departementale politilovkomite av 1912 – Utkast til lov om politiets ordninger m.v.* p. 26 which states that the period after 1814 'does not seem to have been of demonstrable significance for the development of the police'. See Ellefsen, Embetsmannsstatens politipolitikk 1814–1842, *Historisk tidsskrift*, 100 (2) 2021 pp. 101-115, where the cause of the incompetence is described in a political context.

25 By the law regarding the Penal Code of 1902's entry into force, section 2 seventh para., all police ordinances and prescriptions 'concerning the police' in various trading places, were repealed. See Negotiations in the Odelsting no. 69 (1901/1902) p. 657. Section 4 of the Entry into force Act did indeed deal with some ordinances, but this applied to matters of a non-police nature.

26 In this context *autocratic Royal Police Ordinances* are to be understood as something less than an Act, which has its origins in *Stortinget* (Parliament). Regarding Police Ordinances and their significance in a Danish context, see Mührmann-Lund 2016. It is to be regarded as an official order by the King. For different definitions of Ordinance, see also Dam, *Presidential legislation in India – The Law and Practice of Ordinances* (Cambridge University press 2014) p. 27: <https://ebookcentral.proquest.com/lib/bergen-ebooks/detail.action?docID=1578923>.

27 See Eriksen, Forvaltningsrett som disiplin in *Rettslige overgangsformer – politi- og kriminalrett i nordisk rettsutvikling*, eds. Heivoll and Flaatten (Akademisk publisering 2017) pp. 150-184, at p. 157 emphasising that the police ordinances dealt with 'the vast majority of aspects of the state's management of society and the individual citizen' and contained norms of injunctive and prohibitive nature.

28 See, for example, Forvaltningskomiteén of 1958.

29 For a detailed presentation of the development, or lack of development, of statutory law - in the period 1814 to 1995 - which described the police competence norms, see Heivoll 2013 pp. 303–316.

30 See Ot.prp. nr. 59 (1920) *Om lov om politiets ordning m.v.* p. 3 where the committee report is published.

prepared a proposal for the new national Police Instruction of 1920.³¹ Neither the Police Act of 1927 nor the Police Instruction contained provisions that laid down the legal framework for the police's competence to exercise authority.

However, the Police Instruction in general,³² in particular its four introductory sections, which must be regarded as the first formalisation of the police's duty to act,³³ was recognised as an expression of an indirect legal basis. It was seen as presupposing the existence of a corresponding custom-based law that gave the police authority to take necessary and proportionate measures with the aim of maintaining public peace, order and security in cases where the exercise of authority was not regulated by a written norm.³⁴

In 1936, a new Police Act was passed.³⁵ The main purpose of the revision of the Police Act was to 'streamline the [police] organisation and clarify responsibilities' between the state and municipalities,³⁶ and regulate the police's task portfolio. In the period from 1936 until 1995 the Police Act was amended thirteen times, but the legislator did not find any reason to regulate police powers and the exercise of intervening authority in statutory law. Common to these amendments, as in previous legislative revisions, was that they only dealt with administrative, organisational and resource related issues.³⁷ The police's competence to exercise intrusive authority remained rooted in custom-based power of authority until the adoption of the Police Act of 1995.

To explain this development, which had more the character of a *condition*, it is suitable to refer to the definition of *police* derived from Blackstone's *commentaries* on the laws of England. He explains the legitimacy of the UK police's exercise of authority around the 1850s, as derived 'from the king's status as the "father of his people", and

31 See *Instruks for politiet (politiinstruksen)*, FOR-1920-02-06-9751 (repealed).

32 See *Instruks for politiet av 1920* (repealed), sections 1-4 which expressed the tasks of the police.

33 See Auglend 2016 p. 350.

34 See Auglend/Mæland 2016 p. 74.

35 The Norwegian police were organised as decentralised independent units under municipal management and control. The arrangement with municipal police unites lasted until the Parliament in 1936 decided to nationalise the police, cf. the Police Act of 1936 sect. 1: 'The state shall provide the police service needed to maintain public order, prosecute offenses and perform other tasks, which by law or custom are the responsibility of the police.' More on the topic, see Furuhausen, *The Police as a Municipal or State Agency – A Comparison of Police Reforms in Denmark, Norway and Sweden during the First Half of the Twentieth Century* (Nordisk politiforskning 2017) pp. 121 -137, <https://doi.org/10.18261/issn.1894-8693-2017-02-02>.

36 See Auglend, *Politi-loven § 16 første ledd – en rettslig skranke for valg av organisatoriske løsninger på driftsnivå i politidistriktene?* (Politihøgskolen 2012) p. 48.

37 For a more detailed presentation of studies that took place in the period 1936 to 1976, see NOU 1981: 35 *Politiets rolle i samfunnet, del I* p. 42 ff.

the “father familias” of the nation.’³⁸ In other words, the state sovereign was compared to the leader of the household who exercised autocratic authority over his (extended) family, and the individuals - as members of a well-run family - was obliged to adapt their behaviour to norms of standing, good neighbourhood and good behaviour, as well as to be decent and harmless.

The description has several similarities to the Norwegian state’s exercise of police authority in the period from 1660 all the way up to the adoption of the Police Act of 1995.³⁹ During the autocratic period (1660 – 1814), the King acted as an almighty and issued royal police ordinances, regulating the policing activities.⁴⁰ The rules were pragmatic and promoted enforcement which supported efficiency and good governance. Both the norms and the exercise of authority were rooted in the King’s almighty position, without legitimacy from the people.

Despite the end of the autocracy in 1814 with the introduction of democracy,⁴¹ as previously mentioned, the royal police ordinances remained in force until 1905,⁴² after which the tasks of the police were derived from the Penal Code of 1902 and local police statutes.

Exercise of authority rooted in the approach of the *pater familias* holds all the characteristics of a police state. The distinction between a state based on the rule of law and a police state can – in a legal perspective – be described as follows:

*[T]he state is the institutional manifestation of a political community of free and equal persons. The function of the law state is to manifest and protect the autonomy of its constituents in all of its aspects, private and public. From the perspective of police, the state is the institutional manifestation of a household. The police state, as pater familias seeks to maximize the welfare of his - or rather its - household.*⁴³

38 See Dubber, Criminal Police and Criminal Law in the Rechtstaat in *Police and the Liberal State*, eds. Dubber and Valverde (Stanford law books 2008), pp. 92-109, at p. 99 with reference to *Blackstone commentaries*.

39 Norway was in union with Denmark from 1380 to 1814, and from 1814 to 1905 in union with Sweden. Since 1905, Norway has been an independent state.

40 About royal police ordinance in a Danish legal context, see Mührmann-Lund 2016. About *Royal police ordinances* in a Swedish legal context, see Kotkas, *Royal Police Ordinances in Early Modern Sweden – The Emergence of Voluntaristic Understanding of Law*, (Brill 2013). See E-book: <https://ebookcentral.proquest.com/lib/bergen-ebooks/reader.action?docID=1524069>.

41 Since 1814, Norway has had a democratic state constitution in accordance with the principle of people’s sovereignty.

42 See Heivoll 2018 p. 208.

43 See Ramsay, Vulnerability, Sovereignty, and Police in the ASBO (anti-social behavior order), in *Police and the Liberal State*, eds. Dubber and Valverde, (Stanford law books 2008) p. 158.

A state's administration of police authority will always be a product of its time. It is therefore understandable that society, in the age of autocracy, accepted a patriarchal exercise of authority that had its origins in an almighty king. It is more difficult to understand that *household management* along with royal police ordinances from the period of autocracy were accepted as legitimate legal basis for the exercise of police authority in the time after democracy was introduced in Norway, and the principle of the rule of law was acknowledged through the adoption of the Norwegian Constitution in 1814. There is reason to argue that the police's exercise of authority, in the period after 1814 and until the adoption of the Police Act in 1995, was based on patriarchal features. The state's administration of the police exercise of authority has similarities to Kann's description of the time after the American Revolution: 'The Revolution simultaneously freed Americans from the king's police power and freed American officials to exercise police power'.⁴⁴

The exercise of public authority is legitimate when it is based on the consent of the citizens. Police officers exercise of police powers is no exception. As *Dubber* puts it, 'legitimate government is self-government'.⁴⁵ The state's use of punishment is only legitimate if it is considered 'self-punishment'.⁴⁶ A similar approach can be applied to the exercise of authority by the police. The police's interventions are only legitimate as far as they correspond with the citizens' general views on acceptable exercise of authority. In other words, the exercise of intervening authority must always reflect the citizens' defined acceptance of 'self-regulating behaviour'.

Based on *Dubber's* description of legitimate exercise of authority as 'self-government', the Norwegian principle of legality, cf. section 113 of the Constitution, requiring that '[i]nfringement of the authorities against the individual must be founded on the law', is to be regarded as an expression of accepted self-regulation in a Norwegian legal context.⁴⁷ As long as the exercise of police powers was not rooted in statutory law, defined by the people through political processes in the Parliament (*Stortinget*), cf. section 75 of the Constitution, there is reason to ask what legitimised the Norwegian police's exercise of authority in the period leading up to the adoption of the Police Act in 1995.

In the period from the 1850s until 1995, several public appointed committees and the authorities justified the lack of legal regulation of police authority,⁴⁸ exercised

44 See Kann, Limited Liberty, Durable Patriarchy in *Police and the Liberal State*, eds. *Dubber* and *Valverde* (Stanford law books 2008) pp. 74-91, at p. 74.

45 *Dubber* 2008 p. 97.

46 *Dubber* 2008 p. 97.

47 The principle of legality was a custom-based principle until it was codified by the 2014 constitutional reform, cf. the Norwegian Constitution sect. 113.

48 For a more detailed presentation of various draft legislation that affected the police legislation in the period 1912 until the adoption of the Police Act of 1995, see *Nilsen* 2022 pp. 304 - 321.

through actions or interventions, by reference to ‘considerations of appropriateness’. As the Police Law Committee of 1912 stated, it was difficult to provide a police act that exhaustively regulated the police’s main tasks because these were constantly changing. In other words, detailed legal regulation of police tasks and intervention competences did not appear to be practicable.⁴⁹ The consequence of this approach was that the legislature left it to the police to decide which means were most appropriate to use to achieve the agency’s goal of preventing, averting and stopping threats to public and private security.⁵⁰

The government’s approach merely described the actual situation without explaining how the exercise of police authority could be considered to have sufficient legitimacy among the citizens, despite the lack of a basis in formal law. In my opinion, three key factors can explain why the police’s exercise of intervening authority still had a fairly high level of legitimacy despite its lack of basis in formal law.

The first key factor is *trust*. As the *Administrative Committee of 1958* points out, the administrative decisions ‘was received with general acceptance. The public servants were highly regarded and respected for their independence, objectivity, and honesty’.⁵¹ In a period where other public administrative activities had basis in formal law that regulated the individual’s rights and obligations, together with the state’s competence to exercise intervening authority, the police – as the main holder of the state’s power monopoly – continued its exercise of authority essentially by reference to being trusted by the public. In addition, two related factors are important: The police’s exercise of authority was in line with the general moral perception of the citizens,⁵² and its purpose - the enforcement of criminal law and norms that regulated public peace and order - was in accordance with the moral values in society.

Without intending to deal with the topic in depth, there is reason to ask why the introduction of democracy in 1814 did not significantly affect the perceived need for legal regulation of the police’s competence to exercise intrusive authority. With the introduction of democracy in 1814, the right to vote was limited to men over 25 years, who were either senior officials, had residence in cities or independent farmers.⁵³ Consequently, only a limited group could exercise indirect influence on the development of the legal regulation of the police. And the police’s exercise of power mainly affected the part of the population that were not entitled to vote. Only with

49 See *Politolovkomiteen* of 1912 p. 51.

50 See Heivoll 2018.

51 See *Forvaltningskomiteen* of 1958 p. 10.

52 See Bjørge, Strategi for forebygging av terrorisme in *Forebygging av terrorisme og annen kriminalitet*, ed. Bjørge, PHS forskning 2011 (1), <https://phs.brage.unit.no/phs-xmlui/handle/11250/175076> p. 20: ‘Most people abstain from violence because they see it as morally wrong and that it is intolerable and unthinkable to harm other people’.

53 See Saxi, Myter om grunnloven og parlamentarismen, *Plan* 46 (3-4) 2014 pp. 50-56.

the introduction of the general right to vote for men in 1898, for women in 1913 and for the poor in 1919, did it become more important to discuss the legal basis for the police's exercise of power.

The extension of the right to vote came after increasingly large groups could participate in the dialogue in society through increased schooling and, most importantly, through the organisation of political parties and other organisations that influenced politics. While more people took part in the public debate, which indeed did influence policy, the police maintained its public trust without the question of the need for legal regulation of the police's intervention competence being subject to much discussion. In other words, the population's trust in the police survived various changes in society, partly due to changes in the police that made the agency worthy of such trust.

3. The emergence of the Police Act of 1995

Any legal norm, and the interpretation of its content, is influenced by the prevailing legal culture. In this respect, Norwegian police law and legislation are no exception. There are three key factors that have influenced the legal culture and Norwegian police law, respectively the custom-based power of authority as a norm of police competence, the interpretation of the *principle of legality as a prohibition norm*, and the use of *grounds for impunity*, such as the right to self-defense and emergency law, as a legal basis for the police's *exercise of authority*. I will discuss each of these in the following.

Regarding the first, the custom-based power of authority, until the adoption of the Police Act of 1995 this was the primary legal basis for the Norwegian police's competence. As a legal norm, the custom-based power of authority had the character of a prerequisite legal basis, which was derived from the fact that both the police instructions of 1920 and the current police instructions of 1990 set out several tasks that the police were set to administer.⁵⁴ These tasks indicated a general duty of service for the police, as well as the individual police officer. Despite this, no written norms provided guidance on the content of competence to exercise intervening authority. Admittedly, the Norwegian Supreme Court recognised *generalfullmakten* as a custom-based competence norm, but without taking a further position on its scope, in addition to acknowledging that it legitimated the exercise of necessary and proportionate interventions.

The practice of using custom-based legislation as a basis for the police's intrusive exercise of authority, stood in stark contrast to our formerly custom-based national constitutional principle of legality, which - in line with the current codified principle

54 For a more detailed presentation of these tasks, see *Utkast til alminnelig tjenesteinstruks for politiet 1988* p. 26 ff.

of legality, cf. section 113 of the Constitution – prescribed that ‘[i]nfringement of the authorities against the individual must be founded on the law’.⁵⁵

Lack of legal statutory law and other legal regulations of the police’s competence to intervene, combined with the fact that the police’s exercise of authority was rarely subject to judicial review by a court, had several legal implications. Right up to the adoption of the Police Act of 1995, the police’s practice was the only source that provided guidelines for the development and definition of the legal framework for the police’s own competence. This development took place in line with societal developments and changing societal challenges. Consequently, the custom-based power of authority, as the standard of competence for the exercise of police authority, was clearly in tension with *the principle of distribution of power*.⁵⁶

The fact that the custom-based power of authority was, at a given time, observable only through police practice meant that the state *de facto* gave the agency authority to define their own intervention powers, which represented a breach of *the principle of people’s sovereignty*.⁵⁷ Further, the lack of written norms expressing the content of the police’s intervention powers, combined with the absence of case law that made a stand on the scope of the competence norms, meant that citizens had little opportunity to foresee their legal position when they were subject to the exercise of police authority, such as oral orders and physical action.⁵⁸ For that reason, the practice represented a breach with *the legality principle’s lex certa-requirement* which prescribes that legislation authorising intervention measures shall provide sufficiently clear and precise guidance on the content of the norm.

55 Although the custom-based law was and is recognised by the European Court of Human Rights (ECtHR), the Court is clear that the expression ‘in accordance with the law’ is to be understood as ‘in accordance with national law’, see *S.V and A v. Denmark* (35553/12, 36678/12 and 36711/12) sect. 74 where the Court points out that ‘[w]here the ‘lawfulness’ of detention is in issue, including the question whether ‘a procedure prescribed by law’ has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof’.

56 See section 75 first para., letter a) of the Constitution which prescribes that ‘[i]t lies with the Storting to enact and repeal laws’.

57 *The principle of people’s sovereignty* expresses that it is the people, through the Parliament as the legislative assembly, who decides what intrusive measures the executive government can enforce on individual’s rights.

58 The distinction between the polices *oral orders* and *physical actions* can be described with the following example: The police have competence, in certain situations, to give binding commands to civilians. When the police order a person to leave a specific place, the order itself is referred to as an oral order. If the person does not comply immediately with the orders, but chooses to remain on the spot, the police’s act in the form of physically removing the person from the scene, will be referred to as a physical act. And the physical act is intended to secure the fulfilment of any obligation that can be deduced from the polices oral order.

The establishment of legislation that provides guidance on what is considered legitimate use of intrusive measures, including force, is, together with the establishment of institutions for carrying out legality control over the exercise of police service, key elements in the state's duty to ensure human rights, cf. Article 1 of the ECHR. In the same way as individuals, also control bodies need access to legal norms that provide sufficiently precise and clear guidance on what is to be regarded as legitimate exercise of police authority. Considering the practices described above, it must have been challenging for the control bodies to carry out legality control over the exercise of police service and to set qualitative standards for the state's duty to safeguard human rights, cf. Article 1 of the ECHR. Collectively, this practice represented a legal situation that challenged the values that our national principle of legality is based on and is the guardian of. Furthermore, there is reason to assume that the practice also challenged the state's duty to ensure fundamental human rights, cf. Article 1 of the ECHR.

However, the use of custom-based power of authority and the practice associated with its interpretation, were not the only factors that influenced Norwegian police law. Another key factor was the interpretation of the principle of legality as a *prohibition norm*. This brings us to the second of the three points mentioned at the beginning of this section. This interpretation of the legality principle was based on a *formal view* of the principle of legality. This view assumed that the principle covered only the police's intrusive exercise of authority in form of oral orders, and thus did not include physical action.⁵⁹ Consequently, the question of whether the police's physical acts were legitimate had to be considered in the light of *the lex-superior principle*. In short, any physical act of service was permitted if it was not prohibited by law. In that case, the police had to be able to refer to a law of at least equivalent rank. For the exercise of police authority, which essentially consists of physical acts, this interpretation of the principle of legality allowed for further use of intrusive police actions or measures.

This understanding of the custom-based power of authority as a norm of police competence and the principle of legality as a prohibition norm, was not only used as a legal basis by the police. Lack of objections can be considered as explicit approval from the Supreme Court and, implicitly, also by the Parliament. In other words, the individual police officer's understanding of the legal framework for him to intervene was not only supported by a collective understanding among police officers, but also in the agency's different institutions, as well as other state institutions outside the police. Collective and institutional support turn such an understanding into a legal cultural understanding, valid over time and at all levels. This contributes to explain how the custom-based power of authority as a norm of police competence, together

59 See Eckhoff and Smith, *Forvaltningsrett*, 11. ed. (Universitetsforlaget 2020) p. 344 ff.

with the understanding of the principle of legality as a prohibition norm, could exist despite the Constitution's requirement that interventional exercise of authority should have a basis in law.

The third key factor I would like to point out in this context, influencing Norwegian police law, was that grounds for impunity, such as the right to self-defense and emergency law, could also be invoked as a legal basis for the police's exercise of authority.⁶⁰ When the police dealt with the issue of legal boundaries for exercising intrusive policing authority, they first had to clarify whether the measure was prohibited by positive legislation, regardless of the question of whether the measure constituted an intervention. If there was no legal prohibition, the police assumed that they, in accordance with *the general freedom of action*, were entitled to apply necessary and proportionate measures. Examples of physical/factual actions and methods that were justified in the light of the principle of general freedom of action are secret observation, infiltration and provocation of evidence, to name a few. If there was a statutory provision prohibiting measures that the police considered using, such as the Penal Code's prohibition of violence against another person, the custom-based power of authority came into force as a legal basis for the police's acts, by virtue of being *lex superior* to the Penal Code. And outside the scope of the general power of authority, the police could invoke the right to exercise self-defense and emergency law.⁶¹

Considering these three factors, there are indications that the approach to the question of its competence regarding the exercise of intervening policing authority, together with the police's right to exercise discretion regarding the use of this competence,⁶² was influenced by the police law culture formed by the custom-based power of authority. And this legal culture, which prevailed in the Norwegian police until 1995, stood in contrast to our national principle of legality as expressed today in section 113 of the Constitution.

With this as a backdrop, it can be questioned if there may be remnants of this legal culture in the new Police Act of 1995. At least, a review of the preparatory work shows that the need to harmonise the police legislation with the principle of legality was probably not the driving force behind the codification of the custom-based power of authority. The purposes and justifications on which the legislative work was based,

60 See *Utkast til ny lov om politiet med motiver, part IV*, pp. 128-129. Regarding this topic, see Nilsen and Sperr, *Straffeloven § 18 – Nødverge som polisier kometansenorm in Med ære og samvittighet – Festskrift til Magnus Matningsdal*, eds. Bergsjø *et al.* (Gyldendal 2021) pp. 291-315.

61 There are examples of theoretical discussions that also in 2020 suggest that the general freedom of action can be invoked as a 'legal basis' for the police's exercise of intervening authority, see Nordhus, *Straffelovgivningens betydning for politiets kompetanse til å anvende provokasjon*, *Tidsskrift for strafferett*, 20 (2) 2020 pp. 156-180, at section 4.2.

62 Exercise of discretion means that the police, in cases where there is a legal basis and right to act, may decide not to intervene, see NOU 1981: 35 p. 84.

leaves the impression that the police's need for flexible intervention powers that promoted effective exercise of authority, trumped legal safeguards considerations, such as the principle of legality. I will briefly point to four circumstances that support this claim. Firstly, the Ministry stated in the preparatory works that the custom-based power of authority constituted 'an exception to the principle of legality'.⁶³ This was in line with both case law and the prevailing view in legal theory, prior to the adoption of the Police Act of 1995. The custom-based power of authority was recognised and accepted as a legal basis for the police's right to take all necessary and proportionate intrusive police actions and measures.⁶⁴ And its position as an exception to the principle of legality directly reflected itself in the design of section 7 of the Police Act, which is considered as the actual codification of the general power of authority. In the preparatory work, it was explicitly stated that

*in section 7, second paragraph, the most relevant measures that the police must be able to implement in the various situations are included. The listing must not be interpreted antithetically. In other words, the police can implement measures that are not explicitly included in the section if the need so requires.*⁶⁵

Secondly, the Ministry of Justice emphasised the need for the police powers, cf. section 7 of the Police Act, to be given a 'spacious design' so that the entire scope of the general power of authority was covered.⁶⁶ In the text of the law, this was expressed with the following wording: 'In such cases, the police can, among other things ...' (underlined here). Thirdly, the Ministry of Justice also pointed out in the preparatory works that the text of the law should not only express the scope of the general power of authority at the time, but also 'be open to all situations that may arise in the future'.⁶⁷

63 See Ot.prp. nr. 22 (1994-1995) *Om lov om politiet* (The Police Act) pp. 9-10.

64 See the judgements from the Norwegian Supreme Court in Rt. 1995 p. 20 and Rt. 1995 p. 1195.

65 This approach, including emphasis on the consideration of efficiency at the expense of legal security considerations, was in line with what was stated in the Draft to New Police Act with motives, part II, p. 27. Here it is pointed out that codification could lead to rigid, inappropriate and unusable regulations, at the same times as it does not provide satisfactory guidance and business management effect. 'This indicates that the pretensions with regard to the scope and content of the legal regulation should be relatively sober. As a result of the varying diversity of police activities, it will hardly be possible to codify oneself completely away from custom as a legal source factor in the area of police law' (authors translation).

66 See Auglend 2016 p. 532 and Ot.prp. nr. 22 (1994-1995) *Om lov om politiet* (The Police Act) pp. 19-20.

67 See Ot.prp. no. 22 (1994 – 1995) pp. 19-20 where the Ministry states the following: 'The Ministry has been aware of the problem of regulating the right to take action in an area as diverse as that of the police. In practice, it is impossible to overview all situations that may arise in the future. The result of a detailed enumeration may be that what is not positively mentioned is considered not to be legal. This has been considered when designing the draft law'.

And fourthly, the fear that a codification of the general power of authority would lead to the police being paralysed in situations that were not directly regulated in the new Police Act, overshadowed, in my view, the citizens' need for predictability and control over the police's exercise of authority.⁶⁸

This somewhat general review shows that the custom-based power of authority, as an expression of a police law culture, not only influenced the drafting of it, but also seems to have been sought implemented in the Police Act of 1995. Now, I will take a closer look at the impact or consequence this may have had on the democratic legitimacy of the Police Act, specifically in regard to its competences regarding crime prevention.

4. The Police Act, crime prevention and democratic legitimacy

The purpose of legislation is 'to regulate a general class of events for the future through a form that is bound to concise and abstract texts that are given a special status as valid legal texts.'⁶⁹ The legal text thus has 'its own politically and democratically justified legitimacy.'⁷⁰ By virtue of being the result of a democratic legislative process, where the people exercise the legislative power through the Parliament cf. section 49 of the Constitution, first paragraph, and adopted in accordance with sections 76 ff., the Police Act appears to have great democratic legitimacy.⁷¹ The question is whether this impression is adequate.

As a general rule, the Parliament will, when codifying customary law, use the Supreme Court's interpretations as the basis for the codification.⁷² In such cases, the relevant area of law has been subject to judicial review and control, and the Parliament's codification of case law and legal practices thus contributes to making the norm

68 See Ot.prp. nr. 22 (1994–1995) *Om lov om politiet* (The Police Act) pp. 18-19: 'Legislation of the police's right to use force could conceivably be implemented through detailed regulation. Such a list of types of cases where force can be allowed to be used would increase citizens' ability to control and predictability regarding the police's pattern of action. However, the listing will not be exhaustive, and the police will easily be paralyzed in situations that are not directly regulated.'

69 See Graver, Vanlig juridisk metode? Om rettsdogmatikken som juridisk sjanger, *Tidsskrift for Rettsvitenskap* 121 (2) 2008 pp. 149-178.

70 See Graver 2008. See also the preparatory work to the Constitution section 113, cf. Dok. nr. 16 (2011–2012) *Rapport fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven* p. 248, where *democratic control* is highlighted as a central purpose.

71 More about the legislative process, see Mæhle and Aarli, *Fra lov til rett*, 2. ed. (Gyldendal juridiske 2017) p. 34 ff.

72 As an example, see the Supreme Court's decision in Rt. 1977 p. 1035 which dealt with the question of patients' right of access to their own medical records and subsequent codification of the rights in the Patient and User Rights Act, see Lov om pasient- og brukerrettigheter, lov 2. juli 1999 nr. 63.

generally known to citizens, which contributes to strengthen the norm's democratic legitimacy.⁷³ However, this was only to some extent the case with the Parliament's codification of the custom-based power of authority .

A review of the Supreme Court's case-law shows, as previously mentioned, that the custom-based power of authority was recognised as a customary based legal basis for police powers,⁷⁴ but its material content was seldom subject to substantive consideration.⁷⁵ The fact that the custom-based power of authority appeared as an expression of the intervention competences which appeared necessary for the police to be able to carry out their policing tasks, meant that it was mainly the agency's own understanding and definition of the need for intervention competence that shaped and developed the general power of authority as a legal basis. Consequently, the adoption of the Police Act of 1995 represented a codification of the police's own practice, and only to a lesser extent case law developed through the court's review of the police's exercise of powers.⁷⁶

In this respect, the adoption of the Police Act of 1995 did not represent a change in paradigm. Both the Police Act of 1995 and subsequent police legislation, in the form of formal substantive law, seem to be based on an approach where police practice has been the determining factor for the development and definition of police competences. There are several factors that together support such an assertion. As previously pointed out, the Police Act's specification of material conditions and criteria for use of invasive police methods and measures is to a large extent described by using discretionary and imprecise terms.⁷⁷

This, I will now claim, is a particularly evident problem in regard to the (lack of) legal basis for the police's *crime prevention*. According to Police Act section 2, no. 1 and 2, which sets out the tasks, the police shall provide 'protection against any threat to general security in the community' and 'prevent crime and other violations of public order and security' (underlined here). Another example is the Police Databases Act. According to section 2 no. 13, *police purposes* are legally defined as 'the police's activities against crime, including [...] preventive efforts ...'⁷⁸ Additional, according to section 27 first and second paragraph of the Police Databases Act, the duty of

73 See Mæhle/Aarli 2017 p. 54.

74 See, among other, the Supreme Court's decision Rt. 1978 p. 1259: 'The police have a duty to prevent criminal acts. It is possible that the police, after what has been called its "generalfullmakt", have the opportunity to intervene against a person who they believe will violate the Road Traffic Act, section 21 first para., if the person in question drove a motor vehicle.'

75 There are a few Supreme Court decisions that draw substantive boundaries for the exercise of police authority: Rt. 2007 p. 940, Rt. 1995 p. 1195. Rt. 1995 p. 20, Rt. 1981 p. 679 and Rt. 1978 p. 1259.

76 See Nilsen 2022 pp. 327-329.

77 See Fredriksen and Spurkeland, *Ordensjuss*, 2. ed. (Gyldendal juridisk 2015) p. 47.

78 See www.lovdatab.no, English version, The Police Databases Act.

confidentiality shall not preclude the police from disclosing data to other public authorities or private bodies if disclosure is necessary in order to *avert* and *prevent* criminal offenses. Common to the terms: *crime prevention*, *public order*, *security*, and similar legal terms, used in the police legislation, is that they have their origins as police professional terms. These terms are later used in the police legislation as an expression of key material terms and criteria for the police's competence to intervene, without their legal content being further defined.

In other words, the legal term *preventive* constitutes a key material condition for the police's exercise of authority. Despite this, neither the Police Act nor the Police Database Act defines, or in any other way clarifies, what is meant by preventive or preventive work, or similar expressions where prevention is included as an element in the term. The relevant preparatory works do not seem to provide guidance.

The preparatory work for the Police Database Act can stand as an example of a lack of awareness regarding the distinction between *averting crime* and *preventing crime* in a policing context.⁷⁹ According to the Ministry of Justice the disclosure of confidential information, for the purpose of *averting* crime, requires 'both that one has relatively concrete and credible information that a criminal act will be committed, and that its execution will happen quite soon. The right to use confidential information to *avert* criminal acts does not require that the offense must be of a particular seriousness'. However, when the Ministry of Justice deals with the term *preventive*, cf. section 27, the presentation only points out the following: 'If the conditions are met, the information can be disseminated to both public and private recipients, and there is also no special requirement to consider other ways of prevention.'

Another example is the use of the terms *prevent* and *avert* in the preparatory work for the Police Act itself. According to section 7, first paragraph of the Police Act, '[t]he police may intervene to avert or halt violations of the law' (underlined here).⁸⁰ In the preparatory work to the provision, the Ministry of Justice emphasises that the provision contains 'the most important parts of custom-based power of authority. The section will be the police's most important legal tool in the daily service to maintain public order and security and crime prevention' (underlined here). Later in the preparatory work, the Ministry of Justice points out that the 'term *avert* is used instead of *prevent* to make it clear that the offense must be imminent'.⁸¹

The legislator's lack of awareness regarding the meaning of *crime prevention* in a police context and the fact that this part of the police's activity is hardly subject to judicial

79 See Ot.prp. nr. 108 (2008-2009) *Om lov om behandling av opplysninger i politiet og påtalemyndigheten* (the Police Databases Act) pp. 306-307.

80 English translation of the Police Act:
<https://app.uio.no/ub/ujur/oversatte-lover/data/lov-19950804-053-eng.pdf>.

81 See Ot.prp. nr. 22 (1994-1995) *Om lov om politiet* (The Police Act) p. 61.

control by the courts,⁸² have led to a practice where the legislator has *de facto* left it to the police to define *crime prevention* as a legal concept and to develop the police's competence to carry out intrusive exercise of authority with the aim of preventing crime. In other words, the legal culture that the former custom-based power of authority was an expression of, based on shared ideas and internal and external institutional practices, seems even today to affect both the legislator and the police in its approach and to the understanding of the principle of legality as a prohibition norm and as an interpretation principle when the legal framework for the agency's access to exercise intrusive measures is to be determined.

In line with the Government's decision that *prevention* should be the police's primary strategy,⁸³ the Norwegian Police Directorate has prepared a strategic plan for the agency's prevention work. Here, *prevention* is explained as follows:⁸⁴

Preventive efforts can take place before, during and after a criminal act [...] Prevention must be the purpose along the entire time axis. This strategy will help to strengthen the preventive approach, both within the various disciplines and throughout the police's entire task solution.

When the police take preventive measures against an individual, the purpose is to regulate behavior. In other words, the police carry out, on behalf of society, social control. Measures, which aim to regulate behavior for preventive purposes, affect the individual's core rights and values. Consequently, the exercise of social control, with the purpose of regulating behavior, will be in danger of constituting an infringement on rights that are protected under section 102 of the Constitution and Article 8 of the ECHR, with the consequence that they 'must be founded on the law', cf. section 113 of the Constitution.

Section 2 no. 2 of the Police Act acknowledges that crime prevention is one of the primary tasks of the police. Despite this, the police legislation does not contain provisions that give the police general competence to make use of crime prevention measures, nor does it describe what is to be regarded as crime prevention in a legal context.⁸⁵ Therefore, there is reason to question if the police's development of its own professional approach to what is considered crime preventive work – in this case,

82 See Fredriksen and Myhrer, *Politirett i et notteskall* (Gyldendal juridisk 2016) p. 33.

83 See Prop. 1 S (2018-2019), section 4.2.1.

84 See The Police Directorate's crime prevention strategy, *I Forkant av kriminalitet – forebygging som politiets hovedstrategi (2021-2025)*, www.politiet.no.

85 The Police Act contains a provision to take crime prevention measures. Sect. 13 fourth para. prescribes that the police may require of parents and the child to appear before the police for an interview with the purpose to prevent further offenses.

expressed through the agency's strategy for crime prevention – in the long run will lead to the police gaining competence corresponding to their own development of crime prevention as a subject and method.

A legal text is given democratic legitimacy by virtue of expressing the will of the legislature.⁸⁶ But, as the discussions above show, it seems as if the legislature, when legislating on police competences, has deliberately chosen not to take a clear position regarding several of the law's central criteria.⁸⁷ Lack of clarification of key legal terms and criteria for exercise of authority can undoubtedly promote effective exercise of authority, but is overshadowed by the fact that unintentional expansion of the scope of police powers weakens the legitimacy of the law.

Preventive, and other similar legal terms, which will function also as professional terms in the police, will thus determine the content of the police competence norms. These terms will constantly be under professional development and change, with the consequence that the police's competence norms will change in line with the term's significance as a police professional term. The absence of real judicial control with the police's exercise of authority, strengthens this impression.

Consequently, a practice has been established in which the police's understanding of *preventive* and similar police professional terms *de facto* defines the legal framework for the agency's own intervention competence, which challenges *the principle of separation of power* – division of legislative, executive, and judicial functions exercised by different political bodies with a separate origin – and *the principle of people's sovereignty*, principles that allow the people to exercise legislative power through the Parliament, cf. the Constitution section 49 first paragraph, aiming to ensure that the parliament as a legislative body sets the boundaries for what public offices can do.

Further, current practice challenges the Norwegian principle of legality, more specifically the *precision requirement* and *predictability requirement*. The individual may find it difficult to conform to norms that are formed and developed through the police's own practice of the rules, where its actual content is only available by observation 'there and then' during the police's exercise of service.

Additionally, the practice also challenges one of the key considerations on which the Norwegian principle of legality is based on, and the legal security guarantee that the principle seeks to safeguard, namely, to *promote democratic control* in order to *prevent arbitrary exercise of authority*. If the police, concretely, the individual police officer in a specific situation, are authorised to define their own powers to carry out intrusive exercise of police authority, the police are also given competence to define the scope of basic human rights. The process of law enforcement will then become, as

86 See Mæhle/Aarli 2017 p. 90.

87 See NOU 2004: 6, *Mellom effektivitet og personvern. Politimetoder i forebyggende øyemed*, pp. 171-174.

Crawshaw states, 'arbitrary and uncertain because of the huge number of individual decisions being taken by officials applying their own individual standards'.⁸⁸

This means that the further development of police legislation, in key areas, takes place detached from democratic processes and judicial control, which also contributes to weakening the legal legitimacy among citizens of both the police laws and the police's exercise of authority.⁸⁹

High legal legitimacy presupposes, among other things, that the legal source must be available for discussion in the public sphere. This applies to both the legal text of the act itself and the transparency and predictability associated with its further development. Lack of accessibility makes it difficult to scrutinise the arguments that are invoked in support of the interpretation of the law, as well as to ensure that the arguments are valid on a general basis, not only to the specific enforcement officers, in this case, the police.⁹⁰

5. The relevance of the Supreme Court's decision in HR-2020-2137-A

In HR-2020-2137, the Supreme Court had to address the question of whether there is a sufficient legal basis for specific intrusive investigative methods. Norwegian police law relating to investigative purposes is not the topic of this article. However, the decision in HR-2020-2137 is still relevant to our discussion. Here, the question is whether the Supreme Court's approach to the principle of legality as a prohibition norm also can be invoked in relation to the police's use of intrusive methods in a policing context in general, and crime prevention activities in particular.

Through several decisions from 1984 to 2020, the Supreme Court recognised the police's use of intrusive methods for investigative purposes, even though they lacked legal basis in formal law.⁹¹ The Norwegian police's use of non-traditional methods for investigative purposes is not regulated by formal law, but since 1984, the more detailed conditions for the use of these methods have developed through Supreme Court case law (see Rt. 1984 p. 1076) and are further regulated by administrative

88 See Crawshaw, *Police and Human Rights*, 2nd revised edition (Martinus Nijhoff publishers 2009) p. 21.

89 By *legal legitimacy*, I understand as a situation where 'the public belief that laws are personally binding and the corresponding moral obligation to abide by the law', regardless of the morality of a given action. The police then have legal legitimacy to define what constitutes proper behavior. See Jackson et al., *Compliance with the law and policing by consent: notes on police and legal legitimacy* (LSE Research Online April 2014), <http://eprints.lse.ac.uk/30157/>.

90 See Mæhle/Aarli 2017 p. 231 which points out that legal legitimacy is the product of several factors.

91 See Rt. 1984 p.1076.

directives from the Director-General of Public Prosecutions.⁹² In HR-2020-2137-A, the Supreme Court was to consider whether the lack of legal basis for the use of infiltration and provocation contravened the explicit requirement in section 113 of the Constitution, stating that ‘[i]nfringement of the authorities against the individual must be founded on the law’.

After stating that the investigative methods used constituted an infringement of section 102 of the Constitution and Article 8 of the ECHR,⁹³ both concerning the right to privacy, the Supreme Court recognised the police’s exercise of authority even though it lacked a basis in formal law. According to the Supreme Court, the lack of legal regulation of the investigative methods is a ‘question of what is useful’.⁹⁴ And the Court’s recognition of case law as the legal basis for the police’s intrusive investigative methods seems to be based on the following reasoning: Over the years, the Parliament, as legislator, has considered several bills, providing the opportunity to make a stand on the question of legislation on these investigative methods, without ‘at any time having pointed out that basis in formal law is required’.⁹⁵ Furthermore, the Supreme Court assumed that it is reasonable to believe that the Parliament, if they believed that such investigative methods lacked sufficient legal authority, would have expressed this in connection with the codification of section 113 of the Constitution.

By emphasising that the Parliament has positively not decided on or expressed a view during the consideration of bills, the Supreme Court attributes the Parliament’s legislative process ‘negative credibility’, without challenging the custom-based power of authority as a legal cultural notion that is incompatible with section 113 of the Constitution, requiring that ‘[i]nfringement of the authorities against the individual must be founded on the law’. This, however, can be argued to not fulfill the ideal of democratic legitimacy in the area of police law.

Also, I would add, there is reason to be critical to the Supreme Court’s conclusion and arguments. For instance, the court’s recognition of the use of these intrusive investigative methods stands in stark contrast to the Parliament’s adoption of The Human Rights Act in 1999,⁹⁶ which explicitly states that the ECHR shall have the force of Norwegian law, cf. section 2. The Parliament’s decision entailed a recognition that the authorities’ interference with the individual’s private life, cf. Article 8 of the ECHR must be ‘in accordance with the law’, more specifically, ‘in accordance with

92 See Riksadvokatens rundskriv nr. 2/2018, www.riksadvokaten.no.

93 See HR-2020-2137-A para. 36.

94 See HR-2020-2137-A, para. 38.

95 See HR-2020-2137-A, para. 41.

96 See the English version: The Act relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act), Lov-1999-05-21-30, <https://lovdat.no/pro/#document/NLE/lov/1999-05-21-30>.

national law'. Rights derived from Article 8 of the ECHR were later, with the revision of the constitution in 2014, made into Constitutional rights, cf. section 102 of the Constitution. Furthermore, the court's reasoning and decision are also problematic considering section 113 of the Constitution's explicit requirement that '[i]nfringement of the authorities against the individual must be founded on the law'.

I would also add that one should not consider this judgement to solve the problems relating to the police's policing competence in general and crime prevention competences in particular. The main argument for such a position is that the use of intrusive methods for investigative purposes differs significantly from the police's use of intrusive methods in a policing context. First, the detailed conditions for the use of intrusive methods for investigative purposes are determined by the Supreme Court. Secondly, the Director-General of Public Prosecutions has, through administrative directives, provided precise procedural rules for the use of the methods. And thirdly, the use of methods can be made subject to judicial review in the court's processing of the criminal case. Taken together, these safeguards contribute to the safeguarding of other procedural rights and basic principles during the process. Corresponding procedural guarantees do not exist in relation to the use of intrusive methods in a policing context. As previously mentioned, the legal development relating to policing activities is characterised by the fact that it is 'developed by the police, for the police', and judicial review is absent.

6. Closing remarks: Police, democracy, and trust

Norwegian police experience great trust among the inhabitants.⁹⁷ Trust among citizens is the police's most important asset. Without the public's trust, the police cannot fulfil its role in society, cf. section 1, second paragraph, of the Police Act.⁹⁸ Trust and reputation can be described as the police's 'room for manoeuvre' in the form of the citizens accepting the police's intervening exercise of authority without necessarily agreeing.⁹⁹ Trust is as such closely linked to legitimacy, and if the exercise of authority does not have legitimacy, it will be difficult for the police to gain the citizens' trust. The public's trust in the police finds an expression in the Parliament, who on behalf of the population provides the police with democratically established competencies to act, if necessary, by using force. One could question whether the current legal regulation

97 I Politiets innbyggerundersøkelse for 2021, KANTAR Public: <https://www.politiet.no/aktuelt-tall-og-fakta/tall-og-fakta/innbyggerundersokelsen/> (Population survey) for 2021: 80 percent of the inhabitants express that they have fairly or great trust in the police.

98 See Politiet innbyggerundersøkelse for 2021, chapter 1.1.

99 See Strype, Politiets omdømme i Norge in *Tillit til politiet*, ed. Runhovde, PHS Forskning (4) 2010, Politi-høgskolen, p. 39, where the distinction between *trust* and *reputation* is explained as follows: While 'trust' can best be understood as an attitude that individuals have towards the police, the police's reputation is more to be regarded as a quality with which the police are associated. See also, p. 21.

of police activities in general and the police's crime prevention activities in particular, provide the police with sufficient democratic legitimacy.

What builds trust and reputation has changed. The time when the police experienced trust among the inhabitants solely by virtue of maintaining an authoritarian position, in the form of society's civil power apparatus, belongs to the past. Today's society is characterised by an increased distance between social resources, and a weakened consensus on norms and values.¹⁰⁰ And faith in the exercise of authority based on trust will erode when its foundation, in the form of a common public moral opinion, and citizens' belief in authority, deteriorates. And there are many indications that this is about to happen, both nationally and internationally.

The result of this development is that the police experience that the population questions to a greater extent the agency's exercise of authority. As an example, it can be referred to the *Black Lives Matter movement*, which, in a national context has led to increased attention to the police 'stop and search practice'. As a result of citizens' reduced confidence in the police exercising their authority within the boundaries framework of the law, several public debaters and politicians have argued that those who are subjected to police 'stop and search' control are entitled to a receipt as documentation.¹⁰¹

This development is positive. Citizens' social control can contribute to maintaining, and even promoting the police agency's reputation and the citizens' trust in the police. But this presupposes that the police, in any context, can justify their exercise of authority. A credible justification must have the purpose of explaining and creating an understanding that the intervening exercise of authority is legitimate. It requires that the exercise of authority promotes a legitimate purpose, is necessary and proportionate and has a basis in formal law.

The citizens are no longer as benign to accept a practice where the police's crime prevention measures are rooted only in the overarching purpose of the police; a noble purpose of safeguarding the citizens' and the society's security, without the specific infringement having a basis in formal law, cf. section 113 of the Constitution. As *Ramsay*, on a general basis, expresses it: '[T]he moral authority of the sovereign in the exercise of these powers has been explicitly marginalized', and the UK government's justification for the need for ASBO (anti-social behaviour order) 'manifest a distinct

100 See Larsson, *Tillit til politiet – fra nærhet til forhandlet legitimitet*, in *Tillit til politiet*, ed. Runhovde, PHS Forskning (4) 2010, Politihøgskolen, p. 13.

101 See Ingebrigtsen Gundhus, Solhjell og Sollund, *Hvordan gjøre noe med politiets diskriminering og skjønnsutøvelse?* <https://forskersonen.no/etnisitet-juridiske-fag-kriminalitet/minoritetsungdom-og-kvitteringsordning-hvordan-gjore-noe-med-politiets-diskriminering-og-skjonnsutovelse/1920945>.

lack of confidence in the States' sovereign authority'.¹⁰² Citizens' lack of trust in the state, considering it an authoritarian power, seems to reflect a similar lack of state trust in citizens.

Previously, the state's regulation of the individual's behaviour was limited to the restorative aspect in terms of criminal sanctioning of unwanted behaviour, including to establish proof of criminal activity. However, this has changed, as the government's focus is now to a greater extent on the preventive aspect or proactive approach, where the goal is to deter or stop people who is likely to pose a threat now or in the future.¹⁰³ Here, the focus is on behaviour that gives cause for concern that the individual will commit offences without the person in question necessarily having thoughts of committing such acts. The authorities' monitoring and regulation of the individual's behaviour have thus shifted focus towards preventive activities, at the expense of the enforcement activities. In line with this change, the individual moves from being a legal subject to becoming an object representing a risk, while the police assigns the role of '*father familias*' – the house master – who ensures good morale, obedience, order and security in his household.

Every society needs a police force that, within defined legal frameworks, can apply means to the aim of preventing crime and other violations. But the determination of the police's competence to intervene must be decided after a prudent balancing of the consideration of the individual's fundamental freedoms and rights, against society's need to be able to implement intervening measures with the aim of preventing crime. This balancing act touches on fundamental issues of the rule of law, which requires that the decision is subject to democratic control through consideration in the Parliament.

This is not the situation today. Despite the police's increased attention to crime prevention – as a police method aimed at individuals – the current conduct of authority is characterised by a lack of formal legislation that provides guidance on police intervention competence, and the rights and obligations of those exposed to the exercise of authority. Current practice testifies to a lack of understanding of section 113 of the Constitution's significance 'as a basic substantive legal certainty for the citizens'.¹⁰⁴

102 See Ramsay 2008 pp. 157-158.

103 Changes in the focus and scope of the state's police powers can be described as a shift from the common law principle of *sic utere tuo ut alienum non laedas*, implying that legislation that regulates the police's access to intervening exercise of authority must be limited to prevent concrete harm to specified interest only, to focus on a new principle – *salus populi est suprema lex* – implying that states may regulate as they want as long as they claim to promote the public safety, welfare, or morality, see Reynolds and Kopel, The Evolving Police Power: Some Observations for a New Century, *Hastings Constitutional Law Quarterly* 27 (3) 2000 pp. 511-538.

104 See Skoghøy, *Rett og Rettsanvendelse* (Universitetsforlaget 2018) pp. 54-58.

While this article has focused on crime prevention, one may argue that this is only one of several dimensions of police law where this objection is valid. The Supreme Court's clear request to the Parliament in the mentioned decision in HR-2020-2137-A, stating that the time has come to regulate the police's untraditional investigative methods in light of section 113 of the Constitution and 'the legal-political ideal the provision is the bearer of',¹⁰⁵ suggests that it is time for a complete revision of the police legislation with the aim of providing it with better democratic legitimacy. The police's competence to exercise authority should be derived from democratic legislative processes, cf. section 49 first paragraph of the Constitution, and adopted in accordance with section 76 *et seq.* of the Constitution. In this way, it would be ensured that the police legislation, including the legal text and its further development, is always available for discussion in the public space where, among other things, the need for the introduction of new intervention methods and measures, as well as arguments in support of a particular interpretation of the law, can be verified in the public debate. Overall, this will also contribute to the establishment of a legal culture that optimises the system of legal protection and protection of individual rights.¹⁰⁶ The current practice, where police technical terms are decisive for the determination of the material content of the police legislation, should be left behind.

105 See HR-2020-2137-A, para. 43.

106 See Ulfatdjanovna, The role of legal culture in the development of modern society, *Eurasian Journal of Humanities and Social Sciences* (5) 2022 pp. 14-18, geniusjournals.org.