

The Norwegian Supreme Court and Strasbourg: The Case of *Lillo-Stenberg and Sæther v. Norway*

By Arnfinn Bårdsen *

A. Introduction

This article attempts to give a brief overview as to the interplay between the Norwegian Supreme Court and the European Court of Human Rights in Strasbourg. I will do so partly on a general footing and partly connected to a couple of specific cases. In particular, I will comment on the 16 January 2014 judgment from the Strasbourg Court in the Case of *Lillo-Stenberg and Sæther v. Norway*.¹ This case involved an alleged violation of the right to privacy according to Article 8 of the European Convention on Human Rights (ECHR), by publishing pictures from the wedding of a well-known couple—both performing artists—in a weekly magazine, without their consent.

Allow me, however, first to mention that the Norwegian Supreme Court (Supreme Court) is a court of general jurisdiction—it deals with all types of cases, be they civil, criminal, or administrative in nature. The Supreme Court is also a constitutional court, under the duty to set a law aside in the particular case before it if the law—as applied in that case—is in conflict with the Constitution.

The Norwegian Constitution, being 200 years old, is one of the oldest constitutions in the world still in function.² Originally it did not contain a full-fledged Bill of Rights. Thus, the major developments in human rights law in Norway have up till now primarily been facilitated by international law, in particular by the ECHR. But, as part of its bicentennial anniversary in May 2014, the Constitution was amended, now including the classic civil and political rights that are prescribed for in the general human rights conventions, along with certain social, economical and cultural rights and the basic rights of the child. There can be no doubt that these new constitutional provisions ought to, and will be, interpreted and applied in light of their international origin. Moreover, the constitutional reform of 2014

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¹ *Lillo-Stenberg and Sæther v. Norway*, ECHR App. No. 13258/09 (Jan. 16, 2014), <http://hudoc.echr.coe.int/>.

² Kongeriket Norges Grunnlov [Gr], May, 17, 1814 (Nor.).

may facilitate a boost for a contemporary Norwegian constitutionalism. However, such questions are beyond the scope of this paper.

B. The ECHR as Part of Domestic Norwegian Law

Norway—like the other Nordic countries—belongs to the *dualistic* tradition, as opposed to the monistic. Consequently, international law—customary as well as treaty-based—is not as such the law of the land, unless it is incorporated into the domestic legal system by an act of Parliament. Accordingly, ratification of a human rights convention does not as such guarantee, at national level, individuals within the Norwegian jurisdiction the rights and freedoms established by that convention. In principle, the rights and freedoms have to be transposed into the domestic legislation in order to achieve full national effect. In line with this, Article 110c of the Norwegian Constitution (as amended in 1994) said that the detailed provisions as to the implementation of international human rights treaties should be prescribed for by ordinary parliamentary legislation.

An imperative step was taken when the Norwegian Parliament adopted the Human Rights Act on 21 May 1999, thereby giving five named human rights conventions the position of Norwegian statutory law.³ These are: (1) The European Convention on Human Rights (1950); (2) the UN Covenant on Civil and Political Rights (1966); (3) the UN Covenant on Economic, Social and Cultural Rights (1966); (4) the UN Convention on the elimination of all forms of discrimination against women (1979); and (5) the UN Convention on the Rights of the Child (1989). These five conventions were chosen because of their practical impact, universal character, and, of course, political considerations.

Article 3 of the Human Rights Act establishes that if there is a conflict between a provision in one of the enumerated conventions and any statutory provision adopted by Parliament or any other domestic legal rule, the treaty-provision shall prevail. Hence, the conventions acquired a sort of semi-constitutional status in Norwegian law.

As part of the constitutional reform in May 2014, the Norwegian Parliament decided to replace the mentioned Article 110c of the Constitution, with a new Article 92, aiming at strengthening the position of convention-based human rights. This new provision states that every governmental body—including, of course, the Supreme Court—shall respect and secure all rights and freedoms stemming from any international human rights convention to which Norway is a party. Hence, the human rights conventions position as to being a part of domestic Norwegian law, and the supremacy of the rights and freedoms within those conventions, now have a clear-cut constitutional foundation.

³ Lov om styrking av menneskerettighetens stilling i norsk rett [Human Rights Act], May 21, 1999 (Nor.).

Appeals to the Norwegian Supreme Court involving international human rights occur very often, particularly appeals regarding the ECHR. Such appeals are regularly granted leave to appeal by the Supreme Court Appeal Committee, unless they are clearly without merit.

Normally this means that these cases are dealt with by a panel of five judges, based on an oral hearing. Human rights cases are even good candidates for qualifying for a grand chamber (eleven judges) or to be decided by the plenary court (in principle consisting of all twenty Supreme Court judges). The reason is that such appeals often raise issues of far-reaching legal or societal consequences, or they necessitate a balancing of rights and freedoms on one side and governmental needs and the wishes of the political majority on the other.⁴ Sometimes there are even issues of national sovereignty at stake.

The Supreme Court, being a modern court of precedents, is aware of its chief position as to securing the rule of law and a loyal implementation of Norway's obligations under international law. Thus, in a grand chamber judgment in 2009, the Supreme Court defined it as a key mission for the Court to deal with constitutional issues and cases involving Norway's international obligations, in particular those stemming from the ECHR.⁵

C. Strasbourg Case Law: Some General Observations

Quite often there arises justifiable doubt as to how human rights conventions are to be understood and correctly applied. This may be so because, for example, many of the provisions are general and vague, or the application requires a balancing of different interests or values. In addition, we have the dynamic elements connected with interpretation and application of the different provisions.

Case law from international supervisory bodies is an indispensable help in this regard. As to the ECHR—which is our primary concern here—I understand that we currently have approximately 20,000 judgments. This case law is—technically speaking—easily accessed through the European Court of Human Rights' website—at the HUDOC database—which is free and has good facilities for conducting searches.⁶ But, the volume of cases before the Strasbourg court is overwhelming, causing a real challenge both for the European Court of Human Rights and for those applying the ECHR at the domestic level, *inter alia* the Supreme Courts and Constitutional Courts of each member state to the ECHR.

⁴ See, for example, the two cases reported in Rt. 2013 s. 1985 and Rt. 2012 s. 2039 regarding the extradition of minors. A translation into English can be found at the Norwegian Supreme Court's website: <http://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/Summary-of-Recent-Supreme-Court-Decisions/Summary-2012/>, case HR-2012-2398-P and HR-2012-2399-P.

⁵ Rt. 2009 s. 1118.

⁶ EUROPEAN COURT OF HUMAN RIGHTS, <http://hudoc.echr.coe.int>.

The ECHR itself has no provision regarding the impact of the Court's case law on the interpretation and application of the ECHR. Looking at the Court's own approach in practice, it becomes evident that the Court has not adopted a formal doctrine of binding precedent; however, the Court's position has been that it must attach considerable weight to previous case law. The magical formula frequently used is the following: "While the Court is not formally bound to follow its previous judgments, it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart without good reason from precedents laid down in previous cases."⁷ Regardless of how this is formulated as a matter of principle, it is fair to say that case law is *the* most important source of interpretation and application of the ECHR, apart from the ECHR text itself.

As to whether the case law in fact produces legal certainty, foreseeability, and equality, one should, in my opinion, keep in mind that not all judgments from the Court are crystal clear; rulings might be too vague or ambiguous to give any real guidance for domestic authorities, including the domestic courts. To this one must add, I believe, a certain lack of consistency among the forty-seven judges in the Court's five sections, although the Court has established a bureau of internal experts—the *Juristconsult's office*—that is continuously reviewing the Court's case law, in order to prevent the Court from making any unintended deviation from established case law. My point here is not to criticize the Court. But there can be no doubt that any vagueness, ambiguity, or lack of consistency makes the application of the ECHR even more demanding and unpredictable at the national level. The Strasbourg Court is, of course, fully aware of these challenges, and seems to address them with greater effort than before.

Case law serves not only as a vessel for certainty, foreseeability, and equality, but also as the tool used to keep the ECHR "alive," allowing the European Court to ensure that the rights and freedoms are effective in practice, and that the ECHR mirrors present day needs. As is so often repeated by the Court itself, it is of crucial importance that the ECHR is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory: As a "living instrument," the ECHR must be interpreted and applied in the light of the consensus and common values emerging from the practices of European States and specialized international instruments, as well as the evolution of norms and principles in international law through other developments.⁸

For the national judge, it might be difficult to foresee the development of the law under the ECHR. This is especially so because there is typically a delay between the domestic court's evaluation of the case and the judgment from the Strasbourg court. The case of *Lillo-Stenberg and Sæther v. Norway* may serve as an illustration. The Supreme Court gave

⁷ Jones and others v. United Kingdom, ECHR App. Nos. 34356/06 & 40528/06 (Jan. 14, 2014), para. 194, <http://hudoc.echr.coe.int/>.

⁸ See Opuz v. Turkey, ECHR App. No. 33401/02, para. 164 (Jun. 9, 2009), <http://hudoc.echr.coe.int/>.

its judgment in September 2008. The Strasbourg Court's ruling came more than five years—and two clarifying grand chamber judgments—later, in January 2014. At this point, let me remind you that the European Court, for the first time ever, has taken the upper hand on its case load: At the end of 2013 the number of applications pending had decreased to 99,900, reduced by nearly 30,000 in that year alone. At the end of 2014 the figure will be approximately 75,000.⁹ This is truly impressive; the current development gives support to a certain hope that even the European Court of Human Rights will, in the future, not delay justice—as opposed to what has certainly been the case for quite some time now.

The European Court of Human Rights has emphasized that the principle of *subsidiarity* forms the very basis of the Convention, stemming as it does from a joint reading of Articles 1 and 19.¹⁰ Subsidiarity is apparently a principle of sequence; the Member States' duty to implement the ECHR is primary to the European Court's review. But subsidiarity has a bearing on the scrutiny of review carried out by the European Court of Human Rights. It implies, *inter alia* that the Court will be cautious as to deviate from the facts found by the domestic courts, that the interpretation of domestic law is a matter for the national courts, and that the Court leaves the national authorities with a margin of appreciation as to the balancing of conflicting interests in the application of the ECHR. According to the Court's well-established case law, this margin could vary, depending on the measures at hand, the actual right or freedom at stake and the level of European consensus on the matter. The margin is even a dynamic phenomenon, and will accordingly vary over time.

The general character of the norms stemming from the ECHR has a bearing on subsidiarity, as it facilitates a certain leeway for the domestic courts: It is not entirely for the European Court of Human Rights to define the proper application of the ECHR. In the particular case before it, a domestic court must take national law and domestic legal traditions as a starting point and use that more specific body of law as a vessel for the implementation: Human rights are not a distinct area of the law, they permeate the legal system.

D. The Impact of Strasbourg Case Law in Norway

The Supreme Court's current case law shows that human rights conventions shall, even when applied within the Norwegian legal system, be interpreted according to the methods used by the international supervisory organs. Thus, it is not only the convention texts that are integrated to Norwegian law, but also the methods of interpretation. This implies, *inter alia*, that, in general, case law from the international supervisory organs becomes an

⁹ Detailed statistics of the Court can be found at the Court's website: http://www.echr.coe.int/Pages/home.aspx?p=reports&c=#n1347956867932_pointer.

¹⁰ See *Austin v. United Kingdom*, ECHR App. Nos. 39692/09, 40713/09, & 41008/09 (Mar. 15, 2012), <http://hudoc.echr.coe.int/>.

integral part of Norwegian law. This, of course, includes the massive body of case law produced by the European Court of Human Rights. The Norwegian courts are expected to make the same use of this case law as the European Court of Human Rights. Although there certainly are different kinds of nuances that could be added, this methodological starting point seems now undisputed.

Two more general modifications must, however, be made as to the Supreme Court's line of reasoning in regard to its relationship with the Strasbourg Court. First, as a starting point, the Supreme Court leaves the dynamic development of the conventions to the international supervisory bodies, *inter alia* the Strasbourg Court. Second, to the extent that the ECHR prescribes a margin of appreciation to the member states, the Supreme Court sees it as its task to make this margin operational.

At this stage, I believe it is suitable to refer to some quite informative passages from a plenary judgment from 2000. Here, the Supreme Court stated:

Although the Norwegian courts apply the same principles of interpretation as the European Court of Human Rights when applying the ECHR, the task of developing the Convention lies first and foremost with the European Court. . . .

The Norwegian courts do not have the same overview as the European Court of the legislation, interpretations of law and legal practice in other European countries. However, by balancing different interests or values based on the value priorities upon which Norwegian legislation and interpretations of law are based, the Norwegian courts interact with the European Court and contribute to influencing its practice. If the Norwegian courts were equally as dynamic as the European Court in their interpretation of the Convention, the Norwegian courts would risk going further than required by the Convention in individual cases. This could be unnecessary restraint on the Norwegian legislator, and could be detrimental to the balance between the legislative and judicial powers upon which the structure of state in Norway is built.¹¹

¹¹ Rt. 2000 s. 996.

This statement has been referred to in several later judgments from the Supreme Court.¹² I believe that it is still valid as a general description of the Supreme Court's approach. However, it should be borne in mind that the Norwegian Supreme Court today—ten to fifteen years later—is even more at home with the law stemming from the ECHR, and that the Court's view of itself as a constitutional court has been, and will be, developing. These two factors, coupled with the current accentuation of the principle of subsidiarity in the Strasbourg system, are likely to support a more partner-like relationship with the European Court of Human Rights.

It is undisputed that the case law from the European Court of Human Rights during the last twenty years has become an integrated and important source of law in Norway. It has contributed both direction and momentum to domestic legal development, and has inspired what to my mind must be considered a fruitful vitalization of the Norwegian legal system. I cannot give any exact numbers, but I am sure that apart from the Supreme Court's own case law, the Strasbourg case law is by far the most cited in the Supreme Court's judgments and decisions.

One may see the actual impact on the case law of the Supreme Court within a very wide range of subject matters—family law, the right to privacy, freedom of religion and freedom of expression, the protection of property, and fair trial guarantees, to mention the most important areas. Particularly striking are the examples from criminal procedure. As to judicial review, the scrutiny is far more intensive than before, regularly including even the test of proportionality. Even more important is, to my mind, that the very essence of the judicial craftsmanship has been developed and refined under this influence of the European law: The European integration brings the highest courts in Europe together in a common legal universe, enabling an interchange of experiences and practices that, in the longer run, cannot but inspire.

On 25 April 2013, the Supreme Court made its ruling in what must be considered one of the most important cases on human rights protection in Norway for many years.¹³

A and B were lovers for a short period back in 1998. A had a drinking problem and limited control over his temper. One night he attacked B, beating her and threatening her with a knife. He was arrested, and later convicted for the offense and banned from having any kind of contact with B. After serving the sentence he broke the restraining order on a number of occasions and subjected B to threatening and frightening persecution which resembled mental harassment and terror for an extended period of time. It was a classic

¹² See, e.g., Rt. 2005 s. 833.

¹³ Rt. 2013 s. 588. A translation into English can be found at the Norwegian Supreme Court's website: <http://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/Summary-of-Recent-Supreme-Court-Decisions/Summary-of-Supreme-Court-Decisions-2013/>, case HR-2013-881-A.

case of hostile stalking, with devastating consequences for the health and life of B. In 2001 the situation for her got so bad that she decided to move—together with her four children—to another part of the country to go into hiding from A.

Before the courts, B claimed that the police did not provide adequate and effective protection against A, and by this did not secure her rights according to Articles 3 or 8 of the ECHR. A core issue in the case was to what extent the authorities must act in order to protect individuals within their jurisdiction against attacks from other individuals.

The Supreme Court concluded that the State had not fulfilled its obligation under the ECHR to protect B from persecution from A, and that the State therefore was liable to pay damages to B. The acts of the perpetrator undisputedly fell under Article 8 of the ECHR. The Supreme Court left the question as to whether the acts also fell under Article 3 open.

As to liability, the Court attributed decisive importance to the fact that the police's follow-up of the continued violations of the restraining order was highly inadequate, and also to the fact that two potentially very serious threats were not investigated in any detail. Thus, the State's liability was based directly on the ECHR and on the conclusion that B was not afforded reasonable, adequate, and effective protection against what had to be considered a real, immediate, and serious risk that was actually known to the police.

The Supreme Court's approach in the case is well in line with contemporary international human rights law as to the scope of the State's duty to protect and secure the rights and freedoms of everyone within that State's jurisdiction, if need be even by taking active steps to prevent private individuals from violating each other's rights. In particular, this approach fits well with the current international trend as to the need to effectively protect women and children against domestic violence.¹⁴

E. The Case of *Lillo-Stenberg and Sæther v. Norway*

I now turn to the case of *Lillo-Stenberg and Sæther v. Norway* from 16 January 2014.¹⁵ Without a doubt, the contested violation of the right to privacy according to Article 8 of the ECHR is of a more romantic and glamorous nature than in the 2013 Supreme Court case regarding A and B discussed above.

In Norway, Mr. Lillo-Stenberg is a well-known musician and artist. Mrs. Sæther is a prolific actress. They complained to the courts about press invasion of their privacy during their wedding on 20 August 2005. The wedding took place outdoors on an islet in the Oslo fjord accessible to the public. Without the couple's consent, the weekly magazine *Se og Hør*—

¹⁴ See *Opuz v. Turkey*, ECHR App. No. 33401/02 (June 9, 2009) at para. 164.

¹⁵ *Lillo-Stenberg and Sæther v. Norway*, ECHR App. No. 13258/09 (Jan. 16, 2014).

translated “Watch and Listen”—subsequently published a two page article about the wedding accompanied by six photographs. They showed the bride, her father, and the bridesmaids arriving at the islet in a small rowboat, the bride being brought to the groom by her father, and the bride and groom returning to the mainland on foot by crossing the water on stepping-stones.

The article described the ceremony, the applicants, and some of the guests. It stated, *inter alia*, that the ceremony was touching; that several guests could not hold back their tears when the bride arrived at the islet and a male voice choir started singing a Norwegian song, whose title could be translated “To live is to love”; and that a party took place after the ceremony in the garden of a named guest house. It also stated that the applicants’ manager had informed the magazine that the applicants did not wish to comment on their wedding.

The couple brought compensation proceedings against the magazine and won in the first two instances. However, on 2 September 2008, a three-judge majority of the Norwegian Supreme Court found against the couple. I was one of these three judges, so in this sense I am a bit biased.

The majority of the Supreme Court emphasized that the well-known couple had chosen to get married in a place that was generally accessible to the public, that the event was spectacular in the way it was arranged, that no photos of the actual wedding ceremony were published, that the photos were taken from a long distance, that there was no breach of confidence, and that the article was neither offensive nor negative.

The two-judge minority in the Supreme Court found that the article had no public interest, and that taking and publishing pictures of the event without the couple’s consent was unlawful.

Relying on Article 8 of the ECHR, the applicants complained to the European Court of Human Rights that their right to respect for private life had been breached by the Supreme Court’s judgment. In particular, the applicants alleged that the article in question “clearly had a purely entertainment value” and the article did not “contribute to a debate of general interest.” The applicants emphasized that the use of a zoom lens enabled the journalist and the photographer to take close-up photographs of the bridal couple and their guests that made it look as if they were actually at the event themselves, when in fact they were hidden from those who were being observed.

The Norwegian Government submitted that the Supreme Court, in its judgment of 2 September 2008, had carried out a balancing test that was in full conformity with the criteria laid down in the Strasbourg Court’s case law, as summarized and clarified in the

recent Grand Chamber judgments *Axel Springer AG v. Germany* and *Von Hannover v. Germany (No. 2)*.¹⁶ The Government pointed out that in such a situation the Member States should be afforded a wide margin of appreciation and that the Court should require strong reasons to substitute its view for that of the domestic courts. Such an approach would be fully in line with strengthening the principle of subsidiarity.

In the Strasbourg Court's judgment the Court's general approach to Articles 8 and 10 of the ECHR is a blueprint of its approach in *Von Hannover v. Germany (No. 2)*. Moreover, even as to the balance to be struck between private life under Article 8 and freedom of expression under Article 10, the Court referred to what it said in *Von Hannover v. Germany (No. 2)* and *Axel Springer AG v. Germany* as to the Contracting States' margin of appreciation and the Court's own role in the subsequent review. The relevant paragraphs of the latter judgment read as follows:

85. The Court reiterates that, under Article 10 of the Convention, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression guaranteed under that provision is necessary

86. However, this margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court In exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on

87. In cases such as the present one the Court considers that the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher who has published the offending article or under Article 8 of the Convention by the person who was the subject of that article. Indeed, as a matter of principle these rights deserve

¹⁶ *Axel Springer AG v. Germany*, ECHR App. No. 39954/08 (Feb. 12, 2012), <http://hudoc.echr.coe.int/>; *Von Hannover v. Germany (No. 2)*, ECHR App. Nos. 40660/08 & 60641/08 (Feb. 7, 2012), <http://hudoc.echr.coe.int/>.

equal respect . . . Accordingly, the margin of appreciation should in principle be the same in both cases.

88. Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts . . .¹⁷

As to the operative criteria in this balancing, the Strasbourg Court again referred to the judgments in *Von Hannover v. Germany (No. 2)* and *Axel Springer AG v. Germany*, establishing these five key elements in the overall assessment:

- (i) [C]ontribution to a debate of general interest;
- (ii) how well known is the person concerned and what is the subject of the report?;
- (iii) prior conduct of the person concerned;
- (iv) method of obtaining the information and its veracity/circumstances in which the photographs were taken; and
- (v) content, form and consequences of the publication.¹⁸

As to the first criterion, the Strasbourg Court pointed out that what constitutes a subject of general interest will depend on the circumstances of the case. The Court nevertheless emphasized that such an interest exists not only where the publication concerns political issues or crimes, but also where it concerns sporting issues or performing artists.

The criterion regarding how well known the person is and the subject of the report is related to the criterion of general interest. In the present case, the applicants had no public community functions but they were well known performing artists, and accordingly public figures. The article and the photographs concerned their wedding. In this respect the Norwegian Supreme Court had stated:

A wedding is a very personal act. At the same time it also has a public side. A wedding is a public affirmation that two persons intend to live together, and has legal

¹⁷ *Lillo-Stenberg and Sæther v. Norway*, ECHR App. No. 13258/09 at para. 33 (quoting *Axel Springer AG v. Germany*, ECHR App. No. 39954/08 at paras. 85–88).

¹⁸ *Id.* at para. 34.

consequences in many different sectors of society. Thus information about a wedding does not in itself involve a violation of privacy if it is given in a neutral form and based on a reliable source.¹⁹

Hence, although not stating that the article constituted a subject of general interest, the Supreme Court did emphasize that a wedding has a public side. The Strasbourg Court agreed.

As to the method of obtaining the information, its veracity, the circumstances in which the photographs were taken, their content, their form, and the consequences of the publication, the Strasbourg Court refers in the judgment to the details in the reasoning from the majority in the Norwegian Supreme Court, *inter alia*, that neither the text nor the photographs in the disputed magazine article contained anything unfavorable to the applicants, and that there were no photographs of the actual marriage ceremony.

Moreover, the wedding was organized in a very extraordinary way, for example with the arrival of the bride in an open boat and the presence of a men's choir singing a hymn on the islet. Because the ceremony took place in an area that was accessible to the public, easily visible, and at a popular holiday location, it was likely to attract attention by third parties. Hence, the applicants were neither in a place nor in a situation where they could reasonably expect to be left alone without getting attention from others.

The Strasbourg Court then concluded by stating:

44. In the opinion of the Court, both the majority and the minority of the Norwegian Supreme Court carefully balanced the right of freedom of expression with the right to respect for private life, and explicitly took into account the criteria set out in the Court's case-law which existed at the relevant time. In addition, de facto, the Supreme Court assessed all the criteria identified and developed in the subsequent case-law The Court therefore finds reason to point out that, although opinions may differ on the outcome of a judgment, "where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts

¹⁹ *Id.* at para. 13 (quoting Rt. 2008 s. 533 para. 40).

45. In these circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the Supreme Court did not fail to comply with its obligations under Article 8 of the Convention²⁰

This deference to the evaluation and balancing carried out by the Supreme Courts, demonstrates subsidiarity in action. And the lesson to be learned from the Strasbourg Court's approach in *Lillo-Stenberg v. Norway* is that the doctrines of the margin of appreciation and of subsidiarity have proven themselves operative in the troubled balancing of press freedom with private life, in line with what was already established in *Von Hannover v. Germany (no. 2)* and *Axel Springer AG. v. Germany*.

However—and this is the essential issue—it seems to be a precondition that the Strasbourg Court is convinced that the national court actually has carried out a loyal and careful consideration under the ECHR, in accordance with—at least in substance—established Strasbourg case law. Hence, this is the challenge to the domestic courts: To seize this opportunity for judicial dialogue by writing judgments in a manner that convincingly demonstrates that such considerations have actually been carried out at the domestic level, thereby eliminating the need for a subsequent autonomous balancing at the international level.

²⁰ *Id.* at paras. 44–45.

