

## Supreme Courts and the Challenges posed by the Transnationalisation of Law

*Faculty of Law, University of Bergen, 21<sup>st</sup> September 2015*

1. Dear colleagues and friends! Once again the University of Bergen demonstrates its hospitality, its intellectual generosity and its genuine interest in the work and functioning of the Norwegian Supreme Court. I thank you!
2. I shall speak on the challenges that the transnationalisation of law poses to the highest national courts – often referred to as the apex courts – be it supreme courts in the true and technical sense, any other domestic courts of last resort and constitutional courts. I will confine myself to the European perspective. My assessment will inevitably be heavily influenced by my position as a justice in the Norwegian Supreme Court.
3. What I am about to say is, of course, only my personal views, not that of the Supreme Court as such: The Norwegian Supreme Court is a collegial court of 20 independent justices, with distinctive backgrounds and personalities, each and every one of us constitutionally obliged to perform according to our best ability and judgment. Hence, one should be prepared to find different approaches and preferences among the justices.
4. Law is normative and not pure logic. It is, according to former justice of the Constitutional Court of South Africa, Mr. Albie Sachs, in his book *The strange alchemy of life and law*, “a mixture of reason and passion, in a complex interplay of forces – rational, emotional, conscious and unconscious – by which no judge could remain unaffected”.

5. In a Yale Law School lecture in 1955, Philip Jessup introduced the notion of “transnational law”, in order to challenge the doctrinal and conceptual boundaries of law, *inter alia* as to the dichotomy of national and international law. “I shall use”, Jessup stated, “the term ‘transnational law’ to include all law which regulates actions or events that transcend national frontiers”.
6. Later, similar approaches have regained significance in analysing the impact of what is commonly called the globalisation of law, the internationalisation of law, and – indeed – the Europeanisation of law. Today the concept of “transnational law” must be seen in the context of a vibrant discourse on the role of the law and of the judiciary in an increasingly developing, globe-spanning web of regulatory regimes, actors, norms and processes.
7. I am well aware that the notion “transnational law” is neither self explaining nor clear cut and that questions have been asked whether there at all exists such a thing as “transnational law” and whether the concept is any useful to us, analytically or practically. Moreover, as to the precise definition of what is meant by the notion “transnational law”, there are certainly a wide variety of suggestions. I am more than happy to leave the academic endeavour of defining “transnational law” to the academics.
8. My approach will be this: The world around us is changing quickly in terms of perceptions, social mix, cultural values, religion and communications. The economy and the currents of politics are volatile. We face challenges as to climate, national security and migration. To cope, there is certainly need for political leadership. But there is also the need for legal structures that can provide the necessary stability through troubled waters. It follows from the inherent nature of things that these issues are global, and that the law and the systems of law will have to transcend the national state.
9. I intend to illustrate how contemporary law is adopting to these challenges through some simple and selected impressionistic sketches of current European law.
10. The European Union and, as for Norway, the EEA Agreement, could have provided one tableau, as they both have fundamentally changed the legal environment in which the national courts operate, through what may be referred to as the constitutionalisation of international law: From the union perspective, domestic courts are not domestic courts only. They are also European community courts or EFTA courts, respectively.

11. However, I shall not go further into EU or EEA law as such.  
Instead I will use the protection of fundamental rights to illuminate.
12. The European Convention on Human Rights Article 1 prescribes that the Member States to the Convention shall respect and ensure the rights and freedoms enshrined in the Convention to all persons within the Member State's respective jurisdictions. It goes without saying that this task can only be carried out if the domestic apex courts take into account any relevant case law from The European Court of Human Rights. Accordingly, the domestic apex courts are not the supreme masters of the interpretation of international treaties. However, there are some important nuances to this; allow me to expound.
13. The case law of the European Court of Human Rights 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".
14. Let me at this point remind you that there is no watertight distinction between the European Convention on Human Rights and other international instruments for the protection of fundamental rights. Moreover, as a "living instrument", the Convention must evolve 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. This includes the case law from other international courts and tribunals.
15. Also case law on fundamental rights from domestic supreme courts and constitutional courts has, under this heading, an impact. This paves the way for influential supreme and constitutional courts, such as the German Constitutional Court, or the United Kingdom Supreme Court, to have their say. I would not totally exclude the possibility that even the Norwegian Supreme Court, on a good day, would have an ear in Strasbourg.
16. The European Court of Human Rights has emphasised that the principle of *subsidiarity* forms "the very basis of the Convention". Subsidiarity is apparently a principle of sequence. But subsidiarity has a bearing on the scrutiny of review carried out by the European

Court of Human Rights. It implies, *inter alia* that the European Court will be cautious as to deviate from the *facts* found by the domestic courts, that the interpretation of *domestic law* is a matter for the national courts, and that the European Court of Human Rights leaves the national authorities with a *margin of appreciation* as to the balancing of conflicting interests in the application of the Convention.

17. 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 a *dynamic* phenomenon, and may vary over time. Currently the European Court of Human Rights is facing some rough political and legal headwind, which might bring about a broader margin.
18. 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.
19. In the interest of dialogue, it may be beneficial that domestic courts judgments set out fully the domestic legal context of a case, the interests at stake, and – of course – each step in the reasoning, including a thorough discussion of the issues arising under the Convention. The Strasbourg Court will then, in the event of a complaint, have the benefit of that reasoning. The reasoning should in particular demonstrate that each stage of any proportionality test has been rigorously scrutinised by the domestic apex court.
20. It has been crucial for the progress of European law that fundamental rights' existence and main components have been recognised and developed by the European Court of Justice in the European Union. And it was, moreover, a significant step to have fundamental rights expressed through the *EU Charter of fundamental rights* from 2000, that was later also included in EU's constitutional foundation through the Lisbon treaty in 2007, in force from 2009. The fact that fundamental rights *are* adhered to even by the EU as such, and by the Member States when implementing EU law, has paved the way for the European Court of Human Rights' pragmatic approach to the Member State's obligations under Article 1 of the European Convention on Human Rights when implementing EU law:

21. In the landmark judgment in *Bosphorus Airways* from 2005, the European Court of Human Rights confirmed its previous case law that the Strasbourg Court has no competence to review EU acts as such. These may, however, in principle be reviewed *indirectly*, through examining specific implementation measures at the national level, carried out by a Member State. But the European Court of Human Rights simultaneously shaped the doctrine expressing its trust in the fact that the EU guarantees a level of protection of fundamental rights that is equivalent – i.e. not necessarily identical, but *comparable* – to that of the European Convention on Human Rights. The Strasbourg Court could therefore *presume* that any measure adopted by a Member State in fulfillment of its legal obligations under EU law, under the supervision of the European Court of Justice, is compatible also with the European Convention on Human Rights requirements, unless a “manifest deficiency” is apparent in the concrete case at hand.
22. The Bosphorus doctrine is well suited to the need to organize the coexistence of two jurisdictions, that of the European Court of Human Rights and that of the European Court of Justice, both ensuring respect for fundamental rights, but without any hierarchical link or coordination between one another.
23. According to established case law from the EFTA Court, fundamental rights form part of the *general principles of EEA law*, the provisions of the European Convention on Human Rights and the case law of the European Court of Human Rights being particularly important expressions of *the shared European point of reference*.
24. The *EU Charter of fundamental rights* is not as such applicable within the EFTA pillar of the EEA. However, the idea of *homogeneity* between EU law and EEA law suggests that one cannot – in the EFTA pillar – act as if the *Charter* did not exist, completely ignoring its provisions and the European Court of Justice’s case law related to it: Fundamental rights permeate the law, and cannot function properly within a series of parallel and completely self-contained bodies of law.
25. So far, the EFTA Court has handled this skillfully, on what has been characterized as a “low key case-by-case approach”, aiming at maintaining homogeneity between EU and EEA law, without drawing heavily – at least not expressly – on the *Charter* as such. Yet, one may ask if the day will come when the EFTA Court openly declares that “*voilà*, a universe of fundamental rights parallel to that under the *EU Charter of fundamental rights* has actually been established – or shall we say discovered – within EEA law”. As far

as the *Charter* runs parallel to the European Convention on Human Rights, this is, I believe, already the established legal situation.

26. The European development as to the protection of fundamental rights has an impact also on the domestic constitutional development. At this point I will, for obvious reasons, use Norway as the example:
27. As part of the Norwegian Constitution's bicentennial anniversary in May 2014 the Constitution went through a considerable modernisation and expansion as to the protection of fundamental rights. Numerous of the classic civil and political rights as prescribed by the major human rights conventions were taken into the Constitution itself, 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.
28. The *constitutional* and the *international* context for these rights and freedoms run more or less parallel and can hardly be separated. Accordingly, the Norwegian Supreme Court has, in its case law after the reform, stressed that the new constitutional rights and freedoms are to be understood "in the light of" their international background and origin. Perhaps not a very original approach. But nonetheless an important clarification as to the nature and function of those constitutional rights and as to the interpretation an application of the Constitution.
29. The method followed by the Supreme Court is inspired by, and in line with, the Parliament's view when amending the Constitution; the level of protection according to the Constitution shall not run short to that of the parallel convention rights. So, as to the interpretation and application of these new constitutional provisions, any applicable case law from the relevant international courts or tribunals should – still according to the parliamentary committee – be taken into account. Case law from the European Court of Human Rights will have a key position. But in principle, also any other relevant human rights treaty may be taken into account.
30. Although not formally *bound* by the international case law when interpreting the Norwegian Constitution, the Supreme Court should – still according to the parliamentary committee – not deviate from it without good cause. The preparatory work to the constitutional amendments in 2014 shows, moreover, that the international human right treaties were not the only source of inspiration. One also looked to the *EU Charter of fundamental rights*, both as to determining which rights and freedoms to include in the Constitution and as to the detailed structure and design.

31. So, it is to be assumed that case law on fundamental rights from the European Court of Justice may be taken into consideration when interpreting the parallel provisions in the Norwegian Constitution, let's say on the right to respect for private life or the general rule that the best interests of the child shall be a primary consideration. It goes without saying that any case law from the EFTA Court on corresponding fundamental rights within EEA law has similar relevance.
32. The Norwegian Supreme Court has, so far, not had the opportunity to deal extensively with every recommendation given by the parliamentary committee as to the methodological approach to the new constitutional provisions. But there can be no doubt that the Supreme Court has followed the transnational avenue recommended by the parliamentary committee, to the extent that established case law from the European Court of Human Rights has been applied in a similar manner when interpreting the Constitution as it would have been in the parallel interpretation of the European Convention on Human Rights. Although the technical approach may vary slightly from case to case, there is no doubt that the goal is to achieve *coherence*.
33. At the same time, the Supreme Court is indeed aware of the fact that there can be no formal binding as to the interpretation of the Norwegian Constitution and case law from international supervisory bodies: Accordingly, it has been emphasised in the Court's case law that it is the Norwegian Supreme Court – not the international supervisory bodies – that shall develop and clarify the Norwegian Constitution. By underlining this, the Supreme Court positioned the Norwegian Constitution as the fulcrum to the protection of fundamental rights in Norway.
34. These brief outlines must suffice: Contemporary law is dynamic and multidimensional. It is generated and refined by multiple and complex *national, international* and *supranational* motions. It should come as no surprise that the current legal culture – and thus also the identity of the judiciary – is developing across, and to a certain degree totally independent of, national borders.
35. A judge does not have the privilege of declaring “mission impossible” because adjudicating the case becomes too complicated. Faced with the dynamic forces of legal fragmentation and of overlapping jurisdictions, maintaining coherency within the law is of the very essence of judicial duty. This includes clarifying the proper interaction of legal rules on different levels, in order to secure that co-existent and partly integrated systems of law are functioning as a whole.

36. So it is not only about solving the case. It is also about refining law as such. Any court, and certainly any European apex court and the European courts in Luxembourg and Strasbourg, must target coherence as an objective for that particular court's efforts, on a case-by-case basis, as to clarifying and developing contemporary law. In the absence of clear rules and hierarchies of norms and tribunals, it goes without saying that these efforts will not have any prospects of success if performed solitarily or as a play of power, not in the true spirit of cooperation. Hence, the need for the dialogue of courts, procedurally and institutionally.
37. In the simple model of a national legal system, the apex court is functioning within a settled and defined legal framework governed by the constitution or other basic rules in domestic law. Contemporary law is evidently evolving beyond this framework, and has – as a consequence – moved the position and expanded the perspective of the domestic apex courts, redefining the role both towards the world outside and towards the other branches of government at domestic level.
38. There can be no doubt that this “transnationalisation of law” is posing substantial challenges to the domestic apex courts, in particular as to the *influx of legal material* and the need for *multi-layered methodological approaches*. The very nature of *judicial craftsmanship* is evolving. 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 bring about what is often referred to as “cross-fertilisation”. 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, moreover, facilitate quality, conversion and coherence as to the development of the judiciary and as to the interaction with other authorities, be it national or international. It is a challenge to the European apex courts to ensure that the evolution of the judicial craftsmanship and of the functioning of the judiciary remains a sound one, from both the European and from the domestic perspective.
39. Dear colleagues and friends! It has been forecasted that when the legal history of the early 21<sup>st</sup> century is to be written at some remote juncture, that will be a chronicle of courts taking a leading role in clarifying and developing the law and the systems of law. To this end, the European courts in Strasbourg and in Luxembourg have acquired a position that can hardly be overestimated.



40. However, this saga must also be that of *national courts*, clarifying and developing the law on domestic soil, cultivating it in the light of that particular nation's history, values, hopes and beliefs. Moreover, I trust it will be the history of supreme courts taking wise, sustainable and principled choices of legal policy, in accordance with the powers vested in the judiciary, in order to protect both the democracy and the rule of law.

Thank you very much!