

Supreme Court of Norway at the Bicentennial

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1 SUPREME COURT OF NORWAY – HONOURING TRADITION AND KEEPING UP WITH THE TIME

Upon entering the Supreme Court building, we pass by two of the greatest Norwegian legal professionals of the twentieth century – Paal Berg and Rolv Ryssdal. Their busts flank the main entrance to the building. Paal Berg was the Chief Justice during the most dramatic time in the Supreme Court's history, when all the justices resigned from office in 1940. The justices resigned in response to Reichskommissar Terboven's unwillingness to accept the courts' judicial review of regulations issued by the occupying authorities, as well as to the regulation authorizing the kommissariat cabinet minister to decide whether justices would be allowed to continue serving past the age of 65, as this regulation facilitated for the nazification of the Supreme Court. Rolv Ryssdal was appointed Supreme Court justice in 1964, and served as the Chief Justice from 1969 to 1984. With his strong personality and intellectual prowess, he heavily influenced the Supreme Court during his time here, and he also left a strong international legacy, after serving as the president of the European Court of Human Rights from 1985 to 1998.

Further into the building, through the grand entrance hall and up the stairs to what is now the Second Chamber's courtroom and the Supreme Court's Grand Chamber and Plenary courtroom, there is a wall presenting fundamental principles of law from old acts and basic human rights documents. In front of this wall is the bust of Johan Randulf Bull, Chief Justice from the Supreme Court's inception until 1827. He led the Supreme Court through the crucial first stages. We could have continued into the building, up the next flight of stairs to the First Chamber's courtroom and the Hall of Justices, which showcases paintings of the chief justices, as well as photographs or drawings of the justices. Many strong personalities have left their mark on the Supreme Court over the years, and they have all contributed to the court's development in their

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own way. My task is not to prepare a historical account of the institution and its justices, but rather to present the current Supreme Court.

Remembering individual justices, however, serves to remind us that the Supreme Court cannot be understood without its historical context and tradition. These historical recollections also illustrate that the Supreme Court's activities are a reflection of society at any given time.

The story of the Supreme Court would have been very different had pivotal decisions not been made or key events transpired differently. This is evident from the establishment of the Supreme Court of Norway. It was modelled on the Dano-Norwegian Supreme Court, including the principle of oral proceedings. The Supreme Court of Norway would have been different if the union with Sweden also been allowed to influence the court and procedural system.

Many other legal decisions and events, partly within the Supreme Court, and partly through other processes, including legislation, have also contributed to the Supreme Court's current standing and given the Court its current place in the Norwegian constitution. One example is the case law, which, from the very beginning paved the way for the Supreme Court to be established as the controlling body towards the legislative power and the executive body, by performing judicial review of administrative decisions and by the competence to set aside legislation deemed unconstitutional. At the other end of the time frame between establishment of the Supreme Court and the bicentennial is the internationalisation of the law – the incorporation of international human rights, the EEA collaboration and the role of international courts and appellate institutions.

The internationalisation process has strengthened the court's position in relation to our other two constitutional bodies – the Storting (the Norwegian Parliament) and the Government. However, in implementing international human rights conventions, the court has also played a role in the transfer of power to international institutions.

Another key event, both in practice and in principle, was the so-called two-instance reform, which came into force on 1 August 1995. From this date, the District or City Court became the court of first instance for all criminal cases. Appeals against District Court decisions are heard by the Court of Appeal. The change made the Supreme Court a court of third instance for criminal cases, as well as for civil cases. This also changed the Supreme Court's role in the administration of criminal justice. Since the reform the Supreme Court is able to focus more on the important cases consisting questions of principle.

As any other public organ, the Supreme Court, too, is influenced by the time and social context. The cases heard, and the legal issues raised by the parties in these cases, are a reflection of the contemporary industrial and social

context, as well as the activities of public authorities and the restrictions these impose. Contemporary society and ideas also form the Supreme Court's activities in other ways, including practical approaches and contact with the public – not least with media and legal communities in other countries. Some of these developments have been a part of a slow progress, but a great part of the developments has occurred in the past 15–20 years.

The Supreme Court's primary responsibility and function is to decide in cases brought before the court. Procedural legislation provides the framework, by defining the types of cases that may be appealed to the Supreme Court. In cases where there is a right to appeal, the parties decide whether or not to take advantage of this right. The most important decisions judgments from the Court of Appeal in civil and criminal cases – also require leave from the Appeals Selection Committee to be heard by the Supreme Court. Such leave is only granted “when the appeal is concerned with issues whose significance extends beyond the current case, or it is for other reasons particularly important to have the case tried in the t Supreme Court”, cf. Section 30-4 of the Dispute Act and Section 323 of the Criminal Procedure Act. These provisions are laid down on the premise that the Supreme Court's primary function is to serve as a stare decisis court. The Supreme Court should contribute to clarification and – within the framework established by the Constitution and other legislation – development of the law. In other words: The Supreme Court should strive for uniformity, clarification and development of the law. Its decisions are binding precedents to be followed in subsequent similar cases, both for inferior courts and for the Supreme Court itself.

The Supreme Court of Norway's perhaps most distinguishing feature is the broad jurisdiction. The Supreme Court is a general supreme court, which means that it is the court of final instance for civil and criminal cases, but it is also a supreme administrative court, which is the court of final instance in administrative cases, and a constitutional court, in the sense that the Supreme Court is the final instance in reviewing whether law and decisions are in compliance with the Constitution. Many other European countries have a different court system. The jurisdiction of the final instance, and often the jurisdiction of other instances as well, are usually divided into several different courts – a “general” supreme court, a supreme administrative court, and often also a separate supreme court for constitutional issues. Both Sweden and Finland have separate administrative courts, including a separate supreme administrative court.

Related to the Supreme Court's very broad jurisdiction, one should also point out that the justices within the Supreme Court do not specialise; specific types of cases are not heard by specific justices. This arrangement also differs from the supreme courts of many European countries, where justices often are

highly specialised. The broad jurisdiction and lack of justice specialisation places unique demands on how the cases are tried in court. I will to some extent return to this issue in the conclusion of Chapter 11.

The central aspect of the Supreme Court's activities is, of course, the cases heard and the decisions made. The impact of the Supreme Court's decisions on the development of key areas of law is the focus of several articles in this commemorative bicentenary publication. In order to better describe the characteristic features of the Supreme Court, I address principal aspects of its activities below, including its supervisory responsibilities vis-à-vis the Parliament and administrative organs, but also on a more practical level, as how the cases are tried and heard by the court. This is a very broad and multifaceted subject, and my ambition is merely to offer a brief summary and a glimpse into the Supreme Court of today.

My narrative offers an insider's perspective of the Supreme Court. As I have served as a justice for all but three decades, I have also participated in the considerable developments that have taken place during this time. However, my impartiality may for the discerning reader somewhat be mitigated by my detailed knowledge of the institution.

Initially, I take a practical approach to the organisation and activities of the Supreme Court in Chapter 2 and 3. For Chapter 4 through 8, I address some principal aspects of the court's activities, including its constitutional position, the supervision of the legislative and executive power of the state, internationalisation, the Supreme Court as a political body and the requirement of impartiality. Then, in Chapter 9 and 10, I reflect on who we are, the appointment process, and day-to-day life for the community of justices in the Supreme Court, before I in Chapter 11 give some concluding thoughts on necessary future developments within the Supreme Court.

2 ORGANISATION, ACTIVITIES AND PROCEDURES

Organisational structure

The Supreme Court comprises 20 justices, including the Chief Justice. These 20 justices, filling various roles – chief justice, preliminary justice, justice of the Appeals Selection Committee, justice of the chamber, Grand Chamber or Plenary – collectively exercise the judicial power vested in the Supreme Court. In day-to-day activities, the justices rotate between the two chambers and the Appeals Selection Committee. However, over the course of the year, the individual justices are relieved of these duties to attend other obligations, such

as completing judgments, preparing cases to be heard in chambers in the weeks to come, etc. These weeks are informally referred to as office weeks.

Given the Supreme Court's broad jurisdiction, 20 justices is, in fact, a low number. Taking into account that one justice is on educational leave at any given time, the number of justices has remained relatively stable for decades. Expanding number of appeals and an increasing number of cases with complex legal questions, often as a result of the internationalisation of the law, have together resulted in an increased workload. This is a problem that cannot be resolved simply by increasing the number of justices. The Supreme Court's function as a *stare decisis* court requires a certain level of uniformity in the application of the law, which means that the number of justices must be kept as low as possible. The increased workload must be addressed by other means, primarily by expanding the support to the justices, particularly the Legal Secretariat.

The Supreme Court, much like any other institution in a position of power, is dependent on its support functions to meet its obligations in a sound and adequate manner. The court's administrative staff comprises approx. 50 employees. The administrative unit and all other administrative functions are led by the Secretary-General, however the Chief Justice has an overall responsibility for the administration.

Two units within the administrative support functions have responsibilities that are closely related to the court's adjudicative activities. First, the law clerks in the Legal Secretariat prepare the cases for the justices in the Appeals Selection Committee. There are currently 23 law clerks, including the head and two deputy heads. The law clerks are highly skilled, and often young, legal professionals, who serve an important function in facilitating and preparing cases for the justices in the Appeals Selection Committee. Second, the court clerks in the two chambers also play a vital role. The court clerks are also skilled legal professionals, and they, among other things, use their considerable knowledge of the law to verify facts and legal information and references included in the judgments.

The Supreme Court's adjudicative activities are mainly divided between the Appeals Selection Committee and the chambers, but the justices also carry out certain responsibilities as a sole justice, such as a preliminary justice for the Appeals Selection Committee and the chambers. Some decisions regarding the proceedings of individual cases are decided by the Chief Justice, particularly decisions concerning whether to hear the case in Grand Chamber or Plenary.

Previously, the Supreme Court and the Appeals Committee of the Supreme Court was formally divided, in the sense that the Appeals Committee, under Section 1 of the Courts of Justice Act, was seen as a separate court. This changed when the new Dispute Act took effect on 1 January 2008. In this

reform of the procedural code, the Appeals Selection Committee, which it is now called, formally became an integral part of the Supreme Court. In practice, the removal of the formal division between the Supreme Court and the Committee had no bearing on the court's day-to-day activities. The current arrangement, where the justices rotate between the chambers and the Committee, is the same as it was before, and the distribution of work and the jurisdiction in the Committee and the chambers are also the same. The main difference is that the current arrangement better reflects that the responsibilities and jurisdictions are formally aspects of the same court.

Appeals Selection Committee

All cases brought before the Supreme Court is first considered by the Appeals Selection Committee. The cases fall into one of two main categories. The first is appeals against judgments of the Courts of Appeal.

In these cases, the Committee decides whether to grant leave for the case to be heard in chamber. The second is appeals against orders made by the Courts of Appeal. These appeals are against procedural decisions in cases before the District Courts and Courts of Appeal, and some are against orders in cases that by law are finally decided by the Appeals Selection Committee of the Supreme Court.

One of the Committee's primary tasks is to decide which appeals against judgments of the Courts of Appeal the chambers shall hear. As described in Chapter 1 above, having an appeal heard by the Supreme Court is subject to leave from the Appeals Selection Committee, and one of the conditions for the Committee to grant such leave is that the appeal concerns a legal issue that has a bearing beyond the scope of the specific case at hand, which the Supreme Court needs to address. In order for the Supreme Court to be able to meet its obligations in this respect, it is imperative that the majority of appeals are filtered out. Only with such filtering of the appeals will the Supreme Court have the resources available to properly consider all aspects of the cases heard by the chambers, so that the court's decisions can – as they should – serve to give guidance on the principles of law. Annually, only about 10–15 percent of the cases are referred to chambers for a hearing. This means that 85–90 percent of the cases are filtered out. The question of whether to refer a case for hearing is decided in the form of a decision. Any decision to refuse leave to appeal must be unanimous. Decisions do not need to be justified, nor do decisions refusing leave to appeal normally provide an explanation as to why. This filtering process for cases is described in more detail in Chapter 3 below.

There is one exception to the condition that the appeal should be concerned with issues whose significance extends beyond the current case, or it is for other reasons particularly important to have the case tried in the Supreme Court. The exception involves appeals against judgments in criminal cases where the defendant was acquitted in the District Court, but convicted in the Court of Appeal. In these types of cases, leave to appeal may only be refused if the appeal clearly cannot succeed, and the ruling to refuse leave must be justified. This special provision is made necessary by Article 14, no. 5, of the International Covenant on Civil and Political Rights, which specifies that everyone convicted of a crime has the right to have his conviction and sentence reviewed by a higher tribunal. Leave to appeal is refused for the majority of these types of cases, as well, but the decisions refusing such leave specify why the appeal clearly cannot succeed.

The second main task of the Committee is, as described above, to process appeals against orders of the Courts of Appeal. It follows from Section 30-1 of the Dispute Act and Section 7, Subsection 2, of the Criminal Procedure Act, that these appeals are to be decided by the Appeals Selection Committee of the Supreme Court. Some appeals against orders may raise legal questions of significant importance beyond the specific case. In such cases, the Appeals Selection Committee may decide to refer the appeal to chambers for a hearing. Annually, around 10–15 cases that normally would be decided by the Appeals Selection Committee, are referred to a hearing in chambers. In rare cases, the nature and importance of a case may lead to a decision to hear the appeal in the Grand Chamber or in Plenary, such as Rt. 2008 p. 1764.

The filtering process also applies to appeals against orders in civil cases. It follows from Section 30-5 of the Dispute Act that leave to appeal may be refused if the appeal “does not raise questions of relevance that extend beyond the scope of the present case, and there are no other considerations that suggest that the appeal should be tried on its merits”. This means that the Appeals Selection Committee does not try the case on its merits, but reviews whether the case has been given a fair process in the Court of Appeal. If there is reason to question the process in the lower courts, the Committee will review the merits of the case and make a decision. Similar to the provisions of Section 30-4 of the Dispute Act, which relate to the filtering of appeals, Section 30-5 ensures that the Supreme Court does not superfluously spend time and resources on cases that have no relevance beyond the scope of the individual case. Section 30-5 of the Dispute Act is currently applied to approx. 200 cases a year. The provision is not limited to specific types of cases.

Due to considerations of legal safeguards Section 30-5 of the Dispute Act has no equivalent in the Criminal Procedure Act. In connection with appeals from the prosecuting authorities that do not benefit the defendant, Section 387a

of the Criminal Procedure Act does provide that the appeal may be summarily dismissed when the appeal “relates to a question of minor importance or that there is otherwise no reason to hear said appeal”. This provision is rarely applied.

Section 30-9, Subsection 2, of the Dispute Act and Section 387a, Subsection 1, of the Criminal Procedure Act are often applied, and these provisions serve to streamline the filtering process by providing that appeals against orders in civil and criminal cases, respectively, may be summarily dismissed if the Committee unanimously finds that the appeal clearly cannot succeed. The case is decided on its merits, but the justification is considerably simplified. In 2014, these provisions were applied in 330 and 615 cases, respectively.

Before cases are distributed to the justices in the Appeals Selection Committee, they are examined by the Legal Secretariat, where the cases are prepared by a law clerk. The law clerk normally prepares a memo, which includes a presentation of the case and the law clerk's assessment of the legal questions. Relevant sources of law are reviewed, and copies of relevant court decisions, legal theory, etc. are attached. If the case is likely to be decided in the Committee by way of a reasoned decision, the law clerk will prepare a draft introduction of the order/decision, by writing the presentation of the case and a summary of the submissions of the parties, but the law clerk will not write the draft of the decision itself. When the law clerk is finished preparing the case, it will be transferred to the justice assigned to the case, the first-voting justice. Each case is reviewed by three justices. The review is normally carried out in writing, but limited oral proceedings may be carried out within the Committee if necessary. This option is, however, (almost) never used. If the decision needs to be given grounds for, the first-voting justice will prepare a draft. The case then circulates between the justices assigned to the case until they have reached a consensus on the decision and grounds. If no consensus can be reached, the case cannot be decided until the dissenting justice has prepared a dissenting opinion. In complex or particularly difficult cases, the justices may meet in person to discuss the case.

The Committee decides on approx. 2350 cases each year. Distributed across approx. 250 business days, this translates to just over 9 cases a day. Some cases are relatively clear-cut and can be processed quickly. Others are more complicated. The time each justice spends on a case varies, from fifteen minutes to a couple of days – and in some rare instances even more.

The Supreme Court emphasizes speedy processing. The aim is for the Committee to reach its decision within one month of the case being submitted to the Supreme Court. Some cases need to be decided extremely quickly – within one or two days. This includes appeals against committal orders. For this

reason, the Appeals Selection Committee is operational during all business days of the year, including Christmas Eve and New Year's Eve, provided these do not fall on a Saturday or Sunday.

Chambers

The two chambers of the Supreme Court hear appeals against judgments when leave to appeal has been granted by the Committee, and appeals against orders when the Committee has decided to refer them to a hearing in chambers. In some special cases there may be decided that the case shall be heard in Grand Chamber or in Plenary. This is described in more detail in Chapter 3 below.

When an appeal has been referred, particularly in civil cases, a preparatory meeting is usually held. The preliminary justice is normally the justice who first reviewed the case in the Appeals Selection Committee. In many cases there are held a preparatory meeting and it usually takes the form of teleconferencing. The purpose of this meeting in most cases is to clarify the subjects of the hearing, and to ensure that the proceedings focus on the principally significant aspects of the case and the actual dispute between the parties. Further preparations may also be required, involving the law clerk, the preliminary justice and, in some situations, the Appeals Selection Committee, cf., inter alia, Section 30-7 of the Dispute Act.

In the hearing before the Supreme Court, the counsels for the parties must present the necessary facts of the case, go through relevant evidence and relevant legal issues and sources of law, and argue for his client's view. Information about the preparation of the case and the hearing on the Supreme Court's website, www.hoyeste-rett.no, describes how to proceed. The proceedings before the Supreme Court differ from the proceedings in the District Courts and Courts of Appeal. The presentation of evidence in the Supreme Court, save for expert witness reports, is indirect through documents.

Particularly in the last 12–13 years the hearings in the Supreme Court have been far more targeted, focusing primarily on key and disputed facts of the case than before. Cases that, in the past, would be scheduled for 1½–2 days, are now usually scheduled for one day only. The time frame is established by the preliminary justice. The experiences from this process are almost exclusively good, from the Supreme Court's point of view. In some rare cases, though, there is not enough time. In these instances, the court has sought to extend the court day, or postpone the next case. Overall, however, this concentrated focus has been just that—a concentrated focus on the aspects the Supreme Court needs to explore further—and the allotted time is generally sufficient to present all of the key and salient aspects of the case. The general perception within the Supreme

Court is that this concentrated focus has also raised the standard for counsel performances. Furthermore, the targeted appellate proceedings leave more time for the other aspects of the hearing process: preparing for appellate proceedings and, not least, preparing for deliberation.

After the appellate proceedings are completed, the justices assigned to the case deliberate. Deliberations usually do not commence until the next day, unless the case is simple and straightforward. The reason for this is that the justices, as part of their preparations for deliberation, need time to review the case and form a preliminary opinion on the material and submissions presented by the counsels, and to consider whether further sources of law need to be included. The period between the hearing and deliberation differs considerably from the practice of just a couple of decades ago. Deliberations used to commence immediately after the lawyers had presented their closing arguments. This new approach ensures that the justices have time to “digest” and consider the presented arguments, and generally “get a feel” for the case before entering into the crucial deliberations.

Deliberation takes the form of a formalized discussion. The presiding justice, which is the senior justice according to length of service, or Chief Justice, if present, provides a comprehensive presentation of the case, reviews relevant evidence, legal issues and premises, sources of law and arguments, and presents his preliminary assessment and opinion. This review by the presiding justice often takes about an hour, or more in large or complex cases. In practice, this presentation serves as an oral first draft of the judgment. Next, the justice with the second longest seniority is called to argue for his view and position. Then, the other justices are called to do the same, by order of seniority. Normally, there will be a second round of discussion. Sometimes there may be several rounds—often more informal—regarding specific aspects.

The deliberation process may seem cumbersome and time-consuming, and deliberations in the Supreme Court likely differ considerably from similar deliberations between the judges in the Courts of Appeal. These formalized discussions, however, are necessary to ensure good quality. The deliberations are thorough, every justice gets to speak his or her mind, and the risk of overlooking a key point is minimized. It is also important to allow every justice to present his or her arguments and views before the individual justice locks his position. It is not unheard of for justices to change their positions once the conclusions after the deliberation are drawn. This is as it should be; the deliberation process is and should be an important stage in the Supreme Court's processing of a case. Supreme Court Justice Hans M. Michelsen famously summarized the significance of deliberation as follows: “It is the beating heart of the Supreme Court.”

Once deliberation is completed, the first-voting justice is appointed, as well as the justice to write the dissenting vote, if there are any such votes. Save for some rare instances, the first-voting justice is appointed from the group of justices holding the majority position. If the presiding justice is part of this majority group, he or she will appoint the first-voting justice. In practice, the justice from the majority group who has the longest period since the last time as a first-voting justice, will be given the task to write the judgment. The justices then agree on a deadline by which the first draft for the judgment, as well as a draft for the dissenting opinion, if applicable, must be presented. They furthermore agree on a second deadline, by which the remaining justices may submit written comments to the initial draft. Based on the submitted comments, the authoring justices will prepare revised drafts, which are reviewed in the judgment conference. The time of the judgment conference is also fixed at the end of the deliberations. A few comments requesting further changes are often presented during this conference.

If no media interest has been reported for the case, the justices vote immediately at the end of the conference, at which time the judgment is delivered and final. The outcome, in the form of the conclusion of the judgment, is then reported to the counsel of the parties. Later the same day, or the next, the written judgment is rectified in accordance with what was agreed in the judgment conference, and the finished text is proofread. The judgment is then printed on “crested paper” and served on the respective counsels. A brief summary, as well as the full-text judgment, is later posted on the Supreme Court's website. In cases where the media has reported its interest, the voting—the delivery of the judgment—is postponed until the judgment is ready to be sent to the counsels for service and publication on the website. In special cases—primarily in cases heard by the Grand Chamber or in Plenary—the voting takes place with the parties and their respective counsel present.

A great deal of work goes into a Supreme Court judgment. This is as it should be, when the main purpose is not to adjudicate on the specific dispute in question, but rather to offer guidance for how the legal issues should be resolved in the future. This paper does not allow for a detailed account of how the Supreme Court's judgments are written. I do, however, want to emphasize an issue that has been widely debated; should the Supreme Court provide a “broad” reasoning for the outcome, including more far-reaching legal positions, or should the reasoning focus solely on the specific facts of the case in question. Given that the purpose of the judgment is to offer guidance for interpretation of the law, this speaks in favour of a broader approach, rather than a narrow approach. Even so, I recommend a certain level of restraint. Legal reasoning that aims to reach far beyond the scope of the case in question, risks being too far-reaching. There have been a few cases where the Supreme Court has been

unable to fully comply with the precedent established by a previous decision. However, precedents that are not followed, and precedents which there are uncertainty whether they will be followed or not simply because their reasoning seems too general and far-reaching, do not resolve legal issues.

The composition of judgments is a continually debated subject among the Supreme Court's justices, and it has also been the focus of several internal seminars for the justices. It is my position that our judgments generally are better suited to give guidance to interpretations of the law than the Danish and Swedish Supreme Court judgments do. I do, however, also believe that it is possible to some extent to simplify the judgments further, and write the judgments even shorter.

The composition of dissenting opinions is also a debated issue. There is a general consensus that the dissenting opinions should be linked with the majority opinion in such a way that it gives reasons for why it does not agree with the majority position; it should not be composed as almost an independent judgment. This is not always the outcome, however.

The justices personally write their opinions in their entirety. We do not receive draft opinions from law clerks or others, which we later rewrite or “tweak”. The opinion of the first-voting justice is composed as his or her personal opinion – his or her grounds for the outcome. Despite this personal tone, however, the opinion is often the result of teamwork, partly through discussions during deliberation and the subsequent judgment conferences, and partly through written comments to the draft and revised draft(s). While the first-voting justice, or the justice composing the dissenting opinion, formally is free to accept or refuse any and all proposed changes, most proposed changes are accepted and included, simply because they are improvements and received as such by the justice writing the opinion.

Previously, I mentioned that the Supreme Court emphasizes fast processing of the cases. The goal for appellate proceedings in criminal and civil cases is to be held within three and six months, respectively, of the appeal being received by the Supreme Court. In the majority of cases, though not all, the court is able to achieve these goals. The main problem is often to get the lawyers to be present at such short notice.

More on oral proceedings. The role of the lawyers

The oral principle in Norwegian court procedure—and this very much includes proceedings in the Supreme Court—is sincere. It is not “mere dressing” for written presentations and submissions. However, all court instances, including

the Supreme Court, do allow certain types of written presentations regarding facts or legal issues. This approach is not widely used, and whenever written presentations are used, they are secondary to the oral proceedings. Somewhat more used is the regulations in Section 30-9, Subsection 4, and Section 30-10, Subsection 4, of the Dispute Act which make exemptions from oral proceedings and the appeals are reviewed with a written procedure. This is not very common, however, and this option has not been used on more than a couple of cases in recent years. Oral proceedings are deemed to be the best and most comprehensive form of reviewing an appeal.

Not many other countries have implemented the principle of oral proceedings to the degree and as consistently as we have; this is particularly evident if we compare the Supreme Court of Norway with the supreme courts of other countries. Typical of other supreme courts is that the review is writing-only, or that oral proceedings are held in addition to a comprehensive and complete written presentation. During these proceedings, the counsels are given a very short time frame to elaborate on and highlight certain aspects they deem particularly important, and the justices are given the opportunity to question the counsels.

In the general Supreme Courts of Sweden and Finland, the vast majority of appeals are reviewed only in writing, and the Supreme Administrative Courts of Sweden and Finland rely almost exclusively on written proceedings. In these courts, written review of appeals is the norm and deemed to be the best approach. In Denmark, whose procedures are similar to ours, most appeals are heard in oral proceedings. However, the oral proceedings are shorter than ours. Also, in virtually every case, the Danish Supreme Court votes immediately once the oral proceedings are over, and the first-voting justice has already prepared a draft judgment prior to the oral proceedings. This approach is unfamiliar for us. We must hear the oral submissions before we form a firm opinion on the legal issues raised by the case.

There is little doubt that the preferred approach to review appeals against judgments in other European supreme courts is written proceedings. In terms of courts directly comparable to our Supreme Court, only the supreme courts of the common law countries, such as the Court of Appeal of England and Wales and the Supreme Court of the United Kingdom, have maintained a procedure with hearings similar to ours, where oral proceedings are the norm. This requires the question: Why do we maintain the tradition of oral proceedings? The question is a pertinent one, and it was last raised in connection with the procedural reform carried out with the new Dispute Act of 2005. Even though established tradition and habits always play a role in these kinds of considerations, the decision to maintain the principle of oral proceedings was based on the conviction that this approach ensures the most comprehensive and

proper review of each individual case. It is our experience that oral proceedings are better able to penetrate the issue, and furthermore, oral proceedings are better equipped to give full transparency to the facts and legal principles of the case, thus giving the court a more thorough understanding of the issues at hand. We have a certain basis for comparison in the appeals against judgments in cases reviewed in writing, limited in number as they may be. Written communication impedes discussion with the parties – their counsels—to hear their views and have them elaborate and explain in more detail. It is much easier to discuss specific aspects and clarify uncertainties during an oral proceeding.

Overall, oral hearings establish a type of “seminar setting” between justices and counsels, where questions can be asked and problems may be explored in greater detail, to get to the bottom of the issue. In this context, it is natural to point out the role the lawyers play. International colleagues, working in supreme courts where written reviews of the appeals are the norm, rarely find the lawyers to be particularly helpful in the presentation of the case. Instead, they have developed specialised legal secretariat for the fields covered by that particular court's jurisdiction. Our experience in the Supreme Court of Norway, and I know this is the case in the United Kingdom as well, is that in most cases the lawyers who appear before the court have considerable insight and expertise in the field relevant to the case. Adversary and oral proceedings normally establish a strong foundation for the Supreme Court's decision.

The alternative to a strong argumentation on the part of lawyers would for us also have been to develop a much more comprehensive and specialised legal secretariat. This is proven to work well in other countries, as previously mentioned. There is, however, one major flaw in this approach, with internal research instead of argumentation from the parties' lawyers: The principle of adversary argumentation, which is crucial for a comprehensive presentation of a case, is lost, or, at the very least, significantly impaired. On the other hand, there is good reason to further develop and expand the Legal Secretariat to better explore the legal issues raised by some of the appeals. I return to this in Chapter 11. This should, however, come as a supplement to, rather than a replacement for, submissions by the counsels of relevant law material and legal argumentation.

Oral hearings also give the public confidence in the procedure before the Supreme Court. Oral proceedings, in combination with transparency, offer unique insight into proceedings before the court for both the parties and the general public which cannot be achieved when the court procedure is written. In a longer perspective, I think this effect is important. Given the strong position the principle of freedom of information has in Norway, I do not believe that the review of appeals of judgments in the Supreme Court will be altered from oral hearings to a written procedure.

As for the role and significance of lawyers, the arrangement where the lawyers need a permission to appear before the Supreme Court deserves to be mentioned. In order to qualify as a Supreme Court advocate, prospective lawyers must complete and pass a test. They must present and argue two approved cases before the Supreme Court, and their performance must be deemed acceptable by the justices, cf. Section 221 of the Courts of Justice Act. In my opinion, it is a correct and important thing to test the lawyers before they can appear before the Supreme Court. The permission procedure enables us to eliminate those unfit for the task, and, not least, communicate to the lawyers what is expected of them in presenting cases before the Supreme Court. Lawyers learn what it is expected of them partly through their work with the qualifying cases, and partly through information material prepared specifically for the preparation of cases and presentation of cases before the Supreme Court, as well as courses focusing specifically on Supreme Court procedure, where Supreme Court justices are the main lecturers.

3 CASES. SELECTION. DEVELOPMENTS. REINFORCED COURT

The Supreme Court is a *stare decisis* court. This gives guidelines for which kinds of appeals that are referred to a hearing by the Supreme Court in chambers, or in special cases, in the Grand Chamber or in Plenary. The cases referred primarily involve legal issues of principle, where the Supreme Court's decision will give guidance to future interpretations of the law.

In order to focus the appeal hearing on issues of principle, the Supreme Court may—in both civil and criminal cases—grant limited leave to appeal, which means that part of the appeal is granted leave, whereas other parts are refused. This may include one of several legal issues or one of several alleged procedural errors. Furthermore, it is not unusual that the appeal against the assessment of evidence is refused, whereas the appeal against one or several of the legal issues is referred to a hearing.

A case may involve issues of principle, but the Appeals Selection Committee thinks that the Court of Appeal's judgment clearly is correct, which means that the appeal cannot succeed. Unless the issue of principle involved in this type of case is practical and significant, and the Supreme Court's decision is really needed to give guidance to future interpretations of the law, leave to hear the case will normally not be granted. Referring appeals for hearing when they clearly cannot succeed have obvious negative aspects, particularly for the parties involved. Instead, the decision to refuse leave may include a reason for

the denial. This can be done by the Appeals Selection Committee expressly concurring with the Court of Appeal's conclusions. However, it is also possible for the Appeals Selection Committee to conclude that the outcome of the judgment is correct, but that the reason behind it should be different. In such cases, the Committee may specify this. See, for example, Rt. 2011, p. 1011. In these cases, the Appeals Selection Committee's conclusions establish a "mini-precedent". The Committee may offer an explanation for its refusal to grant leave in other types of cases as well. The decisions in Rt. 2008, p. 328, and HR-2012-01381-U are examples of this. As previously mentioned in Chapter 2, refusal to grant leave to appeal in criminal cases must be given reasons for where the defendant was acquitted in the District Court, but convicted in the Court of Appeal. In these types of cases, the condition for refusing to grant leave to appeal is that the Appeals Selection Committee unanimously has found that the appeal clearly cannot succeed.

If we look back a couple of decades, the decision of whether to refer an appeal for hearing greatly emphasized the magnitude of the values involved, meaning that cases where the value subject to litigation was considerable, rarely were refused leave. The value of the subject matter of litigation may, in special cases, still be taken into consideration, but the practical significance of the legal issue is the most important factor. The Supreme Court is accustomed to cases with considerable financial interests at stake, and this in itself has little to no bearing on the decision of whether or not to refer the case for hearing. Similarly, if the value of the subject matter of litigation is insignificant, this in itself is not enough to refuse leave, if a Supreme Court judgment could have actual practical significance in terms of giving guidance to future interpretations of law, such as in the so-called "ankle boot judgment" of Rt. 2006, p. 179. Also, a case will not be heard in accordance with the procedure for small claims if the dispute raises a practical legal issue, where a precedent established by the Supreme Court will have significant impact, Section 10-1, Subsection 3, litra d), of the Dispute Act. The Supreme Court's ambition is to contribute to a clarification and evolution of the law where such clarification is needed, without regard of which area of law the issue arises. The determining factor for whether an appeal is referred for hearing will be the practical need for clarification and the potential for such clarification within the scope of the case in question.

Some cases may, provided that the evidence presented and the assessment of this evidence establishes a given fact, raise issues of principle. The more comprehensive the presentation of evidence becomes, the less likely it is that leave to appeal will be granted. The same applies to cases involving evidence which needs to be presented immediately before the court, typically cases involving parental responsibility and child welfare. These types of cases also

rarely involve legal issues of principles; these cases often involve more case-specific assessments.

Clarification of the law is often needed in the wake of new legislation; see, for example, the Grand Chamber decision in Rt. 2009, p. 1412, involving the significance of legislator statements in the preparatory works to the Penal Code of 2005 regarding elevated sentencing for certain types of criminal offences. Unresolved legal issues are, however, not limited to new legislation. Certain areas of law have evolved slowly, over a long period of time. Section 54 of the former Dispute Act and Sections 1-3 to 1-5 of the current Dispute Act, involving legal interest and locus standi are excellent examples.

The cases referred for hearing generally reflect the general social context. It is no coincidence that the majority of Supreme Court judgments in cases involving bankruptcy and insolvency law are delivered in times of financial turmoil. Supreme Court judgments involving rights on uncultivated land were far more common when agriculture and forestry played a bigger role in the Norwegian economy than these industries do today. Today, cases pertaining to the fisheries, aquaculture and the petroleum industry frequently appear on the Supreme Court's agenda, involving both public law, related to taxes and quotas, and private law. The Supreme Court cases represent greater diversity today than in a long time. Disputes in certain areas of law are normally handled in arbitration, but this is no longer without exception. Construction contracts, for example, are increasingly being handled by the regular court system. We are also witnessing that business law is emerging as a key legal backdrop in several cases, inter alia in tax cases, such as those involving petroleum tax.

At times, the number of administrative cases has been relatively modest. This situation, however, seems to be changing. We are seeing increasing numbers of complex tax cases. Another area of law which has seen a considerable increase in the cases is immigration law. The Supreme Court has also heard a considerable number of national insurance cases in recent years. There has also been an increase in certain other types of administrative cases, including cases regarding planning and building. Considering the number of administrative decisions, however, relatively few are brought before the courts, and of course even fewer are brought before the Supreme Court.

The ratio of civil cases versus criminal cases referred for hearing varies from one year to another, but the Supreme Court now hears approximately the same number of criminal cases as it does civil cases. This ratio is, in my opinion, not relevant. The number of cases referred for hearing is for both criminal and civil cases rather too high than too low. Some of the Supreme Court's decisions have only marginal relevance for future interpretations of the law. This leads to an unnecessarily high workload for the Supreme Court's chambers, which means that the court may not be able to devote enough time to

the important cases. The court is working on refraining from referring cases for hearing if the principal interest of the decision at best is marginal.

One development trend has emerged in recent years. The Supreme Court now hears far more cases as a so-called reinforced court, which means that the court is convened with more than five justices, than it used to. In part this development can be traced to the 2008 reform, which allowed the Supreme Court to convene in a Grand Chamber with 11 justices, but a considerable number of cases have also been heard in plenary sessions. In the period between 2008 and 2014, 13 cases were heard in the Grand Chamber, and 9 cases were heard in plenary. Generally speaking, the cases heard by a reinforced court have involved the Constitution or international conventions on human rights, which have been incorporated into Norwegian law and prevail over other Norwegian legislation in the event of conflicting provisions. Plenary sessions are normally used—in line with the recommendations in the preparatory works to Sections 5 and 6 of the Courts of Justice Act—for cases involving questions of constitutionality, and the Grand Chamber is reserved for other cases of particular significance, such as cases where conventions on basic human rights indicate the setting aside or modification of other legislation in practically significant areas of law.

The introduction of a Grand Chamber is a consequence of the basic principle behind the Dispute Act; the considerations of a case should be proportional to its significance. Some cases are of such great significance that they should be heard by a more broadly composed court than the normal chamber. Plenary sessions are particularly demanding on court resources, among other things because it is difficult to process cases in the Appeals Selection Committee while work on the plenary case is especially intense. The decision of whether or not to convene a reinforced court for the hearing of a case may be a difficult one. One key concern in this regard is that hearing an increased number of cases in a reinforced court may weaken the authority of decisions made in regular chambers, which is undesirable.

So far in this chapter, I have focused my account on appeals against judgments. However, as I briefly addressed in Chapter 2, careful filtering and a stronger focus on matters of principal interest are key concerns in the processing of cases involving appeals against orders as well. While these types of cases as a basic rule are to be reviewed on their merits by the Appeals Selection Committee, Section 30-5 of the Dispute Act provides that leave to appeal may be refused if the appeal does not raise issues whose significance extends beyond the scope of the case in question. This provision is increasingly being applied to a wider range of cases. Very important is also the opportunity to review the case with the simplified procedure, a so-called summary order. One should not forget that significant appeals against orders may also be

referred for hearing in chambers, and in rare cases, a reinforced court may be convened even for these types of cases. Overall, it is possible to ensure proportionality in the Supreme Court's review of appeals against orders as well. By implementing a more summary processing of cases that do not raise issues of principle, more time and resources are available for the thorough and comprehensive proceedings required in important cases.

4 THE SUPREME COURT AS A CONSTITUTIONAL AND SUPERVISORY ENTITY

The Constitution separates state powers into three branches: the executive, the legislative and the judicial. Chapter D of the Constitution lays down provisions “On the Judicial Power”. The chapter provides few details. Of the five provisions in the Chapter, two pertain to the Court of Impeachment and three to the Supreme Court. The most important provision is undoubtedly Section 88, which establishes that the Supreme Court pronounces judgment in the final instance. From this, it follows that supreme jurisdiction in Norway may not be shared by more than one court, and that there are material restrictions as to the types of legal issues that may be finally adjudicated in the inferior courts without a possibility to seek the decision reviewed by the Supreme Court, cf. Rt. 2009, p. 1118, in particular paragraphs 71–73.

Until the Constitutional revision of May 2014, cf. the current Section 95 of the Constitution, the independence of the Supreme Court and the inferior courts was not expressly anchored in the Constitution. Indirectly, the independence of the courts had constitutional protection by the separation of powers and the provision specifying a separate judicial branch. In itself, this is indication that no part of the judicial power may ever be vested in the executive or legislative powers, and that these powers may not intervene in the courts' processing and adjudication of individual cases. However, the independence of the courts is now expressly specified in Section 95 of the Constitution, see Chapter 8 below. Constitutional protection of judicial independence is also supplemented by protection provided by conventions on basic human rights, such as the European Convention on Human Rights, in particular Article 6, no. 1, and the International Covenant on Civil and Political Rights, in particular Article 14, no. 1.

Some aspects of the courts' substantive jurisdiction in its adjudicating activities are anchored in constitutional convention and practice. This applies to the courts' supervisory authority over the other branches of the state, by

performing judicial review of administrative decisions and having the authority to set aside legislation deemed unconstitutional.

5 EXERCISING SUPERVISORY AUTHORITY INTERNATIONALISATION

In a long-term perspective, the authority exercised by the courts, and in practice in the important cases by the Supreme Court, over the other branches of government, is crucial for a state based on the rule of law. Vis-à-vis Parliament, the judicial supervisory authority lies in making sure that the legislation complies with the framework established by the Constitution, that it does not conflict with international conventions on basic human rights, which have been incorporated into Norwegian law and take precedent over all other legislation, and that the legislation does not conflict with Norway's obligations under the EEA Agreement. As for the executive branch, the courts perform judicial review of administrative decisions. I begin with the latter, which in practice is the most important supervisory authority.

Judicial review of administrative decisions

The principle of judicial review of administrative decisions is an established law principle. As previously described, this judicial review has a constitutional basis. In principle, a review of the validity—or legality—of the decision is carried out. The courts may declare a decision null and void, so that it may no longer take effect as issued, for example by making the order—or burden—imposed by it unenforceable. However, the courts cannot take the place of the administrative entity and issue a new decision. The court's decision may, depending on the circumstances, nevertheless obligate the administrative entity to review the case and issue a new decision, in which case the entity is also obligated to comply with the interpretation of the law on which the court's decision is based.

In its review into the legality of the decision, the court may consider whether procedural errors have been made, review the factual basis for the decision, or examine whether the legal basis, including the specific application of the law, is correct. Sometimes, the specific application of the law is based on distinct professional discretion, where the administrative entity, not the courts, holds the expertise. In such cases, the courts will generally be reserved in the review of the specific application of the law in the case in question – we have restrained review.

Administrative law often grants administrative entities some room to manoeuvre—to exercise discretion – in terms of whether to grant rights or impose obligations, as well as for other aspects of an administrative decision. As a starting point, the administrative entity “has a free hand”. In other words, their exercise of this discretion—their right to choose—is not subject to review by the courts. That is, however, just a starting point. The courts may review whether the entity, in exercising its discretion, has taken into account extraneous consideration, whether the decision is discriminatory in light of established practice, and whether the discretion is inherently unreasonable.

Many a time there may be doubt as to whether the assessment of a condition for intervention is subject to administrative discretion or the application of the law. Recent case law signals that if due process considerations strongly indicate judicial review, the assessment in question is generally considered part of the application of the law. The stronger the link between the assessment and professional expertise, the more likely it is to be considered subject to administrative discretion.

The number of administrative cases heard by the Supreme Court has increased, see Chapter 3 above. In practice, judicial review of administrative decisions is important, even though the number of cases heard by the courts, and especially the Supreme Court, from some areas of administrative law is limited.

As previously mentioned, the judicial authority over administrative entities is anchored in the Constitution. The review of administrative decisions could, at least for distinct administrative areas, be subject to restrictions beyond what follows from established practice. General restrictions on the courts' jurisdiction to engage in judicial review, however, could likely not be implemented without a Constitutional amendment.

Constitutional review

The courts have a right and an obligation to review the constitutionality of any legislation, if the issue of a potential conflict is raised in connection with a case before the court. This right and obligation is laid down in our Constitution. In the event of a conflict, the other legislation must be construed restrictively or set aside to allow the Constitution to prevail.

The constitutional review is limited to constitutional issues that emerge in individual cases. This review is not abstract, like the review performed by many constitutional courts. The stare decisis principle, however, ensures that the court's decisions become generally applicable. The established interpretation of the Constitution will provide guidance for future assessments in similar cases.

As a consequence, in establishing the boundaries of the Constitution, the Supreme Court has the final say. If the Parliament is seeking to implement a constitutional interpretation that differs from the one established by the Supreme Court, the Parliament must amend the Constitution.

The Supreme Court's jurisdiction to engage in constitutional review was established as early as the 19th century. The evolution of constitutional review in Norway has been thoroughly addressed in the literature on constitutional law. The frequency of its performance has waxed and waned, with a peak of activity in the period between 1910 and 1930. After World War II, the Supreme Court showed great restraint in its performance of the constitutional review. As recently as 1976, this restraint prompted Professor Torstein Eckhoff to declare: "The fact that the courts have the authority to set aside legislation deemed unconstitutional is not in dispute. I very much doubt, however, that this authority will be exercised to any significant extent." (Jussens Venner, 1976, p. 27) Yet, this assumption would soon be proven to be wrong. In the so-called Kløfta case, Rt. 1976, p. 1, the Supreme Court concluded, in a 10 to 7 dissenting opinion, that new provisions, which excluded an owner from seeking compensation for the market value of the property conceded for compulsory purchase, by forcing him to settle for its utility value, conflicted with Section 105 of the Constitution.

Since that time, the constitutionality of various legislation has been raised from time to time. In some cases, laws have been set aside or construed restrictively to allow the Constitution to prevail. 2010 was a unique year in this respect, with three politically significant cases where the laws in question were found not to be in accordance with the Constitution and hence could not be applied in the cases, cf. Rt. 2010, p. 143 (shipping company taxation), Rt. 2010, p. 535 (the Norwegian Church Endowment) and Rt. 2010, p. 1445 (war crimes). The most recent review of potential constitutional conflict is described in Rt. 2013, p. 1345. Practical implications of constitutional review are likely to increase in the years to come, as a consequence of the expansion of the catalogue of rights within the revised Constitution of May 2014.

In establishing the actual scope of the courts' jurisdiction to engage in constitutional review, one must take into account the graduation of constitutional protection and the significance of the Parliament's opinion regarding that the law in question does not conflict with the Constitution. In the Kløfta case, the Supreme Court applied a graduation of constitutional protection, wherein provisions that protect the freedom or security of individuals have the strongest level of protection, and constitutional provisions that regulate the activities of other government bodies and the division of competence between the state bodies are at the other end of the scale. Of the latter group, the Supreme Court stated that the courts, to a large degree, must

respect the Parliament's opinion of the matter. Constitutional provisions protecting financial rights were placed in the middle of the spectrum. This tripartite classification has been upheld in subsequent case law, and it is a central starting point for constitutional review.

In the Kløfta case, the Supreme Court addresses whether the courts, in their constitutional review, should take into account the opinion of the Parliament on the issue of constitutionality. In principle, this could be said to be a different issue from the classification of constitutional provisions, but in reality the two are closely related, which the decision also specifies. For the intermediary group of constitutional provisions, which protect financial rights, it was emphasized that the “Parliament's interpretation of the law in relation to these constitutional provisions must play a significant role in the courts' review of the constitutionality, and the courts should be wary of placing its own interpretation above that of the legislator.” The first-voting justice further states that he would “refrain from declaring any provision unconstitutional where there is reasonable doubt, provided that the Parliament has expressly considered the provisions and found them to be in compliance with the framework of the Constitution”. However, he adds that “if the jurisdiction to engage in constitutional review is to have any substance, the court must exercise its authority whenever the law, beyond any reasonable doubt, is deemed to imply results in conflict with the Constitution”.

The case law indicates that the legislator may to some extent exercise discretion—even though this is an area of law where the justices have different views. It has been established that even in cases where the Supreme Court delivers judgments with dissenting opinions—even where the number of votes is close—this is not in itself enough for the Parliament's opinion to prevail. This has been the case in several plenary decisions, including the Kløfta case, Rt. 1976, p. 1, and the shipping company taxation case, Rt. 2010, p. 143. From these judgments, we must conclude that the Parliament simply having researched the issue of constitutionality is not sufficient for its position to prevail.

For the Parliament's opinion to be taken into account, its constitutional assessment must meet certain quality criteria, cf. the statement in the Kløfta judgment that “the Parliament has clearly assessed constitutionality and concluded that the act does not come into conflict with the Constitution”. The quality criteria to which the Parliament's assessment is subject were addressed in the cases regarding ground lease in 2007, cf. Rt. 2007, p. 1281, in particular paragraph 76, and Rt. 2007, p. 1308, in particular paragraph 42. As a condition for taking into account the Parliament's opinion, these judgments pointed out that the material consequences of a law that seemingly conflicts with the Constitution, must be foreseen and their constitutionality assessed in the

preparatory works to the act. Does this fail, general statements to the effect that constitutionality has been assessed, cannot be taken into account. The specific provision in question had been included by the committee at a late stage, and no specific assessment into its constitutionality had been carried out.

The majority opinion in the shipping company taxation judgment concluded that comprehensive assessments cannot be presumed to indicate that the Parliament's interpretation of the Constitution should prevail, when said interpretation is based on an incorrect starting point for the assessment. As such, another quality criterion is established, which takes into account the quality of the legal considerations. Generally speaking, this is just another way of expressing the reservations established in the Kløfta judgment, for cases where the justice finds it substantiated, beyond any reasonable doubt, that the law will imply results in conflict with the Constitution.

The issue of how much the Parliament's interpretation of the Constitution should be emphasized has also been addressed for constitutional provisions that enjoy the strongest protection: provisions that protect the personal freedom or security of individuals. The Kjuus judgment of 1997 (Rt. 1997, p. 1821, cf. p. 1831) and the war criminal judgment of 2010 (Rt. 2010, p. 1445, paragraph 95) conclude that any presumptions on the part of the legislator regarding the constitutionality of penal provisions restricting freedom of speech and retroactive penal provisions, respectively, hardly can be taken into account as arguments in favour of restricting constitutional protection.

It is safe to conclude that with the tripartite classification established by case law, and the quality criteria established to assess the Parliament's position on constitutionality, the courts', and ultimately the Supreme Court's, constitutional review of legislation is a practical reality. As a result, the court's actions may strongly intervene in the political decision expressed by the law.

Constitutional review is, as described above, anchored in the Constitution. The substantive aspects to this review cannot be regulated by law. Laws may be implemented, however, to regulate procedure, such as the composition of the court, special conditions for comprehensive review, etc. Substantive restrictions in the jurisdiction to engage in constitutional review, as well as restrictions that otherwise in practice impede constitutional review, require constitutional amendment to take effect.

Review of compliance with human rights conventions. Internationalisation

In practice, the review of legislation for compliance with human rights conventions incorporated into Norwegian law by the Human Rights Act of 1999 has been more important than the courts' performance of constitutional review.

These conventions take precedence over other Norwegian legislation. This type of review had been de facto implemented even prior to the incorporation by the Human Rights Act. The ECHR became increasingly more influential in the early 1990s, primarily in the area of criminal procedure. Among other things, case law from the European Court of Human Rights (ECtHR) established that the prosecuting authority's access to present documentation from statements made to the police where the defendant was not able to question the witness, would have to be restricted beyond what otherwise followed from the provisions of the Criminal Procedure Act. Defamation law was another area where the ECtHR exerted considerable influence. Several times, the ECtHR concluded that Norwegian Supreme Court decisions awarding damages for defamatory statements in the media, conflicted with the provision on freedom of expression in Article 10 of the ECHR. As a consequence, the Supreme Court aligned its practice with the interpretation of the convention applied by the ECtHR. This entailed interpretation of the defamation provisions in a more restrictive way than what follows from their wording and the legislator's intentions.

The increased influence of the ECHR in the 1990s was just the beginning, and the internationalisation of Norwegian law became of even greater importance with the incorporation of human rights conventions by the Human Rights Act of 1999. The review has become more immediate, and there are many examples of laws that have been set aside or interpreted restrictively to avoid conflict with the convention. These have, in some cases, very practical applications, such as for sanction in tax law cases, where access to imposing both administrative additional tax and sanctions in the form of "regular" penalties for the same offence has been considerably restricted.

The ECHR has had the greatest impact, in that other Norwegian legislation has been interpreted restrictively or set aside to avoid conflict with the convention. However other incorporated human rights conventions have also been influential. Examples include Rt. 2008, p. 1764, and Rt. 2008, p. 1783, which involve decisions to refuse leave to appeal and the conditions that apply in this context. Requirement to provide reasoning beyond what otherwise follows from the Criminal Procedure Act is anchored in Article 14, no. 5, of the International Covenant on Civil and Political Rights, as this is applied by the UN Human Rights Committee. The impact of the UN Convention on the Rights of the Child on the interpretation and application of other legislation has also been considerable. For example, considerations of "the best interests of the child", as provided by Article 3, no. 1, of the Convention on the Rights of the Child, have been central in the use of community sentencing as an alternative to imprisonment for individuals under the age of 18, cf. Rt. 2010, p. 1313. In the constitutional revision of 13 May 2014, the concern for the "best interests of the

child” has been laid down in Section 104, Subsection 2, of the Constitution. It is hardly a bold prediction to presume that the influence of incorporated human rights conventions on the application and interpretation of other legislation is likely to increase in the years to come.

Until the constitutional revision of May 2014, the review of legislation for compliance with international law, which has been incorporated into Norwegian law and shall prevail over other legislation, had no constitutional basis beyond the former Section 110c of the Constitution, which provided that Norwegian authorities were obligated to “respect and abide by Human Rights”. This review is the result of the courts' obligation to ensure that any provision applied does not conflict with a higher ranking provision. The Parliament could, however, by law eliminate the difference in rank and decree that the principle of *lex superior* did not come to apply for the provision or law in question, or in general. Section 92 of the revised Constitution provides that “State authorities must respect and abide by human rights, as laid down in this Constitution and in covenants of human rights by which Norway is bound”. It has thus been established by the Constitution that human rights, as provided by covenants binding to Norway, must be respected and protected. Consequently, the review of legislation for compliance with human rights conventions has an immediate constitutional basis. Also, a number of rights established by the human rights conventions, were incorporated into the Constitution by the constitutional revision of May 2014. The starting point for any review of legislation for compliance with these human rights will, naturally, be the relevant constitutional provisions, but interpretations of parallel conventional provisions and any case law related thereto will also be key factors.

The Supreme Court, as well as the inferior courts, also reviews rights and obligations related to EEA regulations. Norwegian courts are obligated to exercise respect for decisions made by EEA courts, cf. Rt. 2000, p. 1811 (pp. 1827–28). The Supreme Court takes this obligation seriously. In Section 2 of the EEA Act there is also a provision of priority for the obligations with a source in EEA law. The provision states that any legislation that serves to fulfil Norway's obligations under the EEA Agreement shall take precedence in the event of conflict with other provisions that regulate the same instance. Similarly, regulations that serve to fulfil said obligations take precedence over any other regulations. In establishing what Norway's obligations under EEA law are, precedents from the EFTA Court and the European Court of Justice are crucial. One example of a Supreme Court review of obligations under EEA law is the so-called universal validity judgment in Rt. 2013, p. 259. In practice, the influence of EEA law extends far beyond what our obligations under said law necessarily indicates. One example in this regard is the age discrimination judgment in Rt. 2012, p. 219. Read more below in Chapter 6.

6 THE SUPREME COURT AND INTERNATIONAL COURTS AND APPELLATE BODIES

International decision-making bodies play a key role in the internationalisation of Norwegian law. The ECtHR is the primary interpreter of the ECHR. The Supreme Court's position is to align its decisions involving the ECHR with the interpretations of the ECtHR. In material respects, the same applies to EEA law. As previously mentioned, decisions made by the EFTA Court and the European Court of Justice (ECJ) play a central role in establishing our obligations under EEA law. A number of laws have been enacted to implement regulations made by the EU in Norwegian law. As a premise, the content of these laws shall correspond to the implemented directive preferably in such a way that any development in terms of how the directive is interpreted is reflected in the future application of the law. Clarification by the EFTA Court or the ECJ of any legal issue within the directive, will, in practice, be complied with by the Supreme Court.

One example in this regard is the age discrimination judgment in Rt. 2012, p. 219. Norway had opted to implement European Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation (the Employment Equality Directive), even though Norway is not obligated to do so under the terms of the EEA Agreement. In the review of whether a national provision is subject to any of the exemptions to the directive's general ban on discrimination, Norwegian courts would have to assess the issue independently, on the basis of the same sources of law that would be relevant if the issue were submitted to the ECJ—paragraph 45 of the judgment. From this judgment, it follows that the ECJ's decision in the so-called *Prigge* judgment became decisive for the interpretation of the ban on discrimination in Section 13-3 of the Working Environment Act, cf. Rt. 2012, p. 219, paragraph 47 ff.

Norwegian courts naturally strive to apply EEA law correctly—at least I have no reservations in declaring that this is the Supreme Court's ambition. A valuable tool in this regard is the access to request an advisory opinion from the EFTA Court. Regulations here differ from the regulations that apply to questions from courts in EU countries to the ECJ. The supreme courts in the EU countries have a wide-ranging obligation to consult with the ECJ and an immediate obligation to comply with the interpretation of the law expressed in the ECJ's response. Under the terms of the Agreement between the EFTA states on the Establishment of a Surveillance Authority and a Court of Justice, the national court may request an “advisory opinion” from the EFTA Court when said court “considers it necessary to enable it to give judgment” (Article 34). In other words, the opinion given by the EFTA Court is merely advisory, and the

decision of whether to request an opinion is left to the discretion of the national court—primarily on the basis of an assessment of whether it is necessary with such an opinion to have a proper foundation for the legal assessment. If an opinion is requested from the EFTA Court, its conclusions carry considerable weight—see the Supreme Court's plenary judgment in Rt. 2000, pp. 1811–1820. The judgment also emphasizes, however, that given the “advisory” nature of the opinion; the Supreme Court has “the competence and obligation to independently consider whether, and if so, to which degree, the opinion shall be the legal basis for the Supreme Court's decision”. See also Rt. 2013, p. 259, paragraphs 93 and 94.

So far, I have discussed the international courts that exert considerable influence over Norwegian law by their decisions and opinions. However, there are number of other international courts, committees and other bodies, whose decisions and opinions undoubtedly will provide sources of law relevant in cases brought before Norwegian courts. The other conventions, in addition to the ECHR, incorporated into Norwegian law by the Human Rights Act, normally have committees, established by the convention, with the jurisdiction to give opinions on how the conventions are to be construed, as well as the jurisdiction to, in some cases, hear complaints from individuals who claim their rights have been violated. In general, opinions and decisions from these bodies will also carry considerable weight when Norwegian courts apply the relevant conventions. In Rt. 2008, p. 1764, the Grand Chamber of the Supreme Court found that an interpretation by the UN Human Rights Committee carries “considerable weight as a source of law”—see paragraphs 75–81. Rt. 2009, p. 1261, paragraphs 35–44, discusses the legal authority of the general comments to the Convention on the Rights of the Child made by the UN Committee on the Rights of the Child. The authority may differ according to the purpose of and background for the statement, cf. also the Supreme Court's plenary judgment in Rt. 2012, p. 1985, paragraph 136.

Several other international courts, tribunals and committees give opinions on the interpretation of conventions which may also become relevant in cases brought before Norwegian courts. It is not possible to make a general statement as to the relevance and weight of such opinions. However, if the committee is established under the terms of the convention, and the convention is ratified by Norway, it would be safe to presume that the opinions at least will carry some weight. In some cases, case law from various international courts necessarily carries considerable influence. This includes decisions made by the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, or the International Criminal Tribunal for Rwanda in cases involving genocide, crimes against humanity or war crimes.

7 THE SUPREME COURT AS A POLITICAL BODY. RELATIONSHIP WITH OTHER BRANCHES OF THE STATE

In connection with the Supreme Court exercising its supervisory authority, one may address an issue that has been strongly debated for the majority of the court's history: Does the Supreme Court have a political function? My answer to this question is an immediate yes; this is how it must and should be. In the following, I briefly touch on a few main points, and otherwise refer to my article on the subject in *Lov og Rett* 2011, p. 319.

The Norwegian Parliament holds legislative power. The fact that legislative activity is a political enterprise is hardly in dispute; it is the very heart of politics. Legislation establishes rights and obligations with a framework for our activities. The Supreme Court also establishes rights and obligations – however, of course, within the framework of the legislation.

Not all legislative provisions are unambiguous. Sometimes strongly discretionary words are used, which leaves the courts with several choices regarding the interpretation of the provision, or the provision may be ambiguous in terms of application—for example if its intended application under specific circumstances is analogous or antithetical. Clarification of such issues is precisely why cases are submitted to the Supreme Court for hearing. Since the Supreme Court's legal basis for its decision set a binding precedent for the courts in similar cases, the Supreme Court's views of the law have general application, much in the same way as if they had been expressed in the provisions of a law.

Sometimes, this clarifying and law-making function is moderate, and, in some cases, even so obvious that it escapes attention. In other situations it is clearly evident, such as in the so-called lie detector judgment in Rt. 1996, p. 1114, which excluded test results from a lie detector from being admissible as evidence in criminal cases.

The Supreme Court does not have free hands in its legal interpretation and contributions to the development of the law. In particular, the preparatory works to the provision in question may establish clear guidelines in terms of specific solutions, or they may offer general directions by explaining the purpose of or considerations behind the act or provision in question. However, there may also be further room to manoeuvre for the Supreme Court when it applies the law, where policy considerations and values play a central role. The more such aspects are included in the application of the law, the more it parallels the political decisions the legislator makes when the provision is formulated.

There is also a clear political dimension to the impact of some of the Supreme Court's decisions. This is particularly evident in cases involving the

court's supervisory authority over the other branches of government—jurisdiction to engage in constitutional review and the review of compliance with incorporated human rights and our obligations under the EEA Agreement. The political element may also be present in the judicial review of administrative decisions. Supervisory authority over the other constitutional entities entails review of important aspects of their exercise of power, and political decisions may be set aside. The courts—and, in practice, in cases involving legal questions of principle the Supreme Court—have the authority to, within the framework of the review, intervene in political decisions.

Setting aside and declaring a law unconstitutional may appear dramatic. It calls attention to the fact that by its jurisdiction to engage in constitutional review, the Supreme Court outranks Parliament in establishing the boundaries of the Constitution. The perceived drama is particularly prominent when the specific law set aside was implemented in the wake of fierce political debate with a divided Parliament, and the Supreme Court's decision was delivered with a strongly dissenting opinion. Relevant examples in this regard include the shipping company taxation judgment, Rt. 2010, p. 143, and in many ways also a later judgment from 2010, involving ground leases under the Norwegian Church Endowment, Rt. 2010, p. 535.

However, while the Supreme Court does serve a political purpose, a clear distinction must be drawn between this purpose and the political roles of the Parliament and the Government—primarily in terms of the extent of political purpose and the legal framework within which the Supreme Court works. For that reason, it serves no purpose to draw any firm conclusions from the Supreme Court's label as “political”, without also taking into account the roles performed by the Supreme Court. Furthermore, it must be pointed out that while the Supreme Court does serve a political purpose, this must in no way be interpreted to mean that the Supreme Court oversteps its constitutional boundaries to encroach on the domain of the legislator. The Supreme Court does not overstep its boundaries, and there is nothing illegitimate about the aspects of the Supreme Court's judicial activities characterized as political. The court's activities take place within the powers vested in the courts by the Constitution and other law. And it must be said: No aspect of the Supreme Court's activities whatsoever can be characterized as party political.

The fact that the Supreme Court does serve a political purpose, means that the court may be perceived as a “competitor” to our “true” political constitutional entities: the Parliament and the Government. This raises the question whether the political aspects of the Supreme Court's responsibilities give rise to conflicts between the Supreme Court and the executive and legislative powers? Overall, the answer to this question is no. In general, the political communities have a good understanding of the tasks assigned to the

courts, and the Supreme Court in particular, as well as of the fact that these tasks may and will entail that the Supreme Court's decisions sometimes intervene in political decisions.

From time to time, however, tensions arise in the relationship between the Supreme Court and the other two branches of government— sometimes this is even brought on by the Supreme Court's supervisory authority. This was particularly noticeable in the wake of the plenary judgments of 2010, and the shipping company taxation judgment in particular, cf. Rt. 2010, p. 143. But also the other two judgments, the judgment involving the Norwegian Church Endowment, Rt. 2010, p. 535, and the war criminal case, Rt. 2010, p. 1445, highlighted the Supreme Court's deciding role in interpretation of the constitution in a way that some found hard to accept.

The Supreme Court's legal interpretation and application of the law in cases that do not pertain to the Supreme Court's supervisory authority sometimes also create tension in the court's relationship with the Parliament and the Government. One particularly example of this is the Supreme Court's sentencing in specific areas of the criminal law. The tension has largely been motivated by disappointment from politicians that the Supreme Court has failed to take into account “political signals”—such as those given in connection with budget proposals—recommending elevated sentencing for certain types of criminal offences. The Supreme Court's position on this subject is that for political recommendations regarding sentencing to carry any weight, the Parliament must express these recommendations in their role as legislator. For more information on this subject, please see cf. Magnus Matningsdal, *Nordisk Tidsskrift for Kriminalvitenskap* 2010, p. 251. However, if the Parliament has expressed its views on sentencing in connection with the preparatory works to the act, the Supreme Court will align its decisions with this view, cf. Rt. 2009, p. 1412, paragraph 22. Read more below in Chapter 8.

Questions have been raised as to whether the political implications of the jurisdiction to engage in constitutional review should have consequences for the appointment and selection of justices to the Supreme Court. I will discuss this in more detail in Chapter 8 below.

8 THE SUPREME COURT'S INDEPENDENCE

The courts, including the Supreme Court, must be independent in exercising their judicial power. There must be no intervention or attempts at influencing the outcome of specific cases on the part of political bodies or communities. In cases where the state is a party, acts as an accessory intervener pursuant to

Section 15-7, Subsection 1, litra b), of the Dispute Act, or takes part, pursuant to Section 30-13 of the Dispute Act, in cases involving the Constitution or the nation's international obligations, the state may, of course, present its views and thereby seek to influence the outcome of the case. This must, however, take place within the framework of the procedure law; the position of the state must be presented by its counsel, and in such a way that the position of the opposing party may also be heard. For example, the minister involved may not use the media to argue and present the position of the state. Politicians in any position of power traditionally comply with these conditions. Another issue entirely is that the courts may come under criticism once the final decision has been made. However, this does not jeopardize the independence of the courts, and politicians should obviously be able to criticize final decisions.

The principle that the courts, as well as judges and justices, must remain independent—and impartial—has after the revision of the Constitution in May 2014 an immediate constitutional basis in Section 95. See Chapter 4 above. Section 95 in part establishes the rights of the parties to have their case heard by an independent and impartial court, compare with Article 6, no. 1, of the ECHR and Article 14, no. 1, of the ICCPR. It also imposes the obligation on the state to safeguard the independence and impartiality of the courts, by providing framework for the establishment of regulations, allocation of resources and practical facilitation for the judicial power.

The independence of the courts is most important in the hearing of individual cases. Naturally, the courts cannot be institutionally independent of the other branches of government. On the contrary, there is and must be a considerable institutional dependence between the three branches: the courts, the Parliament and the Government. Legislative power is constitutionally vested in the Parliament. The Government proposes new legislation, and the Government, as well as other administrative bodies, will often have delegated authority to propose supplemental regulations.

The Parliament may also through the preparatory works to the acts influence the substantive provisions on which the courts' decisions are based. One example is the Grand Chamber decision in Rt. 2009, p. 1412. In Act no. 74 of 19 June 2009 regulations to the specific part of the Penal Code of 2005 were introduced. The preparatory works to this act, in the context of various types of criminal acts in relation to gross physical injuries, recommended a considerable increase in sentencing levels. In part, this was achieved by general statements, such as recommending that the sentencing levels for “the most severe forms of physical injuries” should be increased by a third. Recommendations were also given in the form of references to past cases, by specifying the sentence imposed in the judgment and outlining the new sentencing level according to the Penal Code of 2005. In paragraph 22 of its judgment, the Supreme Court

stated: “By their approach, the legislator have gone to great lengths in the preparatory works to provide detailed guidelines for the level of sentencing. There can be no doubt that when the Penal Code of 2005 comes into force, the courts must apply a sentencing level in accordance with the recommendations in the acts' preparatory works.” This elevated sentencing level was not taken into account in the specific case, however, as the criminal offence had taken place prior to the new provisions being enacted. Section 97 of the Constitution, which provides that no law may be given retroactive effect, precluded application of the new and elevated level of sentencing. Even so, the principle itself—the fact that recommendations made in the preparatory works to the act must be interpreted to express the intentions of the legislator and shall play a central role in the application of the law—was not called into question, quite the opposite. The recommendation made in the preparatory works has been taken into account and applied in many cases.

This legal framework, represented by laws, preparatory works and regulations, will control the judicial activities of the courts, unless in rare cases, where provisions are set aside or interpreted restrictively to avoid conflict with higher-ranking provisions. The fact that the courts are bound by the established framework of laws and regulations is a feature of a nation based on the rule of law, and does not threaten the independence of the courts.

Other aspects of the Parliament's and the Government's authority over the Supreme Court, however, does raise the issue of whether the Supreme Court ought to have some degree of institutional independence. The power to appropriate funds is constitutionally vested in the Parliament. The Parliament will, upon a proposed budget from the Government, appropriate funds to the courts. On the face of it, this is no threat to judicial independence. Budgets do not steer the outcome of individual cases. One cannot deny, however, that the scope of the resources made available to the courts affect their ability to perform the tasks vested in them. The courts cannot claim to be unaffected by budgeting constraints. It is important for the Parliament to be aware of the implications of legal protection, in both civil and criminal law, that cases are being heard and decided quickly and judiciously. This has a side to the important factor in a country based on the rule of law, that people has faith in the courts. Furthermore, in appropriating funds to the courts, the Parliament must take into account that the courts have supervisory authority over the other two branches of government. For example, it will conflict with the considerations behind the principle of administrative review if insufficient resources prevent those who have had an administrative decision issued by a public authority imposed on them, from having the decision tried before a court within a reasonable time.

An entire chapter in the budget is dedicated to the Supreme Court. This is pertinent for several reasons, including the fact that the Supreme Court's tasks differ from those of other courts, specifically the Supreme Court's role in the clarification and development of the law and its role as supervisory authority vis-à-vis the other branches of government, and the fact that the Constitution establishes the Supreme Court as a constitutional entity.

The Parliament determines the salary of the Supreme Court justices, without this determination being subject to discussion by an independent committee. In my opinion, there is reason to question whether the principle behind this arrangement is advisable in terms of safeguarding judicial independence for the Supreme Court. As previously discussed, the Supreme Court holds key supervisory authority over the Parliament, and its jurisdiction to engage in constitutional review may lead to legislation, behind which there may be considerable political drive, being set aside. Even the jurisdiction to engage in administrative review may be perceived as adversarial to the Parliament, or at least the part of Parliament comprising the Government's parliamentary basis. In theory, situations may arise where the decision being reviewed was made in response to discussions within the Government. Giving the supervised free discretion to directly determine the salary of his supervisor would, in most other circumstances, be deemed unacceptable. I have no reason to believe that the Parliament, in determining the salaries of Supreme Court justices, have been prejudiced by the Supreme Court's performance of constitutional review, nor do I believe that the Supreme Court, in any of its decisions, has been swayed by the salary adjustments. I do, however, find it legitimate to raise the question. In my opinion, this should be resolved by appointing—in line with the determination of parliamentary salaries—an advisory committee of independent experts to recommend salary adjustments for Supreme Court justices to the Parliament. This would further serve to ensure that the salaries are determined at a level that ensures a sufficiently broad and professionally qualified basis for the recruitment of new justices.

The question has been raised as to whether the Parliament ought to take part in the process of appointing new justices to the Supreme Court—in the consultation of potential candidates, and also in the approval of the person appointed. This issue has, in part, been justified by claims that the Supreme Court is engaged in politics. In Chapter 7 above, I addressed the fact that the Supreme Court does serve a political purpose. However, given the nature of this political purpose I cannot see how this indicates that the Parliament should be involved in the approval of new justices. We run the risk of party political appointments, in the sense that the Parliament votes along party lines in the appointment process. If this happens, the Supreme Court justices may be perceived to be affiliated with a certain political party, rather than being fully

independent. In the long run, this would be detrimental to the public's faith in the courts as independent and impartial problem-solvers.

Furthermore, I do not believe parliamentary consultation of potential candidates is a good idea. It could be detrimental for the recruitment, and thus ultimately to the quality of the justice bench, which may also negatively affect the independence.

The issue of institutional independence for the Supreme Court also applies to the Norwegian Courts Administration (DA). The establishment of an independent courts administration was principally significant, judicious and in line with an international trend to strengthen judicial independence. The DA has the responsibility for handling the joint administrative aspects of the judicial activity, and clearly has the potential to influence and should influence court activities. DA will not intervene in or lay down guidelines for the hearing of individual cases brought before the courts. Through competence-building, in collaboration with judges and justices, DA will contribute to the development of expertise in various legal issues. This level of influence is both legitimate and necessary. Beyond this, however, DA will not get involved in court decisions. It will not be acceptable for DA, through its representatives or bodies, to argue for cases or types of cases before the courts to be decided in a certain way, for example by suggesting that the courts impose more stringent sentences for specific types of crimes. If any such standards are to be established, beyond those established by law, the task falls to the Supreme Court, which may create guidelines for future sentencing by establishing precedent.

By its unique position and role the Supreme Court in administrative respects has enjoyed a considerable degree of independence. There is nothing in the preparatory works etc., leading up to the establishment of DA that suggest any changes in this respect, and DA has largely conformed to this interpretation. There is, however, at least one major exception. DA sought jurisdiction to review the Supreme Court's non-acceptance of tasks and activities for Supreme Court justices outside the position as justice. The introduction of this type of review from DA could potentially entail that such task or activity, deemed unacceptable out of concern for the work in the Supreme Court or detrimental to the public's faith in the Supreme Court, still would be permitted as the result of a decision made by a body external to the Supreme Court. This had the potential to create an untenable situation. The Parliament and the Government concurred, and the final authority is, by law, vested in the Chief Justice.

When the administration of the courts was part of the Ministry of Justice, supervision of and disciplinary action against judges and justices were, in practice, non-existent. Given the need for judicial independence from the executive power, it is understandable that the Ministry showed great restraint in this regard. Under the provisions of Chapter 12 of the Courts of Justice Act, an

independent supervisory committee for judges has been established. The organisational structure of this committee, taking into account the administrative procedures established, seems reasonably balanced, keeping in mind the Supreme Court's need for institutional independence.

The Judicial Appointments Board also plays an important role in the appointment of Supreme Court justices. This does not pose a threat to institutional independence for the Supreme Court. While the Supreme Court is and should be involved in the appointment process for new justices, the Supreme Court cannot have the final say in who is appointed. I will return to various aspects of the appointment process—including the role played by the Judicial Appointments Board—in Chapter 9 below.

Concerns for the Supreme Court's independence—at least concerns for protection against attempts at undue influence on active cases—extend beyond protection from intervention by other authorities. Like all other courts, the Supreme Court is often subject to attempts at influencing cases by articles and arguments in various media. Statements involving active cases are normally protected by the general right to freedom of expression—as they should be. There is no doubt that various media coverage is able to exert influence. The courts, and the Supreme Court in particular, are aware of the problem and know that arguments presented outside of procedure will not be taken into account in adjudication.

9 COMPOSITION, RECRUITMENT AND THE APPOINTMENT PROCESS

At the time of the bicentenary celebration, the Supreme Court has a broad composition of justices in many respects, including geographical and educational background, professional careers and specialisations. There is an even dispersion between justices who primarily made their careers in private practice and those who spent the majority of their careers in the public service. Seven of the Supreme Court's 20 justices are women. At the time of the celebration, the justices range in age from 48 to 69.

Some countries recruit new justices to their supreme courts by so-called “calling”. This means that the appointing authority contacts the person sought for the position directly—sometimes after consulting with the chief justice of the court in question or with other relevant persons. There is no transparency in the process, and the circle or community conducting the recruitment is often very small. European countries use this kind of non-transparent recruitment processes to a lesser extent than before. One example in this context is Sweden, where they have discontinued the practice of calling for supreme court justiceship.

In Norway, vacant Supreme Court justiceships are published, like all other offices. Candidates must submit their application by the deadline provided. Applications submitted too late are not considered. Applications must be addressed to the Norwegian Courts Administration, which is the secretariat for the Judicial Appointments Board. The Judicial Appointments Board will submit its recommendations to the Ministry of Justice and Public Security, normally nominating three qualified applicants. Section 55a ff. of the Courts of Justice Act provides directions on the composition of and administrative procedures for the Judicial Appointments Board. More information on procedure and the assessment of candidates can be found under the heading Judicial Appointments Board on DA's website—www.domstoladministrasjonen.no. The Judicial Appointments Board will publish its nomination, the ranking, of candidates, but not the reasoning on which their ranking is based. As part of the appointment process, potential candidates are interviewed and their references are consulted. During the interviews, representatives of the Judicial Appointments Board, the Chief Justice and one more justice—preferably the most senior justice—are present.

Section 55b of the Courts of Justice Act provides that “the Chief Justice of the Supreme Court shall issue a verbal or written statement directly to the Ministry after the Judicial Appointments Board has given its recommendation”. In reality, and in line with several decades of practice, this refers to a statement from the Supreme Court justices, presented to the Minister of Justice by the Chief Justice. The justices carry out a formal discussion, assessing the qualifications of potential candidates. In the event two or more candidates are equally or similarly qualified, this is normally pointed out, without ranking the candidates. If one or two candidates clearly distinguish themselves from the rest, it would be natural to mention this fact. If the justices' opinions differ, the statement will reflect this. The Supreme Court's statement is made public. Since the Judicial Appointments Board in its current form was introduced, there have been no disagreements between the Board and the Supreme Court over appointments to justiceships, and the Government has acted in accordance with the provided recommendations.

The number of applicants to vacant justiceships has varied considerably. In relation to an announcement of a vacancy in 2013 there were no applicants. In 2014, only a year later, when two vacant justiceships were announced there were 12 applicants—several of them highly qualified. There are likely several different reasons why the 2013 vacancy did not attract any applicants. There was, however, a strong gender focus in relation to this vacancy. The office was previously held by a female justice, and many people in the legal community took as an indication that the new justice would also be a woman. This may have deterred both men and women from applying—men because they

presumed their application would not be successful, and women because they of course will be assessed and appointed on the basis of their professional expertise and not their gender.

In my opinion, this strong gender focus was uncalled for. The law does not permit preferential ranking on the basis of gender, and in the public service there is a principle to hire the best-qualified candidate, cf. Rt. 2014, p. 402, in particular paragraphs 51–54. For the Supreme Court, this principle is unquestionable. Over time, any other practice would be detrimental to the recruitment of skilled justices—both male and female.

Regarding the 2014 vacancy, candidates who had a compelling reason, could apply to have their name removed from the public list of applicants. Exemptions were granted for 6 applicants—all of whom were lawyers. While it is impossible to know for certain, there is reason to believe that this option to have your name exempted from publication played a role in the high number of applicants. The decision to allow exemptions from publication was limited to the 2014 vacancies.

The low numbers of applicants for certain vacancies, do likely have several reasons. First, the requirements of professional expertise are demanding, and many probably assume, justified or not, that they will not qualify. In many cases, the legal community knows who are going to apply—for example in an event where a highly skilled lawyer who has been unsuccessful in the past and is expected to apply again. The Supreme Court has also learned from the legal community that there is a widespread assumption that potential candidates will be encouraged to apply. This is a misconception. In certain cases, some applicants may have been encouraged to apply by individual justices in the Supreme Court. But this is rather the exception than the rule. Many of the Supreme Court's justices—probably the majority—have applied and been appointed without this type of encouragement. This is as it should and must be.

10 DAY-TO-DAY ACTIVITIES AND THE COMMUNITY OF JUSTICES

Working as a justice in the Supreme Court is characterized by extensive collaboration and cooperation with the other justices. Most of the work carried out by the justices takes place in panels comprising three or five justices, in the Appeals Selection Committee and in chambers, respectively. Previously, I described the work that goes into drafting judgments in chambers, and the procedure of assessing cases in the Appeals Selection Committee. In this work the justices work closely together. This kind of close professional collaboration is critical for the quality of the proceedings and the decisions.

In other aspects of their work, the justices also work closely with other groups of employees, particularly the law clerks in connection with the work in the Appeals Selection Committee, and the clerks of record in chambers. These are highly skilled employees, and the collaboration is both important to secure the legal aspects of the case, but also inspiring for the justices. We also work closely to some extent with other colleagues. In many ways, if the Supreme Court, as an institution, shall be able to fully fulfil its obligations, everyone is dependent on everyone else.

Every year, there are a number of justice meetings, where we discuss comments on consultation papers, requests from the media, inquiries from supreme courts in other nations, budgets, etc. Sometimes, these meetings are convened on very short notice, and other times we are able to schedule them well ahead and have prepared material as a basis for the discussion. The majority of these meetings take place during our lunch breaks, but sometimes they are scheduled after court hours to eliminate time constraints. This will, for example, apply to discussions in connection with the Supreme Court's statement to the Minister of Justice regarding potential candidates for vacant justiceships.

From time to time, we also arrange internal seminars to discuss larger topics. Some of these are for the justices only, some are for justices and law clerks, and some are for all the employees, depending on the subject matter for discussion. Sometimes, we also arrange lunch seminars, which are open to everyone working in the Supreme Court. During one such lunch seminar every year, the Norwegian justice in the ECtHR presents recent decisions from the court and other aspects related to the evolution of the ECtHR.

Every year, often in September, the Supreme Court goes on a trip to one of the Norwegian counties. The tour generally lasts 2–3 days, and the program for the tour is recommended by the chief administrative officer of the county. We visit local industries and administrative bodies and hear presentations about their activities. This allows us to gain insight into the development and challenges in various parts of the country.

In addition to the regular judicial work, the Supreme Court's international activities are considerable. Nordic collaboration is extensive. The president and at least one justice from each of the supreme courts and the supreme administrative courts in all Nordic countries meet every year to discuss legal and administrative issues. The presidents of these courts also stay in touch informally throughout the year. With the exception of years when the Nordic Legal Professional's Seminars are held, annual seminars are arranged for justices of the Nordic supreme courts. 5–8 justices from each country generally attend.

The Supreme Court of Norway is a member of several European and international associations for national supreme courts, supreme administrative

courts and constitutional courts. The Supreme Court is also an observer in the Network of the Presidents of the Supreme Judicial Courts of the European Union, as well as the parallel association for supreme administrative courts in the European Union. These associations arrange meetings, seminars and conferences to discuss relevant legal and administrative topics of general interest. The Supreme Court's justices take part in these international activities.

We also welcome justices from other countries who seek information about Norwegian procedure and judicial system or who want to discuss legal topics. Present at these meetings are normally the Chief Justice and a couple of justices, as well as representatives from the Administration Unit and the Legal Secretariat—depending on the subject matter for discussion. This type of interaction is also useful.

Over the last decade, as part of the development of competence, the Supreme Court has visited the European Court of Human Rights in Strasbourg, the international courts in the Hague, the EFTA Court and the European Court of Justice, most of the Nordic supreme courts and supreme administrative courts. We have arranged seminars with the Constitutional Tribunal of Poland, the Supreme Administrative Court of Finland, and the Supreme Court of Slovenia. Overall, the Supreme Court has engaged in considerable international activity, which has contributed to the competence-building of the court. In light of the internationalisation of the law, this has been crucial.

In connection with the competence-building of the Supreme Court, one should also highlight the arrangement for educational leave, which was established in 1998. The Supreme Court has 20 justices, including the Chief Justice, but only 19 are involved in the day-to-day activities of the court at any given time. The 20th office is reserved for educational leave, by one of the justices being on such leave at all times. Over time, the leaves are distributed evenly among the justices. Educational leave may be granted for up to six months at a time, but the most common duration is three months. The leave is reserved for professional development and/or specialisation. Many justices spend their leave at international supreme courts or universities, writing major academic articles or research papers, or writing books on a law topic. The educational leaves play a major role in the continuous professional development of the justices.

Most justices also have a professional life outside of their work in the Supreme Court and the professional and competence-building activities organised by the Supreme Court. The justices of the Supreme Court give lectures. Some justices give lectures at the universities. Many write articles, and some also write legal books. From time to time justices also write chronicles and articles for the media and engage in the public discourse—often in relation to their work in the Supreme Court. This type of professional activity outside of

the strictly judicial tasks is clearly beneficial, both for the individual justice and for the Supreme Court overall, in that it provides insight and builds competence, while demonstrating social responsibility. Ideally speaking, the Supreme Court justices should perhaps engage even more in these types of activities. There is, however, a limit to how much other activity the justices are able to do in addition to the busy day as a justice.

Even though many of the Supreme Court's justices have a legal professional life outside of the court, relatively few engage in what is traditionally called side activity. As of 1 January 1997, the Supreme Court introduced compulsory registration of side activity, and the information in the register is available to the public. These regulations of 1997 have since been replaced by the provisions regulating judge's side activities in Chapter 6A of the Courts of Justice Act. Side activity for a judge is, with some exceptions, subject to approval. In the Supreme Court, the Chief Justice has final authority.

Chapter 6A of the Courts of Justice Act offers limited substantive provisions as to the types of activity that may or should be approved, and what may not or should not be approved. In the Supreme Court we discussed this topic in great detail in 2003. There was consensus among the justices that side activities that may cause problems for proceeding of cases in the Supreme Court cannot be accepted. In order to qualify for exemptions from this main rule, the appointment or office must hold considerable public interest and where a Supreme Court justice is required for the task. Furthermore the conditions are that the justice in question must apply for a leave of absence from his or her office, and a new justice must be available to fill his or her place. One example of this type of side activity is Justice Webster's appointment as chair of the commission for revision of the legislation concerning lawyers. In order to accept this appointment, she took a leave of absence of more than one year from her office in the Supreme Court. Interim appointments and an accelerated nomination of a new justice compensated for Justice Webster's absence.

Otherwise as a general view, side activities that may negatively affect the public's faith in the individual justice or the Supreme Court as an institution will not be accepted. As a starting point, Supreme Court justices may not accept appointments to serve on the board of directors for public or private institutions, but exceptions may be made for public welfare institutions, foundations or associations. Given its influence on the judicial system, exceptions have been made for appointments to the board of the Norwegian Courts Administration. Supreme Court justices may also not serve on commissions of inquiry, unless considerable and important public interests or concerns indicate otherwise. Furthermore, justices may not serve on public supervisory bodies or other public or private bodies that make decisions that may be challenged before a court.

The issue of arbitration was subject to some debate back in 2003. My position was and is that the Supreme Court's justices should not accept appointments as arbitrator. The reason for this is that arbitration generates considerable income for the arbitrator—so considerable that it may create the impression that the justice's primary interest lies here and not in attending his responsibilities in the Supreme Court. This may very well not be the case, but a mere impression may be enough to damage the public's faith in the Supreme Court. Very few of the Supreme Court's justices now accept appointments as arbitrators, and the number and extent of the cases is limited. Certain conditions must be met to eliminate the risk of affecting the proceedings in the Supreme Court, and the arbitration hearing must take place during the vacation of the justice involved.

I do recognize that some arbitration appointments may give professional insight and knowledge. If we are to allow for more justices accepting appointments as arbitrators on this basis, it is my position that this can only be allowed on the condition that no other remuneration is paid to the arbitrator save for costs incurred in connection with the arbitration as travel and accommodation costs etc.. Only then can we be sure that the public understands that justices, upon accepting appointments as arbitrators, are motivated by the potential for professional development and competence-building. Arbitration on these terms will also serve to safeguard judicial independence for arbitrators which are judges by profession. One might, of course, argue that accepting arbitration on these terms is a purely theoretical exercise, as nobody would serve as arbitrator without being compensated for it. To that my response is that very few of the activities justices engage in outside their regular work, such as writing articles for law journals, are financially profitable. Their main motivation is the professional and academic challenge. And if the professional challenge is not motivation enough to serve as arbitrator, then one might argue that the primary motivator is the economic compensation. Which is precisely why the public might get the impression that justices take on appointments for arbitration primarily for financial gain, to the detriment of the work in the Supreme Court.

11 THE ROAD AHEAD

It is not possible to predict with any reasonable degree of certainty how the Supreme Court will handle its obligations beyond the immediate future. The legal world has evolved dramatically, particularly in recent decades, with increased internationalisation and specialisation. It seems safe to presume that the internationalisation and specialisation trends will continue and intensify in

the future. Among other things, this will mean that cases brought before the Supreme Court increasingly will consist of questions with progressively more complex and specialised sources of law. For a court with general jurisdiction this development is particularly challenging, and will, in my opinion, require change in both organisation and working method.

One approach could be to divide the jurisdiction to hear cases in specialised chambers. In reality, this would entail giving up on the idea of the Supreme Court's general jurisdiction and establish specialised supreme courts with justices who are experts in their respective areas of law. Having expert justices for each area of law should guarantee that the appeals in question were still processed properly. I am, however, sceptical to whether this is a good solution, not least for the crucial areas of law where the state is a party. One would reasonably expect the majority of justices to be recruited from the relevant branch of administration, and the lack of diversity in the recruitment of justices may be detrimental to the public's faith in the court. It is also extremely important to view the development in a particular area of law in light of similar developments in other areas. This is one of the main arguments in favour of having justices and courts with general jurisdiction. It carries considerable weight even in a situation where many of the cases require specialised knowledge and insight.

Legal expertise is supplied to the court by the counsels in each case, and one should be able to acquire the further necessary expertise by expanding and including specialist expertise into the Legal Secretariat. This will ensure that the court has access to complete and satisfactory legal material. The current lack of adequate resources for assistance to legal research for the justices in chambers is a systemic shortcoming that has become evident in connection with the proceedings of individual cases during and after the court hearings. Individual justices have sometimes identified pivotal legal material the lawyers have neither found nor presented. The Supreme Court has a particular obligation to ensure proper application of the law. This responsibility indicates that one cannot rely on individual justices identifying missing material. One must develop a rigorous and robust system which ensures that satisfactory legal material is presented in every case. In 2015, the Supreme Court is expanding its Legal Secretariat with three law clerks, which makes it possible to begin working on implementing the necessary changes.

There will also be a need for assistance from the law clerks for justices writing major opinions in complex and difficult cases, in form of preparing memos on complex legal issues relevant to the composition of the decision, or preparing draft statements and summaries of submissions. This could reduce some of the considerable work pressure on the justice writing the opinion and contribute to better quality of the judgments.

In complex cases requiring specialised knowledge, it is vital that the justices get more time to prepare for the hearing and to work with the case after the hearing. As I discussed in Chapter 3, some cases are referred for hearing even if the principal interest of the decision is marginal, at best. By not admitting those cases for hearing, in addition to streamlining the work performed by the Appeals Selection Committee, it should be possible to free enough resources for the Supreme Court to have enough time to properly hear the complex cases that require considerable work. Under these circumstances, and on the condition that the Legal Secretariat is expanded and reinforced as described above, I have no doubt that the best solution, even in times with increasing demands for specialised knowledge, is to maintain the Supreme Court in its current form—one unified Supreme Court with general jurisdiction.

This kind of organisational development, which entails a considerable expansion of the Legal Secretariat, requires the Parliament and the Government to rise to the challenge of giving the Supreme Court enough financial leeway to succeed. After all, the Parliament and the Government have already recognized the value of building a qualified support and research division for their own activities. Only by making decisions with superior quality will the Supreme Court be able to retain the public's faith in the court and serve as the solid foundation for our constitutional state as our Supreme Court should be.

If the Supreme Court is given sufficient possibility to act, as described above, and practical arrangements are made to allow the Supreme Court to continue recruiting justices among the best lawyers and judges from different areas of the legal profession, there is every reason to be optimistic for the future of the Supreme Court. Which is important to the quality of the idea of Norway as a community governed by law.