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The Norwegian legal system, the work of the Appeals Committee and the role of precedent in Norwegian law

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I Introductory remarks

I was originally asked to speak to you about the use of precedents in Norwegian law, but the request was soon enlarged to include the topic of appeals selection by the Supreme Court. In order to be able to address these two issues I have in order to give a background felt it necessary to include an introductory presentation of the Norwegian court structure as well as on Norwegian law. I thought that you might also be interested in some information about the process of appointment of judges, and the way that individual judges may be disciplined in Norway. Of course I'll be open to give you any other information that you might desire at the end of my presentation.

II The court structure

There are three main levels of courts, and they are the same both in civil and criminal cases. At the first level there are 68/67 district courts each with a geographically delimited area. At the next level we have six courts of appeal – each responsible for a geographically limited area and at the highest level there is the Supreme Court.

The court system does not include separate administrative courts. Cases concerning administrative matters are heard by the ordinary courts. Norwegian courts are empowered to review whether Government decisions comply with the law. Generally such cases are civil cases, and the question to be decided by the courts is whether the administrative decision is valid or not.

All Norwegian Courts are empowered to review whether Government decisions comply with the law and whether legislation adopted by the Parliament is constitutional or contrary to international obligations.

All cases, civil as well as criminal, start at the district court level. The decisions/judgements of the district courts are appealed to the courts of appeal and from there to the Supreme Court. However, there is a limited possibility to request permission to appeal a judgement by the district court directly to the Supreme Court. Such permission – also known as leave to appeal – is not often granted, but if the case raises questions of a more general nature, e.g. whether legislation has been adopted in conflict with the Constitution or raises questions concerning the compatibility of Norwegian statutory rules with provisions in human rights conventions that Norway has ratified.

There are very few special courts in Norway. The general court structure includes the Land Consolidation Courts. In addition there are certain administrative questions that are dealt with in a semi judicial manner by administrative organs. The validity of their decisions can be adjudicated. With the exception of decisions by the Social Welfare Court, where an appeal has to be lodged with the Court of appeal, all cases start at the district court level.

III. The recruitment of the Norwegian judiciary

There are certain statutory prerequisites for the appointment of judges: Only Norwegian citizens with a right to vote may be appointed; judges must have a law degree with the best or second best grade, and there is an age requirement (Supreme Court justices 30 and 25 for the other judges); the judges must also be economically reliable.

It is a guiding principle in the appointment of judges that the judiciary should represent a broad spectrum of working experiences. Accordingly judges are recruited from various positions

within public administration, local authorities, the prosecuting authority, private law-firms, the universities etc. Another guiding principle is that the judiciary should represent high professional skills. When assessing applicants, considerable weight is put on the law school examination grades as well as other indicators of professional skills.

These principles apply whether recruiting Supreme Court Justices or judges to the lower courts. It is considered especially important that experience from different parts of the legal profession is represented in the Supreme Court.

The King in Council, following a statutory procedure, appoints judges. Vacant posts are made public, and those interested have to submit an application. A Nomination Council, composed of three judges, an advocate, a lawyer representing the public sector and two laymen, evaluates the applicants and gives a written recommendation to the Minister of Justice. Prior to giving its recommendation, the Nomination Council arranges interviews, gathers information and hears the opinion of the leader of the court in question.

As a rule the Nomination Council recommends three applicants – if possible – for each vacant post, and it has to give reasons for its choice. If the Minister wants to appoint someone who was not on the list from the Nomination Council, he has to request an opinion about this person from the Nomination Council.

The process is open to the public: the names of applicants are publicized; the recommendation from the Nomination Council is made available on the internet (but not the reasons for it) as well as the appointment itself.

The Nomination Council has the power to appoint temporary judges for the District Courts and Courts of Appeal when the duration of the appointment is less than a year. The King in Council makes other temporary appointments.

There is no examination in connection with the recruitment procedure. No other public authority than the King in Council and the Nomination Council may appoint judges.

There is no probative period for judges, and the appointment is not limited by time. The age limit is 70 years. But as judges are included in the national security system they have a right to retirement with a pension from the age of 67.

It does not follow explicitly from the Norwegian constitution that judges are independent. But the principle of judicial independence is still a fundamental principle in the Norwegian Constitution, which is based on the principle of division of powers. The principle is also expressed explicitly in section 55 of the Courts of Law Statute which states that a "judge is independent in his/her judicial work". There is no interference from other judges, or any other third party. In principle the only way to influence the handling and the outcome of a case is through appeal.

IV Administration of the Courts

To safeguard the independence of the courts, the administration of the courts is organised through a separate National Courts Administration, separated from the Ministry of Justice and Police. The Courts Administration is governed by a board consisting of nine members: two elected by Parliament, three judges, one land consolidation judge, one employee of the courts and two lawyers appointed by the King in Cabinet.

The Court Administration will present a budget proposal, but the budget for the courts is part of the budget of the Ministry of Justice and the Police, as part of the Ministry's annual national budget proposal, and it is Parliament that makes the necessary funds available through its adoption of the budget. The funding influences the work of the courts.

The National Court Administration is the central support and service organ for the courts. It is responsible for the professional training and additional education for judges. Seminars, courses, lectures and educational stays are arranged, and funding for local and regional educational programs is granted.

The NCA is also responsible for arranging a series of five courses aimed at newly appointed judges. The courses deal with issues such as ethics, media handling, witness psychology and issues within procedural and criminal law. These courses are mandatory, and the duration of each course is four days.

V Disciplinary questions

Parties, witnesses, indicted or lawyers, who have been subjected to alleged misconduct by a judge in the performance of his or her office, may bring a complaint against the judge to the Supervisory Committee for Judges. The Committee is a separate, administrative, collegiate body composed of six persons: Two representing the public, two ordinary judges, one judge from the land consolidation courts and one practising lawyer – all appointed by the government. If professional misconduct is revealed, the Committee can react with authoritative criticism in the form of "criticism or a warning", where the latter is the strongest reaction. The decisions by the Committee are made public on the Internet and in addition it issues its own year report.

In addition a judge may be liable for prosecution under the Criminal Code for misconduct. Pursuant to Article 22 of the Constitution, a judge may only be discharged or transferred outside the profession following a trial and judgement. A judge may be liable in tort for damages caused by his miscarriage of justice. In the case of Justices of the Supreme Court there is a special procedure envisaged in the Constitution.

VI The Norwegian legal system

The Norwegian legal system has its origin in old Nordic traditions but has over the years been influenced by German/Austrian/French legal thinking as well as Anglo-Saxon law. During the last century the Nordic countries cooperated a lot in the elaboration of legislation in the civil law area, and I think that there is a Nordic legal system. However, there are noticeable variations between the five countries, especially when it comes to questions of procedural rules. Here the Eastern and Western Nordic countries follow different traditions. The same applies to administrative law.

In the Nordic countries legislation has traditionally been drafted in more general terms, and when applying a statutory rule to the facts of a case, courts – in addition to the wording of the applicable legal provisions – study the preparatory work from Parliament and the government as well as previous decisions where the Supreme Court has applied the same statutory rules, but in a different factual setting. Legal writing is also utilized as a tool to establish the contents of the applicable legislative rule in the case. As you see the primary tools used in the interpretative

work of a judge are: the wording of the provision, preparatory works, and previous decisions interpreting the provisions – so called precedents.

I think it is fair to say that Norwegian judges use a dynamic approach to the interpretation of statutory provisions. Statutory provisions have often been interpreted in the light of modern needs. In certain areas the courts have also developed new law through decisions, one such area is torts and especially the introduction of strict liability.

VII. The work of the Supreme Court

1. General description

The Norwegian Supreme Court carries out its work in *four* different institutional forms. The daily work is carried out in *panels* of five Justices. Particularly important cases involving the compatibility of statutory legislation with constitutional provisions or international conventions made binding in municipal law should under the Dispute Act be tried by the Supreme Court sitting in *plenary*. Instead of a plenary session the Supreme Court may hear a case as a *Grand Chamber* with 11 Justices. This form that was new in 2008, has especially been used in connection with cases involving the compatibility of statutory rules with obligations emanating from international human rights conventions that have been made part of municipal law. Lastly, the *Appeals Committee of the Supreme Court*, made up of three Justices who sit on a rotation basis, has as its main task to decide appeals against interlocutory orders and examining appeals against judgements with a view to granting or refusing leave for the appeal to proceed.

With the exception of the Appeals Committee the Supreme Court decides almost all cases after hearing oral arguments advanced by lawyers on behalf of the parties involved. The procedure in the Appeals Committee is written. I think the Norwegian Supreme Court is quite extraordinary in the amount of time allotted to oral hearings in cases that have been granted leave. As a rule the panels sit in chambers hearing arguments four days a week, and they may during an ordinary week hear very divergent cases argued, e.g. whether a decision by the tax authorities should be upheld or set aside, whether the seller of a house is liable to the buyer for defects of that house, whether the lower courts have interpreted a provision of the Criminal Code rightly and if the punishment decided by the Court of Appeal should be changed. As you will see from these examples the Supreme Court decides a great variety of cases, and I would here like to stress that the same panel will deal with all cases – there is no such thing as a specialized Supreme Court

Justice in Norway. Let me add that Norwegian judges in general are not specialized but sit on all types of cases that are brought before the courts.

I would like to add that the Supreme Court never decides whether a person is guilty or not to a crime. The last instance in that respect is the Court of Appeal. However, the Supreme Court may set aside a judgement by the Court of Appeal and remit a case if the Supreme Court finds that the case has been decided on the basis of an erroneous interpretation of a statutory provision or that procedural rules have not been followed.

The main function of the Supreme Court is to contribute to the clarification and the unity of existing law and – to a certain extent – to the development of law. The implication of this is that individual justice should be dispensed in the courts of Appeal. I think this a necessary background for my two next items: "selection of cases" by the Appeals Committee and the task to develop "precedents".

Before I start on these two topics let me give you some figures: In 2009, 482 appeals against judgements and 478 appeals against interlocutory orders and decisions *in civil cases* (a total of 960) and 410 appeals against judgements and 644 appeals against interlocutory orders and decisions (a total of 1054) in criminal cases were handled by the Appeals Committee. In the same year the Supreme Court heard a total of 60 civil and 77 criminal cases. This implies that leave to appeal – against judgements – was granted in 12 % of the civil cases and in 17 % of the criminal cases. Even though the percentage may vary somewhat I think that these figures give a fair picture of the impact of the Appeals Committee on the workload of the Supreme Court.

2. Appeals Committee

All justices participate in the work of the Appeals Committee on a rotation basis (schedules of five weeks). As I said earlier the procedure here is written and three Justices decide in each case even though the committee generally has four of five members.

The task of the Committee is to decide appeals against interlocutory orders and decisions, which I'm not going to say more about, except that in some cases the Committee decides that appeals should be heard by a panel and decided after an oral hearing.

The second task of the Committee is as mentioned to grant or deny leave of appeal. In this context the task of the Supreme Court – as defined by the lawmaker – to achieve legal unification, legal clarification and to develop the law is of great importance together with the fact that the task of the court is not to dispense individual justice.

The statutory provisions on leave to appeal to the Supreme Court in the Criminal Procedure Code and the Dispute Act are short. Section 30-4 of the Dispute Act has the following wording:

> **"Section 30-4 Leave to appeal against judgments**
> **(1) Judgments cannot be appealed without leave. Leave can only be granted if the appeal concerns issues whose significance extends beyond the scope of the current case or if it is important for other reasons that the is case determined by the Supreme Court.**
> **(2) The issue of leave shall be determined for each appeal. Leave may be limited to specific claims and to specific grounds of appeal, including to specifically invoked errors in the application of law, procedure or the factual basis for the ruling.**
> **(3) The issue of leave shall be determined by the Appeals Committee of the Supreme Court by way of decision. A decision to refuse leave or to grant limited leave requires unanimity."**

The wording in section 323 of the Criminal Procedure Code is similar. To be allowed an appeal must concern issues that are of importance beyond the scope of the actual case, or that there are other reasons that necessitate that it be determined with by the Supreme Court.

The members of the Appeals Committee study the judgements by the lower courts, the arguments given for the appeal by the appellant as well as the arguments by the other party.

An appellant usually tries to show that the judgement is based on an erroneous understanding of the applicable legal provisions or that there are errors in the procedure, but may also argue that the Court of Appeal has misunderstood the evidence. In criminal cases the appeal often concerns the sentence (length or type).

In order to aid the Appeals Committee a memorandum presenting a sketch of the facts of the case, its procedural history, the arguments by the parties and comments on these arguments is prepared by one of the 17 law clerks that work for the Supreme Court, and specially the Appeals Committee. In the memorandum the law clerk will discuss previous decisions by the Supreme Court in similar cases as well as applicable legal literature. The justices add their comments to the remarks in the memorandum and focus on whether the appeal in their view raises issues where there is a need for the Supreme Court to express itself in order to give necessary guidance

to lower courts in their handling of similar cases. – The task to decide which appeals to permit and which to refuse is often difficult.

A decision to refuse leave of an appeal to proceed must be *unanimous.* If one of the three Justices finds that leave should be granted then the appeal goes to the Supreme Court. An appeal may be partially granted, i.e. certain arguments are denied and others allowed.

The caseload is divided evenly – and automatically – between the Justices who work on the Appeals Committee.

Without this possibility to select which cases to be granted leave for the appeal to proceed, the Norwegian Supreme Court would not be able to perform its functions in relation to the other courts.

3. *The establishment and use of precedent in Norway*

Judgements handed down by the Supreme Court, whether sitting as a panel of five, in Grand Chamber or in Plenary are considered as precedents by the lower courts and to a large degree also by the Supreme Court. The same applies to reasoned decisions by the Appeals Committee in cases concerning interlocutory orders or other decisions by a Court of Appeal.

As far as I know there has never been any legislative rule concerning establishing decisions by the Supreme Court as precedents that should be followed by the lower courts. The doctrine and practice of precedent has a long history. In a Statute from 1925 to amend the legislation relating to Høyesterett – no longer in force – one finds a regulation based on the presupposition that the Supreme Court as a rule follows its owns previous decisions and that it has the competence to overrule the same decisions. The Statute, however, did not constitute the basis either for a duty to follow or for a competence to overrule. Neither did it place any restraints on the Supreme Court's competence to delimit its own competence to overrule, that is to say, on the Court's competence to create a doctrine of precedent addressed to it. But the provision in the 1925 statue said that a panel of the Supreme Court can require that a case be decided in a plenary session when two or more members of the panel of five wish to overrule a previous decision by the Supreme Court. This provision was not kept when new procedural rules were adopted some years ago. As far as I can see, the entire concept of precedent is based on the power of the

Supreme Court to overturn judgements by the lower courts that do not follow earlier decisions of the Supreme Court – the vertical effect; and as far as the Supreme Court itself is concerned on the concept that even if it sits in panels of five or in an Appeals Committee the Court is a unity.

The content of the doctrine is that lower courts are bound by judgements by the Supreme Court as far as the Supreme Court has pronounced itself on the interpretation and applicability of legal provisions in a judgement/decision in a case where the factual circumstances are similar. The fact that the Supreme Court is the highest court in the country given the power in the Constitution to have the final say in a case, may explain why lower courts consider themselves bound by the judgments/decisions of the Supreme Court.

Similarly the Supreme Court as a starting point follows its own interpretation in later cases. The rationale here is the idea of the Court seen as one unity even though panels of five decide most cases – or the Appeals Committee consisting of three justices. I would like to add that there is a hierarchy: a panel of five will not often consider itself bound by a decision of the Appeals Committee. Likewise a Grand Chamber or Plenary may set precedents emanating from a panel aside. Of course you may also speak of weaker or stronger judgements by the Supreme Court. If a decision was taken by a split vote, it may be easier to just ignore it in the next similar case, or distinguish the issue in the new case in order to limit the impact of the previous judgement.

Furthermore there is a difference between pronouncements in a judgement that are necessary in order to allow the court to decide the case (the binding rule of the case often called ratio decidendi) and pronouncements that are not necessary (obiter dicta).
Strictly speaking only the rationes decidendi are binding, but obiter pronouncements may often be seen to have at least a persuasive impact in later cases.

Before I continue, I would like to stress that in my view the doctrine of precedent presupposes that judgements and decisions by the Supreme Court
are reasoned/motivated and that they are made known to/available for the lower courts as well as the legal environment and the general public – by being publicized on paper or by use of a database.

Judgments by the Supreme Court, as well as by the lower courts, have to be reasoned/motivated. There are statutory requirements to this effect both in the Criminal Procedure Code and the

Dispute Act. Very often the motivation by the Supreme Court goes quite far in explaining why the Court has found that a statutory rule has to be interpreted in a certain way, and how the Court has applied this rule to the facts of the case before it.

Norwegian judges draft/write their judgments/decisions themselves. A judgement in the Court of Appeal is presented as a collective motivation of the ultimate result, unless one of the judges wants to dissent. On the other hand a judgement by the Supreme Court is written in the first person and the other judges on that panel/Grand Chamber or Plenary may join it, dissent or concur in a separate opinion. Hence the individual viewpoint of a judge that has participated will always be known. In some cases there is a split 3-2, or similar in Plenary and Grand Chamber cases.

Generally speaking even a judgement decided by three votes against two will be considered binding on the lower courts in cases raising similar questions. Whether it binds the Supreme Court in a later similar case is a different question.

Precedents are used and discussed by the legal community in many different ways, both in judicial opinions and in legal writing. The courts in their judgements as a rule refer to the judgements/decisions by the Supreme Court by giving a reference to where you will find it in the Law Report. The reports often refer to the year, the page and paragraph where you will find the statement that the court applies. Also judgements or decisions from the Supreme Court itself contain references to previous judgements.

When an appeal is heard by the Supreme Court, lawyers are expected in their argument to refer to all relevant previous decisions by the Supreme Court and to argue to what extent they consider them decisive or not. In the lower courts it may suffice that the lawyers only refer to the more important judgements, but it is the task of the judge to ascertain applicable law.

Of course the Norwegian Supreme Court may decide to set aside a precedent. That can take place in an open way, explaining why the issue should be solved differently now, or by ignoring the fact that there is a precedent. In some cases the distinguishing technique is used.

The main advantage of the use of precedents is that similar cases are – hopefully – solved in the same way in different jurisdictions over the country; that the lower courts are guided in the

interpretation of the legislation; and that the Supreme Court does not have to attend to the same interpretative questions over and over again.

VIII Impact of human rights conventions on Norwegian law

I would like to end my presentation by discussing the impact that certain human rights conventions that Norway has ratified, have had on the work of the Supreme Court – and the lower courts – during the last decade or so.

Norway has ratified most of the existing human rights conventions and has also accepted the individual complaints system of the European Convention as well as the UN Covenant on Social and Political Rights. The European Convention was ratified as early as 1954 and the UN Covenant with it additional protocol in the 1970ies. Norway is a dualist country and any international obligations have to be transferred – in one way or other – to national/domestic law. I think it is fair to say the treaties had little impact on the work of the courts until the 1990ies, but until 2000 it was still not a dominant factor. This changed however in 1999 when the Norwegian Parliament adopted a statute whereby certain enumerated human rights conventions were given the status as Norwegian law, and the courts were empowered to set existing Norwegian legislation aside if they found that it would be in conflict with the human rights obligation. Since then the Norwegian courts and notably the Supreme Court has spent a lot of time interpreting the human rights obligations in order to give the lower courts the necessary guidance in their work. I think it is fair to say that the impact of our human rights obligations on many Norwegian legal rules has been quite significant.

The wording of the human rights conventions is often very general, and the organs that have been established to decide in the individual complaint cases have adopted a dynamic approach to their interpretation of the obligations that the conventions impose on the member governments. Even though the organs follow the rules found in articles 31 and 32 of the Vienna treaty on treaties, special emphasis is put on the purpose of the human rights convention – protection of an individual. The convention organs utilize its own interpretation of the terms utilized in the provisions of the Convention. Furthermore they follow the precedents established through earlier judgements, thereby often establishing more general rules of law.

The Norwegian courts have been mandated to apply the rules of the Conventions in cases before national courts in the same way these rules would have been applied by the convention organ – without developing the conventions. This is a most difficult task as it in the case of the European Human Rights Convention makes it necessary for us to study decisions by the Strasbourg Court not only in English, but also often in French. As to the UN Covenant the General Comments issued by the UN Human Rights Committee constitute a helpful tool. But it is a most demanding task for courts to apply the provisions of human rights conventions to domestic situations, but it is a task that must be undertaken nationally in order to lessen the burden of the organs that have been established to enforce the obligations under the conventions.