Supreme Court Justice dr. juris Arnfinn Bårdsen,
Norwegian Supreme Court

The Norwegian Supreme Court as the Guardian of Constitutional Rights and Freedoms

"Norway in Europe", Centre for European Law, Oslo 18th September 2017

Excellences, colleagues, friends!

1. Article 2 of the Norwegian Constitution states that the Constitution shall promote democracy, human rights, and the rule of law. The three are arranged on the same footing. Moreover, they are closely interconnected and even interdependent, each one of them being only a shallow phrase without the other two. Needless to say, there is also an inherent tension here: It is a perpetual challenge to all liberal constitutional democracies – and any court functioning within such democracies – to preserve a workable equilibrium of law and politics, of stability and change.

2. The Norwegian constitutional reform in 2014 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 against shifting, shortsighted political change.

3. The essential legal effect of constitutionalizing rights and freedoms is that they acquire the force of *lex superior*; in the hierarchy of legal norms within the Norwegian jurisdiction, constitutional rights and freedoms have the highest rank. Any other law, enactment, regulation or governmental decision must yield. As confirmed by the Supreme Court's recent ruling *en banc* in *Holship*, this includes international agreements entered into by the Norwegian government, such as the EEA agreement (HR-2016-2554-P para 80).

4. Article 92 of the Constitution came along as part of the constitutional reform in 2014. Echoing Article 1 of the European Convention on Human Rights and Article 2 nr. 1 of UN Covenant on Civil and Political Rights, it requires every governmental body, including the Norwegian Supreme Court, to *respect* and *secure* the constitutional rights and freedoms and the rights and freedoms enshrined in human right treaties to which Norway is a party.

5. As to the second limb – the human rights treaties – the Supreme Court concluded in *Holship* that Article 92 does not go so far as to incorporating the substantive provisions of those human right treaties on a constitutional level (paras 65–70). Thus, although Article 92 probably assumes that human right treaties are to be implemented into Norwegian law effectively and in good faith, the Constitution now seems to leave the exact design of the implementation to the Parliament's discretion. The Human Rights Act (1999) is, therefore, still pivotal.

6. Turning to the *constitutional* rights and freedoms in the new part E of the Constitution, the Supreme Court held in *Holship* that Article 92 *imposes* on the Supreme Court to *enforce* these rights and freedoms, and to do so in accordance with their *constitutional rank* (para 70). The spectre of practical implications of this is yet to be clarified and developed by the Supreme Court, *inter alia* as to remedies. *Acta* (Rt-2014-1105) is one example.

7. In any case, the Supreme Court's duty to respect and secure – i.e. to *enforce* – constitutional rights and freedoms, must be performed in line with its functioning as a court of law, according to Article 88 of the Constitution. The Court cannot take on a case *on its own motion* – it may only decide in those cases brought before it by the parties. Hence, the future legal development is also dependant on what cases are brought before the Court, and how those cases are presented to the Court by the parties. It is through usage that the precise normative implications of the Constitution's general terms, notions, and principles are identified and comes to life.

8. The Norwegian Supreme Court is a *court of precedence*. Although a ruling from the Court is legally binding – *res judicata* – only upon the parties to the case, the Court's interpretation is expected to be upheld in similar future cases – the ruling has in this respect, accordingly, a more general application as a matter of clarifying or of developing the law. Article 88 to the Constitution makes no reservation as to constitutional issues. The Court has emphasised – *inter alia* in the grand chamber ruling in *Finnsbråten* (Rt-2009-1118) and in *Maria* (Rt-2015-93) – that constitutional interpretation is one primary assignment for the Court. Moreover, the Supreme Court's case law demonstrates that constitutional arguments may have a decisive role also when it comes to the interpretation and application of *statutory law*.

9. One particular feature here is the Court's right and duty to *set aside* or to *interpret narrowly* any legal provision that proves to be contrary to the Constitution, in particular as to constitutional rights and freedoms of individuals. Within the framework of a "Common law/Nordic model" of constitutional review, we are not talking of quashing the law or the particular provision, declaring it null and void in any formal or technical sense. By setting the provision aside, the Supreme Court limits itself to cutting of the provision's normative power in the particular case.

10. The ground breaking judgment 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 – declared that the Court would not apply any law as far as the law was found to be in conflict with the Constitution. The Norwegian Supreme Court's *motivation* is amazingly parallel to that given by the US Supreme Court some 60 years previously, in the landmark case of *Marbury v. Madison* from 1803, forming the basis for the US Supreme Court's position as a constitutional court. The Norwegian Supreme Court made no explicit reference to *Marbury v. Madison*. But it is beyond doubt that some of the justices were familiar with it. The Norwegian Supreme Court's ruling was a major European breakthrough.

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

12. There have always been critical voices, partly connected to the very idea that the Supreme Court should carry out constitutional review, and partly connected to particular cases. In the 1920's and early 1930's, the question of abandoning the Supreme Court's powers was discussed in the Parliament. In the 1960's and 1970's, leading commentators perceived constitutional review by the Supreme Court as odd and out-dated. However, the Supreme Court reinforced constitutional review in an *en banc* case in 1976 – *Kløfta* (Rt-1976-1), and has continuously confirmed it in subsequent case law, as in *Shipowner's taxation* from 2010 (Rt-2010-143).

13. Connected to the constitutional reform in 2014 and to 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 constitutional review. 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."

14. The Parliament emphasised that the provision refers to what was already established by the Supreme Court through customary constitutional law. 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 cases – the Parliament's solemn recognition of the Norwegian Supreme Court's functioning as to constitutional review. In this respect, the codification in Article 89 is indeed important: It provides a renewal of the legal foundation for the Supreme Court's constitutional role, entrusting the Supreme Court's functioning in this respect with improved legitimacy.

15. The cumulative effect of the elements that I have addressed is that the Supreme Court bears a heavy responsibility as a protector of the Constitution, and has a rather strong position vis-à-vis the other two branches of the State.

16. Moreover, 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. Expanding the Constitution's catalogue of protected rights and freedoms – ranking them as *lex superior* – has inevitably, substantially broadened the Supreme Court's constitutional *repertoire*.

17. 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. The emerging case law from the Norwegian Supreme Court is screened, analysed and commented upon. Occasionally we even experience rather edgy outbreaks towards the Court or particular justices within the Court.

18. I cannot advance any ready-made overarching philosophy of constitutional interpretation. I confine myself to portray, very briefly, some of the characteristics, as I see them.

19. The constitutional text will, of course, always be the starting point. The framer's intentions, the constitutional history, the context and the provisions' object and purpose, will also have to be taken into consideration. Moreover, a long-standing case law from the Supreme Court demonstrates that the Court is prepared to apply a *contemporary perspective* to constitutional adjudication – the Constitution is not dead, it is alive.

20. As to interpreting the Bill of Rights from 2014, 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, repeatedly stressed that the Bill of Rights is to be interpreted and applied "in the light of" its international background and treaty parallels. In *Holship*, it was stated that the parallel provision of the European Convention on Human Rights, and the European Court's case law connected to it, would serve as the "starting point" (para 81).

21. 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 of that of the parallel convention rights.

22. 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 connected to any other human rights treaty to which Norway is a party, was also supposed to be relevant. During the preparatory stage, it was moreover agreed upon that, although not formally bound by international practice when interpreting the Norwegian Constitution, the Supreme Court should not deviate from it without good cause.

23. 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 when interpreting the Constitution, in a manner comparable to how it is applied when interpreting parallel provisions of the European Convention on Human Rights. Although the technical approach may vary slightly from case to case, depending also on the particular constitutional provision, the objective is to preserve coherence and to avoid that the protection provided by the constitutional Bill of Rights falls short to that provided for by the human right treaties to which Norway is a party.

24. So far, one can see this approach in particular as to the right to a *fair trial within a reasonable time* under Article 95 of the Constitution, where case law under Article 6 of the European Convention on Human Rights has been more or less decisive. The same holds true as to the Constitution's Article 102 on the protection of *the family and private life*, compared to the case law under Article 8 of the European Convention. In *Holship*, the Court drew a close parallel between Article 101 in the Constitution and Article 11 in the European Convention of Human Rights on the *right to organise and to take collective action*. Moreover, the Supreme Court's interpretation of Article 104 on *children's rights* is highly influenced by the UN Convention on the Rights of the Child, also taking into account the UN Committee's general comments to the Convention.

25. On the systemic level, the Court established already in *Acta* (Rt-2014-1105 para 28) the general doctrine that any *restriction* on the constitutional rights and freedoms must be *in accordance with the law*, must pursue *a legitimate aim*, and, moreover, must be *necessary* and *proportionate*. The doctrine has been confirmed in subsequent case law, *inter alia en banc* in *Holship* (para 81–82). To my mind, this is so far the Supreme Court's most important contribution to the further development of the new Bill of Rights. The influence from general European law is obvious.

26. This being said: The Supreme Court has accentuated that although the developing case law from the European Court of Human Rights or other international bodies must be taken into serious consideration when interpreting and applying the Norwegian Constitution, it is still 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. This important reservation, and the emphasis on the Court's own responsibilities towards the new constitutional Bill of Rights, was first articulated in *Maria* (Rt-2015-93), thus sometimes referred to as the *Maria-formula*.

27. I will close my intervention by making the following assertions: The Supreme Court's approach to the Norwegian Bill of Rights is loyal to, and in line with, the Parliament's ambitions with the constitutional reform in 2014. Moreover, case law so far demonstrates that the Court seeks to combine the Court's constitutional duty to be the master of the constitution, with the need to see to it that the Bill of Rights is not operating in a vacuum. 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 securing a coherent development of the Norwegian Bill or Rights in a European context, and it provides the Court with a channel into the on-going worldwide constitutional dialogue.