



# SUPREME COURT OF NORWAY

## Questionnaire for the XVIIIth Congress of the European Constitutional Courts

### **GENERAL PART – CATALOGUES OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

#### ***1.1 International catalogues of human rights (ECHR, UDHR and ICCPR)***

- ***In your country, what is the constitutional position/characteristic/legal force of international treaties protecting human rights?***
- ***What mechanism is used to invoke the international treaties in national court decision-making?***
- ***Is it possible to invoke the direct effect of the international catalogues of human rights? If so, please describe the mechanism.***

According to the [Norwegian Constitution](#) Article 92

“The authorities of the State shall respect and ensure human rights as they are expressed in this Constitution and in the treaties concerning human rights that are binding for Norway.”

According to the Norwegian Human Rights Act section 2 the following conventions have the force of Norwegian law insofar as they are binding for Norway:

- “1. The Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol no. 11 of 11 May 1994 to the Convention, together with the following protocols:
- a) Protocol of 20 March 1952,
  - b) Protocol no. 4 of 16 September 1963 on the protection of certain rights and freedoms other than those already included in the Convention and in the First Protocol to the Convention,
  - c) Protocol no. 6 of 28 April 1983 on the abolition of the death penalty,

- d) Protocol no. 7 of 22 November 1984,
- 2. The International Covenant of 16 December 1966 on Economic, Social and Cultural Rights,
- 3. The International Covenant of 16 December 1966 on Civil and Political Rights, together with the following protocols:
  - a) Optional Protocol of 16 December 1966,
  - b) Second Optional Protocol of 15 December 1989 on the abolition of the death penalty.”

According to the Human Rights Act section 3 the provisions of the conventions and protocols mentioned in section 2 shall take precedence over any other legislative provisions that conflict with them.

Human rights may be invoked in any court proceeding, both in civil and criminal cases. It is up to the court to decide whether a claim concerning human rights has any merit.

In a recent judgment by the Supreme Court, [HR-2016-2554-P \(Holship\)](#), the court stated the following concerning the status of international human right conventions in light of the Constitution article 92 and the Human Rights Act:

“(64) *What is the status of international human rights conventions?*

(65) Under and pursuant to Section 2, cf. Section 3, of the Human Rights Act, specific international human rights conventions shall have the “force of Norwegian law” and take precedence over other legislative provisions. Some conventions have been incorporated by other legislation. Conventions incorporated by law have, in principle, a rank equal to other acts.

(66) In the constitutional amendment of 13 May 2014, the Constitution got several new provisions concerning human rights. These new constitutional provisions naturally have a rank equal to the Constitution, and therefore take precedence over other statutory provisions.

(67) Section 92 of the Constitution, which got its current wording in the constitutional amendment of 13 May 2014, establishes that the authorities of the State “shall respect and ensure human rights as they are expressed in this Constitution and in the treaties concerning human rights that are binding for Norway”. The wording is ambiguous, and in light of Proposal to the Storting no. 186 (2013–2014), p. 22, there has been some debate as to whether the provision is to be interpreted so as to elevate all international human rights conventions binding to Norway per 13 May 2014 to a rank equal to the Constitution, cf. Skoghøy, “The status of human rights under the Constitution”, *Lov og Rett* 2015, p. 195–196.

(68) In the present case, NTF, with the support of LO, has submitted that Article 92 of the Constitution is an incorporative provision, elevating the

European Social Charter (revised), ILO Convention no. 87 concerning Freedom to Associate and Protection of the Right to Organise, and ILO Convention no. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively to a rank equal to the Constitution. In support of this position, reference has been made to the majority opinion of the Standing Committee on Scrutiny and Constitutional Affairs in Proposal to the Storting no. 186 (2013–2014), p. 22, which specified that reference to international human rights conventions in Article 92 of the Constitution was intended to prevent “misunderstandings concerning which international human rights are equal in rank to the Constitution”.

(69) This statement, however, does not reconcile with other statements made by the Standing Committee on Scrutiny and Constitutional Affairs’ majority opinion, emphasising that “references to Norway’s international commitments do not change the current state of the law”. If Article 92 elevates all international human rights provisions binding for Norway per 13 May 2014 to a rank equal to the Constitution, the provision will not only make the Human Rights Act redundant, but also every other human rights provision incorporated into the Constitution by the constitutional amendment of 2014. Such an interpretation would definitely have changed the previous state of the law.

(70) In light of the above, I find that Article 92 of the Constitution clearly cannot be interpreted as an incorporative provision, but rather as a directive to the courts and other authorities to enforce human rights at the level at which they have been incorporated into Norwegian law.”

### *I.II Supranational catalogues of human rights (the Charter)*

- *Is the Charter a point of reference to review the constitutionality of legal rules and/or decisions of public authorities, be it directly (a formal point of reference in some EU member states) or indirectly by “radiating” through the national catalogues (a substantive point of reference in other states)?*
- *Does the human rights case law of the Court of Justice of the European Union serve as guidance for the interpretation and application of the national catalogue in your country by general courts, or as a source for judicial law-making?*
- *Is the national impact of the Charter conditioned, in constitutional terms, by its essentially equivalent degree of protection afforded, or as the case may be in the EU member states, is conditioned by making a request for preliminary ruling with the Court of Justice of the EU?*

Norway is not part of the EU, but is connected to the EU through the EEA-agreement. Under the EEA Agreement, Norway and Norwegian citizens have the same rights and obligations as other EEA countries and their citizens when it comes to trade, investments, banking and insurance, and buying and selling services. They also have

the same right to work, study and live in other countries in the EEA. The Charter of Fundamental Rights of the EU is not part of the EEA-agreement and Norway is therefore not bound by the Charter. However, since the Charter is comprised of principles that were present in the EU before the EEA-agreement, the Charter is not considered irrelevant where human rights are concerned. An example of this is that the Charters article 41, the right to good administration, was mentioned in connection with the preparatory work for a new Public Administration Act.

### *I.III National human rights catalogues*

- *Is the catalogue of human rights part of the constitution of your country? If so, how is it incorporated (a separate constitutional charter, a part of the Constitution, a part of the constitutional order)? What is its structure?*
- *What is the historical background of the creation of the national catalogue of human rights in your country? Is the respective legislation in your country based on other legislation (previous or foreign), or is it original?*
- *What has been the development of your national catalogue of human rights over time? Is it undergoing a change? Are new rights included? Is there a constitutional procedure for its modification or amendment?*

Article 92 of the Constitution states that

“The authorities of the State shall respect and ensure human rights as they are expressed in this Constitution and in the treaties concerning human rights that are binding for Norway.”

The treaties that are binding for Norway are, as before mentioned, listed in the Norwegian Human Rights Act section 2, and section 3 of this act states that the provisions of the conventions and protocols mentioned in section 2 shall take precedence over any other legislative provisions that conflict with them.

In addition, the Norwegian Constitution chapter E, contains an expansive national catalogue of human rights.

Some of the human rights listed in chapter E have been a part of the Constitution since it was adopted in 1814, for example the right to freedom of expression, the prohibition against punishment without law and that no law must be given retroactive effect. More human rights were added to the Constitution over the years. Some of the changes were inspired by economic and cultural changes in society and some were inspired by international human rights. However, it was not until 13 May 2014 that the full catalogue of human rights, as seen now in chapter E, became a part of the Constitution. The occasion for this was the 200-year anniversary of the Norwegian constitution.

The constitutional procedure for modifications and amendments to the Constitution is described in the Constitution Article 121. In short, a proposal to amend the text of the

Constitution must be submitted to the Storting (the Norwegian Parliament) during one of the first three years of a four-year parliamentary term. Even if the right of initiative belongs to the government, proposals are normally presented by individual members of Parliament. Such proposals cannot be considered by the Storting until one of the first three years of the next parliamentary term, a system that provides an opportunity for the electorate to have its say through the election of the new Parliament. The proposal is considered by the Storting in a sitting in which at least two-thirds of the members of the Storting must be present to constitute a quorum. Of these, at least two-thirds must vote in favour of the proposal in order for it to be adopted.

#### *I.IV The mutual relationship between different catalogues of human rights*

- *Can you give examples from the case law of your court related to the use of any of the international catalogues?*
- *Has your court considered the relationship/hierarchy/competition of the catalogues of human rights in light of the protection afforded?*
- *Is there an established procedure for choosing a specific catalogue of human rights in cases where the right is protected under more catalogues (NB: The application of the Charter is binding in EU member states subject to compliance with Article 51(1), i.e. its application is not discretionary.)*

The Supreme Court of Norway often makes rulings, both in civil and in criminal cases, that concern human rights. A recent example is the Supreme Court's ruling in case [HR-2018-1958-A](#), concerning a physician's right of reservation against inserting IUDs. In this case The Supreme Court also commented on the application of Article 9 of the European Convention on Human Rights to this situation.

Another example is the case [HR-2015-2308-A](#) concerning protection of sources for unpublished documentary film material. The Supreme Court concluded that given the weighing of interests and the broad protection of unpublished material fit to reveal the identity of unidentified sources established by the European Court of Human Rights pursuant to Article 10 of the European Convention on Human Rights, there were no grounds on which to yield the protection of sources.

The Supreme Court of Norway usually considers issues of human rights starting with the rights covered by the Norwegian Constitution and European Convention on Human Rights because these are considered to be the most comprehensive catalogues. In some cases the court may find it necessary to consider human rights as they are formulated in other human rights catalogues, either because these catalogues contain rights not afforded protection elsewhere, or because the parties in the case have argued for the application of other human right catalogues. An example of this is the before mentioned HR-2016-2554-P (Holship), where the parties submitted the application of the ILO Convention no. 87 concerning Freedom to Associate and Protection of the Right to Organise, and ILO Convention no. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.

***SPECIAL PART – SPECIFIC ISSUES RELATED TO SELECTED FUNDAMENTAL RIGHTS***

***II.1 Right to life***

- ***What is the original wording of the provision protecting this right in your national catalogue?***
- ***Is it possible to restrict the right? If so, how and under what conditions?***
- ***Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.***
- ***Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?***

The right to life is protected in the Norwegian Constitution Article 93:

“Every human being has the right to life. No one may be sentenced to death.

No one may be subjected to torture or other inhuman or degrading treatment or punishment.

No one shall be held in slavery or required to perform forced labour.

The authorities of the State shall protect the right to life and oppose torture, slavery, forced labour and other forms of inhuman or degrading treatment.”

There is no death penalty in Norway and euthanasia is not legal. In some extreme cases, a life may be taken in self-defense – this however is part of the criminal law.

In connection with the abovementioned article being added to the Constitution in 2014, there was a debate about the wording of the Article and the possible conflict with the right to abortion. The preparatory works clearly show that Article 93 of the Constitution was not meant to infringe upon the right to abortion as it follows from The Abortion Act.

The Supreme Court has handled cases that concern other aspects of Article 93, but not the right to life. As before mentioned, the wording in this particular article is only a few years old. The Supreme Court has considered cases concerning the European Convention on Human Rights article 2. The protection of life in itself was however not the central element in most cases.

One of the most central cases concerning the right to life is Rt-1983-1004 (not available in English). The case concerned a priest who refused to perform his duties in protest of the legalization of abortion. The Norwegian Supreme Court considered the Constitution, The United Nations Universal Declaration of Human Rights and the European Convention on Human Rights Article 2 and concluded that these did not infringe upon the right to abortion.

When considering human rights that derive from international treaties and conventions, the Supreme Court always takes into consideration relevant case law from international courts, primarily the European Court of Human Rights.

## *II.II Freedom of expression*

- *What is the original wording of the provision protecting this right in your national catalogue?*
- *Is it possible to restrict the right? If so, how and under what conditions?*
- *Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.*
- *Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?*

The freedom of expression is protected in the Norwegian Constitution Article 100:

“There shall be freedom of expression.

No one may be held liable in law for having imparted or received information, ideas or messages unless this can be justified in relation to the grounds for freedom of expression, which are the seeking of truth, the promotion of democracy and the individual's freedom to form opinions. Such legal liability shall be prescribed by law.

Everyone shall be free to speak their mind frankly on the administration of the State and on any other subject whatsoever. Clearly defined limitations to this right may only be imposed when particularly weighty considerations so justify in relation to the grounds for freedom of expression.

Prior censorship and other preventive measures may not be applied unless so required in order to protect children and young persons from the harmful influence of moving pictures. Censorship of letters may only be imposed in institutions.

Everyone has a right of access to documents of the State and municipalities and a right to follow the proceedings of the courts and democratically elected bodies. Limitations to this right may be prescribed by law to protect the privacy of the individual or for other weighty reasons.

The authorities of the state shall create conditions that facilitate open and enlightened public discourse.”

The access to restrict the freedom of expression follows directly from the articles third and fourth paragraph. Examples of such restrictions are the prohibition against threats, hate-speech, harassment and some infringements of privacy.

There is extensive case law from the Supreme Court concerning the freedom of expression. Some of the most known cases concern racist and anti-Semite hate-speech from prominent figures in neo-Nazi movements, for example Rt-2007-1807 (Vigrid) and Rt-2002-1618 (Boot Boys) (not available in English).

A thematically different example is Rt-2007-404 (Brennpunkt) concerning an interlocutory measure against a Norwegian TV-channel, forbidding the channel from showing a news story about police methods and an informant in a large criminal case under investigation. The Supreme Court considered the right to freedom of expression in reference to the Constitution and the European Convention on Human rights Article 10 and concluded that the freedom of expression could not be limited in this case.

When considering human rights that derive from international treaties and conventions, the Supreme Court always takes into consideration relevant case law from international courts, primarily the European Court of Human Rights.

### ***II.III Right to privacy/right to respect for private life/right to private life***

- ***What is the original wording of the provision protecting this right in your national catalogue?***
- ***Is it possible to restrict the right? If so, how and under what conditions?***
- ***Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.***
- ***Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?***

The right to privacy and private life is protected in the Norwegian Constitution Article 102:

“Everyone has the right to the respect of their privacy and family life, their home and their communication. Search of private homes shall not be made except in criminal cases.

The authorities of the state shall ensure the protection of personal integrity.”

The right of privacy and private life is not explicitly restricted in this Article, but may be restricted when in conflict with other human rights or weighty interests. The right to privacy will typically be limited by regulations in the Penal Code and Criminal Procedure Act, for example in the context of police searches, investigations and incarcerations. Outside the criminal justice aspects, privacy can in some cases be restricted within the boundaries of privacy legislation such as GDPR.

The Supreme Court has considered a number of cases concerning the right to privacy and private life. In the case [HR-2018-104-A](#), the court referenced the Constitution and the European Convention on Human Rights Article 8 in connection with police seizing material that a client had confided to his lawyer. The right to privacy and private life

are also recurring themes in cases about child protection and immigration. In Rt-2004-510 and Rt-2003-593, two cases that had different outcomes, the Supreme Court weighed the right to privacy against the freedom of expression in cases concerning media coverage (pictures taken by the press) of the accused in criminal cases.

When considering human rights that derive from international treaties and conventions, the Supreme Court always takes into consideration relevant case law from international courts, primarily the European Court of Human Rights. Outside criminal cases, the courts will also take in to account decisions from the EFTA Court and EU Court concerning GDPR.

#### ***II.IV Freedom of religion***

- ***What is the original wording of the provision protecting this right in your national catalogue?***
- ***Is it possible to restrict the right? If so, how and under what conditions?***
- ***Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.***
- ***Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?***

The right to freedom of religion is protected in the Norwegian Constitution Article 16:

“All inhabitants of the realm shall have the right to free exercise of their religion. 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.”

The freedom of religion is not explicitly restricted in this Article, but may be restricted when in conflict with other human rights or weighty interest, for example if the expression of a religion is in conflict with regulations in the Penal Code, anti-discrimination regulations, child protection regulations, etc.

The wording in this Article of the Constitution is relatively new (2014), there is therefore little case law that references the Article. The Supreme Court has however considered cases concerning the freedom of religion in the context of the European Convention on Human Rights. A recent example is the Supreme Court’s ruling in case [HR-2018-1958-A](#), concerning a catholic physician’s right of reservation against inserting IUDs. In this case The Supreme Court considered the application of Article 9 of the European Convention on Human Rights to this situation.

When considering human rights that derive from international treaties and conventions, the Supreme Court always takes into consideration relevant case law from international courts, primarily the European Court of Human Rights.

## *II.V Prohibition of discrimination*

- *What is the original wording of the provision protecting this right in your national catalogue?*
- *Is it possible to restrict the right? If so, how and under what conditions?*
- *Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.*
- *Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?*

The prohibition against discrimination is protected in the Norwegian Constitution Article 98:

“All people are equal under the law.

No human being must be subject to unfair or disproportionate differential treatment.”

Discrimination is also prohibited through the [Equality and Anti-Discrimination Act](#). Section 6 of this Act reads as follows:

“Discrimination on the basis of gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or combinations of these factors is prohibited. «Ethnicity» includes national origin, descent, skin colour and language.

The prohibition includes discrimination on the basis of actual, assumed, former or future factors specified in the first paragraph.

The prohibition also applies if a person is discriminated against on the basis of his or her connection with another person, when such discrimination is based on factors specified in the first paragraph.

«Discrimination» means direct or indirect differential treatment pursuant to sections 7 and 8 that is not lawful pursuant to sections 9, 10 or 11.”

According to section 9 of the same Act, not all differential treatment is unlawful:

“Differential treatment does not breach the prohibition in section 6 if it:

- a) has an objective purpose,
- b) is necessary to achieve the purpose, and
- c) does not have a disproportionate negative impact on the person or persons subject to the differential treatment.

In employment relationships and in connection with the selection and treatment of self-employed persons and hired workers, direct differential treatment on the basis of gender, ethnicity, religion, belief, disability, sexual orientation, gender identity or gender expression is only permitted if the characteristic in question is of decisive significance for the performance of the work or the pursuit of the occupation and the conditions in the first paragraph are met.

Age limits specified in laws or regulations, and favourable pricing based on age, do not breach the prohibition in section 6.”

The conditions for lawful differential treatment are further specified in the Act section 10 and 11 in the context of pregnancy, childbirth or breastfeeding and leave in connection with childbirth or adoption and positive differential treatment.

Section 5 of the Act states that the United Nations International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 shall apply as Norwegian law.

Most cases concerning discrimination are handled by the [Equality and Anti-Discrimination Ombud](#) and the Anti-Discrimination Tribunal. Few cases therefore reach the courts. The Supreme Court referenced the Constitution Article 98 and the Equality and Anti-discrimination Act in a recent decision concerning the rights of indigenous people (HR-2018-872-A, not available in English).

When considering human rights that derive from international treaties and conventions, the Supreme Court always takes into consideration relevant case law from international courts, primarily the European Court of Human Rights.

## ***II.VI Right to liberty***

- ***What is the original wording of the provision protecting this right in your national catalogue?***
- ***Is it possible to restrict the right? If so, how and under what conditions?***
- ***Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.***
- ***Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?***

The right to liberty is protected in several Articles of the Norwegian Constitution. As before mentioned, Article 93 states that:

“Every human being has the right to life. No one may be sentenced to death.

No one may be subjected to torture or other inhuman or degrading treatment or punishment.

No one shall be held in slavery or required to perform forced labour.

The authorities of the State shall protect the right to life and oppose torture, slavery, forced labour and other forms of inhuman or degrading treatment.”

Article 94 of the Constitution states that:

“No one may be taken into custody or otherwise be deprived of their liberty except in the cases determined by law and in the manner prescribed by law. Deprivation of liberty must be necessary and must not constitute a disproportionate infringement.

Persons arrested shall as soon as possible be brought before a court. Others who have been deprived of their liberty have the right to bring their deprivation of liberty before a court without unjustified delay.

Those responsible for the unwarranted arrest or illegal detention of a person shall be answerable to the person concerned.”

According to the Constitution article 94 liberty may be restricted: “in the cases determined by law and in the manner prescribed by law.” Deprivation of liberty must further be “necessary and must not constitute a disproportionate infringement.” Prison sentences, arrest and custody, detention in immigration centers, detention in mental health institutions and child welfare institutions are examples of the right to liberty being lawfully restricted.

The Supreme Court has handled a number of cases about the right to liberty. Common examples are cases concerning police custody, detention in immigration centers and detention in psychiatric hospitals (none available in English).

When considering human rights that derive from international treaties and conventions, the Supreme Court always takes into consideration relevant case law from international courts, primarily the European Court of Human Rights.