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ROYAUME DE NORVÈGE / KINGDOM OF NORWAY / KÖNIGREICH NORWEGEN / КОРОЛЕВСТВО НОРВЕГИЯ

The Supreme Court of Norway Norges

Høyesterett

Anglais / English / Englisch / английский

Role of the Constitutional Court in Upholding and Applying the Constitutional Principles

Questionnaire

For the national reports

I. The role of the constitutional court in defining and applying explicit/implicit constitutional principles.

1. We do not have *separate* constitutional courts in Norway. The general courts, with the Supreme Court as the highest judicial tribunal, are empowered to review the legality of governmental decisions and the constitutionality of legislation adopted by the Parliament. On 15 June 2015, the Parliament passed an amendment to Article 89 of the Constitution codifying the courts' competence to determine whether laws and other decisions made by the authorities conflict with constitutionally established rights and freedoms. This principle of judicial review has, however, been practised and recognised as customary law since the last half of the 19th century.

   There are no *expressed*limitations in Article 89 of our Constitution. However, the courts will, in accordance with practice, bereluctant to interfere manifestly with public policies that have been clearly expressed by the parliament.The judicial review is also limited to cases where an actual conflict is brought before the court for resolution. When the Supreme Court in final instance finds that a law is unconstitutional, the law is only set aside to the extent required by the individual case. The precedential effect of the court's decision will depend upon how general or how specific the reasons given for the setting aside of the law in the particular controversy were.

2. The constitutional protection of human rights is of profound importance, andis often material to the cases tried in the Supreme Court. The original catalogue of human rights included, inter alia, the prohibition of torture, the prohibition of retroactive laws and the principle that a state cannot expropriate property without compensation. In May 2014, the Parliament passed the greatest reform of the Constitution since it was adopted in 1814. Several of the human rights that already existed in Norwegian law through binding human rights treaties, including the right to fair trialand the rights of the child,were incorporated into the Constitution. The main purpose of the incorporation was to further strengthen the position of human rights under Norwegian law.

3. Implied principles of customary law, originating from case law and/or constitutional practice, have played an important part in *developing* Norwegian constitutional law.The principle of judicial review is already mentioned, cf. the answer to QI.1. Other examples arethe general principle of legality, a cabinet

minister's duty to resign if the parliament passes a vote of no confidence and the right to establish political parties.All these principles have, however, been incorporated into the Constitution just the last decade. Also the other main principles that started out as customary law, are nowcodified in the Constitution. As a result, implied principles are today of lesser importance.

4. TheSupreme Court has played and still plays an influential role in defining and developing the constitutional principles.

   TheSupreme Court uses the wording of the relevant article as the starting point for the interpretation. The *travauxpreparatoires*may be used to ascertain the meaning of the text, but the value of the preparatory work will depend on the circumstances (the weight of other available legal sources etc.).

   It has been emphasized in the Court's case law that it is the duty of the Norwegian Supreme Court – not the international courts or other supervisory bodies – to ascertain, clarify and develop the constitutional rights.It is nonetheless full consensus that Constitution shall not run short to that of the parallel convention rights. As for the constitutional provisions that were new in 2014 (cf. the answer to QI.2), this means that any applicable case law from the relevant international courts or tribunals willbe taken into account. Case law from the European Court of Human Rights has a key position, but also any other relevant human rights treaty may be considered.

5. All constitutional principles are the genesis of the existing constitutional framework, and Norwegian constitutional law makes no clear distinction between "basic principles" and "concrete constitutional norms". The general principles, such as the right to a fair trial, are construed in connection with more detailed and specific articles.TheCourts are fully competent to enforce any constitutional principle insofar it is required by the individual case; cf. the answer to QI.1.

6. It is in the very nature of the subject matter that the most applied principle is the principle of judicial review. As mentioned above, this principle has been established, confirmed and developed in case law.

   Also several other constitutional provisions have been largely influenced by constitutional adjudication. An illustrative example is Article 105 on the state's obligation to pay full compensation for expropriation. There is an extensive case law from the Supreme Court providing guidelines as to the points of difference between expropriation and other restrictions in the right of disposal that do not trigger the constitutional right to compensation. The Supreme Court has also in its case law addressed the principal methods of calculating the amount of compensation.

II. Constitutional principles as higher norms? Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in Constitutions and judicial review of constitutional amendments.

1. The constitutional principles are placed at the top of the hierarchy of legal norms in Norway, and will prevail in case of a conflict with provisions of basic law. Certain human rights conventions and the rules of the EEA agreement have so-called "semi-constitutional"-status, butthis only implies that the rules prevail in the event of a conflict with *a domestic statutory provision*. No principles of international law are deemed superior to the constitutional provisions.

2. There is no *formal* hierarchy among the constitutional provisions. However, the Supreme Court has in its practice shown to be more reluctant to set aside constitutional provisions on areas where there are less need of judicial review, or where the relevant principle is a result of a clearly expressed public policy. In the Supreme Court case published in Rt. 1952 p. 1089it was expressly stated that the courts should be more cautious to set aside the legislator's opinion on how far the Parliament may go in delegating their authority to other governmental bodies, than what would have been the case if the dispute concerned the legal rights and obligations of citizens. In Rt. 1976 p. 1 the Supreme Court made a further distinction, now within the group of legal rights and obligations of citizens. The court found that rights that protect the personal freedom and security of the individual enjoy a preferred position as compared to economic rights when it comes to judicial review. This principle of "preferred rights" has been confirmed and further developed in subsequent case law.

3. The Norwegian Constitution has, since it was adopted in 1814, provided for a special procedure for constitutional amendments. The amendment must be presented and approved by the Parliament at least one year before a general election, and cannot be adopted until after the election – by a different parliament, cf. Article 121 of the Constitution. The amendment then has to be adopted exactly as proposed by at least two thirds of the members of parliament.

   The procedure has since 1814 been expressly limited to amendments that do not *"contradict the principles embodiedin this Constitution, but solely relate to modifications of particular provisions whichdo not alter the spirit of the Constitution".*The reservation has historically given grounds for a relatively reserved attitude towards constitutional amendments. The most recent years, however, the Parliament hasshown an increased will to amend the Constitution. The reasons behind the most recent years amendments have typically been to strengthen the position of human rights (cf. the answer to QI.2) or to codify already existing principles of customary law (cf. the answer to QI.3).

4. The prevailing opinion appears to be that constitutional amendments should remain a political process.

5. The constitution does not provide for any judicial review of the constitutionality *of an constitutional amendment*, and it is unclear whether such principle can be implied. We are not aware of any cases where the Supreme Court has discussed whether it is empowered to review to what extent an amendment complies with the reservation in Article 121; cf. the answer to QII.3.

   In contrast, it is undisputed that the courts are competent to review whether *any statutes* are in conflict with the new constitutional provision. This follows from the general principle of judicial review codified in Article 89.Any physical or legal person that shows a genuine need to have this matter determined by the Courts, may initiate legal proceedings against the government subject to the general principles of Norwegian procedural law.

6. As explained in the answer to QII.5, it is an uncertain issue whether, and if so to what extent, the Courts can review the constitutionality of *the constitutional amendment*. It is on the other hand clear that the Courts may determine whetherthe content of *any normal statutory provisions* is in conflict with the new or amended constitutional provision. We have several examples of cases were the Supreme Court has taken constitutional amendments into use. In Rt. 2015 p. 93, for instance, the Court appliedArticle 102 on the right to a private life and Article 104 onthe rights of the child.Both provisions were incorporated into the Constitution in 2014.

7. We are not aware of any ongoing discussions as to whether the courts can review to what extent an amendment complies with the reservation in Article 121; cf. the answer to QII.3. It is unquestionable that the courts are competent to consider whether normal statutory provisions are in conflict with the constitutional amendment.