
Document 16

(2011–2012)

Report to the Presidium of the Storting
by the Human Rights Commission concerning Human Rights in the
Constitution

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To the Storting

As part of the Storting's preparations for the Bicentenary of the Norwegian Constitution in 2014, the Presidium of the Storting appointed on 18 June 2009 a commission whose terms of reference were to

“prepare and put forward recommendations for a limited revision of the Constitution with the object of strengthening the position of statutory national human rights by means of enshrining central human rights in the Constitution.”

The Commission's terms of reference also instruct it to base its recommendations on the draft constitutional amendments resulting from the cross-party settlement of 2008 on the State and the Church of Norway, cf. Document no. 12 (2007-2008), draft constitutional amendment no. 10. In this context, the Commission has attached particular importance to the proposed objectives clause in the new § 2:

“This Constitution shall safeguard democracy, the constitutional state and human rights.”

The assignment has now been completed, and the Storting's Human Rights Commission is pleased to submit its recommendations for a limited revision of the Constitution.

Oslo, 19 December 2011

Inge Lønning
(Chair)

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Part I Introduction

1. Summary

1.1 The Commission's recommendations for constitutional amendments

The Storting's Human Rights Commission was appointed to prepare and put forward recommendations for a limited revision of the Constitution with the object of strengthening the position of human rights in Norwegian law.

The Commission has debated in which ways the protection of human rights in the Constitution may be reinforced.¹ Several of the Constitution's provisions on human rights were drawn up in 1814. Certain of these are as relevant today as ever, while others have little or no relevance. Some of the provisions are also extremely difficult to understand. Society has changed in the time that has passed since the Constitution was adopted. Only to a moderate degree has this been reflected by new human rights provisions.

This means that, in the sense that only certain, central human rights are expressed in the Constitution, the protection of human rights in today's Constitution is fragmented. The Constitution does not present an overall picture of the degree to which the protection of human rights really exists in Norwegian legislation. Thus, there is the danger that those reading the Constitution will form a distorted and insufficient picture of the values that Norwegian society is based on. At the time of the State/Church of Norway settlement, there was broad cross-party consensus that the Constitution must have a new objectives clause in § 2, where it is stated that the object of the Constitution is to protect democracy, the constitutional state and human rights.² This is an argument in favour of revising and supplementing the protection of human rights in the Constitution in order to improve the visibility of these values and to satisfy the proposed objectives clause in the new § 2.

It is also possible that today's fragmentation may lead to judicial ambiguity regarding whether the values expressed in the Constitution are more important than or take precedence over human rights in other legislation. If this is the case, application of the Constitution in courts of law and administration may lead to a situation where certain human rights are unintentionally given special attention at the expense of others.

Additionally, we have seen that in every parliamentary term, several draft amendments to the provisions on rights in the Constitution have been put forward. This indicates that there is general dissatisfaction with the extent of today's constitutional rights. In recent years more comprehensive public reports on personal privacy and protection against discrimination have concluded that the protection of rights in the Constitution must be reinforced.³

The Commission concludes that protection of rights in the Constitution should cover, at minimum, those central human rights that form the basis of the international human rights conventions endorsed by Norway. It is a prerequisite of the international work on human rights that these questions, first and foremost, find an expedient and effective solution nationally so that international bodies set up by the UN and the Council of Europe are not weighed down unnecessarily by legal questions that could be solved at a national level. Even though Norway places relatively little strain on these bodies, it is important all the same that Norway accepts the same responsibility as other member states for finding good national solutions to human rights questions. Since the Constitution is more difficult and time-consuming to amend than other legislation, cf. Constitution § 112, the enshrining of central

¹ For questions about whether the protection of human rights in the Constitution should be reinforced, see chapter 10.

² For more about the State/Church of Norway settlement, see point 10.3.

³ See NOU 2009: 1 and NOU 2009: 14.

human rights in the Constitution would advance stability and predictability in Norwegian society.

In the view of the Commission, the enshrining of central human rights in the Constitution would not result in what is often described as the juridification of society.⁴ The principal function of human rights is to safeguard the freedom of the individual, equality and human dignity, cf. the preamble to the Universal Declaration of Human Rights from 1948. Throughout history there have been countless examples of freedom, equality and human dignity being grossly neglected and violated. Central human rights set the limits for legislative and executive power, with one of the duties of the courts being to protect these rights so that individuals do not suffer wrong. This balance between the branches of the state is integral to any constitutional state. This is why it is hard to envisage a credible constitutional state and a good democracy unless the most fundamental rights are safeguarded. With regard to those rights whose role is to safeguard the freedom of the individual, equality and human dignity, it is consequently wide of the mark to say that enshrining such rights in the Constitution may lead to the increased juridification of society. It may be added that these rights already form part of Norwegian law through the incorporation of several international conventions in the Human Rights Act of 1999. Consequently, the enshrining of central human rights in the Constitution would not result in there being more rights in the statutory framework.

In its preparation of specific recommendations for how the protection of human rights in the Constitution should be reinforced, the Commission has taken as its point of departure the premise in the terms of reference that it is the “central” human rights or the “universal principles” that are to be incorporated into the Constitution. When identifying these central human rights, the Commission has taken several aspects into account. The Commission has, inter alia, taken into consideration the minimum level of protection developed globally and in Europe. The Universal Declaration of Human Rights from 1948 and subsequent UN conventions have had great significance in determining which human rights are considered “central” in an international context. Next, the Council of Europe’s conventions, and in particular the European Convention on Human Rights of 1950 as interpreted by the European Court of Human Rights have played a prominent role in the development and safeguarding of central human rights in Europe.

In addition, the Commission has considered how human rights have been expressed in modern Western European constitutions, in particular the constitutions of our Nordic neighbours and the EU’s Charter of Fundamental Rights. At the same time, the commission has placed considerable emphasis on Norwegian traditions and values, both with a view to improving the visibility of the values that Norwegian society is built upon and in order that the Constitution is better suited to meeting Norway’s future challenges.

The Commission has endeavoured to reach agreement on which values and which rights should be included in the Constitution, and how these rights should be formulated. Alternative formulations may be found in the record of the Commission’s deliberations.

The Commission considered there to be two alternative models for how to place human rights in the Constitution.⁵ The first model entails that the new provisions in the Constitution would be placed among the existing provisions in the Constitution, while the second model entails that human rights in the Constitution would be collected in a new Part E, which would deal with human rights only. In the latter model, it is proposed that those provisions that currently reside in Part E but that do not relate to human rights would be moved to a new Part F consisting of general provisions. The Commission was unanimous in its view that the latter model would improve the visibility of human rights in the Constitution and would consequently best realize the new § 2. At the same time, a separate part on human

⁴ For a more detailed assessment of juridification, see in particular point 10.5.3.

⁵ For a more detailed examination of these two models, see chapter 17.

rights would play a clarifying and educational role when compared to placing human rights provisions among the existing provisions in the Constitution. Such a clarification would in turn contribute to raising public understanding of and interest in the Constitution.

In light of this, the Commission recommends a new Part E on human rights and a new Part F consisting of general provisions. In this summary, the Commission's proposals for a new Part E in the Constitution have been phrased in the constitutional language currently in use. In the last part of the report, the specific voting proposals have been phrased in both a general style and in the constitutional language currently in use.⁶

Kari Nordheim-Larsen does not endorse the Commission's proposal for a new § 103 first sentence, cf. point 31.5.6. Carl I. Hagen does not endorse the Commission's proposals for new §§ 104, 107, 108, 109, 110, 111, 112, 115 and 116, cf. point 11.4.2. In accordance with the Commission's recommendations, the new Part E in the Constitution will appear as follows (the amendments have been highlighted in italics):

“E. Human Rights.

§ 92

It is the responsibility of the authorities of the State to respect and ensure human rights.

§ 93

Every human being has an inherent right to life. No person may be sentenced to death. No person may be subjected to torture or other inhuman or degrading treatment or punishment.

No person shall be held in slavery or forced labour.

It is the responsibility of the authorities of the State to protect the right to life and to prevent torture, slavery, forced labour and other forms of inhuman or degrading treatment.

§ 94

No person 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 so required and must not constitute an unreasonable infringement.*

Persons detained should as soon as possible appear before a court. Others who have been deprived of their liberty should have the right to bring their deprivation of liberty before a court without unreasonable detention.

For unwarranted arrest, or illegal detention, the officer concerned is accountable to the person imprisoned.

§ 95

Everyone has a right to have their case tried by an independent and impartial court within reasonable time. Legal proceedings shall be fair and public. The court may however conduct proceedings in camera if considerations for the privacy of the parties concerned or if a weighty and significant public interest necessitates this.

§ 96

⁶ For those existing provisions that the Commission has proposed moving to another article number, the Commission has used as its basis today's constitutional language or the modernization of the language in the Constitution resulting from draft constitutional amendment no. 16 in Document no. 12 (2007-2008), which will be considered by the Storting during the current parliamentary term.

No one may be convicted except according to law, or be punished except after a court judgment.

Everyone has the right to be presumed innocent until proved guilty according to law.

No one may be punished more than once for the same act.

No one may be sentenced to surrender property or accumulated wealth unless the assets have been used to commit or are profits from a criminal act.

§ 97

No law must be given retroactive effect.

§ 98

All people are equal under the law.

No person must be exposed to unfair or disproportionate discrimination.

§ 99

Everyone has the right to freedom of thought, conscience, religion and life view. This freedom includes the individual's right to change their religion or life view, and to practise their religion or life view alone or in community with others.

§ 100

There shall be freedom of expression.

No person 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 municipal administration 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.

It is the responsibility of the authorities of the State to create conditions that facilitate open and enlightened public discourse.

§ 101

Everyone has the right to form, join and leave associations, including trade unions and political parties.

All people may meet in peaceful assemblies and demonstrations.

The Government is not entitled to employ military force against citizens of the State, except in accordance with the forms prescribed by law, unless any assembly disturbs the public peace and does not immediately disperse after the Articles of the Statute Book relating to riots have been read out clearly three times by the civil authority.

§ 102

Everyone has the right to the respect of their privacy and family life, their home and their communication.

It is the responsibility of the authorities of the State to ensure the protection of personal integrity and information. The systematic collection, retention and use of information about others' personal affairs may only take place in accordance with the law.

§ 103

The family is a fundamental group unit of society. Everyone who is of marriageable age has the right to found a family, to marry and to dissolve the marriage in accordance with the specific provisions prescribed by the law. Marriage may only be entered into with the consent and free will of the intending spouses.

§ 104

Children have the right to respect for their human dignity. They have the right to be heard in questions that concern themselves, and due weight shall be attached to their views in accordance with their age and development.

For decisions that affect children, the best interests of the child shall be a fundamental consideration.

Children have the right to protection of their personal integrity. It is the responsibility of the authorities of the State to create conditions that facilitate the child's development, including ensuring that the child is provided with the necessary economic, social and health security, preferably within their own family.

§ 105

If the welfare of the State requires that any person shall surrender his movable or immovable property for the public use, he shall receive full compensation from the Treasury.

§ 106

Everyone who resides legally in the Realm may move freely within the borders of the Realm and choose their place of residence there.

No person may be denied the right to leave the Realm, unless so required out of consideration for effective legal proceedings or the performance of military service. Norwegian citizens may not be refused entry into the Realm.

§ 107

It is the responsibility of the authorities of the State to respect the individual's cultural identity and to create conditions that enable the individual to participate in cultural activities and to experience a diversity of cultural expression.

Scientific and artistic freedom shall be respected.

§ 108

It is the responsibility of the authorities of the State to create conditions enabling the Sami people, as an indigenous people, to preserve and develop its language, culture and way of life.

§ 109

Everyone has the right to education. Children are obliged to receive basic education. The education shall safeguard the individual's abilities and needs, and promote respect for democracy, the constitutional state and human rights.

It is the responsibility of the authorities of the State to ensure access to upper secondary education and equal opportunities for higher education on the basis of qualifications.

§ 110

It is the responsibility of the authorities of the State to create conditions enabling every person capable of work to earn a living by their *work or enterprise*. *Those who cannot themselves provide for their own subsistence have the right to support from the State.*

Specific provisions concerning the right of employees to co-determination at their work place shall be laid down by law.

§ 111

It is the responsibility of the authorities of the State to respect and ensure the right to a satisfactory standard of living.

Similarly, it is the responsibility of the authorities of the State to promote the health of the population and to secure the right to essential health care.

§ 112

Every person has a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources should be managed on the basis of comprehensive long-term considerations *which will safeguard this right* for future generations as well.

In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.

It is the responsibility of the authorities of the State to take measures for the implementation of these principles.

§ 113

Infringement of the authorities against the individual must have a legal basis.

§ 114

In cases brought before the Courts, the Courts have the right and duty to examine whether the law and other decisions made by the authorities of the State conflict with the Constitution.

§ 115

Every limitation of rights that is recognized in this Constitution must be laid down in the law and must respect the essence of the rights. The limitation must be proportional and necessary for safeguarding the public interest or others' human rights.

In no case may such limitations be made in §§ 93, 94, 95, 96, 99 first sentence and 105. The same applies in § 97 for questions regarding punishment.

§ 116

The rights in this Constitution may not be departed from unless a decision is adopted to make a temporary exception when a proclaimed war or emergency situation makes it openly necessary to protect democracy, the constitutional state or the existence of the Realm.

In no case may a decision be adopted to depart from §§ 93, 96 and 99 first sentence. The same applies in § 97 for questions regarding punishment."

In addition, the Commission recommends that the existing § 49 is supplemented by a formulation about free and secret elections. The Commission's proposal is highlighted in italics.

“§ 49

The people exercise the Legislative Power through the Storting. *The Members of the Storting are elected through free and secret elections.*”

1.2 Composition of the report

The Commission has divided the report into six parts, with consecutively numbered chapters. The six parts deal with different subjects, while the chapters examine the specific issues at hand more closely.

In Part I of the report, Chapter 1, a summary of the Commission's conclusions and recommendations, along with this overview are presented. In Chapter 2 the Commission's composition and terms of reference, the Commission's work, and the reasons for appointing the Commission are explained.

In Part II of the report an overview of the legal points of departure and assumptions for the Commission's work is provided. Chapter 3 introduces this part. Chapter 4 provides a closer examination of the Constitution's previous history, its role and functions, along with which rights appeared in the resolution of 1814 and which rights have come later. Chapter 5 gives a summary of the development of international human rights. Chapter 6 provides a review of the position of international human rights in Norwegian law. In the final chapter of Part II an outline of human rights in other countries' constitutions is provided, cf. Chapter 7.

In Part III of the report the Commission considers the general issues at hand that are raised by the Commission's terms of reference. In this part the Commission has assessed and made decisions on several fundamental questions which must be answered before being able to conclude more specifically on which rights should potentially be enshrined in the Constitution. In this part general points of discussion relating to all of the rights in the Constitution are also raised.

To begin with, in Part III Chapter 9, the Commission raises the question of what is meant by human rights. In Chapter 10 the Commission considers the fundamental question of whether or not changes should be made to the human rights provisions in the Constitution. Chapter 11 assesses which rights must be considered central or universal. This is followed by Chapter 12, which deals with the Constitution's general provisions on the protection of human rights. In Chapter 13 the Commission examines more closely whether a general statutory authority that stipulates the conditions for when limitations to the different rights provisions may be made should be enshrined in the Constitution. This is followed by Chapter 14, which concerns the maintenance and scrutiny of human rights. In this chapter various ways of securing human rights are referred to, and, among other things, an assessment is made of whether the courts' power of judicial review should be enshrined in the Constitution. In Chapter 15 the Commission raises the question of how the Constitution's human rights provisions shall be interpreted, including the question of whether an interpretation provision should be enshrined in the Constitution. In Chapter 16 the Commission deals with the question of whether human rights may be departed from in a war or emergency situation, so-called derogation. In this respect, it is considered whether or not it would be expedient to enshrine in the Constitution the conditions for when human rights may be departed from. Finally in Part III the Commission considers where to place possible new human rights in the Constitution, cf. Chapter 17.

In Part IV of the report the Commission considers the question of enshrining individual rights in the Constitution. In chapters 19 to 42, the rights that the Commission has identified in Chapter 11 as central or universal are dealt with in turn. In these chapters the Commission goes through each individual right in turn and makes reference to prevailing law in the area, what Norway's obligations are through the international human rights conventions, and in what ways, if at all, the rights have been expressed in other countries' constitutions, especially in those of our Nordic neighbours. Next, the Commission makes an assessment of whether rights should be enshrined in the Constitution, and, if so, how this should happen.

In Part V of the report the Commission briefly considers the potential economic and administrative consequences that an adoption of the Commission's recommendations would have.

In Part VI of the report the Commission's specific voting proposals are presented. These proposals will be phrased in both a modern language style and in the constitutional language currently in use. This should be seen in conjunction with the fact that during this parliamentary term a vote will be held on a proposal about whether to modernize the language of the Constitution, see draft constitutional amendment no. 16 in Document no. 12 (2007-2008).

2. About the Commission

2.1 The Commission's appointment and composition

The Presidium of the Storting decided on 18 June 2009 to appoint a commission whose terms of reference were to prepare and put forward recommendations for a limited revision of the Constitution with the object of strengthening the position of statutory national human rights by means of enshrining central human rights in the Constitution.

The Commission has comprised the following seven members:

Inge Lønning (Chair), Emeritus Professor of Theology at the University of Oslo and former President of the Lagting.

Carl I. Hagen, Adviser and former Vice-President of the Storting.

Jan E. Helgesen, Associate Professor of Jurisprudence at the University of Oslo.

Hilde Indreberg, Supreme Court Justice.

Kari Nordheim-Larsen, County Governor of Telemark.

Pål W. Lorentzen, Supreme Court Advocate, Bergen.

Janne Haaland Matlary, Professor of International Politics at the University of Oslo.

Kari Nordheim-Larsen was appointed by the Presidium of the Storting on 3 December 2009 to replace Grete Faremo, one of the original members of the Commission. This followed the appointment of Ms Faremo as Minister of Defence in the autumn of 2009.

The Commission's secretariat has comprised Benedikte Moltumyr Høgberg, Ph.D., who has been the Commission's specialist secretary throughout. In addition, the work of the secretariat has been supported by the fact that one of the Commission's members, Hilde Indreberg, was on leave of absence from the Supreme Court for the purposes of contributing to the work between 1 October 2010 and 31 March 2011. Moreover, Mari Mæland, senior executive officer in the Storting's administration, has provided the Commission with practical and technical assistance.

2.2 The Commission's terms of reference

The Commission was given the following terms of reference:

“The Presidium of the Storting has appointed a commission whose purpose is to prepare and put forward recommendations for a limited revision of the Constitution with the object of strengthening the position of statutory national human rights by means of enshrining central human rights in the Constitution. The Commission’s work is included as part of the Storting’s preparations on the occasion of the Bicentenary of the Norwegian Constitution in 2014.

The Constitution regulates certain fundamental human rights. The current tradition of revising individual provisions means that both the subject and angle of such revisions may appear relatively random. During the forthcoming parliamentary term, several draft constitutional amendments, inter alia on discrimination, dwelling rights and the right to asylum, are under consideration.

It is therefore necessary to view the different constitutional provisions on human rights as a whole with a view to tidying up and adapting the Constitution to today’s situation. § 110 c of the Constitution states “It is the responsibility of the authorities of the State to respect and ensure human rights. Specific provisions for the implementation of treaties thereon shall be determined by law.”

Norway has incorporated a number of human rights conventions into its legislation. These conventions take precedence over other legislation if there is a disparity. This is why it is important that a fundamental and complete assessment of the place of human rights in the Constitution is undertaken. This should also include an evaluation of the Human Rights Act’s rule of precedence and the question of whether it should be possible to refer rights to the courts.

The purpose of this review will be to enshrine the universal principles of human rights in the Constitution, rather than to form a list of individual rights, which naturally belongs in ordinary legislation.

The Commission shall, on the basis of this, assess how the protection of human rights in the Constitution should be formulated.

It is assumed that the political agreement of 10 April 2008 on the State and the Church of Norway, which the seven parties represented in the Storting entered into (cf. Recommendation S. no. 287 (2007–2008)), underlies the Commission’s work.

Draft provisions shall take as their point of departure Norwegian constitutional tradition, and today’s Constitution shall be normative with respect to the scope, formulation, structure and division of the text. The Commission may propose necessary editorial changes that are a consequence of the substantive amendments recommended.

The Commission’s report is to be submitted to the Presidium of the Storting by 1 January 2012.”