**The openness of national legal orders to international law in the 21st century: the case of Norway**

**Research initiative by PluriCourts and The Faculty of Law, University of Oslo**

Concept note

In the course of the last decades, the use and application of international law in the domestic context has increased dramatically. This is reflected in the practice of domestic courts, which in the contemporary context regularly include matters of international law, such as questions of immunities, human rights, jurisdiction, recognition of foreign governments, international environmental law, refugee-related issues, and treaty law more generally. As observed by Lord Bingham in 2005, "To an extent almost unimaginable even thirty years ago, national courts in this and other countries…consider and resolve issues turning on…international law…routinely, and often in cases of great importance".[1] Similarly, in a recent interview in which he reflected on a more than two decades-long tenure as a judge at the Norwegian Supreme Court, Magnus Matningsdal pointed to the dramatic increase in the domestic relevance of international law as by far the most significant development in the course of his tenure.[2]

The reasons for the increased presence of international law in the domestic context are manifold. The general process of globalization has led to the expansion of international regulation within a range of different areas, from the law of the sea to international trade and human rights. The development of international law from a system of norms having an almost exclusive inter-state focus to a system increasingly concerned with measures by states in their internal spheres, has increased the potential for friction between government action in the domestic sphere and international regulation. Examples include international human rights and criminal law, but also restrictions or requirements addressed to states in international trade and investment law, and in international environmental law. In contrast to the inter-state focused 'Westphalian' international law, the international law of the 21st century is increasingly 'inward-looking'. Finally, the rise of international organizations, and not least international courts, are important.

As the role and relevance of international law in the domestic context increase, so does the need to understand the interrelationship between the internal and external legal spheres of states. What are the normative arguments for relying on international law in a domestic context? Under which conditions can legal arguments be based on sources of international law? On what conditions can legal disputes concerning questions of international law be subjected to litigation before domestic courts? How are normative conflicts between domestic law and international obligations of the state to be resolved? What is the municipal judge to do when asked to adjudicate on a question of international law involving a sensitive matter of foreign affairs? To what extent and in what ways does the application of international law in the domestic context engage constitutional questions concerning the separation of powers? Finally, how do politics and political developments affect the interface between domestic law and international law?

[1] Shaheed, Fatima, *The Domestic Application of International Law in British Courts,* in Bradley, Curtis A. (ed.), *The Oxford Handbook of Comparative Foreign Relations Law,* Oxford University Press (2019), p. 486, referencing Shaheed, Fatima, *Using International Law in Domestic Courts,* Hart Publishing (2005).

[2] https://rett24.no/articles/etter-seks-tiar-som-dommer-gar-magnus-matningsdal-av-til-hosten

Traditionally, the relationship between domestic law and international law has been approached from the perspective of a binary distinction between monism and dualism. The term monism is taken to denote a fully integrated and hierarchical legal system in which international legal sources are directly applicable in the domestic context. The term dualism, on the other hand, is taken to refer to a secluded relationship between domestic law and international law, according to which domestic law is a distinct legal system and international legal sources have no direct relevance in the domestic context without some act of incorporation. In recent decades, this binary approach has increasingly been exposed as lacking in explanatory force. Few domestic legal systems, if any, seem to fit neatly as either strictly monist or strictly dualist in their approach to international law. The precise relationship of any domestic order with international law seems, rather, to be more complex and lying somewhere in between these outer positions drawing on elements of both approaches.

For example, although the US legal system has traditionally been designated as following a 'monist' approach to international law, US law still distinguishes between various sources of international law in terms of their relevance in the domestic context. Whilst treaties ratified by the United States is recognised by the American constitution as forming part of the law of the land, there is, for example, no similar provision for the direct relevance of non-treaty based international law. Moreover, US jurisprudence has also seen the emergence of many doctrines that blunt the effect of the constitutional principle of direct applicability of treaty obligations in US domestic law. Examples include the doctrine of non-self-executing treaties and the notion of a 'foreign affairs exceptionalism' in US foreign relations law.[3] There are thus elements of both monism and dualism in the US approach.

A similar mixed outlook can also be found in jurisdictions generally designated as following a 'dualist' approach to international law. The UK, for instance, treats customary international law as an integral part of the common law although the basic constitutional position of the UK legal system is that there is a dualist relationship between UK law and international law.[4] In Germany, the Basic Law provides that general international law forms an integral part of German law, whilst treaties, on the other hand, generally require an act of incorporation in order to be applicable at the domestic level. In Norway, significant parts of international law is given direct applicability through the inclusion of open-ended harmonisation provisions in legislative acts, essentially establishing a far-reaching and complex system of 'sectoral-monism', even though there is a fundamentally dualist approach to international law at the constitutional level.

These examples illustrate that the interrelationship between international law and domestic law in the 21st century context is more complex and dynamic than the dualism/monism dichotomy can fully account for. Dualism and monism appear to be important as constitutional starting points (or guiding principles) for any legal system's ordering of the relationship with international law. But these starting points are modified through constitutional principles for the separations of powers, through the emergence of doctrines for consistent interpretation or presumptions of compatibility, through various doctrines and techniques of application that serves to tame the effect of international law in the domestic context, or through the introduction of international law via legislation. Hence, the precise relationship between domestic law and international law seems more accurately described as eclectic rather than streamlined, and as being moved by various factors, normative concerns,

[3] Bradley, Curtis A., *What is Foreign Relations Law,* in Bradley, Curtis A. (ed.)*, The Oxford Handbook of Comparative Foreign Relations Law,* Oxford University Press (2019).
[4] Shaheed, Fatima, *The Domestic Application of International Law in British Courts,* in Bradley, Curtis A. (ed.)*, The Oxford Handbook of Comparative Foreign Relations Law,* Oxford University Press (2019).

processes and techniques creating openings for international law and factors, concerns, processes and techniques setting up barriers against such openings.

The present research initiative seeks to assess and discuss the interrelationship between Norwegian law and international law. The initiative is a cooperative effort by PluriCourts and the Faculty of Law at the University of Oslo. The main focus of the initiative is to generate research on the legal dimensions of the interrelationship between Norwegian law and international law as seen in a comparative context. At the same time, the research initiative also aims to include research focusing on normative and political aspects, discussing the law and its logic in context. Finally, the initiative will provide guidance for the development of the educational curricula at the University of Oslo pertaining to the relationship between international and national law.

*Constitutional aspects*

Whilst it is clear that Norwegian law follows a fundamentally dualist approach to international law, there seems at the moment to be less clarity and discussion about the legal implications of this basic ordering and its constitutional basis. Does the relationship between international law and national law follow from the Constitution? What effect does international law have on the interpretation of the Constitution itself? To what extent does the reception of international law into Norwegian law engage questions concerning the constitutional separation of powers? Is the principle of parliamentary sovereignty, which is codified in Articles 49 and 75 of the Norwegian constitution, actively applied in discussions about the relevance of international law as a counter-force against the direct applicability of treaty law without prior parliamentary approval? Should it be? To what extent does the principle of legality inform discussions about the application of international law in matters concerning individuals? And does the practice of courts and executive agencies suggest that there is a doctrine of 'foreign affairs exceptionalism' in Norway, similar to that which has been claimed to exist in the US[5] system according to which constitutional constraints and the judicial role is practiced more relaxed than in cases concerning domestic law?

*Incorporation through legislation*

Another aspect concerns the techniques for the reception of international law through legislation. In this regard, one standout observation regarding Norwegian law is the widespread resort to general harmonization clauses in domestic legislation, creating multiple spaces of 'sector-monism' across Norwegian legislation. Why is this technique so frequently applied in the Norwegian context? What concerns does it engage in terms of the separation of powers, considering that treaty-making competence is placed with the executive and enforcement competence with the judiciary? Has the use of sector-monism provisions led Norwegian courts, similarly to domestic courts in the USA, to develop avoidance techniques that serve to blunt the openness between domestic law and international law, such as doctrines of self-executing and non-self-executing treaties, or doctrines of foreign affairs exceptionalism? Is there a case for revisiting the resort to and scope of harmonization clauses in light of the expanding pace and scope of international regulation in the 21st century? In this regard, how would alternative techniques for the reception of international law fare with regard to the separation of powers and the interest in compliance with international obligations and the general effectiveness of international law?

[5] Bradley, Curtis A., *What is Foreign Relations Law,* in Bradley, Curtis A. (ed.)*, The Oxford Handbook of Comparative Foreign Relations Law,* Oxford University Press (2019).

*Relevant principles of interpretation*

Thirdly, in what ways and to what extent do techniques for the application of international law affect the relationship between Norwegian law and international law?[6] What is the reach of the presumption of compatibility (POC) between Norwegian law and international law? Is the POC interpreted and applied as a principle for resolution of normative conflict or as a principle for the general harmonisation of domestic law and international law on a systemic level? And what is there to be said about the POC from a normative perspective? This principle furthers the effectiveness of international law. Yet, in the context of an ever-expanding body of international regulation against which domestic rules might be harmonised, the POC also raises questions with regard to the separation of powers and the transparency and predictability of legislation. To what extent do Norwegian courts take such considerations into account when applying the POC?

*Migration of principles and methods*

A further topic may be to what extent elements of international law and its methods are borrowed/migrate to domestic law and its methods beyond what states originally intended. One example of such import of legal concepts is the international doctrines for proportionality testing, which has been increasingly integrated as a basis for proportionality balancing at the domestic level.

*The role of relevant actors*

Looking beyond the formal framework of the law, the interrelationship between domestic law and international law should also be assessed with a view to the strategies and postures adopted by domestic institutions and agents in relation to international law. To what extent do domestic courts, parliament, and the executive seek alignment, avoidance or contestation when engaging with questions of international law? To what extent, when and how do domestic institutions and agents have ambitions of developing international law (active approach), responding to international law (passive approach) or resisting international law (confrontational approach)? How can the strategies and postures adopted towards international law be explained, by reference to legal and non-legal considerations?

*Law and politics*

Lastly, what is the impact of geopolitics and current global trends on the interrelationship between domestic law and international law? To what extent does the relationship between Norwegian law and international law support the common presumption that smaller states generally favour international law, as this is seen as a means through which to increase international influence? To what extent do shifts in the global order affect the relationship between Norwegian law and international law? Does the possible gradual move away from a liberal, international and unipolar world order of the post-Cold War years to a more nationalistic and authoritarian world order affect ideas and perspectives at the domestic level as to how international law is and should be integrated into the domestic context? To what extent does these geopolitical aspects influence the strategies and postures of domestic institutions and agents in their engagement with international law and international institutions?

Oslo, 28 September 2021, Jørgen Skjold and Geir Ulfstein

[6] For a general discussion of such techniques of application, see the 2016 Report of the International Law Association Study Group on Principles on The Engagement of Domestic Courts with International Law, p. 10-13. The report is available on the following web-link: Conference Study Group Report Johannesburg 2016. (3).pdf