Supreme Court Justice, dr. juris Arnfinn Bårdsen[*]

Religion in the public sphere – Norway

Rencontre des juges européens, Bristol 24 November 2017

1. One's conception of life and the transcendental is considered a precious asset – un bien précieux – for everybody, not only for the religious believer but also for the atheist, agnostic, sceptic and the unconcerned. Religion in the broader sense is however, not only a highly sensitive personal matter, but moreover a phenomenon that strongly influences our relationship with others and the society as a whole. Along with expanding social, ethnical and cultural diversity, religion and belief, and the manifestation of it in the public sphere, can cause new challenges to the way we live together – le vivre ensemble. It can create serious tensions and even harsh destructive conflicts. Hate speech towards religious minorities has become a pan-European public concern. There is a strong call for integration of migrants and a genuine need to circumvent religious diversity from developing into a threat to public security and social stability. We experience how deeply religious matters permeates our history, culture and the daily life, and that core values of tolerance, respect, equality and non-discrimination are being confronted.

2. Historically, Norway has been a homogeneous society also when it comes to religion. Most citizens have been Lutheran Protestants, in accordance with what was until very recently the official *state religion* in Norway. Now that we are inevitably developing in the direction of more religious multiplicity even in Norway, I can assure you that the questions that we are dealing with during our meeting here in Bristol are as topical in Norway as they are in most other European states.

[*] I thank Monica Magdalena Zak and Reidun Ellen Engh for their assistance during the preparation of this paper.

3. One of the issues currently under debate is, of course, the use of religious symbols and clothing in the public sphere, in particular the use of hijab, niqab and burqa. The Norwegian National Institution for Human Rights addressed this topic specifically in its 2016 report to the Parliament, urging for a broad, inclusive and balanced process prior to any bans being introduced (see NIM Annual Report 2016 page 76–78). The general policy in Norway has as its starting point that the need to respect the freedom of religion without any discrimination implies that also the use of religious symbols must be tolerated.

4. However, there is the assumption that one can, and to a certain decree should, restrict the use of headscarves due to weighty considerations connected to a person's public or professional function. However, no such case has yet reached the Supreme Court. Moreover, there is a general scepticism towards headscarves covering the face. To this end, case law from the ECtHR accepting bans on the use of such headscarves, including the ruling 11 July 2014 *S.A.S. v. France,* has been embraced. Several municipalities – including the capital, Oslo – have already introduced a ban on face-covering headscarves in public schools. And the Government has as recently as in June 2017 made a proposal for a national ban in all educational institutions on the use of headscarves covering the face.

5. The core of the international legal framework is, also regarding Norway, the *UN Covenant on Civil and Political Rights* (CCPR), and the *European Convention on Human Rights* (ECHR). Moreover, several other international instruments are relevant, among them the *UN Covenant on Economic, Social and Cultural Rights*, the *UN Convention on the Rights of the Child* and the *UN Convention on the Elimination of all forms of Discrimination against Women*. All these five international instruments are as such, and along with the relevant international case law, *incorporated* into domestic Norwegian law, with a *higher rank* than statutory and customary law, see the Human Rights Act 1999 section 2 and 3. Accordingly, if any conflict should occur, the *conventions* shall prevail. Moreover, Article 92 of the Norwegian Constitution prescribes that every governmental body, including the courts, are obliged to respect and secure the convention rights in accordance with their higher rank.

6. Norway's challenges as to the international protection of the freedom of religion have first and foremost played out under CCPR Article 18 (4) and ECHR Protocol 1 Article 2, according to which the state parties undertake to respect the liberty of parents to ensure the religious and moral education of their children in conformity with the parents' own convictions.

7. The deeper historical and cultural explanation to this conflict rests in the fact that there have been close ties between the church and the state ever since the reformation, and that the Norwegian Constitution, accordingly, already from the start in 1814 established the Evangelical Lutheran Religion as the state religion. Originally, Article 2, second sentence of the Constitution stated:

> "The Evangelical Lutheran Religion remains the State's official religion. Residents who subscribe to it are obliged to educate their children likewise."

The effect of having a state religion was that the church as such was not considered to be a separate body apart from the state: According to the Norwegian Supreme Court's interpretation of Article 16 of the Norwegian Constitution as it then stood, the King (the Government) was the head of the church, also when it came to *internal* issues such as confession and liturgy, see Rt-1987-473. The King – and, according to Article 12 of the Constitution, a minimum of half of his cabinet – had to be members of the church. For the general adult population, membership was, however, voluntary. But children became automatic members if their parents were members, but they were nonetheless able to opt out at the age of 15. By the turning of the millennium approximately 85 % of the Norwegian population were members of the church.

8. Instruction in the Christian faith has been part of Norwegian school curriculum since 1739. In fact, it was for a long period only the church that provided education at all – thus, in Norway, the historical and cultural ties between religion and education are indeed close. From 1889 onwards, members of religious communities other that the church were, however, entitled to be exempted in whole or in part from the teaching in the Christian faith. From 1969, children of parents who were not members of the church, were entitled – upon their parents' request – to be exempted in whole or in part from. They were instead offered lessons in the philosophy of life. In 1998, the Norwegian primary-school curriculum was changed, with two separate subjects – Christianity and philosophy of life – being replaced by a single subject covering Christianity, religion and philosophy, known as *KRL*. Under the 1998 Education Act, a pupil could be granted exemption only from those parts of KRL which the parents considered amounted to the practising of another religion or adherence to another philosophy of life. The parents had to explain their view, and it was in practice very difficult to have an effective partial exemption, as the KRL itself leaned heavily towards religious instruction.

9. A group of parents that had been denied exemption for their children, all members of the Norwegian Humanist Association, challenged KRL before the Norwegian courts, on the basis that the right to be exempted was too narrowly construed, thus amounting to a breach of CCPR Article 18 and ECHR Article 9 and Protocol 1 Article 2. The challenge was without success, see the Norwegian Supreme Court's judgment Rt-2001-1006.

10. One part of the group then lodged a communication with the United Nations Human Rights Committee, see *Leirvåg and others v. Norway* (1155/2003). On 3 November 2004, the Committee expressed the view that the framework of KRL, including the regime of exemption, as it had been implemented in respect of the complainants, constituted a violation of Article 18 (4) of the Covenant. The Committee stressed that any instruction in subjects as the general history of religion and ethics must be given in a neutral an objective way, and that public education that includes instruction in a particular religion or belief is inconsistent with Article 18 (4), unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of the parents. The partial-exemption arrangement under KRL did not meet this standard.

11. A second part of the group of parents complained to the ECtHR, see the Grand Chamber judgment 29 June 2007 *Folgerø and others v. Norway*. In that judgment, the ECtHR concluded – along lines comparable to the Human Right Committee's – that Protocol 1 Article 2 had been violated, in particular as to the partial-exemption arrangement being poorly designed. Firstly, parents needed to be adequately informed of the details of the lesson plans to be able to identify problematic activities and to notify the school in advance. Secondly, it was a condition for obtaining partial exemption that the parents give reasonable grounds for their request. Information about personal religious and philosophical conviction concerned some of the most intimate aspects of private life, and there was a risk that the parents might feel compelled to disclose to the school authorities intimate aspects of their own religious and philosophical convictions. Thirdly, for a number of activities, for instance prayers, the singing of hymns, church services and school plays, *observation by attendance* could replace involvement through participation, the basic idea being that the exemption should relate to the activity itself, not to the knowledge to be transmitted through the activity. However, in the Court's view, this distinction between activity and knowledge must not only have been difficult to practice, but it also seemed to have substantially diminished the effectiveness of the very right to a partial exemption.

12. Against this background, notwithstanding the many laudable legislative purposes associated with the introduction of KRL in the ordinary primary and lower secondary schools, Norway had not taken sufficient care that information and knowledge included in the curriculum be conveyed in an objective, critical and pluralistic manner for the purposes of Protocol 1 Article 2. As many as nine of the members of the Court disagreed, among them the Norwegian and the Danish justice.

13. As a consequence of the view from the Human Rights Committee and the judgment from the ECtHR, the curriculum in Norwegian schools was altered in 2008 to the effect that it was now stressed that any religious information must be presented objectively and critically and in a pluralistic manner, also when it comes to Christianity. The term *Christianity* was deleted from the title. The limited exemption arrangement was, moreover, changed, so that it is now sufficient for the parents to notify the school, without any further explanation, that the child shall not participate in specified activities. However, information on Christianity still holds a dominant position. In fact, as late as in 2015, the curriculum was altered, and the Government reintroduced *Christianity* in the title, now allocating as much as 50 % of the classroom hours in KRL to Christianity.

14. As I said, until recently the Norwegian Constitution prescribed for a state religion. The ECtHR has accepted that a state church system such as the Norwegian, cannot in itself be considered to violate Article 9 of the Convention, see decision 18 September 2012 *Ásatrúarfélagid v. Iceland*, para 27. The ECtHR reiterated, as held by the European Commission of Human Rights 23 October 1990 in *Darby v. Sweden* para 45:

> "[a] State Church system cannot in itself be considered to violate Article 9 of the Convention. In fact, such a system exists in several Contracting States and existed there already when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to satisfy the requirements of Article 9, include specific safeguards for the individual's freedom of religion. In particular, no one may be forced to enter, or be prohibited from leaving, a State Church."

15. A state church system is also accepted under CCPR Article 18, see the Human Right Committee's *General Comment No. 22* (1993) para 9–10. The Human Rights Committee has, however, emphasised that if a set of beliefs is treated as an official ideology in constitutions, statutes, proclamations of ruling parties, etc., or

in actual practice, this must not result in any impairment of the freedoms under Article 18 or any other rights recognized under the Covenant, nor in any discrimination against persons who do not accept the official ideology or who oppose it.

16. Although a state church is permissible under international human rights law, to uphold such a system in a modern diversified society has shown not only to be challenging, but also even without sufficient support in the general public. Moreover, the church itself has found it increasingly troublesome to be directly associated with, and instructed by, the Government. After virtually a decade of reforms, debate and evaluation, Norway abandoned the system of having a state church as of 1 January 2017, with the necessary constitutional amendments in place already in 2012. The Evangelical Lutheran Church materialised as a separate legal entity, named *The Church of Norway*. The King is no longer the head of the church.

17. The decision to separate the church from the state was based on a broad political agreement, aiming at balancing the different views on that question and basing such a far-reaching process on a solid consensus. Consequently, the Constitution still has a linkage to the Christian heritage, as a bearer of Norwegian traditions and values. As a symbol of that, Article 4 of the Constitution still requires that the King is a member of The Church of Norway. Moreover, the new Article 2, first sentence states:

> "Our values will remain our Christian and humanist heritage."

Furthermore, Article 16, second, third and fourth sentence, says:

> "The Church of Norway, an Evangelical Lutheran church, will remain the Established Church of Norway and will as such be supported by the State. Detailed provisions as to its system will be laid down by law. All religious and belief communities should be supported on equal terms."

18. The general idea behind this provision is to signalise that The Church of Norway still has a particular position, and that the state is expected both to regulate and to support that church, see St.meld. nr. 17 (2007–2008) page 73. The last sentence of Article 16, on the duty to support all religious and belief communities on equal terms, seems rather ambiguous. According to the *travaux preperatoires* to that provision, the purpose is to state that the government is expected to have an "active and supportive" policy on questions of religion and belief. However, no specific duties on

the Government, or rights for religious or belief communities, shall – still according to the preparatory work – be inferred from the fourth sentence of Article 16. The succeeding legislation seems to affirm this approach, see Prop. 12 L (2015–2016) and Prop. 9 L (2016–2017), and that the core of the provision in the fourth sentence in Article 16 is a duty for the state to give at least *some* economic support to religious and belief communities, and any such support being based on the principle of non-discrimination.

19. As a consequence of the separation of the church and the state, a whole set of changes had to be made in the legislation regulating the church and other religious and belief communities. I cannot go into the details. However, I have to mention that the Government as recently as 27 September 2017 made public its first draft for a general and completely integrated law on religious and belief communities, aiming at consolidating the legal situation after the separation of the church and the state, and at developing further the objects of that reform. The draft is thorough and principled, has already triggered some discussion, and will surely be debated extensively. A particular delicate issue addressed in the draft is whether, and on what conditions, the Government should be able to deny economic support to a religious or belief community, based on that community's actions, beliefs and values. There are also several rather complex questions of an economic nature concerning the Church of Norway itself, including what to do with the property historically affiliated to the church.

20. Now, in my final remarks, I return to the constitutional protection of the individual freedom of religion. The Norwegian Constitution Article 16, first sentence reads:

> "Every citizen is free to exercise his or her religion."

This wording came into the Constitution in 1964 (first as Article 2, later moved to Article 16). Prior to that, no general constitutional rule on the freedom of religion, or on the free exercise of religion, existed. According to the original 1814 text of Article 2 of the Constitution, *Jesuits* and communities of *monks* were even prohibited (until 1956 and 1887, respectively). Moreover, *Jews* were not allowed to enter Norwegian territory (this ban was lifted in 1851). And then we have had, until 1 January 2017, the paradox – or at least the particular challenges – connected to the combination of a basic freedom of religion with having a state church.

21. As part of the Norwegian Constitution's bicentennial anniversary in May 2014, numerous of the classic civil and political rights as prescribed by the major human rights treaties were taken into the Constitution in a new Part E, in addition to certain economic, social and cultural rights and the core rights of the child. It is common ground that the reform did not aim at creating *new* individual rights and freedoms, compared to what was already established through the international human right treaties to which Norway was a party, or domestic law apart for the Constitution. The objective was to strengthen the *constitutional protection* of certain rights and freedoms already protected elsewhere, in order to make them more resistant to shifting, shortsighted political change.

22. The commission that was appointed by the Parliament to develop a draft to the constitutional reform – the *Lønning Commission* – was of the opinion that Article 16 on the freedom of religion needed some modernisation and clarification. The Commission saw a particular need for the Article to state expressly that the freedom of religion is for everyone, not only citizens, that the freedom extends far beyond religion in the traditional and narrower sense and that the freedom includes not only the freedom to exercise one's belief, but also the freedom to take, to have and to change one's view without coercion. Moreover, the Commission thought it would be beneficial to include the criteria for justified limitation and regulation of the freedom to exercise one's religion or belief, based on the parallel provisions in the CCPR Article 18 and ECHR Article 9 – *law*, *legitimate aim* and *proportionality*. I refer to Dok. nr. 16 (2011–2012) page 153.

23. However, the Parliament did not approve. It is surprisingly difficult to trace any explicit explanation. But the lack of enthusiasm was probably due to a fear that the introduction of such an amendment would reopen the discussion on the division of state and church, and thereby also challenge the rather finely tuned political consensus that had already been established on that issue. Be this as it may. It is my assertion that although the Parliament did not approve of the Commission's proposal to amend Article 16 in order to bring the wording in line with the parallel international provisions, Article 16 must nevertheless be interpreted and applied in light of those parallel international provisions and the case law that is connected to them.

24. My assertion at this point connects to a general question of constitutional interpretation, a question that seems suitable as my short final: Is it permissible and advisable for a domestic apex court to be informed by international law in the interpretation and application of the national constitution? On the one hand we have the US Supreme Court's restrictive approach, considering international law as more or less *irrelevant* when it comes to constitutional adjudication. On the other hand, we have the South African Constitutional Court, which is – according to the very wording of the South African Constitution – *obliged* to take international law into consideration. Most jurisdictions have positioned themselves some place in between these two extremes. A recent and readable example connected specifically to the freedom of religion, is the Canadian Supreme Court's judgment 2 November 2017 *Ktunaxa Nation v. British Colombia* [2017 SCC 54], para 65. The Court stated that Article 2 (a) of the Canadian Charter of Rights and Freedoms, on "the freedom of conscience and religion", must be interpreted and applied based on the presumption that the Charter provides "at least as great a level of protection as is found in Canada's international human rights obligations".

25. The Lønning Commission that prepared the Norwegian constitutional reform 2014 actually addressed this principled question specifically in its report regarding Article 16 on the freedom of religion. The Commission stated that the provision, even without the proposed amendments, should be read "in light of" CCPR Article 18 and ECHR Article 9. The Government has subscribed to this view also, in its aforementioned explanatory report 27 September 2017 to the proposal for a new legislation on religious and belief communities, see page 47 of the report. Moreover, such an approach would be entirely in line with the Norwegian Supreme Court's general case law after 2014 connected to other fundamental right issues, such as the protection of private life and the family, protection against forced and compulsory labour, the right to a fair trial and the freedom of association. In fact, the Norwegian Supreme Court has repeatedly stressed that the Constitution's provisions on fundamental rights are to be interpreted and applied "in light of" its international background and treaty parallels, or with the treaty parallels as the "starting point", see in particular HR-2016-2554-P *Holship*, para 81. There is to my mind no reason why this transnational approach to constitutional interpretation and application should not be workable also regarding the freedom of religion as enshrined in Article 16 of the Constitution.