

Interpreting the Norwegian Bill of Rights

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1. Throughout its more than 200 years of existence the Norwegian Constitution has been altered and amended by the Parliament more than 300 times. Furthermore, important new norms have been established through customary constitutional law. It seems reasonable to suggest that in order for a constitution to stay alive, it must adapt and develop.
2. As part of the Constitution's bicentennial anniversary in May 2014, numerous of the classic civil and political rights as prescribed by the major human rights treaties such as the European Convention on Human Rights and the parallel UN Covenant, 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 according to the UN Convention on the Rights of the Child. It is common ground that the reform did not aim at new rights. The intention was to strengthen the constitutional protection of certain rights already protected elsewhere, in order to make them more resistant against shifting, shortsighted political changes.
3. Along with Cervantes' *Don Quixote*, we must appreciate that "the proof of the pudding is in the eating". In order to transform the great, yet hardly definable, ideals that the Norwegian parliament captured in the new unpretentious and straightforward text into legal norms with an impact on real lives, the provisions must be applied. It is usage that verifies that the Bill of Rights is not a paper tiger, but a genuine body of operative constitutional law. Moreover, it is through usage – and the process of interpretation that this necessitates – that the precise normative implications of the Bill's general terms, notions and principles are identified.

4. Hardly any topic generates more debate among constitutional scholars than constitutional interpretation. As for Norway, the constitutional reform in 2014 has certainly boosted the discussion. There are, as one would expect, different starting points, approaches and opinions – in particular as to how the courts should react to the Bill. The emerging case law from the Norwegian Supreme Court is screened, analysed and commented upon – sometimes with surprising temperament.
5. I will not enter into that debate. Neither will I advance any ready-made overarching philosophy or commit myself to a specific school of constitutional interpretation. What I intend to do is to explore – from a judges perspective – what we can derive from the Constitution itself and from the Court’s case law so far. The framework will be what I consider the four constitutional cornerstones for the Norwegian Supreme Court’s functioning as a court and constitutional power.
6. *Firstly*, I turn to Article 88 of the Constitution, which establishes the Court as a court of law. Accordingly, the Court cannot take on a case on its own motion – it may only decide in those cases brought before it by the parties. Furthermore, law only – nothing more, but certainly nothing less – shall decide the case. It is not for the Court to substitute the other governmental branches’ assessments of policies, reasonableness or expediency within the limits of the law, with the Court’s own appraisal.
7. According to Article 88, held together with Article 90, the Supreme Court is a court of last resort – there is no further appeal. Moreover, the Supreme Court is a court of precedence: Although the rulings are formally binding – *res judicata* – only upon the parties to the case, the Court’s interpretation of the applicable law will normally be upheld in similar cases – the rulings have, accordingly, a more general application. Article 88 to the Constitution makes no reservation as to constitutional issues. Moreover, the Court has emphasised that constitutional interpretation is one of its primary assignments, and more particularly that it is a responsibility for the Court to clarify and develop the Bill of Rights.

8. *Secondly*, I turn to Article 2, second sentence of the Constitution, which states that its very purpose is to promote democracy, human rights and the rule of law. The constitutional amendment in 2014 is a true child of this provision: Inspired by an overarching ambition to revitalize the Constitution symbolically, politically and legally, the Norwegian Parliament affiliated with a spirit of viable constitutionalism – of checks and balances – traceable back to the genetics of all modern western democracies.
9. In Article 2, second sentence, “democracy”, “human rights” and “the rule of law”, are arranged on the same footing. The Constitution is thereby recognising both our trust in democracy and the need for limitations that stems from fundamental rights and freedoms and the rule of law. “Faith in democracy is one thing, blind faith quite another”, justice *William Brennan* stated in a speech on constitutional interpretation in 1985. He continued: “Those who drafted our Constitution understood the difference. One cannot read the text without admitting that it embodies substantive value choices; it places certain values beyond the power of any legislature.” (Constitutional Interpretation, Georgetown University, October 12 1985). The Norwegian Constitution embodies such substantive value choices also. Democracy cannot trump the Bill of Rights – politics and law must equilibrate.
10. *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 Supreme Court, is obliged to respect and ensure the new constitutional rights and the rights and freedoms enshrined in human right treaties to which Norway is a party. Indeed, 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 to fundamental convention rights?
11. One conclusion seems, however, inescapable: Article 92 leaves the Court with no discretion as to whether fundamental rights are a matter for the court or not: By not respecting and securing those rights, the Court –

and the justices within it – would act in conflict with the constitutional duties specified by the Parliament. I want to stress this, since the debate sometimes leaves the impression that this it is more or less a matter of policy and discretion for the Supreme Court and of individual choice for the justices within the court.

12. *Fourthly*, I turn to Article 89, as amended in 2015 – just some weeks before the Supreme Court’s own bicentennial anniversary. This provision addresses a fundamental question in constitutional law, whether the courts can review a statute or a particular provision within it, or any other governmental act or action 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 Court to answer.
13. The ground breaking judgment in Norwegian constitutional law is *Grev Wedel Jarlsberg v. Marinedepartementet* from 1866. In that judgment the Court for the first time publicly – and without any particular references in the written Constitution itself – declared that it would not apply any law as far as the law was found to be in conflict with the Constitution. Probably inspired by the famous US Supreme Court ruling in *Marbury v. Madison* from 1803, the Court thus perceived the Constitution’s provisions as legally operative norms. Moreover, the Constitution was *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. The development 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 unwritten part of the Norwegian Constitution.
14. There have always been critical voices, partly in opposition to the very principle that the Supreme Court can carry out constitutional review, and partly connected to how the Court has performed 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 Court's power to set aside parliamentary legislation as "a stick willingly thrown into the wheels of democracy". The conflict between democracy and constitutional review is often emphasised in the contemporary constitutional debate also.

15. Article 89 is a pure codification. However, it expresses – based on 160 years of experience, including the Supreme Court's more intense constitutional scrutiny in recent years – the Parliament's solemn recognition of the 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. By adopting Article 89 in 2015, the Parliament entrusted the Supreme Court's performance of constitutional review with improved legitimacy.
16. When turning to the more specific building blocks of constitutional interpretation, I believe it is fair to say that the text will always be the starting point when interpreting the Norwegian Constitution. The framer's intentions, the constitutional history, the context and the provisions' object and purpose, will also have to be taken into consideration as possible decisive elements. Moreover, case law demonstrates that the Court is prepared to apply a contemporary perspective to constitutional interpretation: The historic approach to Constitutional law often referred to as originalism has little bearing within the Norwegian Supreme Court, although the Supreme Court is indeed aware of the need for stability, the importance of making democracy work, and the limits these factors represent as to a dynamic approach to the Constitution.
17. The Court will also apply these established building blocks when interpreting the Bill of Rights from 2014. However, the constitutional and the international context run parallel and can hardly be separated. Accordingly, the Supreme Court has, in its case law after the reform, stressed that the Bill is to be interpreted and applied "in the light of" its international background and treaty parallels. This is not an original

approach. The German Constitutional Court has adopted a comparable doctrine as to the interpretation of the basic German law.

18. The technique applied by the Norwegian Supreme Court is in line with the Parliament's recommendations when it amended the Constitution; the level of human rights protection according to the Constitution shall not run short to that of the parallel convention rights. So, 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 material on any other human rights treaty was also supposed to be relevant. During the preparatory stage, it was agreed upon 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.
19. 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 is being 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, the objective is to preserve coherence and to avoid that the protection provided by the Bill falls short to that provided for by the human right treaties to which Norway is a party.
20. So far, one can see this approach in particular as to the right to a fair trial under Article 95 of the Constitution, where case law on Article 6 of The European Convention on Human Rights has been more or less decisive. The same holds true as to Article 102 on the protection of the family and private life, compared to the case law under Article 8 of the European convention. Moreover, the Court's interpretation of Article 104 on children's rights is highly influenced by the UN Convention on the Rights of the Child. Currently the Supreme Court is dealing with a case involving Article 101 of the Constitution, protection the right to form, join or not join, trade unions, and the possible guidance as to the

interpretation of that provision from case law under Article 11 of The European Convention on Human Rights. In this case, the interplay between fundamental rights protection within EU and EEA-law, human rights treaties and constitutional rights is also an issue.

21. The Supreme Court has emphasised that it is not formally bound by the precedence from the European Court of Human Rights when interpreting and applying the Constitution. The constitutional basis for this reservation is obvious – the European Court of Human Rights cannot be the ultimate interpreter of the Norwegian Constitution: Although case law from the European Court of Human Rights shall be taken into serious consideration, it still is – and must be – the Norwegian Supreme Court that has the responsibility to interpret, clarify and develop the Norwegian Bill of Rights.
22. As my short final I will say this: The Court's approach to the interpretation of the Norwegian Bill of Rights, is loyally aligned with the Parliament's ambitions with the reform. It combines the Court's constitutional duty to be the master of the Norwegian Bill of Rights, with the need to see to it that the Bill is not operating in a vacuum.
23. From a transnational or comparative perspective, the effects of the Court's approach are rather intriguing. I will pinpoint the following: The coupling to the case law under different human rights treaties provides the Court with a virtually inexhaustible and evolving source of legal material. It equips the Court with a tool for a coherent development of the Bill of Rights in a European context and a channel into the worldwide constitutional dialogue.
24. Moreover, the methodological linkage to the evolving case law under the human rights treaties, exposes the Norwegian Constitution itself to the comparative and dynamic style of interpretation applied by several of the international human rights bodies, in particular to the broad transnational approach used by The European Court of Human Rights when identifying "the present day conditions" as a framework for the interpretation of the Convention as "a living instrument".

25. Furthermore, a feasible long term effect of the association of the Norwegian Bill of Rights to its treaty parallels is that the general methodology, ideology and philosophy of human rights protection that emerges from the European and international case law taken as a whole, over time and as a matter of legal culture, will inspire the Norwegian Supreme Court as to the Court's general attitude to being the guardian of the Constitution.