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Guardians of Human Rights in Norway: Challenging mandates in a new era

Centre on Law and Social Transformation in collaboration with Bergen Resource Center, Litteraturhuset Bergen 11th of May 2016

[Norway's human rights regime changed with the 2014 constitutional reform and the establishment of the National Human Rights Institution (NIM). The changes come at a time when human rights values and obligations are questioned by refugee crisis and economic challenges. What are the implications for the protection of the recent changes for the human rights mandate of Norwegian national institutions? What are the dynamics between national control mechanisms and international institutions such as the European Court of Human Rights?

Centre of Law and Social Transformation invites Supreme Court Justice, ***Arnfinn Bårdsen*** *and* ***Petter Wille****, Director of NIM to discuss challenges and opportunities faced by guardians of human rights. Moderator:* ***Malcolm Langford****.]*

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1. This evening's seminar addresses key elements in the current development and debate as to the protection of fundamental rights and freedoms in Norway. And rightly, it acknowledges the importance of the context: Europe is changing quickly in terms of perceptions, social mix, cultural values and communications. The economy and the currents of politics are volatile. We face new challenges as to national security and migration. It is essential that the constitutive legal structures provide us with the stability and principled guidance we need to manoeuvre steadily thought troubled waters. Our Constitution is such a legal structure – still vital after 200 years!

2. Initially, I must stress the significance of political leadership, and the need to protect and support the democratic institutions, decisions and policies. Moreover, it is crucial to establish that the prime guardians of fundamental rights and freedoms are, and must be, the Parliament and the executive power – a responsibility explicitly given these branches of the State by the Constitution itself.

3. By inviting me – in my capacity as a Supreme Court Justice – the organisers implicitly suggest and recognize that the Norwegian Supreme Court is, or is expected to be, at the centre stage of this legal enterprise. I agree: The history of fundamental rights is a chronicle of courts taking a lead position in clarifying and developing the law. Moreover, the future of fundamental rights depends on courts taking them seriously, transforming the rights from normative ideas to realities with an impact on real-world lives. In order to do so, courts need to take wise, principles choices of legal policy, within the limits of the law an in accordance with the powers vested in the judiciary.

4. The European Courts in Strasbourg and in Luxembourg have in this respect acquired a position that can hardly be overestimated, dedicated to making fundamental rights a living corpus of law. But the past, and certainly also the future of fundamental rights, is also the saga of *national* supreme courts and constitutional courts, recognising, clarifying, developing and protecting these fundamental rights and freedoms on domestic soil, cultivating them in the light of that particular nation's history, values hopes and beliefs. It is at the national level that the fundamental rights and freedoms must be respected and secured, the international machinery of enforcement being *subsidiary*.

5. More than anything else, the human rights conventions and the international legal material attached to them, has characterized the Norwegian Supreme Court's work – and the evolution of the Norwegian Supreme Court's constitutional function – in the first 15 years of our millennium.

6. The international legal expansion has in itself been powerful, with, in particular, the European Court of Human Rights as the dynamic promoter of the European Convention on Human Rights as a living instrument containing rights and freedoms that are effective, not only in theory but also in practice.

7. At the domestic level, the development was trigged in 1999 by the Human Rights Act, making several human rights conventions – *inter alia* the European Convention on Human Rights – part of Norwegian law with priority over other legislation. The Norwegian Supreme Court has followed up, in an extensive case law based directly on the convention and the case law from the European Court of Human Rights, regarding, *inter alia*, detention, fair trial, the presumption of innocence, legality, the right to private and family life, home and correspondence, freedom of religion and freedom of conscience, freedom of expression, the protection of private property, the right to appeal in criminal cases and the prohibition against repeated prosecution for the same offence.

8. From the outset in 1814, the Norwegian Constitution contained only selected human rights provisions. Few later amendments were made in this respect. Accordingly, the Norwegian constitutional protection fell increasingly short of the international development and the Supreme Court's implementation of international human rights based on the Human Rights Act.

9. However, as part of the Norwegian Constitution's bicentennial anniversary in May 2014, the Constitution went through a considerable modernisation and expansion. Numerous of the classic civil and political rights as prescribed by the major human rights conventions where taken into the Constitution itself in a new Part E, in addition to certain economic, social and cultural rights and the core rights of the child as prescribed in the UN Convention on the rights of the child (Article 93 to Article 113).

10. Through this constitutional reform, the Parliament affiliated with a true spirit of *sustainable constitutionalism*, inspired by an overarching idea of *revitalizing* the Constitution symbolically, politically and legally.

11. It is common ground that the constitutional reform in 2014 did *not* aim at new rights, 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 idea was rather to strengthen the *constitutional protection* of certain rights already protected elsewhere, in order to make them more resistant. The basic legal effect of such transformation of rights into constitutional rights is – generally and simply speaking – that they acquire the status of *lex superior*; in the hierarchy of legal norms that are applicable within the Norwegian jurisdiction, constitutional rights have the highest possible rank.

12. In order to expound on the effect of this transformation as to the Supreme Court, I shall turn to what I consider to be the *four constitutional cornerstones* for the Norwegian Supreme Court's functioning as a court, being at the same time one of the three branches of the State – i.e. a constitutional power.

13. *Firstly,* I turn to Article 88 of the Constitution, which establishes the Norwegian Supreme Court as a *court of law*. The Supreme Court's mandate as a guarding of fundamental rights and freedoms is both connected to, and limited by, its function as a court.

14. This has at least two implications: The court cannot take on a case *on its own motion* – it may only decide in those cases brought before the court by the parties. Additionally, *law only* – nothing more and nothing less – must decide the cases. It is not for the Supreme Court to substitute the other governmental branches' assessments of policies or expediency with the Supreme Court's own appraisal.

15. Moreover, according to Article 88, held together with Article 90, the Norwegian Supreme Court is a court of last resort – there is no further appeal. This implies, in accordance with the principle of rule for law, that even the government must accept and respect the judgements handed down by the Supreme Court. As for the private party, a certain reservation must, however, be made at this point – he or she can make an application to the European Court of Human Rights, arguing that the Norwegian Supreme Court's judgment is not in accordance with the European Convention on Human Rights. In this particular respect, the European Court of Human Rights has the final say.

16. As a court of last resort, the Norwegian Supreme Court is a court of precedence. Although the ruling in a judgment from the court is formally binding – *res judicata* – only upon the parties to the case, the court's understanding of the applicable law is expected to be upheld in similar cases in the future – the ruling of the judgment has, accordingly, a more general application. This function is the basis for an extensive case law by the Supreme Court, clarifying and developing the law.

17. Article 88 to the Constitution makes no reservation as to constitutional issues arising in cases before the court. Therefore, the Supreme Court must adjudicate the cases before it on the basis also of constitutional rights; the Supreme Court is the final arbiter as to the application of those rights; the Supreme Court's judgement has, as to the court's constitutional interpretation, the general effect of precedence.

18. *Secondly*, I turn to Article 2 of the Constitution, which states that the very *purpose of the Constitution* is to promote democracy, human rights and the rule of law. These three are arranged on the same footing, the Constitution thereby recognising both the legitimacy of democracy and the limitations on such government that stems from fundamental rights and freedoms and the rule of law. Indeed, this is the challenge to any constitutional democracy –

and any court functioning within such democracy – to find a workable equilibrium of law and politics, stability and change.

19. *Thirdly*, I turn to Article 92, which came along as part of the constitutional reform in 2014. It prescribes that every governmental body, including the Norwegian Supreme Court, is obliged to *respect* and *ensure* both the new constitutional rights and the rights and freedoms enshrined in human right treaties to which Norway is a party.

20. Certainly, in all its simplicity, this new article 92 of the Constitution is a challenge on more than one level. What is meant by the duty for the Supreme Court to "respect and ensure" the fundamental *constitutional* rights? And what is the legal effect of the referral not only to constitutional rights, but also to fundamental *convention* rights?

21. One conclusion seems, however, obvious and unescapable: Article 92 leaves the Supreme Court with *no discretion* whatsoever as to whether fundamental rights are a matter for the court or not: By not respecting and securing those rights, the Court would act in conflict with its constitutional duties, as specified by the Parliament. I want to stress this, since the public debate sometimes leaves the impression that this it is more or less a matter of policy and discretion for the Supreme Court and a question of individual choice for the justices within the court.

22. *Fourthly*, I turn to Article 89, as amended in 2015 – just some weeks before the Norwegian Supreme Court's bicentennial anniversary. This provision addresses a fundamental question in constitutional law, whether the court can review a statute or a particular provision within it, or any other governmental act for that matter, in order to decide whether it is in conflict with the Constitution. The Norwegian Constitution of 1814 was silent on that point. The question was therefore left to the Supreme Court to answer.

23. The ground breaking judgment in Norwegian constitutional law is *Grev Wedel Jarlsberg v. Marinedepartementet* from 1866. In that judgment the Norwegian Supreme Court for the first time publicly – and without any particular references in the written Constitution itself – declared that the Court would not apply any law as far as the law was found to be in conflict with the Constitution. One perceived the Constitution's provisions as legally operative norms with a binding effect also on the other branches of government. Moreover, the Constitution was – and still is – *lex superior* – with precedence over any other governmental decisions. In effect, the judgment established the Norwegian Supreme Court to be the first constitutional court apart from the US Supreme Court.

24. The development initiated by the Supreme Court was backed by the legal doctrine and followed up in subsequent case law, and gradually even became accepted by both the Parliament and the Government, as an operative – and important – part of the Norwegian Constitution. At some point in time the Supreme Court' power and duty to perform constitutional review achieved the status of *customary constitutional law*.

25. It goes without saying that there have always been critical voices, partly connected to the very idea that the Supreme Court should carry out a constitutional review, and – of course – partly connected to how this has been carried out in particular cases. In the 1920's and early 1930's, the question of abandoning the Supreme Court's powers was discussed in the Parliament on several occasions. In the 1960's and 1970's, leading commentators perceived the Supreme Court's power to set aside parliamentary legislation as "a stick willingly thrown into the wheels of democracy". However, connected to the constitutional reform in 2014 and the Supreme Court's 200 years anniversary in 2015, the Parliament decided on the 1st of June 2015 to make an amendment to the Constitution regarding the question of constitutional review by the Norwegian Supreme Court. The new Article 89 states:

"In cases brought before the courts, the courts have the power and the duty to review whether laws and other decisions by the State authorities are contrary to the Constitution."

26. During the preparation of this amendment, the Parliament emphasised that the provision refers to what was already established through customary constitutional law. Accordingly, Article 89 is a pure *codification*. However, this new Article expresses – based on 160 years of experience, including the Supreme Court's more intensely constitutional scrutiny in recent cases – the Parliament's solemn recognition of the Norwegian Supreme Court's functioning as a constitutional court, and an up-to-date acceptance of the court's role as a guardian of human rights and the rule of law. In this respect, the codification is indeed important – as it provides a renewal of the legal foundation for the Supreme Court's functioning as a constitutional court, through the most democratic pronouncement there is; a Parliamentary constitutional amendment. Thereby the Parliament also entrusted the Supreme Court's role as a constitutional court with improved legitimacy.

27. Article 88, Article 2, Article 92 and Article 89 of the Norwegian Constitution are the four cornerstones for the Norwegian Supreme Court's functioning as a court of precedence and as a constitutional court. The cumulative effect is that the Supreme Court bears a heavy responsibility as a protector of the Constitution, assigned also a rather strong position vis-à-vis the other two branches of the State. Expanding the Constitution's catalogue of protected rights and freedoms – ranking them as *lex superior* – has therefore inevitably, and as a systemic legal consequence – substantially broadened the Supreme Court's constitutional repertoire as a court.

28. I think it is fair to say that through the constitutional reform the Supreme Court's mandate as a guardian of fundamental rights and freedoms and the rule of law has been consolidated, clarified and democratically anchored.

Moreover, through the constitutional reform in 2014 the Parliament brought the core of human rights home, confirming the Constitution as the primary legal source and the expected starting point for the protection of fundamental rights and freedoms in Norway.

29. I shall address briefly certain issues of *constitutional interpretation*. It is established that the Supreme Court, when interpreting and applying the Constitution, must adopt its own view based on a contemporary perspective, in accordance with the present day situation. So, the textual, historic approach to Constitutional law advanced, *inter alia*, by some of the justices in the US Supreme Court – often referred to as *originalism* – has little bearing within the Norwegian Supreme Court. On the other hand, the Supreme Court is indeed aware of the need for stability and the importance of making democracy work, and the limits these factors represent as to a dynamic approach to the Constitution. Thus, there is reason to believe that in general the Parliament's intentions behind each new constitutional right or freedom will be the point of departure also for the Supreme Court.

30. The constitutional and the international context for the new constitutional rights and freedoms according to the amendment in 2014 run parallel and can hardly be separated. Accordingly, the Norwegian Supreme Court has, in its case law after the reform, stressed that the constitutional rights and freedoms are to be interpreted and applied "in the light of" their international background and parallels. Obviously, this is not an original approach. But it is, nonetheless, an important clarification.

31. The method followed by the Supreme Court is in line with the Parliament's view when it amended the Constitution; the level of protection according to the Constitution shall not run short to that of the parallel convention rights. So, as to the interpretation and application of these new constitutional provisions, any applicable case law from the relevant international courts or tribunals should – according to the Parliament – be taken into account. Case

law from the European Court of Human Rights was expected to have a key position, but also material linked to any other human rights treaty to which Norway is a party was supposed to be relevant. It was said during the preparatory stage that although not formally bound by international case law when interpreting the Norwegian Constitution, the Supreme Court should not deviate from it without good cause.

32. The Supreme Court has followed the transnational avenue recommended by the Parliament to the extent that established case law from the European Court of Human Rights has been applied in a comparable manner when interpreting the Constitution as it would have been in the parallel interpretation of the European Convention on Human Rights. Although the technical approach may vary slightly from case to case, there is no doubt that the objective is to preserve coherence.

33. However – and this brings me to my final point – the Supreme Court has emphasised that it is not *bound* by future precedence from the European Court of Human Rights when interpreting and applying the Norwegian Constitution, as this would imply that the European Court of Human Rights became the final judge as to the fundamental rights and freedoms according to the Norwegian Constitution. This nuanced doctrine was articulated for the first time in the *Maria-case* from 2015 (referred in Rt. 2015 page 93), thus being referred to as the *Maria-formula*, where the Supreme Court accentuated that although the developing case law from the European Court of Human Rights must be taken into serious consideration when interpreting and applying the Norwegian Constitution, it is the Norwegian Supreme Court – and not the international tribunals, such as the European Court of Human Rights – that has the mandate to interpret, clarify and develop the Norwegian Constitution.

Thank you!