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The Norwegian Supreme Court and the internationalisation of law

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1. The issues that I am going to deal with are labelled "The Norwegian Supreme Court and the internationalisation of law". The order has probably little significance here – it could well have been the other way around: "Internationalisation of law and The Norwegian Supreme Court", or even "Law and the internationalisation of the Norwegian Supreme Court". However, I like to think of the Supreme Court as being on top of things, active and ahead – thus my preference for placing The Norwegian Supreme Court in front.

2. This is, of course, only my personal view, not that of the Supreme Court as such – as are the remainder of the observations, assessments and opinions expressed during my intervention. The Norwegian Supreme Court is not one big brain with one consolidated agenda. It is a collegial court of 20 independent justices, with distinctive backgrounds and personalities, with a substantial societal responsibility and with a constitutional duty to perform according to our very best ability.

3. One should be prepared to find different approaches and variations in preferences among the justices. You have to remember that law is not pure logic – it is "a mixture of reason and passion, in a complex interplay of forces – rational, emotional, conscious and unconscious – by which no judge could remain unaffected" (former Constitutional Court justice South Africa, Albie Sachs, *The Strange Alchemy of Life and Law,* referring to a lecture given by US Supreme Court justice William Brennan in honour of justice Benjamin Cordozo).

4. The international aspects of law and the judiciary are obvious in cases involving parties or events anchored abroad, be it disputes deriving from transnational business-operations, the taxation of foreign corporations, the right to asylum, gambling through internet-services located in remote places or the prosecution of war criminals.

5. Moreover, classic International law-issues regarding Norwegian jurisdiction beyond the territorial waters have found their way to the Norwegian Supreme Court, forcing the Court – indeed not an *inter-state* court akin to the *International Court of Justice* in The Hague – some distance out of the comfort-zone. I refer in particular to a case from 2014 (cited in Rt. 2014 side 272) concerning the scope and effect of the Svalbard-treaty's clause of non-discrimination regarding illegal fisheries carried out by an Icelandic captain from a German vessel in the waters outside Svalbard's territorial sea. You would probably know that the Norwegian

government's position that these waters, and the resources under and within them, are under full Norwegian jurisdiction is indeed disputed internationally.

6. As The Norwegian Supreme Court concluded that no discrimination had occurred, it was, however, not necessary to decide whether the Svalbard-treaty – and its clause on non-discrimination – is at all applicable outside the territorial sea of Svalbard. But it was a close call, and a reminder of the thin line between cases on International law and foreign policy, and of the potential effects of an apparently prosaic Supreme Court judgment as to the control over tremendously valuable natural resources. And as to the norm of discrimination, the Court was in fact inspired by current European developments as to the linkage between *discrimination* and *proportionality*, even if the Svalbard-treaty dates back to 1930.

7. However, it is neither the facts nor the parties' origin I think of when I think of the "internationalisation of *law*". What comes to my mind under this heading is law perceived not as an enclosed hierarchical structure, but as an open and fragmented organism of legal material, generated and cultivated by a web of multiple and complex momentums on a *national*, an *a-national*, an *international* and a *supranational* level. The totality of the appearance seems impossible to grasp. You are the researchers and scientist that have to sort this out. I shall not even try. My ambition is limited to rendering some of the forms and colours, in the impressionistic sketch of a practitioner.

8. Next year, the 30th of June 2015, the Norwegian Supreme Court will be celebrating its bicentennial anniversary. The Chief justice and the six justices appointed to become the first members of the Court 200 years ago were educated at the *University of Copenhagen* in Denmark. The law faculty was highly influenced by continental legal traditions and trends flowing from a Europe in transformation, among them the refreshing ideas of rationality and reason – the freedom to use one's own intelligence and ability to reflection, coupled with the analytical approach to law and ethics that characterised what is today referred to as the *Age of Enlightenment*. It may well be assumed that the first Norwegian Supreme Court justices had a truly European mind-set.

9. Norwegian Supreme Court justices have since then continuously kept on looking abroad for inspiration, through reading, personal contact with other justices, seminars and exchange-programs. Supreme justices have been appointed as members, and even presidents, of the most important international Courts and tribunals – currently Supreme Court justice Erik Møse has leave from the Norwegian Supreme Court in order to serve as a judge at the European Court of Human rights.

10. Today's information-technology opens up the legal universe in an unprecedented scale, facilitating easy and immediate access to legal material from all over the world, *streamed*

hearings on web-TV and handing down of judgments via *YouTube*. There is, of course, a vital linkage between *access to information* and *legal development*, and furthermore between *transparency* and the *rule of law*.

11. The enthusiasm towards international legal material has, evidently, varied from one époque to another. And not all justices have been equally passionate – perhaps due to linguistic limitations, lack of professional curiosity and creativity, fear of the unknown, a feeling that looking elsewhere represents some sort of betrayal, or even the most dangerous perception that our own system is already optimised.

12. But I believe it is fair to say that as a general depiction, the Norwegian Supreme Court has always held both foreign and international legal material as valuable, for mind-broadening inspiration, as a source of good ideas and of persuasive arguments. Allow me at this point to remind you that a long-term consequence of the European legal integration is the amalgamation of civil law and common law. Norwegian law, characterised not only by civil law's commitment to formal structures and internal logic, but moreover by the common law's pragmatic and argumentative style, gives the Supreme Court ample leeway both for an international approach to Norwegian law and an apt entry to European legal culture.

13. Traces of the Supreme Court's internationalism might be seen all over the Court's case law, *inter alia* in important

elements of private law, procedural law, administrative law and criminal law.

14. One particularly striking line of development as to a comparative approach starts with the groundbreaking judgment of *Grev Wedel Jarlsberg v. Marinedepartementet* from 1866. The particularities of the case are of little bearing. However, in that judgment The Supreme Court for the first time publicly – and without any particular references in the written Constitution itself – declared that the Court would not apply any law found to be in conflict with the Constitution. The judgment established the Norwegian Supreme Court to be the first *constitutional* court apart from the US Supreme Court. It has been characterised as a major breakthrough for Nordic and European judicial formation.

15. My point here is, however, that the Norwegian Supreme Court's *motivation* for its approach is amazingly parallel to that given by the US Supreme Court some 60 years previously, in the landmark case of *Marbury v. Madison* from 1803, forming the legal basis for the US Supreme Court's position as a constitutional court. The Norwegian Supreme Court made no explicit reference to *Marbury v. Madison*. But it is beyond doubt that at least some of the justices were familiar with it.

16. More that 100 years later – in the Kløfta-case from 1976 (cited in Rt. 1976 page 1) – the Norwegian Supreme Court once again relied heavily on case law from the US Supreme Court on constitutional review, this time by transplanting the doctrine of the *preferred position principle* – developed by the US

Supreme Court from the late 1930's onwards – into Norwegian constitutional review. In short, the doctrine implies that the Court's scrutiny of legislation towards the Constitution will be more intense as to constitutional provisions protection individual freedom and security than those protection economic positions. The doctrine has been referred to as recently as in a plenary judgment from 2010 (cited in Rt. 2010 page 143 – rederiskatt – paragraph 138).

17. As to *International law* in the technical sense, the doctrinal starting point in Norwegian law has been, as you would know, that of *dualism* – an approach that fits well with the idea of Parliamentary sovereignty.

18. The division between domestic and International law has, however, never been watertight: The legal literature and the Supreme Court's case law have always recognised the *presumption* that Norwegian domestic law is in accordance with *customary* International law. Later, the presumption's scope has gradually, and quietly, been enlarged through the Supreme Court's case law, so that it today even encompasses *treaty-based* International law. The effect of the presumption-principle is that Norwegian law, as far as possible, shall be *interpreted and applied in accordance with International law*, thereby avoiding conflicts (for illustrations, see the cases cited in Rt. 1997 page 580, Rt. 1997 page 1019, Rt. 2000 page 1811 – Finanger I – and Rt. 2007 page 234).

19. Moreover, the existing Norwegian legislation is permeated with references to International law, prescribing that the latter shall *prevail*, so that the other provisions of that piece of domestic legislation have priority *after* International law. Such provisions are often referred to as provisions of *sector-monism* (see, *inter alia* the Criminal code Article 1, second paragraph, the Criminal procedure code Article 4 and the Civil procedure code Article 1-2).

20. As to the Agreement on the European Economic Area between the EFTA States and the EU States – the *EEA Agreement* – the main part is incorporated into Norwegian law according to Article 1 of the code on the EEA Agreement.

21. In addition, according to Article 2 of the same code, any law-provision aiming at fulfilling Norway's obligations under the EEA Agreement shall prevail. However, an *act of implementation* is necessary as to secondary EEA law. In contrast to the state of European Union law since the landmark case of *Van Gend en Loos*, there will be no *direct effect* of secondary EEA-law in the domestic legal order of Norway. The EFTA Court has, in accordance with this, emphasised that "the EEA Agreement does not require that a provision of a directive that has been made part of the EEA Agreement is directly applicable and takes precedence over a national rule that fails to transpose the relevant EEA rule correctly into national law" (E-1/07).

22. The recent ECJ's judgement in C-431/11 (the 26th September 2013, *United Kingdom and Norhern Ireland v. Council of the European Union*) seems confused on this point, as the ECJ, without any reservation states (paragraph 53-55):

"It should also be noted that, pursuant to Article 7 of the EEA Agreement, acts referred to in the annexes to the EEA Agreement or in the decisions of the EEA Joint Committee are to be binding on all the Contracting Parties and made part of their internal legal order.

In particular, as regards an EU regulation, Article 7(a) of the EEA Agreement expressly provides that such an act is 'as such' to be made part of the internal legal order of the Contracting Parties, that is to say, without any implementing measures being required for that purpose."

23. This is an approach that will – if it is upheld by the ECJ and subsequently even followed by the EFTA Court – be contrary to the founding principles of the EEA Agreement and in conflict with the Norwegian Constitution, in particular as this would imply the transferral of legislative authority to the EEA Joint Committee without the consent from the Parliament prescribed for in Article 115 of the Constitution (see Jan Magne Juuhl-Langseth, LoR 2014 page 465-476). I expect the Supreme Court will have to choose the Constitution.

24. However, as the EFTA Court held in case E-9/97 *Sveinbjörnsdottir v. Iceland*, an EEA-state can be held liable for not implementing EEA-law, according to the same conditions as an EU-state would have been under EU-law.

The Norwegian Supreme Court has agreed with the EFTA Court that such a liability is part of the EEA Agreement and that it shall, according to Article 1 of the code on the EEA Agreement, be enforced by Norwegian courts (see in particular the cases cited in Rt. 2005 page 1635 – Finanger II – and Rt. 2012 page 1793). So in this respect, as a matter of liability, even the secondary EEA law has some sort of a direct effect in Norwegian law.

25. When it comes to *international human rights,* the former Article 110 c of the Norwegian Constitution as amended in 1994, said that all governmental bodies should respect and secure human rights, and that the provisions as to the implementation of human rights treaties should be prescribed for by parliamentary legislation.

26. An imperative step in this regard was taken when the Norwegian Parliament in May 1999 adopted the Human Rights act, thereby giving certain conventions the position of Norwegian statutory law. These are: The European Convention on Human Rights (1950). The UN Covenant on Civil and Political Rights (1966). The UN Covenant on Economic, Social and Cultural Rights (1966). The UN Convention on the elimination of all forms of discrimination against women (1979). The UN Convention on the Rights of the Child (1989).

27. Article 3 of the Human Rights act establishes that if there is a conflict between a provision in one of the enumerated conventions and any statutory provision adopted by

Parliament or any other domestic law, the treaty-provision shall prevail. Hence, the conventions acquired by the Human Rights act a sort of *semi-constitutional* status in Norwegian law.

28. The European Convention on Human Rights has by far been the most important one. However, also the UN Covenant on Civil and political Rights has had a weighty impact, in particular on the basic structures of the appeal-system in Norwegian criminal procedure. The UN Convention on the Rights of the Child has showed itself both practical and important, *inter alia* by inspiring a fundamental shift of mind-set in juvenile criminal justice as a result of a Supreme Court ruling in 2010 (cited in Rt. 2010 page 1313). But I am afraid there is still some way to go as to give the UN Convention on the rights of the child full effect in Norwegian law, *inter alia* in immigration an asylum cases.

29. In May 2014 the Norwegian Constitution went through a considerable modernisation as to the protection of human rights. Numerous of the classic civil and political rights as prescribed by the major human rights conventions where taken in, in addition to certain economic, social and cultural rights and the core rights of the child as prescribed in the UN Convention on the rights of the child. Although these rights now have acquired a domestic constitutional basis, there can – to my mind – be no doubt that these new provisions ought to, and will be, interpreted an applied in the light of their international origin. In any case, the

constitutional reform in 2014 may facilitate a boost for a contemporary Norwegian constitutionalism.

30. As part of the constitutional reform in May 2014, the Parliament decided to replace the before mentioned Article 110 c with a new Article 92, aiming at strengthening the position of convention-based human rights. The new Article 92 simply states that all governmental bodies shall respect and secure the rights and freedoms stemming from any international human rights convention to which Norway is a party. Hence, the supremacy of human rights conventions and the Supreme Court's duties as to safeguarding international human rights now have a clear-cut constitutional foundation.

31. Moreover, these duties are not limited to the five conventions enumerated in the Human Rights act from 1999, but encompasses according to the Constitution's own wording human rights as they are prescribed by the Constitution or by any human rights treaty of which Norway is a party. This even goes for human right treaties entered into subsequently to the new Article 92. However, at this point the Parliament made a reservation in the *travaux preperatoires* to Article 92, presuming that in order for a new treaty to acquire constitutional status this must be affirmed by the Parliament in accordance with the rules for constitutional amendments in Article 121 (Innst. 186 S (2013-2014) at 2.1.2).

32. As to the *State's liability* before Norwegian courts for any breach of its duty to respect and secure human rights, there is no universal provision in Norwegian law or in the Constitution. However, in accordance with general principles of international human rights law, a State can be held liable for breaches. And according to the principle of *subsidiarity*, there is undoubtedly a clear preference for a system whereby an individual claiming to be the victim of a violation can achieve reparation already before the domestic courts, making a complaint to international supervisory bodies superfluous. Article 92 of the Constitution strongly supports that the courts should establish liability for the State, and a duty to pay compensation, based directly on the fact that a breach has been established.

33. Moreover, Supreme Court case law confirms that the State can be held liable both for the State's own breaches, and for the lack of protection against breaches carried out by other private parties.

34. The 25th of April 2013, the Supreme Court made its ruling in what must be considered one of the most important cases on human rights protection in Norway for many years (cited in Rt. 2013 page 588): A and B were lovers for a short period back in 1998. A had a drinking problem and limited control over his temper. One night he attacked B, beating her and threatening her with a knife. He was arrested, and later convicted for the offence and banned from taking any kind of contact with B. After the sentence was served he broke

the restraining order on a number of occasions and subjected B for an extensive period of time to threatening and frightening persecution that resembled mental harassment and terror. It was a classic case of hostile stalking, with devastating consequences for the health and life of B. In 2001 her situation got so bad that she decided to move – together with her four children – to another part of the country, and to go into hiding from A.

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

36. The Supreme Court concluded that the State had not fulfilled its obligation under the European Convention on Human Rights to protect B from persecution from A, and that the State therefore was liable to pay damage to B. The acts of the perpetrator undisputedly fell under Article 8 of the European Convention of Human Rights on the protection of private- and family life, and possibly even Article 3 on degrading or inhuman treatment.

37. As to liability, decisive importance was attributed to the fact that the police's follow-up of the continued violations of the restraining order was inadequate and to the fact that two potentially very serious threats were not investigated in any detail. So, the State's liability was based directly on the

Convention itself – and on the conclusion that B was not afforded reasonable, adequate and effective protection against what had to be considered a real, immediate and serious risk known to the police.

38. The acceptance of rights towards the State and the government is a cornerstone in the concept of the rule of law. However, the other side of the coin is the individual's *duties* towards his fellows and the society taken as a whole. What is the Norwegian Supreme Court's approach to International law as an immediate basis for *individual responsibility*?

39. We know that according to Article 7 in the European Convention on Human Rights, even International law may serve as a sufficient legal basis for *penal* responsibility, in accordance with established international practice since the Nuremberg tribunal after World War II. However Article 96 of the Norwegian Constitution says that criminal responsibility can only be established if the charged person has acted in breach of a law prescribing that such breach can be punished. And by that notion of "law", Article 96 refers to *Norwegian legislation*. *International penal law* cannot as such be applied directly by Norwegian courts. In a plenary judgement from 2010 (cited in Rt. 2010 page 445) the Supreme Court emphasised that the development in International law, and Norway's interest in assisting international criminal courts, cannot undermine this fundamental requirement that a

criminal conviction by a *Norwegian* court must have an authority in Norwegian legislation.

40. International law may, however, be of interest when interpreting criminal law provisions. So, contrary to what has been said by the Supreme Court in its previous case law, the Supreme Court recently ruled that the general provision in the Criminal code Article 228 on violence prohibits *any corporal punishment* of children (cited in Rt. 2014 pace 702). The Court made references to UN Convention on the Rights of the Child article 19 nr. 1 and to *General Comment* No. 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, and *General Comment No. 13* (2011): The Right of the Child to freedom from all forms of violence.

41. As for *private parties' civil liability* towards other private parties for breaches of International law, the legal situation in Norway is somewhat unsettled. In one case from 2011 (cited in Rt. 2011 page 769) the Supreme Court took the UN Convention on the Rights of the Child into consideration when assessing the compensation to a little boy that had been fatally hurt by his father. With reference to article 19 of the Convention and to *General comment No. 13* from UN Committee for the protection of the rights of the child, the Supreme Court held that the amount awarded should mirror the parent's particular responsibility, and the child's special need for protection against maltreatment.

42. The Supreme Court's recent case law indicates that liability for private individuals based more or less directly on a human rights convention can be tangible, *inter alia* in cases of invasion of another individual's privacy, if there are no other effective sanctions at hand – typically penal sanctions. I refer in particular to a case from 2012 (cited in Rt. 2012 page 1669), where the Supreme Court also stated that there are good reasons for the Parliament to look into this question. My guess is that the Parliament will not act on this, so the issue will remain open for the Supreme Court to develop in due time.

43. The Norwegian Supreme Court, being at modern court of precedents, is aware not only of its obligations towards the Constitution, but also of its chief position as to securing the rule of law and a loyal implementation of Norway's obligations under International and European law.

44. Thus, in a grand chamber case from 2009 (cited in Rt. 2009 page 1118) the Supreme Court defined it as a *key mission* to deal with constitutional cases and cases involving Norway's international obligations, particularly concerning EEA-law and the law of the European Convention on Human Rights.

45. So, what are the practical consequences of these developments as to the work of the Norwegian Supreme Court? It goes without saying that in order to cope with the international dimensions of law, the Court and the justices need to be well informed as to the current European legal culture and development.

46. This includes in particular, of course, the two major pillars, represented by the EU/EEA Agreement and by the European Convention on Human Rights. The Supreme Court has excellent relations to both the European Court of Human Rights and the EFTA Court:

47. In 2013 all the justices of the Supreme Court visited Strasbourg for at two-days seminar concerned with the interplay – the dialogue – of our to courts.

48. And as recently as the 7th and the 8th of October 2014 the members of the EFTA court and the legal secretariat visited the Supreme Court for what must be considered a very collegial and fruitful seminar dedicated in particular to the referral procedure under the EEA Agreement. A follow-up seminar is already planned for 2016.

49. The Supreme Court must also be a partner in the dialogue of supreme courts, constitutional courts and supreme administrative courts – the APEX-courts – within Europe. The Nordic APEX-courts have a well-established network, *inter alia* thought annually seminars for the justices and regular meetings between all the chief justices. And the Supreme Court participates in several European arenas that provide us with insights as to the major currents and debates, *inter alia* as to the development within the highest courts of The United Kingdom, Germany and France. Personally, I will pinpoint the new UK Supreme Court as of particular interest for the Norwegian Supreme Court.

50. There can even be inspiration to be drawn from APEX-courts outside Europe. As I commented on initially, the US Supreme Court has been to a great inspiration for Norwegian Supreme Court as to constitutional review. And the Norwegian Supreme Court has had a close contact with the Constitutional Court of South Africa, a court not more than 20 years old, applying one of the most dynamic constitutions in the world in a truly impressive manner. In fact, four justices for the Norwegian Supreme Court – including Chief justice Schei and myself – will early November this year visit both Cape-Town and Johannesburg in connection to the 20th anniversary of the Constitutional Court of South Africa.

51. As to the cases before the Norwegian Supreme Court, there is *no general right of appeal. Leave to appeal* must be granted by at least one of the three judges in the Appeals Selection Committee. Leave to appeal shall only be granted if the appeal raises questions that have *significance beyond the current case* or there are *otherwise important reasons* which merit consideration by the Supreme Court (see the Civil Procedure Code Article 30-4 and the Criminal Procedure Code Article 323). In nearly 9 out of 10 cases leave to appeal is not granted.

52. Supreme Court's constitutional duty to secure international human rights and the principle of subsidiarity under the different human rights conventions, strongly support that appeals which raise real human rights issues, normally must

be granted leave to appeal. Similarly, appeals involving genuine questions as to the *interpretation* of EEA-law will regularly be admitted. On the other hand, if the appeal primarily concerns the facts or the concrete application of established EEA-law, leave to appeal will regularly not be granted.

53. The lower courts' judgments, any advisory opinions from the EFTA Court, European case law and the arguments provided for by the parties, are of course the most important material to consider when deciding whether the appeal should be admitted or not. However, in order to properly carry out the selection procedure, the justices sitting in the Appeal Selection Committee will also need assistance from a staff of law clerks (in the future, preferably law clerks that are specialised in European law), providing the justices with an updated examination of the issues of the case, and an unbiased advise as to whether the case – or parts of it – should be admitted.

54. During the preparatory stage – after the admittance of the appeal – the justice in charge must see to that the international dimensions of the case are properly dealt with, in such a way that the justices that eventually are going to decide the case after the oral hearing are provided with the necessary legal material. At this stage, the question of asking the EFTA Court for and advisory opinion may arise, and in the future even whether to ask the European Court of Human Rights for an advice according to *Protocol No. 16* to

the Convention. Moreover, it may on some occasions be advisable to postpone the case, awaiting the outcome of a case already pending before one of the European Courts (see Rt. 2005 page 1598 and Rt. 2012 page 219).

55. Very few of the justices in the Supreme Court are specialists in European law, and often the European legal material is both ample and complex. Currently, we are to a large extent in the hands of the parties, in the sense that it is their lawyers that provide us with the legal material and the arguments. To my mind, we are currently too reliant on the parties and their lawyers. A strengthening as to the staff of legal clerks could compensate for this, enabling us to have a systematic and thorough quality-check of the legal material and the arguments that the parties derive from it. We have started this process, by adding three new clerks next year. On a long-term basis, the number of clerks should be doubled – from today's 20 to 40.

56. Human Right cases and cases involving EEA-law might be candidates for being decided by a *grand chamber* (11 judges) or by the *plenary court* (in principle consisting of all 20 judges): Appeals in these areas will typically raise issues of far-reaching legal or societal consequences, established law and practice might be challenged, or the decision necessitates a balancing of rights and freedoms on one side and governmental needs and the priorities of the political majority on the other. There are even issues of national sovereignty at stake.

57. As to the *interpretation* and *application* of International and European law, there are a series of issues. I will start with some observations connected to *EEA-law*. The basics here are simple, in the sense that the Norwegian Supreme Court is expected to interpret EEA-law in conformity with the interpretation of EEA-law, and the parallel community law, that derives from the case law of the ECJ and the EFTA Court.

58. If the case before the Norwegian Supreme Court involves an unsettled matter of EEA law, the Court may even ask the EFTA Court for an advisory opinion. This has, however, happened only three times in the EFTA Courts 20 years of functioning, and not at all the last 12 years. Perhaps we should avail ourselves of this opportunity to a dialogue of courts more often?

59. The fundamental idea of *homogeneity* and *reciprocity* would be tampered if the Norwegian Supreme Court allowed itself to develop its case law on EEA-law in a specific Norwegian direction. Neither would such a development be in accordance with the duty to a loyal implementation of EEA-law according to Article 3 of the EEA Agreement. According to the case law from the EFTA Court, national courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into national law, as far as possible in conformity with EEA law. Consequently, they must apply the interpretative methods recognised by national law as far as possible in

order to achieve the result sought by the relevant EEA rule (E-1/07).

60. This does not imply that an advisory opinion from the EFTA-court is *formally binding* on the Supreme Court, not even if the advisory opinion is connected to the actual case before the Supreme Court. EEA law (Article 34 of the SCA) prescribes on the contrary a procedure for *advisory* opinions, and by this makes a deliberate deviation from the referral-procedure that has been established before the ECJ.

61. However, already the fact that a domestic court has decided to ask for an advice by the EFTA Court creates a strong presumption that the advice will have a considerable impact. Such a presumption is also supported by the fact that the EFTA States found it appropriate to establish this procedure as the EFTA-pillars version of the EU referral-procedure, and the Norwegian Parliament's intentions of such a presumption when ratifying the EEA Agreement. The EFTA Court possesses particular expertise in EEA law, and the rules of procedure opens up for input from the EU Commission, the EFTA Surveillance Authority and the EEA Member States.

62. Consequently, an advisory opinion from the EFTA Court should have the utmost interest when determining the correct interpretation of EEA-law. According to the Supreme Court's own words in the plenary case of Finanger I (cited in Rt. 2000 page 1811), *significant importance* must be

attributed to the opinion from the EFTA Court. I certainly agree to this. Of course we have the *STX* (cited in Rt. 2013 page 258), which might be perceived as more outspoken on the Norwegian Supreme Court's duty to perform an independent interpretation of EEA-law. However, the approach, language and outcome in the *STX* must be seen in the light of the quite distinctive circumstances. And I think the case is a strong reminder of the complexity of EEA-law.

63. The EFTA Court and the Norwegian Supreme Court often refer to case law from the ECJ. This presupposes that EU-law and EEA-law are equivalents. Whether this is the case is, however, not always obvious. EU law and EEA law might have taken different turns, due to changes in the structures of EU law that are not transferred into the *static* EEA Agreement. I believe this "widening gap" may represent a genuine challenge as to the interpretation and application of EEA-law. The EFTA Court has an important function identifying the gaps and the legal consequences of them.

64. I now turn to the interpretation and application of *international human rights provisions*, in particular The European Convention of Human Rights. The Strasbourg Court's position has been that it must attach *considerable weight* to previous case law, being *the* most important source of interpretation and application of the Convention, apart from the Convention text itself. The formula frequently used is the following: "While the Court is not formally bound to follow its previous judgments, it is in the interest of legal certainty,

foreseeability and equality before the law that it should not depart without good reason from precedents laid down in previous cases …"

65. As to whether the case law in fact produces *legal certainty*, *foreseeability* and *equality*, one should, in my opinion, keep in mind that not all judgments from the European Court of Human Rights are crystal clear; rulings might be too vague or ambiguous to give any real guidance for the domestic courts. To this one must add, I believe, a certain lack of consistency among the 47 judges in the Court's five sections, although the Court's own *Jurisconsult* guides the judges carefully as to avoid any unintended deviation from established case law. The Strasbourg Court is, of course, fully aware of these challenges, and seems to address them with greater effort than before.

66. Case law serves not only the interests of certainty, foreseeability and equality. It is also the tool used to keep the Convention "alive", allowing the European Court of Human Rights to secure that the rights are effective in practice, and that the Convention mirrors the needs of today. – As so often repeated by the Court itself, "it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory".

67. Let me at this point remind you that there are no watertight distinction between the European Convention on Human

Rights and other international instruments for the protection of human rights. So – as one example – in the case of *Nunez v. Norway* (28th of June 2011) the European Court of Human Rights held that a child's right to family life according to Article 8 of the Convention must be understood with reference to Article 3 in the UN Convention on the Rights of the Child, according to which the best interest of the child shall be a primary consideration in all actions taken by public authorities concerning children.

68. Today it seems established case law that the rule of the best interest of the child originated from the UN Convention forms an integral part of Article 8. I refer to *Antwi and others v. Norway* (14th of February 2012) and to the recent case of *Kaplan and others v. Norway* (24th of July 2014). In the latter Norway was once again convicted for breach of article 8, as the authorities – including the Supreme Court – had not paid sufficient attention to the best interest of the child when expelling the child's father with a five-year re-entry-ban.

69. Moreover, as a "living instrument", the Convention must be interpreted in the light of the consensus and common values emerging from the practices of European States and specialised international instruments, as well as the evolution of norms and principles in International law through other developments (see in particular the judgment in *Opuz v. Turkey*, 9th of June 2009 paragraph 164). This even includes the case law from other international courts and tribunals.

70. The European Court of Human Rights has emphasised that the principle of *subsidiarity* forms "the very basis of the Convention, stemming as it does from a joint reading of Articles 1 and 19" (*Austin and others v. United Kingdom,* 15th of March 2012). Subsidiarity is apparently a principle of sequence. But it has a bearing on the scrutiny of review carried out by the European Court of Human Rights. It implies, *inter alia* that the European Court will be cautious as to deviate from the *facts* found be the domestic courts, that the interpretation of *domestic law* is a matter for the national courts, and that the Court leaves the national authorities with a *margin of appreciation* as to the balancing of conflicting interests in the application of the Convention. According to the Court's case law, this margin could vary, depending on the measure at hand, the actual right or freedom at stake and the level of European consensus on the matter. This margin is even a *dynamic* phenomenon, and will accordingly wary over time.

71. The general character of the norms stemming from the European Convention of Human Rights has a bearing on subsidiarity, as it facilitates a certain leeway for the domestic courts: It is not entirely for the European Court of Human Rights to define the proper application of the Convention. In the particular case before it, a domestic court must obviously take national law and domestic legal traditions as a starting point and use that more specific body of national law and legal culture as a vessel for implementing and specifying the Convention at domestic level.

72. The Norwegian Supreme Court's current case law shows that human right conventions shall – also when applied within the Norwegian legal system – be interpreted according to the methods used by the international supervisory organs. Thus, it is not only the convention texts that are integrated in Norwegian law; the methods of interpretation are likewise adopted as such. This implies that case law from the international supervisory organs becomes an integral part of Norwegian law – including the massive body of approximately 20 000 judgments produced by the European Court of Human Rights. The Norwegian courts are, in principle, expected to make the same use of this case law as the Strasbourg Court itself.

73. At least two general modification must, however, be made. *Firstly*: The Supreme Court leaves – as a starting point – the *development* of the conventions to the international supervisory bodies, *inter alia* the Strasbourg Court. *Secondly*: To the extent that the convention leaves a *margin of appreciation* to the States, the Norwegian Supreme Court sees it as its task to make this margin operational (see in particular the cases cited in Rt. 2000 page 996 and Rt. 2005 page 833).

74. At this stage, I believe it is suitable to refer some quite informative passages from the unanimous plenary judgment from 2000 (cited in Rt. 2000 page 996):

"Although the Norwegian courts apply the same principles of interpretation as the European Court of

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

75. It should be borne in mind that the Norwegian Supreme Court today is familiar with the law stemming from the European Convention of Human Rights, and that the Supreme Court's view on itself as a *constitutional* court has been, and will be, developing. These two factors, coupled with the current accentuation of the principle of *subsidiarity* in the Strasbourg system, are likely to support a more partner-like relationship with the European Court of Human Rights.

76. I am sure that apart from the Norwegian Supreme Court's own case law the Strasbourg Court's case law is by far the most cited in the Supreme Court's judgments. One may see the actual impact within a very wide range of subject matters – family law, the right to privacy, freedom of religion and freedom of expression, the protection of property and fair-trial guarantees, to mention the most important.

77. Particularly striking are the examples from criminal procedure. As to judicial review, the scrutiny is more intensive than before, regularly including even the test of *proportionality*. However, to my mind there is still some way to go as to give full effect of that principle in the Norwegian Supreme Court, based on the *structured approach* to proportionality that are prescribed for not only by case law from the European Court of Human Rights but also the EFTA Court and the ECJ.

78. Perhaps the most important point here is not the evolution of the law, but how the *judicial craftsmanship* has been developed and refined under European influence. This is not only due to the role of the European Convention on Human Rights, or the EEA Agreement, taken in isolation. The European integration brings the highest courts in Europe together in a common legal universe, enabling an interchange of experiences and practices that, in the long run, cannot but inspire.

79. To illustrate: Just some weeks ago, I hosted a seminar at the Supreme Court, with participants from the European Court of Human Rights, The UK Supreme Court, Conseil d'Etat in France, Consiglio di Stato in Italy, The Swedish Supreme Court, the University of Oxford, Cambridge, Sorbonne and Oslo discussing the different traditions as to style of writing judgments throughout Europe.

80. Taking into consideration that the highest domestic courts today to some extent must be forward-looking and policy-making, this dialogue of European courts can facilitate quality, conversion and coherence as to the development of the judiciary and as to the strategies of interaction with other authorities, be it national or international.

81. This brings me to the international *audience* to the Supreme Court's work. One prosaic obstacle here is *language*. I am certainly in favour of a more systematic and generous practice as to the translation of our judgments into English, so that the Norwegian Supreme Court can even *have* a voice in the European dialogue. So far, the Norwegian Government and Parliament have not been prepared to provide the Supreme Court with the necessary funding.

82. As to substance, you should be aware of the function The Supreme Court's judgments may have in the event that they are to be examined by an international body or court, in particular the European Court of Human Rights. Accordingly, it may be beneficial that Supreme Court judgments set out fully the history and the domestic legal context of a case, the interests at stake, and – of course – each step in our reasoning, including a thorough discussion of the issues arising under the Convention. The Strasbourg Court will then have the benefit of our reasoning. That reasoning should in particular demonstrate that each stage of any proportionality test has been rigorously scrutinised by the Supreme Court.

83. In the case of *Lillo Stenberg and Sæther v. Norway* (16th of January 2013) the issue was whether the Norwegian Supreme Court had struck a fair balance between the right to privacy according to Article 8 and the freedom of the press in Article 10, having concluded that the press' publication of pictures from the renowned couples' wedding did not violate their right to privacy. No doubt, the Supreme Court – both the majority and the minority – had made an effort to identify the elements of the balancing of the two rights and to describe the actual balancing in great detail. To this, the Strasbourg Court stated that "where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts". This is *subsidiarity in action* – and an invitation from the European Court of Human Rights that should be seized with enthusiasm by the Norwegian Supreme Court.

84. Law as international phenomenon is indeed fragmented and multi-layered. The interplay of courts generates dynamics. Allow me, before I sum up, to remind you of the ongoing process of the European Union's accession to the European Convention on Human Rights:

85. Since July 2010 the European Commission and the member States of the Council of Europe have been negotiating the terms of the treaty, which will bring about the accession. In

April 2013 the negotiators finalised a draft agreement. The European Court of Justice held hearings on the matter in May 2014, and is currently preparing its opinion on the accession – which is expected to be delivered in the spring term next year. Then the EU member states, the European Parliament and the parliaments of the Council of Europe's member states must be in support.

86. By acceding to the Convention, and thereby allowing external judicial supervision, the European Union will for its actions be bound by the same international human rights requirements as those applying to the actions of individual European States, under the supervision of a common European Court of Human Rights. How will this affect the European Court of Justice's approach to human rights law, and how will the European Court of Human Rights cope with a completely new role as towards the institutions of the European Union? And what will be the situation for the bodies established by the EEA Agreement?

87. Allow me to make only some short *concluding* remarks: Technically speaking, and on the surface, it is the Norwegian Parliament that has the legislative power, and which through that power formally decides both the direction and the speed as to any legislative changes and developments. And the Norwegian Supreme Court has the last saying as to what is the law within the Norwegian jurisdiction.

88. However, Norway, with our open economy, our need for allies and our humanitarian convincement, is today deeply committed – politically and legally – in a multifaceted range of international undertakings. A substantial part of Norwegian legislation is an immediate response to such international projects of cooperation. Quite often there is an obligation to amend the law in a certain manner, or even an expectation of a more or less full harmonisation, in particular at European level. The legal culture and identity of the judiciary develops across, and even independently of, the national borders.

89. In short, we have to acknowledge that maintenance and refinement of the legal system as such cannot be sustainable performed within the limits of the national state. Recalling my introductory remarks as to the perception of law, my point is that the delimitation line between the national and international systems of law is blurred, and to some extent erased: The law is international in its defining construction and operational structure.

90. The Norwegian Supreme Court's identity and functions have been equally altered. Comparable to the developments elsewhere in Europe, the Norwegian Supreme Court's position as a mediator of International law – in particular European law – affects the *balance* between the three institutional arms of government.

91. The most obvious is that the equilibrium of checks and balances has moved towards a higher degree of judicial scrutiny of governmental actions by the Norwegian Supreme Court and the European Courts. Moreover, today's architecture of law implies that the Norwegian and the European judiciary have *a joint responsibility* in protecting and cultivating the defining values and the forming principles of our common legal system.