Chapter 10

The Council of Europe and Pan-European General Principles of Good Administration – the Influence on the Administrative Law of Norway

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I. Norway, Administrative Law and the Council of Europe[1]

Norway was one of the founding members of the Council of Europe. It additionally signed the ECHR in 1950[2] and has thereafter signed all further protocols. The ECtHR has played an important role in the development of Norwegian human rights law particularly and more actively from 1990 onwards. By 2018 there had been 48 cases against Norway at the ECtHR. Violations of the ECHR were found in 30 cases. The numbers have increased year by year relatively since 2000. Very few of these cases are directly relevant to Norwegian administrative law. Several cases concern penal procedural law. Other cases concern freedom of speech, the right to privacy and family life, and asylum rights. The cases concerning the right to family life and asylum rights may concern vital aspects of administrative law.

The rule-of-law tradition has a historically long standing in Norway from King Magnus Lagabøtes' law of the land (*landslov*) of 1274. While principles of legality and objectivity in public law have been part of Norwegian constitutional law from 1814, codified modern and statutory general administrative law have primarily been developed since 1945 in tandem with more active public regulatory law in several specialized fields. The general act relating to the procedure in cases handled by the public administration – the Public Administration Act (*Lov om behandlingsmåten i forvaltningssaker - forvaltningsloven*) - was adopted after many years of preparation in 1967. This secured general procedural rights for citizens and other legal subjects which still are at the core of Norwegian administrative law, and which are generally consistent with the Recommendations of the CoE concerning administrative law.[3] Several of the procedural rights in the 1967 Act were already being to some extent applied and respected in

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1 Translations of some of the Norwegian legal acts cited in this chapter can be found at https://lovdata.no/register/forskrifterEngelsk.

2 See on the debates preceding the ratification of the ECHR in Norway E. Møse, 'Norway', in: R. Blackburn/J. Polakiewicz (eds.), Fundamental Rights in Europe (Oxford: Oxford University Press, 2001), pp. 625 – 654 (pp. 624 et seq.).

3 See for more details *infra* II (2).

Norwegian administrative law at the time of codification.[4] The enactment secured a statutory act which up until then had been missing.

The ECHR, the many protocols which have been added thereto, the other CoE conventions and recommendations and the case law of the ECtHR have generally contributed to strengthening the 'rule-of-law tradition' in Norwegian law. They have thus had a significant impact on the implementation, administrative practice and adjudication of rights as part of Norwegian administrative law, procedurally as well as substantively. The impact has become stronger over time, first through the increasingly active ECtHR and then through the adoption of the Act on Strengthening the Status of Human Rights in Norwegian Law (*Lov om styrking av menneskerettighetenes stilling i norsk rett – menneskerettsloven*) of 21 May 1999 by the *Stortinget* (the Norwegian Parliament) and the later amendments of a human rights chapter of the Norwegian Constitution.[5] However, most of the CoE conventions and recommendations in the realm of administrative law have come after the equivalent Norwegian legal reforms were enacted, as will be demonstrated below with a chronological presentation of the codification of Norwegian administrative law.

II. The History of Norwegian Administrative Law and Recent Developments

The rule of law has long-standing traditions in Norway but in the term has had different meanings over time. The use of the '*ting*', meaning a regional assembly of male leaders where general decisions meant to be seen as 'the law of the land' were made, and where conflicts were solved, goes back more than a thousand years. The first centralized 'law of the land' came about in 1274 and in a comprehensively revised version in 1687. The history of the Norwegian state in its present form started with the constitutional assembly and the *Kongeriket Norges Grunnlov* of 1814, the Constitution of the Kingdom of Norway of 1814, which is still in force today, even if subsequently amended several times, most recently by the Resolution of 1 June 2018.[6] The most comprehensive and significant amendments were made with codification of the already existing practice of parliamentarism in 2007 and a new chapter on human rights in 2014 including several of the material and procedural rights of ECHR.[7]

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4 F. Castberg, *Innledning til Forvaltningsretten* (Oslo: Akademisk forlag, 1938).

5 See for more details *infra* III (1).

6 See for a short characterization of this constitution: O. Wiklund, 'The Reception Process in Sweden and Norway', in: H. Keller/A. Stone Sweet, A. (eds.), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008), pp. 165 – 228 (pp. 168 et seq.).

7 See *infra* III (1).

The loss of Denmark in the Napoleonic Wars and the ensuing Kiel Peace Treaty resulted in the Kingdom of Denmark-Norway having to accede Norway to Sweden in 1814. The agreement of a constitution for Norway at the constitutional assembly at *Eidsvoll*, however, enabled the establishing of a separate Norwegian state in a union with Sweden under the Swedish king. The Norwegian Parliament, government and Supreme Court (*Høyesterett*) with constitutional powers were established under the new constitution. However, there were originally, and still are, few regulations concerning public administration under executive power, of the government or citizens' rights in relation to decisions made by public administrative agencies. One explanation is that such regulations of the use of the competences and power of public administration are often kept in statutory law and not in constitutions. Another explanation is that historically the executive powers of the Norwegian constitution have been formally invested in the king and his council. The constitutional statutes on executive power have been formulated on this basis and insufficiently modernized. The Norwegian constitutional tradition has been focussed on constitutional powers and a core of human rights. Legislation concerning public administration has been kept on a statutory level, and – as already highlighted – only in 2014 was a more comprehensive and diverse chapter on human rights included.

1. *The Beginnings of Norway's Administrative Law (Principles)*

Despite the aforesaid lack of regulation concerning public administration, the principle of legality was primarily expressed in § 96 (1) of the Constitution of 1814:

"No-one can be sentenced to a penalty (of prison) unless by law and a decision by court".

Even if the principle of legality is expressed here (only) in relation to the implementation of penal law, it has been seen as a general principle relating to the execution and implementation of public law in Norway. Furthermore, it is indirectly expressed in § 97 of the constitution with its ban on retroactive legislation. Additionally, since 1814 § 105 of the constitution guarantees the protection of private property from state expropriation. Moreover, in the 2014 revision a new and general provision for the principle of legality was added in § 113 of the constitution:

"Infringement of the authorities against the individual must be founded on the law".

Judicial review of legislation as well as of the constitution has been applied by the Norwegian *Høyesterett* since quite early in the nineteenth century. Over time it has been unevenly practiced

in terms of intensity but is seen as a vital part of the rule of law in Norway.[8] In the 21st century, with the increasing emphasis on human rights, judicial review has been applied more intensively than previously.

The first legislation on administrative law was introduced in the 19th century. In 1845 the first legislation on economic and social support for the poor was enacted, and renewed in 1863. These acts did not, however, introduce rights for the poor, only duties for municipalities. Social law regulations relied for some time on insurance-like schemes. It was not until after 1945 that more comprehensive public law regulation and administration evolved. Legal rights for private parties in relation to public regulations developed unevenly and over time.

Administrative law as a specific discipline developed slowly and in a fragmented manner until 1945. Parts of administrative law, particularly its basic principles, may previously have been seen as included in the contents of the basic principles of the then existing constitutional law.[9] In 1938 Frede Castberg published '*Innledning til forvaltningsretten*'[10] – an introduction to Norwegian administrative law – shortly after publishing his two volumes on Norwegian constitutional law.[11] In the post-war era public law regulations and administrative law expanded significantly along with the expansion of public administrative agencies and tasks. Several issues concerning administrative law were, however, actively discussed in the 1930s and from 1945, and particularly the application of the principle of legality in public regulations.

2. Development and Content of the Basic Codifications of Norwegian Administrative Law

The work towards a unified administrative law act started with the appointment of a governmental commission in 1951. This commission was given a comprehensive mandate to propose procedural regulations securing rule-of-law principles for public administration and agencies. The result was a report delivered in 1958 with several proposals for public administrative legislation.[12] It is an extremely comprehensive report on the status of administrative law in Norway

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8 E. Smith, *Konstitusjonelt demokrati* (Bergen: Fagbokforlaget, 2017), 4.utg., ch.VII.6 – 8, and VIII; see furthermore O. Wiklund (n. 6), pp. 177 et seq.

9 F. Castberg, *Norges Statsforfatning I og II* (Oslo: Universitetsforlag, 1935).

10 F. Castberg, *Innledning til Forvaltningsretten* (Oslo: Akademisk forlag, 1938).

11 F. Castberg, *Norges Statsforfatning I og II* (Oslo: Universitetsforlag, 1935).

12 *Innstilling fra Komiteen til å utrede spørsmålet om mer betryggende former for den offentlige forvaltning (Forvaltningskomiteen): komiteen oppnevnt 5. oktober 1951: innstilling avgitt 13. mars 1958* (Oslo: Justis- og politidepartementet, 1958).

at the time including almost complete references to specialized public administrative law legislation with its numerous procedural regulations and relevant Norwegian case law. Crucial aspects of the administrative procedural regulations which were included in the proposals, and later the enactments of a general procedural administrative law, were already in place at the time of the report in several of the specialized sectoral regulations and referred to therein. Additionally, the report includes lengthy references to relevant comparative administrative law, particularly French, German, English, US and other Nordic countries. The proposals for legislation in the report are thus heavily based on thoroughly documented material relating to current Norwegian as well as European and international comparative administrative law. In an introductory chapter discussing how to secure general rule-of-law principles of the committee refers not only to the Norwegian Constitution but also to the ECHR and the UN Declaration of Human Rights as contributors to the protection of human rights and basic freedoms.[13] These documents are seen as vital sources for the construction of further individual and economic rights in Norwegian law including in a new act of administrative procedural law.

The report included a complete proposal for a new general procedural administrative act to be applied to all public law agencies under the executive governmental branch and all municipalities. Their first concern is more substantively oriented towards the forms of public legislation. It is emphasized that the forms and the purposes of public law need to be formulated as clearly as possible in order to secure the rights of citizens and rule-of-law principles in the implementation of public law. Additionally, there is a distinction between administrative decision-making and legislation in terms of remarking the different constitutional and legal competences on the different institutional levels and procedures required in order to secure rule-of-law rights in decision-making concerning individual citizens. The commission made a comprehensive report on the different ministries, agencies and organisations in public administration in order to get an overview of the different forms of organisations, including the different uses of delegation.

The commission's proposal for an act on administrative procedures and the aforementioned Public Administration Act (*forvaltningsloven*) which was finally passed by the Norwegian Parliament[14] are significantly similar and will thus be presented here in common as the final result. There are no further references to the ECHR in the preparatory works but the initial reference

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13 Forvaltningskomiteens innstilling (n. 12), p. 17.

14 Ot.prp.nr.38 (1964-65), ot.prp.nr.2 (1965-66), Innst.O.nr.53 (1965-66).

referred to above is significant in terms of legal as well as symbolic meaning. It is part of a more general pattern of emphasis on individual rights as also part of administrative law. The *forvaltningsloven* was passed before the CoE started issuing recommendations on administrative law and individual rights. The ECHR has probably been an important aspect of the new emphasis on individual rights which was also expressed by new requirements for administrative law procedures but the specific rights given in the *forvaltningsloven* are to some extent inspired by previous specialized Norwegian legislation and Nordic normative patterns of inclusion.

The *forvaltningsloven* starts with a definition of what types of '*decisions*' are seen as public administrative law decisions based on public authority directed at citizens or other legal subjects, and to be covered by the Act. A crucial aspect of the definition of public law decisions concerns when they are decisive for the legal rights or duties of a citizen or other legal subject. Another definition concerns who are to be seen as '*parties*' to such decisions, and thus given the procedural rights of the act.[15] The first and basic procedural right is the right to *guidance* (§ 11) in relation to the relevant case and legal area in question from the relevant public agency. Following that is the duty of public agencies to *explore and prepare each case* as carefully as possible (§ 17). A part of this is the duty to *inform* the parties in question of all relevant information and documents (§ 17, 18). This is a vital and necessary aspect of a *contradictory procedure* allowing private parties to convey their information and to respond to, and if necessary to correct and contradict, information from public agencies. Regulations on the duty of confidentiality apply to public agencies but also to private parties who receive such information (§ 13). Private parties must be fully informed of a pending case as soon as a public agency starts working on it in order to protect their interests. This is a necessary part of the contradictory procedures.

A decision by a public agency based on law and decisive for private interests and rights must be given in written form unless practically impossible (§ 23). The decision must *state the reasons* for the conclusion (§ 24), unless there is reason to believe that all parties involved are satisfied. The statement of reasons must cover all factual and legal aspects necessary for the parties to the decision to be able to fully understand the decision and be able to appeal it if necessary. This is part of the requirements for an effective contradictory procedure. Exceptions are made for confidential information which cannot be shared. The parties affected by a decision must be *informed* as soon as possible of the decision and of their *right to appeal*. There

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15 See for details of the *forvaltningsloven* E. Smith, "Norway", in: J. B. Auby (ed.), *Codification of Administrative Procedure* (Brussels: Bruylant, 2014), pp. 277 – 320 (pp. 289 et seq.).

need to be fair and transparent procedures for an appeal, with a reasonable time limit given (3 weeks from receiving the decision) and with clear and simple conditions for the format of what an appeal can be. The formal requirements for an appeal are very simple. It must appear as an appeal and state what decision or part of a decision is subject to appeal. It is part of the rule-of-law ideals that public authorities must not make it difficult for the citizens and private parties affected to appeal a decision. Additionally, any decision of administrative law can be subject to judicial review.

Until today there have not been many amendments to the *forvaltningsloven* since its enactment in 1967[16] but there have been many changes in the various specialized and general public administrative acts and consequently the organization of public administration. Individual rights play an increasingly vital role in substantive and procedural legislation. The impact of human rights including the ECHR and the ECtHR are the backbone of this. Even if Norway has not had very many decisions against it by the ECtHR, the general caseload of the court and the attention to and significance of procedural rights have played a crucial role in legal thinking in administrative law. The expansion of material rights and duties in public administrative law has led to an equivalent interest in procedural rights in order to secure continued and effective implementation of the rule of law in public administrative law. The expansion of specialized administrative law has further led to a diversity of forms of rights and duties which underlines the significance of functioning procedural rights. Another crucial part of the background for administrative law review is the comprehensive digitalization of public sector organizations and the implementation of legislation. This aspect is included in the report but there are still many unresolved challenges over how to deal with its consequences while retaining a public administration fully based on rule-of-law principles and practice.

Another part of the commission's report of 1958 concerned establishing the institution of an ombudsman. In 1962 a Law on the Parliamentary Ombudsman for Public Administration (*Lov om Stortingets ombudsmann for forvaltningen – sivilombudsmannsloven*) similar to the commission's proposal was passed. The ombudsman in Norway is appointed by the Parliament and acts independently. The institution has since been a vital part of the control and accountability of public and executive agencies. The function of the ombudsman is partly to handle complaints

16 See, however, the revisions of Ot.prp.nr.3 (1976-77) and Ot.prp.nr.52 (1998-99).

about public administration decisions from citizens and partly to generally control the activities and decisions of public agencies.[17]

Finally, in 1970, the Freedom of Information Act (*Lov om offentlighet i forvaltningen – offentlighetsloven*) was passed.[18] It was replaced in 2005 by the Act relating to the right of access to documents held by public authorities and public undertakings *(Lov om rett til innsyn i dokument i offentleg verksemd – offentleglova*).[19] This act concerns general rights for all citizens regarding access to information and documents from public agencies. One crucial aspect of this legal reform was to review which types of public organizations and corporations should be included in the scope of the Freedom of Information Act. The diversity of types of publicly owned organizations and legal subjects, typically with service-oriented and infrastructure tasks and with varying degrees of autonomy, has led to many unclear situations concerning to what extent they are covered by the Freedom of Information Act. The Public Administrative Law Act, on the other hand, and the review of this, deals with the execution of public authorities under law, regarding both individual decisions and secondary legislation.

3. The Current Debate on Reforming the Public Administration Act (forvaltningsloven)

Currently the *forvaltningsloven* of 1967 is under general revision for the first time. A government-appointed committee delivered a more than 700-page report and proposal for a new general administrative law to the Ministry of Justice and Public Security in March 2019.[20] This report and the proposal for a new administrative procedural law act will now be reviewed by the ministry and the government. A proposal for a new act will subsequently be forwarded to the Norwegian Parliament (*Stortinget*).

Chapter 7 of the committee's report aims to give a comprehensive, general presentation of Norway's most important international obligations of relevance to the drafting of the new act and to discuss key international-law obligations, including obligations pursuant to the ECHR. Namely, the 'material' rights stipulated by articles 5, 8 and 10 ECHR are emphasised as signif-

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17 See A. Fliflet, "Appeals against administrative acts: procedural questions – non judicial appeal", in: Council of Europe (ed.), *Judicial control of administrative acts* (Strasbourg: Council of Europe Publishing, 1997), pp. 55 – 59.

18 Ot.prp.nr.70 (1968-69), Ot.prp.nr.13 (1969-70), Innst.O. XIV, Ot.prp.nr.4 (1981-82).

19 St.meld.nr.32 (1997-98); Ot.prp.nr.102 (2004-05), Ot.prp.nr.9 (2005-06), Innst.O.nr.41 (2005-06).

20 The Committee's report is published as *Norges offentlige utredninger* 2019: 5 *Ny forvaltningslov*.

icant for many types of administrative decision-making (para. 7.2.2.). Furthermore, the relevance of the European Charter on Local Self-Government is stressed (para. 7.4.2.). As for the pertinent recommendations of the Committee of Ministers of the CoE in the realm of administrative law, the committee highlights Resolution (77) 31 on the protection of the individual in relation to acts of administrative authorities, Recommendation No. R (80) 2 concerning the exercising of discretionary powers by administrative authorities, Recommendation No. R (2000) 10 on codes of conduct for public officials, and, above all, Recommendation CM/Rec(2007)7 on good administration (para. 7.4.3.). The committee stresses that even if these recommendations are formally not binding they should be taken into account when designing new legislation. It would often be natural to see the recommendations as an international consensus on what is 'best practice'. Every state has the freedom to choose whether and how a recommendation should be followed up nationally, therefore it says much for it to be waived only when there are good reasons for it. Finally, the committee takes, *inter alia*, the work of the CoE (namely GRECO) in the field of combatting corruption (para 7.4.4.) into account. However, in general, the committee is of the opinion that the rules in Norwegian current administrative law, as well as the propositions of the new draft, are essentially well within the framework of international obligations. It is stressed that Norwegian administrative law is based on a number of basic principles that harmonize well with the purposes of the relevant conventions and other guidelines (see the summary at para. 7.5.).

III. Reception of Pan-European General Principles of Good Administration through Ratifying CoE Conventions

1. The ECHR, its Protocols and their Status in the Norwegian Legal Order

It has already been said that Norway signed the ECHR in 1950 and has thereafter signed and ratified all further protocols supplementing the ECHR except for Protocol No. 12, which has been signed but not ratified. The ECHR and its protocols have strengthened various human rights in Norwegian legislation[21] and consequently parts of substantive and procedural administrative law directly or indirectly. In particular, the right to private property and the right to education were both strengthened by Additional Protocol No. 1, and the right to freedom of movement was fostered by Protocol No. 4.[22] Even if it has never been ratified by Norway, this is also true with regard to Protocol No. 12 and its general prohibition of discrimination. This

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21 See the examples given by E. Møse (n. 2), pp. 639 et seq.

22 See furthermore O. Wiklund (n. 6), p. 171.

must be seen in relation to the ratification of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) of 1969. Both documents have had an important impact on the emphasis on non-discrimination legislation in Norway.

Norwegian legislation on discrimination and equality was thoroughly reviewed and revised in 2005 and 2013 after comprehensive expert reports and legislative discussions. In 2005 revised legislation on an ombudsman and an appellate body for the implementation of equality and discrimination was introduced. In 2009 a governmentally appointed commission delivered a comprehensive report with a proposal for new legislation on discrimination and a specific review on the ratification of Protocol No. 12.[23] Eventually, a (5-4) majority of the commission recommended that Protocol No. 12 should not be ratified by Norway. This recommendation was followed by the legislative authorities. A major reason, as given by the commission, was that Article 14 of the ECHR and CERD were seen as sufficient in terms of material protection against discrimination. Additionally, the wording of Protocol No. 12, with "any right set forth by law" and "on any ground such as", were seen as unclear and wide formulations. It was uncertain how the ECtHR would develop its interpretation of the Protocol. It was feared that the ECtHR might develop an overly general principle of objectivity which could lead to a dynamic, unpredictable and overly wide interpretation of the scope of the Protocol.[24] The commission did not favour a general human rights-based principle of objectivity in Norwegian law. It was also the view of the commission that the existing protection against discrimination in Norwegian law based on Article 26 of the UNCCP was sufficient, and that Protocol No. 12 would not add to the existing substantive protection against discrimination. In 2013 new acts on gender equality and on non-discrimination on the basis of ethnicity, religion and life views were passed.[25] Legislation on non-discrimination has been given increased importance and attention in administrative law and has become a vital part of public law in general. Ratification of Protocol No. 12 was not further discussed. Further revision of the Norwegian legislation on discrimination was passed in 2017.

The status of the ECHR and its protocols in the internal legal order of Norway has been clearly strengthened by the aforementioned Act on Strengthening the Status of Human Rights

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23 *Norges offentlige utredninger* 2009: 5 *Et helhetlig diskrimineringsver*n (Norwegian Public Reports, A comprehensive protection against discrimination), Chapter 24.7.

24 *Norges offentlige utredninger* 2009: 5, Chapter 24.7.2.

25 Prop.88 L (2012-2013) *Diskrimineringslovgivning* (Legislation on discrimination).

in Norwegian Law (*menneskerettsloven*),[26] of 1999, which was last amended in 2014.[27] Following § 2 of the *menneskerettsloven*, the ECHR and protocols No. 1, 4, 6, 7 and 13, as well as the main UN human rights treaties (CCPR, CESCR, CERD and later CRC and CEDAW):

> "[…] shall apply as Norwegian law to the extent that they are binding on Norway".

§ 3 of the *menneskerettsloven* even states explicitly:

> "The provisions of conventions and protocols mentioned in § 2 shall, in the event of conflict, precede provisions of other legislation".

In 2014 the Norwegian Constitution was amended with a comprehensive chapter on human rights. The chapter starts with § 92 stipulating:

> "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".

Thus, it seems clear today that the ECHR and the protocols thereto, except for Protocol No. 12, are directly applicable sources of law in Norway along with the preferential treatment clause of the Human Rights Act. Furthermore, § 92 of the Constitution serves as an additional general guarantee of the inclusion of the human rights treaties ratified by Norway in Norwegian internal law. However, after the inclusion of § 92 and the human rights chapter in the constitution there has been a discussion on the precise meaning of the wording of the new § 92. § 92 of the constitution, which could be interpreted either as a general guarantee that the ratified human rights treaties are part of Norwegian law under the Human Rights Act or as meaning that the ratified treaties hold a constitutional rank.[28] The question was not sufficiently discussed in the preparatory works of the 2014 amendment but the *Høyesterett* has had to deal with the question in several decisions. Namely, in a judgement of 16 December 2016 concerning the protection of the right for employees to be organized, the *Høyesterett* had to discuss the legal status of the Revised European Social Pact and the ILO conventions No. 87 on the right to association and No. 98 on the right to be organized and to collective bargaining. The *Høyesterettt* discussed § 92 of the constitution and concluded that it could not be interpreted as an incorporation of all

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26 See on this E. Møse (n. 2), p. 628 and pp. 5635 et seq.; O. Wiklund (n. 6), pp. 184 et seq.

27 The preparatory works of the act: Ot.prp.nr.3 (1998-99), Innst.O.nr.51 (1998-99), beslutning.O.nr.58 (1998-99).

28 For the previous constitutional situation see E. Møse (n. 2), pp. 624 et seq, and O. Wiklund (n. 6), pp. 178 et seq.

human rights treaties into a constitutional rank.[29] The parliamentary committee which made the final draft of the human rights amendment to the constitution expressed the view that the reference in § 92 to Norway's international human rights obligations was not meant to change their legal status.[30] The human rights treaties have been incorporated into Norwegian law by the 1999 Human Rights Act. If the meaning in 2014 had been to give the treaties constitutional rank, which would have been a very significant change, this would have been done much more explicitly and clearly.

2. Other CoE Conventions on Administrative Law Issues Ratified by Norway

Including the ECHR and the protocols thereto Norway has signed and ratified about 170 of the more than 2203 CoE conventions. Those CoE conventions that Norway has neither signed nor ratified deal mostly with private and commercial law issues, international private or penal law or with issues regarding the free movement of persons, products and services or transnational administrative cooperation. In contrast, Norway has signed nearly all CoE conventions dealing with classical 'public law' issues[31] and therefore seems to be quite open to accepting these kinds of international treaties.

The legal status of international treaties under Norwegian law depends first on whether they have been ratified, and secondly on whether they have been incorporated into Norwegian law. Norway follows the principle of dualism with regard to international law. Norwegian law is presumed to correspond to international treaties which have been ratified but not incorporated. Treaties which have been incorporated are part of the Norwegian law.[32]

Norway signed and ratified the European Social Charter of 1961, its Additional Protocol of 1988 and its revised version of 1996. However, these have to a considerable extent been preceded by Norwegian legislation. The Social Charter primarily concerns social and labour rights but is extremely comprehensive and includes protection for children, women and migrant workers and their families. Its Additional Protocol, for its part, includes the right to equal opportunities and equal treatment, rights of the elderly, etc. The rights to safe and healthy working

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29 Høyesterett, Judgement of 16 December 2016, HR-2016-2554 P, para 68 – 70.

30 Innst.186 S (2013-2014), p. 22. Other preparatory works are Dok. 16 (2011-2012), and Dok. 12:30 and 31 (2011-2012). See also J. E. A Skoghøy, "Menneskerettighetenes stilling etter Grunnloven", (2015) *Lov og Rett*, pp. 195 – 196.

31 However, Norway seems to have systematically abstained from signing and ratifying CoE conventions on cultural and archaeological heritage.

32 E. Møse (n. 2), pp. 625 – 654 (pp. 624 et seq.), O. Wiklund (n. 6) , pp. 165 – 228 (pp. 168 et seq.).

conditions, fair remuneration and the rights of children working were included early in the Social Charter and implemented more specifically and as enforceable rights in domestic legislation later on and over time. This is also true for the rights included in the Additional Protocol.

With a closer regard to the implementation of pan-European general principles of good administration within the Norwegian legal order, it is above all noteworthy that Norway has signed and ratified all those CoE conventions which may have a deeper impact on the 'core' of the administrative law of the Member States regulating transversal issues of relevance for (nearly) every administration.[33] Thus, Norway signed and ratified the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which came into force in 1985. This was preceded by the first Norwegian legislation on the protection of personal data in 1978 (later revised in 2000). The Norwegian legislation is more detailed but the CoE Convention includes articles on transborder data flows. In 2001 Norway signed the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows. This Protocol has, however, not yet been ratified. On the other hand, Norway has already signed the new Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 10 October 2018.

Furthermore, as early as 1989 Norway signed and ratified the European Charter on Local Self-Government. This has also made an important contribution to the strengthening of the principle of the right to local self-government in Norway and to the constitutionalization of the principle through the amendment of § 49 (2) of the Norwegian Constitution in 2016.[34] However, the practice and legislation relating to local self-government is a longstanding tradition in Norway preceding the Council of Europe. Moreover, in 2009 Norway also signed and ratified the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority. Nevertheless, Norway did not formally integrate both – the Charter and its Additional Protocol – into the domestic legal order, meaning that their provisions cannot directly be invoked before Norwegian courts.[35] On the other hand, there is a

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33 See *Chapter* 1 III (2) – (5).

34 See for more details G. Boggero, *Constitutional Principles of Local Self-Government in Europe* (Leiden: Brill, 2017), pp. 266 et seq.

35 See G. Boggero (n. 34), p. 75.

strong and long-standing tradition of the right to local self-government in Norway. This is primarily implemented by '*kommuneloven*' of 1992, the legislation on municipalities. It is however practised in combination with centralized legislation on most of the services offered by municipalities and centralized systems of taxation, except for a discretionary municipal system of private property taxes which may be used to supplement their income.[36]

Finally, it is worth mentioning that Norway is one of the few states which signed and ratified the CoE Convention on Access to Official Documents back in 2009. Yet, it has already been said that the ratification of this convention was preceded by the entry into force of the new Norwegian Freedom of Information Act of 2005, which replaced the Freedom of Information Act of 1970.

IV. The Impact of the Case Law of the ECtHR on Norwegian Administrative Law

Cases against Norway before the ECtHR have predominantly concerned criminal procedural law. As already mentioned, by 2018 there had been 48 judgements by the ECtHR against Norway. In 30 of them the ECtHR found a violation of the ECHR. However, several cases concerned or had consequences for substantive and/or procedural administrative law.[37] The comprehensive ECtHR case law on criminal procedural law has developed 'rule-of-law norms and principles' with consequences far beyond the field of criminal procedural law. The evolution of 'rule-of-law principles' in administrative law has been influenced by several factors, and the ECtHR case law is probably one of the more effective, even if it is indirect.

There have been several cases against Norway concerning the rights of children and parents in cases on the right to private and family life (Article 8 ECHR) in cases concerning immigration and asylum rights,[38] childcare and adoption.[39] All these cases have concerned substantive and specialized administrative law but general administrative or procedural questions have played vital roles. Documentation and reasons for administrative decisions are vital and emphasized in the argumentation of the ECtHR. All these cases concern different types of vulner-

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36 S. Stokstad, *Kommunalt selvstyre* (Oslo: University of Oslo: 2012).

37 See also the overview of E. Møse (n. 2), p. 642 et seq.; O. Wiklund (n. 6), pp. 203 et seq.

38 *Nunez v Norway* (55597/09) September 28, 2011 ECtHR; *Butt v Norway* (47017/09) March 4, 2013 ECtHR.

39 *T.S. and J.J. v Norway* (15633/15) October 11, 2016 ECtHR (dec.); *JMN and CH v Norway* (3145/16) October 11, 2016 ECtHR (dec.); *I.D. v Norway* (51374/16) April 4, 2017 ECtHR (dec.); *Strand Lobben v Norway* (37283/13) November 30, 2017 ECtHR.

able persons with little access to financial resources and often with a distance from, unfamiliarity with and even distrust of public authorities. Furthermore, some of the persons involved are unfamiliar with both the language and legal culture of the Norwegian authorities. The Norwegian authorities may take knowledge of certain legal norms or practices for granted and thus pay less attention to comprehensive and specific reasons and argumentation for their decisions, particularly in areas of presumed widespread political or cultural consensus in Norwegian society. Minorities with few resources or little political power, immigrants and asylum seekers may have cases which require specific and detailed documentation and argumentation, something which is not always sufficiently addressed by national public authorities. Childcare cases are particularly complex for a number of reasons. They concern intimate family relationships and are thus sensitive for all families. It is often difficult to get sufficient knowledge and evidence of the problems involved, and there may easily be different views on assessing the documentation. When cultural differences are involved there may be different views on the upbringing of children and on the responsibility of families. The cases against Norway before the ECtHR referred to above illustrate how the ECtHR requires specific and detailed reasons when the state makes decisions intervening into private and family life where differing social and cultural contexts of the families and persons involved compared to majority cultures may be vital aspects of a case. The ECtHR contributes with an outsider view on legal practice even in states like Norway with generally high 'rule-of-law levels' of administrative legislation and standards. The cross-European assemblage of judges contributes to more culturally diverse views on the bench compared to domestic state courts. This is at times seen as a problem, particularly concerning different cultural views on the family, privacy and religion.

Other vital administrative law standards applied by the ECtHR in its argumentation are non-discrimination, non-arbitrary decisions and proportionality. Non-discrimination has become a vital administrative law standard with significant contributions from both the CJEU and the ECtHR. Arbitrary criteria or arguments are often scrutinized in a more detailed way by European courts than by domestic ones because the cross-European judges will more easily question stabilized or standardized patterns of argumentation applied by domestic public authorities.

The impact of the ECHR and the practice of the ECtHR in Norwegian law including administrative law have increased significantly with the Human Rights Act of 1999 and the new constitutional chapter on human rights of 2014. They are comprehensively referred to in a large number of cases before the *Høyesterett*. There have been several cases concerning the rights of asylum-seeking children, alone or with parents. § 102 and § 104 of the Norwegian Constitution (the right to private life and the rights of children), corresponding to Article 8 ECHR and the

UNCRC, have been crucial in cases on the right to asylum or the right to stay in the country and with references to ECtHR.[40] Relevant administrative law questions have concerned various aspects concerning the right to an effective remedy (Article 13 ECHR). The right to a non-prejudicial decision concerning a breach of the ECHR has been sustained in principle but limited to breaches of incorporated human rights treaties, not widened to more discretionary decisions.[41] The right to have a case before the courts decided on by the use of new and current information, not limited to the facts at the time of the administrative decision, has been contested in Norwegian law and with references to the scope of Article 13 ECHR. The general view of the Norwegian Supreme Court has been that it is the facts at the time of the administrative decision which prevail for the court but there may be new facts which must be taken into consideration. It is beyond doubt that the ECHR and particularly its Article 13 has had an impact on Norwegian administrative law, including introducing a more stringent and comprehensive scope of civil procedural principles into administrative law cases.

Furthermore, the ECHR and the case law of the ECtHR also are considered to have an important impact leading to a certain expansion of public authority liability in Norway,[42] which is – in principle - governed by the general Tort Liability Act (*Lov om skadeserstatning – skadeserstatningsloven*) and integrated into the general civil law system.[43]

V. Conclusion

Norwegian administrative law has developed in parallel with the expansion of its public administration and with the administrative law of many other European states but preceding many of the relevant conventions and recommendations of the CoE. An obvious reason for this is that public regulation expanded significantly in many of the democratic European states in the era following 1945. The principles of legality, reason and fairness were part of their legal traditions and infrastructures. The expansion of public law required more specific administrative law regulations, with procedural rights and guarantees for citizens and legal subjects who were subject

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40 Høyesterett, Judgement of 21 December 2012, Rt-2012-1985; Høyesterett, Judgement of 2 January 2013, Rt-2012-2039; Høyesterett, Judgement of 30. January 2015, Rt.-2015- 93; Høyesterett, Judgement of 8 November 2018, HR-2018-2133-A.

41 Høyesterett, Judgement of 2011, Rt.-2011-666, para. 32; Høyesterett, Judgement of 21.12.2012, Rt.-2012-2039, para. 99–101.

42 See B. Askeland, "The Liablitity of Public Autorities in Norway", in: K. Oliphant (ed.), *The Liability of Public Authorities in Comparative Perspective* (Cambridge: Intersentia, 2016), pp. 331 – 350 (pp. 334 et seq.); O. Wiklund (n. 6), pp. 214 et seq.

43 See for more details B. Askeland (n. 42), pp. 331 et seq.

to public law regulations, long before the CoE had matured sufficiently for such a task. On the other hand, CoE conventions and recommendations have supplemented Norwegian administrative law, and by regularly signing and ratifying CoE conventions in the realm of administrative law Norway shows its willingness to be influenced by new administrative law standards developed within the CoE. Particularly, the case law of the ECtHR on specified administrative procedural law and the principle of legality in specific cases have been quite influential in Norway. They have arguably had a considerable effect on Norwegian domestic law, including administrative law on procedural rights but also on elements of substantive public regulatory law, for example recently in cases concerning immigration and asylum law.

Annexes

Table of cases

1. *European Court of Human Rights*

Nunez v Norway (55597/09) September 28, 2011

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T. S. and J.J. v Norway (15633/15) October 11, 2016

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Strand Lobben v Norway (37283/13) November 30, 2017

2. *Norwegian (Høyesterett)*

Judgement of 2011, Rt.-2011-666

Judgement of 21 December 2012, Rt-2012-1985

Judgement of 2 January 2013, Rt.-2012-2039

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