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ROYAUME DE NORVÈGE / KINGDOM OF NORWAY /
KÖNIGREICH NORWEGEN / КОРОЛЕВСТВО НОРВЕГИЯ

The Supreme Court of Norway
Norges Høyesterett

Anglais / English / Englisch / английский

Cooperation of Constitutional Courts in Europe -

Current Situation and Perspectives

Questionnaire for the national reports

A few introductory remarks may prove useful for the understanding of the answers given below.

Norway has no separate constitutional court. The Supreme Court of Norway deals with all kinds of cases, both civil cases, criminal cases, administrative cases and cases related to constitutional questions.

Norway is not a member of the EU, but has access to EU's internal market through the European Economic Area Treaty (the EEA Treaty). As a consequence, Norway is not bound by decisions given by the Court of Justice of the European Union. To monitor the implementation of the EEA provisions, the EFTA Court has been set up. The EFTA Court decisions are formally no more than advisory opinions on the interpretation of the EEA Agreement. In this respect, the legal standing of the EFTA Court differs from that of the Court of Justice of the European Union. Another important difference between the EU and EEA law is that the latter does not have direct effect in domestic law. For an EEA provision to be enforceable by Norwegian courts, and thus establish rights and obligations for individuals, it is a necessary requirement that the provision is implemented into domestic law by an explicit decision by the relevant authorities.

When referring to Supreme Court case-law below, reference will be made to the official Norwegian Supreme Court Law Reports Norsk Retstidende (Rt.).

I. Constitutional courts between constitutional law and European law

1. Is the constitutional court obliged by law to consider European law in the performance of its tasks?

Answer: Yes. According to an unwritten principle, Norwegian courts are obliged to interpret national law in a way that does not conflict with our obligations under international law. This entails that Norwegian courts must take into consideration both treaty provisions and international case-law when Norwegian law is being applied in specific cases.

2. Are there any examples of references to international sources of law, such as

- a) the European Convention on Human Rights,
- b) the Charter of Fundamental Rights of the European Union,
- c) other instruments of international law at European level,
- d) other instruments of international law at international level?

Answer: The Supreme Court of Norway often makes reference to international sources of law. Most frequent are references to the European Convention on Human Rights and to Norwegian obligations under the European Economic Area (EEA) Agreement. References are also made to the provisions under the EU Agreement. There are fewer references to the Charter of Fundamental Rights of the European Union.

At the international level, references are often made to the UN International Covenant on Civil and Political Rights, the UN International Covenant on Economic, Social and Cultural Rights, the UN Convention on the Rights of the Child and the UN Convention on the Elimination of All Forms of Discrimination against Women.

3. Are there any specific provisions of constitutional law imposing a **legal** obligation on the constitutional court to consider decisions by European courts of justice?

Answer: No. On the contrary, Norwegian constitutional law establishes that the Supreme Court of Norway pronounces judgments in the final instance, and that the Supreme Court is completely independent. This formal principle was considered of paramount importance when the EEA agreement was drafted. For political reasons, Norway could not accept a treaty that entailed a surrender of legislative, administrative or judicial sovereignty.

4. Is the jurisprudence of the constitutional court influenced **in practice** by the jurisprudence of European courts of justice?

Answer: The formal provision stating that the Supreme Court of Norway is completely independent is in practice modified by the need for a consistent, homogenous and autonomous comprehension of EEA obligations throughout the whole of the EEA area. Norwegian courts will attach great importance to relevant decisions from the EFTA Court and the Court of Justice of the European Union, even though there is no formal obligation to do so.

5. Does the constitutional court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?

Answer: Yes, case-law from the Court of Justice of the European Union and the European Court of Human Rights are frequently used as references.

Significant examples from the Court of Justice of the European Union include

- Case C-348/98 Ferreira (ref the Supreme Court decisions Rt. 2012 page 1793, Rt. 2008 page 453, Rt. 2005 page 1365 and Rt. 2000 page 1811),
- Case C-6/90 Francovich (ref the Supreme Court decisions Rt. 2005 page 1365 and Rt. 2000 page 1811),
- Case C-341/05 Laval (ref the Supreme Court decision Rt. 2013 page 258),
- Case C-458/05 Jouini (ref the Supreme Court decisions Rt. 2012 page 983 and Rt. 2011 page 1755), and
- Case C-446/03 Marks & Spencer (ref the Supreme Court decisions Rt. 2007 page 140 and Rt. 2006 page 404).

Significant examples from the European Court of Human Rights include:

- Case of Üner v. The Netherlands (46410/99) (ref the Supreme Court decision Rt. 2012 page 2039),
- Case of Nunez v. Norway (55597/09), and case of Antwi and others v. Norway (26940/10) (ref the Supreme Court decisions Rt. 2012 page 1985, Rt. 2012 page 667 and Rt. 2011 page 1548),
- Case of Saunders v. United Kingdom (19187/91) (ref the Supreme Court decision Rt. 2013 page 323, Rt. 2011 page 800, Rt. 2007 page 932, Rt. 2004 page 134, Rt. 2000 page 996 and Rt. 1999 page 1269),
- Case of Welch v. United Kingdom (17440/90) (ref the Supreme Court decisions Rt. 2004 page 1500, Rt. 2003 page 1100, Rt. 2003 page 264, Rt. 2002 page 1271 and Rt. 2002 page 1216), and
- Case of Taxquet v. Belgium (926/05) (ref the Supreme Court decisions Rt. 2010 page 1018, Rt. 2009 page 773 and Rt. 2009 page 750).

6. Are there any examples of divergences in decisions taken by the constitutional court and the European courts of justice?

Answer: In one special example, the Supreme Court of Norway rejected to attaché decisive importance to an advisory opinion given by the EFTA Court. The case Rt. 2000 page 1811 Finanger concerned the interpretation of EEA provisions relating to insurance against civil liability in respect of the use of motor vehicles. Norwegian statutory rules limited the liability in cases where the passenger claiming compensation knew that the driver was under the influence of alcohol at the time of the car accident. Before deciding the case, the Supreme Court requested the EFTA Court for an advisory opinion on the interpretation of the relevant EEA provisions. In the case E-1/99 Storebrand Skadeforskring AS v. Finanger, the EFTA Court found that the Norwegian rules were incompatible with the EEA law.

The Supreme Court of Norway acknowledged the fact that the Norwegian rules were in conflict with our obligations under the EEA law, but concluded that the Norwegian rule should prevail. Crucial for the understanding of this decision is the fact that the EFTA Court's decisions are not legally binding, and that the EEA law does not have direct effect in Norway.

In the Finanger case, the Supreme Court of Norway found that although the EEA law was binding on the international level, the Norwegian implementation of these rules was faulty. As a consequence, the individual seeking compensation could not base her claim on any applicable domestic rule. Due to the dualist system, she could neither base her claim directly on the EEA provision.

It should be added that the Finanger case has had a long aftermath. The domestic law was changed to comply with the EFTA Court interpretation, and the passenger successfully sued the Norwegian state for the faulty implementation of the EEA provisions. The Norwegian state was held responsible for the economic loss occurred due to the incorrect implementation.

Another example is the Supreme Court decision Rt. 2010 page 1500. In this case five persons sought compensation from the Norwegian Government due to faulty implementation of EEA regulations concerning the taxation of share dividends across EEA borders. The Government liability depended, amongst other things, on whether the relevant EEA law conferring rights on the individuals was sufficiently established at the time of taxation. In this assessment, the Supreme Court found that the EFTA Court opinion in another case, E-1/04 Fokus Bank, could not be upheld. The reason was that the Court of Justice of the European Union held a different view in three cases rendered after the Fokus Bank case. The case illustrates that the Supreme Court of Norway considers itself entitled and also obliged to make an independent assessment of applicable EEA law, and not automatically adheres to the interpretations presented by the EFTA Court.

There are also examples of differing interpretations between the Supreme Court of Norway and the European Court of Human Rights. The case Lindheim and others v. Norway (13221/08 and 2139/10), is the most recent example. The European Court of Human Rights concluded that Norwegian domestic law that limited the possibility for landowners to increase rents to people leasing their land constituted a violation of Article 1 of Protocol No 1 (protection of property) of the European Convention on Human Rights. The Supreme Court had previously reached the opposite conclusion in the plenary decisions Rt. 2007 page 1281 and Rt. 2007 page 1306.

In another case, Nunez v. Norway (55597/09), the European Court of Human Rights concluded that the Norwegian decision to expel a national of the Dominican Republic constituted a violation of Article 8 (right to protection of private and family life) of the European Convention on Human Rights. The expulsion would separate the individual from her small children living in Norway. The case had earlier been tried before the Supreme Court of Norway, which concluded in the case Rt. 2009 page 534 that the expulsion did not constitute a violation of Article 8.

In both of the above-mentioned cases, the Supreme Court decision preceded the judgment rendered by the European Court of Human Rights. To our knowledge, the Supreme Court of Norway has never deliberately based its decisions on an interpretation of the European Convention on Human Rights that is in conflict with the views formulated by the European Court of Human Rights.

7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the constitutional court taking it into consideration in its decisions?

Answer: Yes. The Supreme Court practice is however not the sole reason why other national courts consider jurisprudence of the European courts. The obligation to construe national law in accordance with Norway's international treaty obligations applies to lower instance courts as well as to the Supreme Court of Norway.

8. Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national constitutional courts?

Answer: There are examples of the EFTA Court reacting to the jurisprudence of the Supreme Court of Norway, but these reactions might be seen more as obiter dictum remarks than decisive reasons for the EFTA Court's decision. One recent example is the EFTA court case E-3/12 Staten v/Arbeidsdepartementet v. Stig Arne Johnsson. The remarks given in paragraph 59-60, concerning the respect inter alia of the right of EEA workers to move freely, have been regarded as a reaction to the Supreme Court hesitation to accept the EFTA Court's views in case E-2/11 STX Norway Offshore AS v. Staten v/Tariffnemnda. The remarks did not, however, constitute deciding arguments in favour of the EFTA Court decision.

The European Court of Human Rights has in a similar matter reacted to the Norwegian Supreme Court case law in the case of *Taxquet v. Belgium* (926/05). In a concurring opinion, one of the judges criticized the Norwegian case-law-driven development of a requirement that verdicts given by a jury should be reasoned in exceptional cases.

In another example, *Shala v. Norway* (1195/10), the European Court of Human Rights used the Supreme Court case Rt. 2009 page 750 to support the view that the application was manifestly ill-founded. On this basis, the application was declared inadmissible.

II. Interactions between constitutional courts

1. Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European constitutional courts?

Answer: Yes. Recent examples include Rt. 2012 page 468, Rt. 2008 page 1078, Rt. 2006 page 1008 and Rt. 2004 page 1816 (references to the Swedish Supreme Court), and Rt. 2012 page 1985, Rt. 2007 page 1759 (references to the Danish Supreme Court), Rt. 2012 page 139 (reference to the British House of Lords), and Rt. 2011 page 1581 (reference to the French Conseil d'Etat).

2. If so, does the constitutional court tend to refer primarily to jurisprudence from the same language area?

Answer: References are most commonly made to jurisprudence of the Swedish and Danish Supreme Courts – both within Norway's language area. An important reason might be the extensive legislative co-operation between the Nordic countries. Nordic case-law is also more accessible due to common cultural background and similar languages.

3. In which fields of law (civil law, criminal law, public law) does the constitutional court refer to the jurisprudence of other European or non-European constitutional courts?

Answer: The Supreme Court of Norway refers to the jurisprudence of other European constitutional courts in the areas of both civil and public law. The examples given above relate to bankruptcy, insurance, private international law, torts, administrative law and tax law.

4. Have decisions of the constitutional court noticeably influenced the jurisprudence of foreign constitutional courts?

Answer: Not to our knowledge.

5. Are there any forms of cooperation going beyond the mutual acknowledgement of court decisions?

Answer: The Nordic countries co-operate on the legislative field, for example in the areas of contract law, torts, intellectual property rights and criminal law. In addition, the Nordic countries co-operate on other areas in the justice sector, e.g. co-operation and the sharing of information on issues affecting the police, prosecution and court services. Nordic co-operation is also ongoing in criminology and the care of offenders.

In addition, the Supreme Court of Norway participates in the Council of Europe's advisory body on constitutional matters: the European Commission for Democracy through Law ("The Venice Commission"). The Supreme Court of Norway is also a member of different international organizations, for example: Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA Europe), Network of the Presidents of the Supreme Judicial Courts of the European Union and The International Association of Supreme Administrative Jurisdictions (IASAJ).

III. Interactions between European courts in the jurisprudence of constitutional courts

1. Do references to European Union law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the constitutional court?

Answer: Under the EEA law there is no obligation on the EFTA states to refer unsolved EEA law questions to the EFTA Court. However, in the case E-18/11 Irish Bank Resolution Corporation Ltd v. Kaupthing hf, the EFTA Court stated that a refusal of a motion to ask the EFTA Court for an advisory opinion "may fall foul of the standards of Article 6(1)" of the European Convention on human Rights. The Court also stated that the provisions of the EEA Agreement are to be interpreted in the light of fundamental rights, and that the provisions of the European Convention on Human Rights and the judgments rendered by the European Court of Human Rights are important sources for determining the scope of these fundamental rights.

Nonetheless, the interaction between the European Court of Human Rights and the EFTA Court impacts the Supreme Court jurisprudence to a very little extent.

2. How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the European Union?

Answer: The impact of the Supreme Court on the interaction between the European Court of Human Rights and the Court of Justice of the European Union is also very little.

3. Do differences between the jurisprudence of the European Court of Human Rights, on the one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the constitutional court?

Answer: Norwegian courts will attach great importance to decisions from both the Court of Justice of the European Union and the European Court of Human Rights. Norwegian courts will also respect the EU-driven development in the jurisprudence of the European Court of Human Rights, and vice versa.