Iris Nguyên-Duy, Dept. Of Public and International Law

Introduction to the Norwegian Legal System

Lecture 2

”Norway & European Integration A Constitutional Perspective”
Norway and European Integration

I. The issue of sovereignty and supranational European integration – The constitutional background of the issue of Norway’s membership in/to the EU

II. Norway and the EU: Outside and inside at the same time

III. The effects of European integration
I. The issue of sovereignty and supranational European integration – The constitutional background of the issue of Norway’s membership in/to the EU

1. The tradition of dualism in Norway
2. The status of international law in Norwegian (domestic) law
3. How to enter into an international agreement in Norway [the normal procedure]
4. The challenge of (European) supranational cooperation – The problem of the nature of EU law and its impact on the national sovereignty
I. The constitutional background

1. The tradition of dualism in Norway

a. Monism

In States with a monist system, international law does not need to be translated into national law. It applies directly to the State’s legal order. The act of ratifying an international treaty immediately incorporates that international law into national law. International law can be applied directly and without transformation. International law can be directly applied by a national judge, and can be directly invoked by citizens, just as if it were national law.

b. Dualism

According to the dualist theory, national law and international law are two different and separate legal systems operating in different fields. International law is not directly applicable domestically. It must first be translated or transformed into national legislation by the competent political institutions of the legislative or of the executive, before it can be applied by the national courts and existing national law that contradicts international law must be modified, put aside or eliminated in order to conform to international law.

c. The legal basis for the tradition of “dualism” in Norway

Even though it is not explicit in the wording of the Constitution, many constitutional provisions show that the Norwegian legal system calls for dualism: Article 1; The provisions in Part C of the Constitution (§ 49); Part B (§ 3) and Part D (§ 88); art. 93.
Finanger I (Rt. 2000 s. 1811)

In the first Finanger case (Rt. 2000 s. 1811), there was a clear conflict between the wording of an EU/EEA directive and the domestic Car Liability Act implementing the directive.

The Norwegian government had misinterpreted a directive when transposing it to Norwegian law. The majority held that it then had to follow the text as adopted by the Norwegian parliament and not to give primacy to the directive.

The Supreme Court gave the precedence to the Norwegian legislation even though it was in conflict with EEA legal provisions that Norway was bound to respect, because they had not been properly transposed into Norwegian law.

NB: The courts usually manage to interpret national law in conformity with Norway’s international obligations.

In a follow up case, Finanger II (Rt. 2005 p. 1365), the Norwegian government was held liable for the loss incurred due to the erroneous transposition of the directive. A minority of the justices found that the government was not liable due to excusable erroneous interpretation of the provisions of the directive.
I. The constitutional background

2. The status of international law in Norwegian (domestic) law

NB! Note that I am using here the explanations I found on the Norwegian Government’s website and that the definitions of incorporation and transformation can vary from the ones you and I are usually familiar with.

Source (in Norwegian, for the explanations from a. to d.):

a. Passive transformation (acknowledgement/declaration of legal harmony – konstatering av rettsharmoni)

One possibility is that Norway declares or acknowledges the so-called “legal harmony”, between the dispositions of the new EEA act/rule and the domestic ones. This means that the EEA obligations are considered to be already covered by Norwegian law, and that one does not need to do anything further to ensure that they comply with the new act or rule. No new legislation is needed to implement the new EEA act/rule in Norwegian law.

In Norway, the passive transformation has been the traditional manner of implementing international conventions. But it is less used now.

b. Incorporation (inkorporasjon)

Incorporation means that the Norwegian authorities have to take the formal decision (usually in the form of an Act of Parliament) for an international convention to be part of and directly applicable in Norwegian law.

The official (“authentic”) wording of the convention will then apply, in line with other Norwegian legislation. The Norwegian translation of the Convention will be an important tool, but it is the original text that will be legally conclusive. The Convention shall be interpreted with regard to its international origin.
NB: The fact that a convention is incorporated does not in itself mean that it automatically supersedes or takes precedence over any other national legislation in the event of conflict. Any conflict between an incorporated convention and an other Norwegian law, must be resolved according to the Norwegian general principles of interpretation. The legal status of the convention can also be determined directly in the law.

For example, the Human Rights Act of 1999 (menneskerettsloven) is an example of a law that incorporates human rights conventions. The Human Rights Act § 3 states that the incorporated conventions take precedence over other legislative provisions in the event of conflict.

c. Transformation (transformasjon)

A third possible mechanism for the implementation of international law on the domestic legal order is the so-called “(active) transformation” – as opposed to “passive transformation” or legal harmony: Before any rule or principle of international law can have any effect within the domestic legal system, it must be expressly and specifically “transformed” into domestic law by the use of the appropriate constitutional machinery.

A convention is under transformation when it is translated, and sometimes even re-written, in Norwegian, in order to provide for a better expression (uttrykk) of the content of the convention when placed or assessed in a Norwegian context. Then it is adopted as a new law or incorporated in an already existing piece of legislation in the same field.

The transformation can be partial or total, it will take the form of one law or be scattered in different laws. Transformation can render it necessary to rewrite or modify the provisions of many Norwegian laws.
Full active transformation means to adopt a law which renders, in more or less processed or modified form, all the substantive provisions of a convention. It means to pass the provisions of a treaty or convention in statutory form. The final text is in Norwegian. There are no examples of “full transformation” in the Norwegian law in the human rights field.

**Partial active transformation** means to adopt legislative provisions that reflect, in a more or less processed/modified form, the conventional provisions when they naturally belong to Norwegian law (= “å vedta lovbestemmelser som gjengir, i mer eller mindre bearbeidet form, en konvensjons bestemmelser der de naturlig hører hjemme i det norske lovverket”).

### d. Combining incorporation and transformation

Another alternative is to combine partial active transformation and incorporation. For ex., this involves, first, transforming and amending Norwegian legislation so that it better matches with the requirements of the Convention, and then taking the formal decision that the Convention shall apply as Norwegian law.

For example, the FN’s Convention on the Rights of the Child is incorporated in Norwegian law by way of incorporation. In addition, some legislative provisions have been amended so as to render more “visible” some of the Convention’s provisions in Norwegian law.

Note also that the EEA Agreement has been both incorporated and transformed in Norwegian law: The 129 articles are incorporated by way of “formell lov” or Act of Parliament in the EEA law (EØS-loven) of November 27, 1992. The regulations and directives are both incorporated or transformed into Norwegian law, especially under the form of administrative regulations (forskrift).
e. Sector monism (sektormonisme)

When a domestic enactment includes a clause on the applicability - or even the priority or precedence - of international treaties or of a specific treaty in matters covered by the law in question (M. Scheinin), it is called “sector monism”.

It is a specific implementing method in Norwegian legislation that takes into account a dynamic development of international law.

A typical example of “sector monism” can be found in the field of civil procedure law (tvistemålsloven), immigration law (utlendingsloven), criminal law (codes of procedure and Penal code – straffeloven og straffeprosessloven). For example, in the Criminal Procedure Act, article 4 (introduced in 1962), it is stated: ”The provisions of this Act shall apply subject to such limitations as are recognised in international law or which derive from any agreement made with a foreign State.”

See also the decision of the Supreme Court “Bølgepapp” (Rt. 1994 s. 610).

f. The principle of presumption (presumsjonsprinsippet)

Traditionally Norwegian courts and authorities apply the principle of presumption of treaty conform interpretation when requested to interpret Norwegian legislation that is based on a treaty that Norway is bound by.

They do so so that Norwegian law does not conflict with the external obligations of Norway.

It is also presumed that the Norwegian authorities do not / did not mean to adopt rules or provisions that come in conflict with Norway’s international commitments, nor to maintain them when there now are new international obligations.
Of course, the interpretation must remain “reasonable” and cannot be equivalent to an amendment or to the repeal of the rule in question.

When the interpretation is of no help, the application of the international rule should be set aside and the solution should be found in domestic law.

Moreover, the principle has to be set aside when the Norwegian legislator, in connection with the adoption of Norwegian legislation, has clearly expressed its opinion on the interpretation of the actual provision.

The significance of this doctrine has been considerably enhanced with the EEA agreement, and, in most cases, it will fulfill the same function as the principle of direct effect in Community law: in other words, EEA rules can have legal implications even though they are not implemented by the Norwegian legislator.

g. The legal status of international law in national law (“short version”)
I. The constitutional background

3. How to enter into an international agreement in Norway [the normal procedure]

- Treaties involving *pure international cooperation* can be concluded by following the sole procedure of article 26 of the Constitution.

- According to **article 26** of the Constitution, that contains the main provisions for the conduct of foreign affairs:

  “The King has the right to call up troops, to engage in war in defense of the Realm and to make peace, to conclude and denounce treaties, to send and to receive diplomatic envoys.

  Treaties on matters of special importance, and, in all cases, treaties whose implementation, according to the Constitution, necessitates a new law or a decision by the Storting, are not binding until the Storting has given its consent thereto.”

NB: If the international treaties contain an element of *supranational cooperation*, the procedure of article 26 of the Constitution is not enough.
I. The constitutional background

4. The challenge of (European) supranational cooperation
   – The problem of the nature of EU law and its impact on the national sovereignty

→ Supra-national cooperation with direct effect is clearly contrary to the Norwegian Constitution. It is linked to the problem of the transfer of sovereignty. But there are (technical and constitutional) ways to overcome these limits or restrictions. Articles 93 and 112 offer two different possible alternatives if Norway wishes to join the European Union.

→ Read the article written by Eivind Smith on the subject.

a. Article 93 of the Constitution

b. Article 112 of the Constitution
I. 4. a. Article 93 of the Constitution

“In order to safeguard international peace and security or to promote the international rule of law and cooperation, the Storting may, by a three-fourths majority, consent that an international organisation to which Norway belongs or will belong shall have the right, within specified fields, to exercise powers which, in accordance with this Constitution, are normally vested in the authorities of the State, although not the power to alter this Constitution. For the Storting to grant such consent, at least two thirds of its Members shall be present, as required for proceedings for amending the Constitution.

The provisions of this Article do not apply in cases of membership in an international organisation whose decisions only have application for Norway exclusively under international law”.

I. 4. a. Article 93 of the Constitution

- Main purposes for the adoption of article 93
- Rules of procedure
- Material limits

→ Norway entered the EEA agreement (*EØS-avtalen*) by using the constitutional procedure of article 93 of the Constitution, instead of using the normal procedure of article 26 of the Constitution for binding international agreements or conventions.
I. 4. b. The alternative: Article 112 of the Constitution

The revision of the Constitution according to article 112

Article 112

“If experience shows that any part of this Constitution of the Kingdom of Norway ought to be amended, the proposal to this effect shall be submitted to the first, second or third Storting after a new General Election and be publicly announced in print. But it shall be left to the first, second or third Storting after the following General Election to decide whether or not the proposed amendment shall be adopted. Such amendment must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution, and such amendment requires that two thirds of the Storting agree thereto.

An amendment to the Constitution adopted in the manner aforesaid shall be signed by the President and the Secretary of the Storting, and shall be sent to the King for public announcement in print as an applicable provision of the Constitution of the Kingdom of Norway.”
I. 4. b. The alternative: Article 112 of the Constitution

Could article 112 of the Constitution be used to join the EU?

The pros and the cons (the obstacles)

• The pros
  • The formal conditions are not a problem: a less greater qualified majority is required (two thirds).
  • And the problems inherent to the (material) criterion “objectively defined fields” as established by article 93 may be overcome by conferring parliamentary consent to Norwegian membership in the EU through formal amendment of the Constitution by virtue of article 112.
  • The use of article 112 would also probably secure a calmer, quieter political atmosphere around the membership

• The cons
  BUT, even according to the wording of article 112, the road is not totally “open”: the principles and the spirit of the Constitution can be an obstacle, even if one has to distinguish between the 1814 and the present-day’s principles and spirit of the Constitution. There are limits to what Parliament, even as a derived constituent assembly, can do. Here the notion of supra-constitutionality comes to mind. It is difficult to deny that the principle of national sovereignty is a fundamental part of the spirit of the Constitution. There have been lots of doctrinal debates on the subject. However, many believe that article 1 does not constitute an absolute limit to the membership to EU
II. Norway and the EU: Outside and inside at the same time

1. Norway is not a member of the EU

2. The EEA agreement and Norway’s relationship with the EU

Read: EEA Review Committee, Outside and Inside – Norway’s agreements with the European Union, Official Norwegian Reports NOU 2012:2 (18 p.).

http://www.regjeringen.no/pages/36798821/PDFS/NOU201220120002000EN_PDFS.pdf

More documents (in Norwegian) www.europautredningen.no

For the alternative report: www.alternativprosjektet.no
II. Norway and the EU: Outside and inside at the same time

1. Norway is not a member of the EU
   
   a. Why did Norway not join the European Union?
   
   b. A short history of Norway and the EU

   • Between 1961 and 1967, Norway, Ireland, the UK and Denmark apply twice to join the European Economic Community (EEC), but the accession negotiations are suspended both times when French President Charles de Gaulle vetoes the UK’s membership application.

   • In 1972, a majority of Norwegians (53.5%) voted against European Community (EC) accession in a referendum.

   • In 1992, the EEA Agreement was signed between the EFTA States and the EC. Norway, Sweden, Finland and Austria applied for membership of the EU. [EFTA: European Free Trade Association]

   • In 1994, the EEA Agreement entered into force on 1 January 1994. A majority of Norwegians (52.2%) rejected membership of the European Union (EU) in a referendum.

   • In 2001, the Schengen Convention enters into force for Norway and the other Nordic countries. All passport control between Norway and the Schengen countries is abolished.

   • In 2004, the EU is enlarged with 10 new member states. The EEA Enlargement Agreement establishes a European Economic Area consisting of 25 EU member states and the EEA EFTA states Norway, Iceland and Liechtenstein.

   • In 2007, Romania and Bulgaria join the EU. The EEA is now made up of 30 European countries.
II. Norway and the EU: Outside and inside at the same time
2. The EEA agreement and Norway’s relationship with the EU

b. Other agreements
c. The Mission of Norway to the European Union (www.eu-norway.org)
II. 2. a. The EEA agreement

- The aim of the EEA agreement
- The institutions of the EEA
  - The EEA Joint Committee
  - The EEA Council
  - The EEA Consultative Committee
  - The EEA Joint Parliamentary Committee
  - The Standing Committee of the EFTA States
  - The EFTA Surveillance Authority (ESA)
  - The EFTA Court
The EFTA Court

Kilde: Foto: Robert Schilitz/EFTA-domstolen
II. 2. a. The EEA agreement
The two-pillar EEA structure

http://efta.int/eea/eea-institutions.aspx
II. 2. a. The EEA agreement

The fundamental institutional differences between the EEA and the EU

- The ratification of the EEA agreement did not entail transfer of legislative power from a contracting party to the institutions of the EEA.
- The EEA organs, though inspired by the Community ones, are unique.
- The dynamic development of the Agreement is provided for through the provisions of the decision-making procedure, including the provisions on the consequences of failure to reach the agreement. These provisions differ from the ones within the Union.
- Furthermore, there is no majority voting. All decisions in the EEA are taken by consensus between the Community and its member States, on the one hand, and of the three EFTA EEA countries, on the other.
II. 2. b. Other agreements

• The EEA and Norway Grants
• Justice and Home affairs & the Schengen agreement
  • The Stockholm agreement
  • The Schengen agreement / cooperation
• Other agreements:
  • The Dublin Convention
  • The European Migration Network
  • Europol
  • Eurojust
• Norway and the EU’s foreign and security policy

c. The Mission of Norway to the European Union

→ The Mission of Norway to the European Union represents the Norwegian government on all EU-related issues.
Norway in a European Perspective

http://commons.wikimedia.org/wiki/File:Supranational_European_Bodies-en.svg
Author: Supranational_European_Bodies-tr.svg: The Emirr; Wdcf
III. The effects of European integration

1. The effects on the Norwegian legal system as a whole
2. The effects on the Norwegian Parliament
3. The effects on the Norwegian Judiciary
2. The Effects on the Norwegian Parliament

The EEA Agreement has meant transfer of REAL – if not formal – power from the Storting to the Community institutions and, at the same time, it has led to a shift in the balance of powers weakening the Parliament while strengthening the Government, the administration and the courts.

Different functions of Parliament have been weakened by the europeanisation process:

- mainly the legislative one (The Storting has not transferred any formal legislative powers, but the ceding of real legislative power is vast and for most practical purposes the Storting is in the same situation as other national parliaments of the EU. Formally, the legislative process is often curtailed, more hasty and not as well and thoroughly thought through as it should because of the amount of work and bec. of the time limits. Materially speaking, the EEA Agreement entails a massive transfer of legislative power from the Storting. Within the framework of the EEA Agreement, Parliament is in reality no longer the lawmaker, but must be content with enforcing the rules that have been designed at EU level.), but also, to a much lesser extent,

- the financial and budgetary powers of Parliament (These two last powers were less affected than those of the members states because the EEA does not cover the EMU or the taxation policy).

- Its control function and

- its function as an arena for political debate have also been undermined.
According to the report “Outside and Inside”, EU law has been incorporated to some extent into around 170 out of the 600 Norwegian statutes and approximatively a thousand (1000) administrative regulations.

Only a few fields are less “europeanised”, such as agriculture (landbruket), fisheries (fiskeripolitikken), trade policy with third countries (handelspolitikk med tredjeland). And Norway is not part of the Eurozone.

3. The effects on the Norwegian Judiciary

As a general rule, Norwegian courts have to apply the law as adopted by the Parliament (or the administration’s regulations).

However, when interpreting the rules that have an EEA background, the judges have to use the **same methods as those applied by the EFTA court and the ECJ**, and not the methods of interpretation that are otherwise used by Norwegian lawyers. Cf. also art. 6 of the EEA Agreement.

Most of the **acquis communautaire** has been transposed to Norwegian legal texts. The difficulty, for the Norwegian lawyer is to determine whether the provisions in question originate from the transposed acquis, especially when the transposed acquis has been placed in a statute or regulation that also contains provisions that have a “national” origin.

Often, the lawyers and the judges themselves may have difficulties in perceiving the different origins of an applicable law in a given case.

And the extensively purposive method of interpretation used by the Luxembourg courts also tend to create difficulties.

But, all in all, if we focus on the national balance of power in Norway only, it is the **courts** that have been **strengthened at the expense of the legislative and the executive power**. It is one of the conclusions the EEA Review Committee came to in January 2012.