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Transnational Judicial Cooperation in the Light of Legal Pluralism: A Look at the Relationship between the EFTA Court and the Icelandic Courts

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Transnational judicial cooperation in the light of legal pluralism: A look at the relationship between the EFTA Court and the Icelandic courts

Abstract: Doctrines developed by the EFTA Court have placed considerable demands on national courts in the EFTA States. The Court now considers the EEA Agreement to form an "international treaty sui generis which contains a distinct legal order of its own." It would thus seem that EEA law has transformed into an independent legal order, and subsequently has a claim to validity which emulates the self-legitimising presentation of the EU legal order. This, however, is not an empirically verifiable fact, but a particular understanding which arises when one adopts the viewpoint of the EFTA Court. EEA law takes place in a different realm when interpreted and applied in the national order: this realm is essentially a construction of the constitutional order. Case law shows that the Icelandic Supreme Court is far from accepting all EEA judge-made principles. This study will describe a context of legal pluralism by reference to the Icelandic legal system and its relationship with the EEA legal order. To illustrate the discussion, the most important case law relative to the interaction between Icelandic laws and EEA law will be considered in the light of legal pluralism - particularly the principles of contrapunctual law designed by Miguel Maduro. The paper argues that the Supreme Court's internal domestic approach to the application of EEA law will inevitably become a source of fragmentation unless it takes place within an institutional framework of judicial tolerance and judicial dialogue.
Keywords Legal pluralism, EEA law, EFTA Court, Icelandic courts, EEA legal order, interpretation of legal rules

I. Introduction

The EEA Agreement, which is firmly entrenched in the EFTA States, has nowadays reached a certain level of development and implementation. The EEA legal order, through influx of new written legal material and judge-made law from the EFTA Court, accentuates the pluralist challenges facing the EFTA States. Nowadays, the classical dualist paradigm appears to be increasingly inadequate – descriptively as well as normatively – to explain how the EEA

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Agreement, an international treaty sui generis comprising its own specific legal order, fits into domestic practice. It is apparent that even with the best intentions there will be inadvertent clashes between EEA law and national law, as some of the solutions adopted by the Icelandic legislator may not always be in accordance with solutions derived from Europe. Such insufficiency in the Icelandic statutory framework poses distinctive challenges for the courts. On the one hand, judges operate within their own domestic legal order, and derive authority from their national constitutions. On the other, they are under an EEA obligation to facilitate the application of obligations imposed by the EEA legal order and assumed by the State.

Despite the problems posed by the development of the EEA legal order, most works on EEA law are characterised by an apparent absence of any discussion of legal theoretical questions. When reading EEA law, Norwegian and Icelandic public law specialists have usually limited themselves to a point of view internal to the State. This form of representation is conditioned by the constructs of national law and instinctively tries to fit the EEA entity into the familiar state-law concepts. The other side of the debate has adopted a point of view internal to the separate and independent EEA system. An analysis taking such a single "internal" approach towards the object of study is important and can of course be the "correct" one for its respective purposes. However, this is not the only view that should be adopted in a theoretical study of the subject matter. The paper argues that the legal reality of EEA law cannot be expressed with a simple reference to the dualist theory and the familiar state-law concepts. It maintains that a transfer of the theory of legal pluralism into the sphere of EEA law is necessary in order to account, descriptively and normatively, for the diversity within the EEA legal order, in general, and the links between national and EEA law, in particular.

In the last decade, commentators on international and European law have become increasingly aware of the partial and limited nature of particular perspectives and explored the idea of pluralism for understanding the complex relationship between national, international and EU legal systems.[1] It is a view of law that, according to *Neil MacCormick*, "allows of the possibility that different systems can overlap and interact, without necessarily requiring that one be subordinate or hierarchically inferior to the other or some third system."[2] The different elements of legal pluralism, of course, do *not* present themselves in the same manner in EEA law as in EU law. Indeed, as the EEA has developed its own formal and material legal

[1] As a theoretical term, legal pluralism first made its appearance in the 1993 article by Neil MacCormick, 'Beyond the Sovereign State', 56 *The Modern Law Review* (1993) 1-18. The concept later gained momentum with the Maastricht Judgment of the German Constitutional Court (Brunner v. European Union Treaty, [1994] 1 Common Market Law Reports).
[2] MacCormick, *ibid.*, 8.

principles, it has given rise to a new arrangement between national and EEA sources of law, or a special form of legal pluralism. This paper argues that the pluralist approach gives us effective tools for analysing the behaviour and practices of the EFTA Court and the EFTA States'national courts. In carrying out this pluralist analysis, Miguel Maduro's theory of legal reasoning will be used as an analytical tool to open up some issues regarding the relations between the EEA and Icelandic legal systems.

II. A look at the features of the EEA Agreement

A close look at the EEA Agreement suggests that it was created with the purpose of extending the internal market and its protections for individuals to the EFTA States without creating supranational institutions and thus necessitating the ceding of sovereignty from the States. The Agreement is based on reciprocal access based on the four freedoms and an internal common market. The central concept for this purpose is "homogeneity", which is the idea that EEA law shall, as far as possible, be interpreted and applied in the same way in the EU Member States and the EFTA States. Nonetheless, the EEA Agreement differs from the EU-treaties on many aspects. Article 7 EEA states that an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties. An act corresponding to an EEC directive shall be, or be made, part of their internal legal orders, but shall leave to the authorities of the Contracting Parties the choice of form and method of implementation. Furthermore, the preamble to Protocol 35 stipulates that the aim of achieving a homogeneous EEA, based on common rules, does not require the contracting parties to transfer legislative powers to any institution of the EEA. Therefore, the EEA Agreement lays down a somewhat dualist system for the relationship between EEA law and national law. This rationality informed the EFTA Court when the Court finally declared that the EU doctrines of direct effect and primacy could not be generated by the EEA Agreement alone, in its much-anticipated *Criminal proceedings against A* judgment of October 2007.[3] It follows that there does *not* exist any requirement on national courts to apply a rule of EEA law as an independent rule of decision in the national legal order, when that rule is not transposed, or not adequately so, in domestic law.

However, the EEA Agreement is not merely a regional treaty under international law. In its so-called "advisory opinions", the EFTA Court has had a significant impact on the substantive development of EEA law. The Court has encouraged the application and effectiveness of EEA law, despite refusing to allow their direct enforcement, by supplying the

[3] Case E-1/07 *Criminal proceedings against A*, [2007] EFTA Court Report, 245.

initial text of the Agreement with a number of principles. These include indirect effect,[4] "quasi-direct effect",[5] "quasi-primacy" (see analysis below), the principle of state liability (see analysis below), the principle of human rights,[6] and the principle of effective judicial protection[7]. Even though the Agreement does not explicitly provide for these doctrines, it contains certain elements from which these principles could be inferred with the adoption of a kind of teleological interpretation. Backed up by the recourse to the teleological interpretation, particularly associated with the ECJ, the EFTA Court developed its vision of the EEA to the extent that it now forms an "international treaty *sui generis* which contains a distinct legal order of its own."[8] It thus seems that although engendered by public international law, EEA law has more in common with EU law than international law. As a general rule, EEA law is interpreted on the basis of its own internal criteria of validity, much like EU law grounds its validity on EU law norms. That is, EEA law decides by itself, by virtue of its autonomy as a legal order, which norms belong to it and on the content and scope of these norms. It is furthermore a dynamic legal order: the dynamics of the homogeneity objective require that the Agreement is interpreted in a dynamic fashion by way of teleological/functional interpretive methodology which differs sharply from that of a conventional approach found in international law.

III. Juridical pluralism in the EEA

The theory of pluralism permits the existence of potentially conflicting claims in the interaction between legal orders and recognizes that such claims are equally valid from the internal point of view of the respective system.[9] However, this acceptance, that different legal orders each act as discrete units with autonomy, is only one part of the bigger picture. The

[4] See Case E-4/01 Karlsson [2002] EFTA Court Report 240, and more recently Case E-1/07 *Criminal proceedings against A*, [2007] EFTA Court Report, 245, where the EFTA Court stated: "it is inherent in the objectives of the EEA Agreement [...] as well as in Article 3 EEA, that national courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into national law, as far as possible in conformity with EEA law. Consequently, they must apply the interpretative methods recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule."
[5] The Court held in *Restamark* that it follows from Protocol 35 that individuals and economic operators must be entitled to invoke and claim at the national level any rights that could be derived from the provisions of the EEA Agreement (having been made part of the respective national legal order), as long as they are unconditional and sufficiently precise. See Case E-1/94 Restamark [1994-1995] EFTA Court Report 15, para. 77.
[6] Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185.
[7] See, for instance, Case E-2/10 *Kolbeinsson*, [2009-2010] EFTA Ct. Rep. 234, para. 47, where the EFTA Court stated that: "Article 3 EEA requires the Member States to take all measures necessary to guarantee the application and effectiveness of European law."
[8] Case E-9/97 Sveinbjörnsdóttir v Iceland [1998] EFTA Ct. Rep. 95, para. 59.
[9] See, for instance, Neil MacCormick 'The Maastricht-Urteil: Sovereignty Now', 1 *European Law Journal* (1999) 259–266.

theory also aims to impose some order and reduce tensions between the legal orders by allowing communication between the different perspectives.

As Maduro puts forth, the theory considers the national legal orders and the "global legal order" as a single broader common legal order, organised according to certain rules of engagement.[10] The characteristic element of exclusivity and separation of the legal orders (belonging to the same broader legal system) is therefore accompanied by a discourse between those legal orders. However, whether one finds more appropriate to conceptualize the character of the relationship between EEA law and national law as there being one broader legal order (composite of the coexisting national legal systems and the EEA legal order) or whether the EEA should be viewed as distinct from and separate from the EFTA States' legal systems, there is no doubt that EEA law cannot act autonomously from the rest of the legal actors. Whatever the general qualification may be, it is clear that we cannot hold such a transnational governmental entity apart from the bodies of law with which it comes into contact. The same can be said for the EFTA States' legal orders. At least in matters concerning EEA law, they have relinquished the right to act unilaterally, irrespective of the other legal orders. In this sense, they cannot be separated from the broader EEA system of which they are a part. Pluralism thus promotes the insight that there is interaction between the different legal orders. This begs the question of how cooperation and coherence can be secured in the relations between EEA law and the law of the EFTA States.

When this author turned to legal theorists who have been preoccupied with the theories of pluralism, it was Maduro who offered the right analytical tools to understand the relationship between EEA and EFTA States. However, various pluralist models have been advanced, and the choice of tools must be justified. *First*, Maduro's work remains one of the most fully developed with regard to the relationship between legal orders, for it gives useful guidance to the courts in exercising their judicial duties. More than a theory, Maduro's notion of legal pluralism is a *method* realized through application of the principles of contrapunctual law, the respect of which are intended to guarantee a mutual adaptation of legal orders with each other.[11] *Second*, the process of elimination led to this choice. Most legal theorists in this

[10] See Miguel Maduro 'Legal Travels and the Risk of legal Jet-Lag – The Judicial and Constitutional Challenges of legal Globalisation' in M. Monti et al. (eds), *Economic Law and Justice in Times of Globalisation, Festschrift for Carl Baudenbacher* (Nomos- Verlag, Baden-Baden, 2007) 175-190, at 177: "It is possible to have a coherent legal order in a context of competing determinations of the law so long as all the participants share the same commitment to a coherent legal order and adjust their competing claims in accordance with their commitment to engage in a coherent construction of a common legal order."

[11] Maduro advances four contrapunctual requirements (the principles of pluralism; consistency; vertical and horizontal coherence; universalisability; and institutional choice). The analysis will be restricted to the first three principles as the implications of the fourth principle of institutional choice (which accepts that courts can only go so far and suggests a resort to politics) reaches beyond the scope of this paper.

field have focused much of their attention on constitutional conflicts between the EU and Member States – i.e., the question of ultimate authority. However, within the EEA it is unhelpful to focus on the exceptional case of constitutional conflict, which cannot equally implode between the EEA and the EFTA States legal orders. The EFTA Court has *not* made a claim that EEA law is the supreme law of the land, taking primacy over conflicting national constitutional provisions in the EFTA States. The quasi-primay principle however requires the national courts to set aside a *statutory* provision conflicting with *implemented* EEA rules. EEA law therefore does not contain a principle of supremacy of EEA law equal to the principle of supremacy of EU law. Furthermore, the EFTA Court has confirmed that the Agreement does not demand that its norms become enforceable as *EEA law*, but rather that they become enforceable by the courts in the EFTA States as transformed *national law*. There are consequently no questions that need to be resolved to determine that the EFTA States' constitutional law takes precedence over any other national law, including implemented EEA law. Instead, the attention should be directed to the interaction between national and EEA law on a daily basis and cases of conflicts of a legal nature. Maduro's contrapunctual *principles* therefore offer effective tools for analysing the behaviour and practices of the EFTA Court and Icelandic courts, as they are intended to "guide the ordinary state of affairs"[12] in the day-to-day application of European and, more generally, transnational law[13] in different legal orders. Furthermore, although initially developed with regard to EU law, the contrapunctual setting is not exclusive to the EU.[14]

IV. The Sveinbjörnsdóttir and Einarsson cases

The EFTA Court's *Sveinbjörnsdóttir* (state liability) and *Einarsson* (quasi-primacy) cases and the Supreme Court's reaction to them are perhaps the best examples of how the EEA can be understood as the product of a discursive practice among the courts of a broader or "common legal order". Thus, in order to demonstrate how the EEA and Icelandic legal orders interact, despite differences in their conceptions of EEA law, Maduro's principles will be applied to these well-known cases. However, before doing so, a brief look at the judgments is in order.

[12] Miguel Maduro 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 501-537, at 532.
[13] *See* Miguel Maduro, *supra* note 10.
[14] This was made apparent in Maduro's contribution to a festschrift in honour of *Dr. Carl Baudenbacher*, president of the EFTA Court, where the author moves his framework to a wider regional context. See Miguel Maduro, *ibid.*

The EFTA Court's 1998 *Sveinbjörnsdóttir* case,[15] concerned Iceland's failure to (correctly) implement Directive 80/987/ EEC on the protection of employees against insolvent employers and the liability of an EFTA State. In the absence of any textual foundation, the Court held that it was a principle of the EEA Agreement that EFTA States must compensate damage caused to individuals by violations of EEA law imputed to them. In setting out its arguments, the Court interpreted the Agreement as being something more than a mere regional set of norms of international law:

> The Court concludes [...] that the EEA Agreement is an international treaty sui generis which contains a distinct legal order of its own. [...] The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law.[16]

In a later passage, the Court states:

> The Court finds that the homogeneity objective and the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities are so strongly expressed in the EEA Agreement that the EFTA States must be obliged to provide for compensation for loss and damage caused to an individual by incorrect implementation of a directive.[17]

To briefly summarize the reasoning in *Sveinbjörnsdóttir*, the Court provided several legal justifications for its intervention through the state liability doctrine. The Court rejected a wide interpretation of Article 6 EEA as the basis of EEA law state liability and resisted making any reference to the ECJ case law. It rather relied on the interrelated concepts of purposes, homogeneity, role played by individuals, loyal cooperation and nature of the EEA Agreement. Consequently, the principle was necessitated by the underlying need for rendering EEA rights effective, i.e., on functional grounds.

Subsequent to the EFTA Court ruling, the Icelandic Supreme Court (Hrd. 1999.4916) emphasized that, in accordance with the Icelandic Constitution, it had to assess independently whether state liability had a legal basis in domestic law. It noted that it follows from the loyalty obligation in Article 3 EEA, in combination with Article 7 EEA, that Iceland is under a duty to implement Community acts - which have been adopted by the EEA joint Committee

[15] Case E-9/97 Sveinbjörnsdóttir *v Iceland* [1998] EFTA Ct. Rep. 95.
[16] Sveinbjörnsdóttir, at para. 59.
[17] Sveinbjörnsdóttir, at para. 60

- and to accord individuals their rights leading from them. It further held that if the directive at issue had been properly implemented, Ms. Sveinbjörnsdóttir would have received payment of her wage claims. It then stated that, while the EEA agreement did not entail a transfer of legislative powers, the text of the agreement had been enacted in national law. It then stipulated:

> ... [i]t is appropriate that the act, giving legal force to the main part of the Agreement, is interpreted in such a way that individuals have a claim to Icelandic legislation being brought in harmony with EEA rules. Insofar this is not accomplished, it follows from Act No 2/1993 and the fundamental principles and purposes of the EEA Agreement that [the state] undertakes a liability under Icelandic law. Based on this, as well as the origins and purposes of act No. 2/1993, the duty of [the state] to pay compensation because of the unsatisfactory implementation of the directive has sufficient legal basis in that act.

To summarize, it follows from the judgment that the Supreme Court recognizes this obligation of the Icelandic State as valid, within its jurisdiction, only because of Icelandic legislation in the form of the internal EEA Act. It thus follows that the application of the obligation is controlled by the national courts.

We now turn to the EFTA Court's *Einarsson judgment*,[18] which concerned a differentiated taxation scheme for books in Iceland. The Reykjavík District Court raised the question of whether the EEA Agreement contains any provisions dictating what rules should apply if the Icelandic law relevant in the case was deemed incompatible with the EEA Agreement. The Icelandic Government argued that the EEA Agreement does not contain any specific rules on the issue of conflict between national rules and EEA rules. It submitted that Protocol 35 simply imposes a duty on EFTA States to introduce a statutory provision to the effect that EEA rules are to prevail in cases of conflict between implemented EEA rules and other statutory provisions, but as clearly stated in the preamble to Protocol 35, this must be achieved though national measures.[19]

The EFTA Court, however, rejected the Government's proposition and adopted an expansive interpretation of the Protocol's scope. It stated that if a provision of national law is incompatible with implemented EEA law, "... a situation has arisen which is governed by the undertaking assumed by the EFTA States under Protocol 35 to the EEA Agreement, the premise of which is that the implemented EEA rule shall prevail." The EFTA Court's view is,

[18] Case E-1/01 Einarsson [2002] EFTA Court Report 1.
[19] Written Observations from intervening parties in the Case, para. 70.

therefore, that it flows from Protocol 35 that EEA rules introduced into the EFTA States legal order must prevail over conflicting internal provisions, provided they are unconditional and sufficiently precise. The president of the EFTA Court, *Carl Baudenbacher*, who himself participated in the case, asserts that the decision established "quasi-primacy" as a principle which follows directly from the EEA Agreement.[20]

In continuation of the advisory opinion of the EFTA Court, the Supreme Court came to the conclusion that the differentiated taxation scheme was in breach of the special prohibition of discriminatory taxation under Article 14 EEA. The Supreme Court, however, did not regard itself under an EEA law obligation, independently of national law, to grant EEA-based law priority. The Court did not consider the EEA rule in Protocol 35, but preferred to interpret its national counterpart provision in Article 3 of the Icelandic EEA Act and the statute's preparatory work, which introduces the concept of EEA law as "special law" (lex specialis)[21] It resolved the conflict between the EEA Agreement and the domestic provision in the following way:

> The second paragraph of Article 14 EEA which provides that "no Contracting Party shall impose on the products of other Contracting Parties any internal taxation of such a nature as to afford indirect protection to other products", *must be defined as a special provision* regarding taxation on imports from other EEA States, *which takes precedence over Article 14(6) of the previously enacted legislative Act* No. 50/1988, providing for a preferential VAT rate on books in Icelandic. After the EEA Agreement was given the force of law under the Icelandic legal system through the adoption of Act No. 2/1993 it was therefore unlawful to differentiate value-added tax applied to books in the Icelandic language and books in foreign languages. (italics added).

Thus, it is Article 3 of the Icelandic EEA Act which authorizes and permits the application of EEA-based law in place of contrary national legislation. The Supreme Court's case therefore

[20] Carl Baudenbacher 'The EFTA Court Ten Years On' *The EFTA Court Ten Years On* (Oxford: Hart Publishing, 2005) 13-55, at 26.

[21] The undertaking in the sole article of Protocol 35 was believed to be fulfilled by the legislature with Article 3 of Act No. 2/1993 (hereinafter referred to as the EEA Act). The Article which was adopted specifically in order to comply with the Protocol states that:
"Statutes and regulations shall be interpreted, in so far as appropriate, in accordance with the EEA Agreement and the rules deriving from it."
The obligation of Protocol 35 is, not easily transferable to this interpretation rule which, crucially, does not import such a "primacy provision". The *travaux préparatoires* to the provision, however, declares:
"Article 3 of the EEA Act entails, inter alia, that implemented EEA rules will be considered as special provisions in relation to incompatible subsequent legislation in order to consider them as remaining in force in cases of possible conflict, unless the legislator specifically said otherwise. This is necessary to ensure a uniform interpretation of the provisions of the EEA-agreement."

suggested that, in the form of a *lex specialis* principle, a national complementary version of the "quasi-primacy" principle had been developed.

V. Miguel Maduro's contrapunctual principles

The above cases show that from the EFTA Court's point of view, EEA law has transformed into an independent legal order and subsequently has a claim to validity emulating the self-legitimising presentation of the EU legal order. However, the enforcement of EEA law is not a one-way, top-down process. Although the EFTA Court has created doctrines that have put real teeth into the EEA, it is clear that, in the absence of a transfer of sovereign powers, the Court must rely even more than the ECJ on cooperative action. EEA law can thus be described as a product of inter-judicial discourse and an on-going, though not always tranquil, dialogue between the EFTA States' national courts and the ECJ/EFTA Court, as well as between national law and EEA law principles. The truth of the matter is that the dynamic way in which the law of the EEA and the law of the EFTA States interact poses a number of new and difficult questions that cannot be adequately explained by the adoption of the static state-law-centred, dualist or positivist method. The general understanding of this relationship must be placed on a different conceptual basis. This study argues that an account based on a theory of legal pluralism is better equipped to explain the relationship between EEA law and domestic law. Such a theory is more likely to produce concepts that may shed light on how judges understand and operate in this field.

1. The plurality of jurisdictions and legal sources

The pluralist theory is based on a mutual recognition of authority. Thusly, Maduro's first contrapunctual principle postulates that the courts should be aware that they are acting in a pluralist legal order:

> ... all legal orders must mutually recognize each other and their right to 'self-determination'. Therefore, the globalization of the law, which has been described as creating a form of legal and constitutional pluralism, imposes the recognition and adjustment of each legal order to the plurality of equally legitimated claims of authority made by other legal orders.[22]

To apply this principle would mean that "no legal order should be forced to abandon its own internal viewpoint."[23] It thus retains a certain form of dualism.

[22] Miguel Maduro, *supra* note 10, 177.
[23] Miguel Maduro, *supra* note 12, 526.

The observed cases show a reciprocal understanding between the EFTA Court and the Supreme Court, as both courts acted in accordance with this principle. By virtue of the authority of EEA law as a legal order, the EFTA Court looked to the EEA-system as sufficient ground for the creation of its doctrines. However, it managed to balance the weight of its claim against the constitutional set-up in the Nordic dualist legal systems, where there is a strong tradition of legislative authority. In order to make the doctrine of state liability less intrusive for the national judiciaries, the EFTA Court stated that since the principle of state liability is an integral part of the EEA Agreement, "it is natural to interpret national legislation implementing the main part of the Agreement as also comprising the principle of state liability".[24] In theory, this remark is applicable to all general principles, and the EFTA Court used a similar approach in *Einarsson,* by referring to the Icelandic court's discretion under the grounding provision of Article 3 of the EEA Act. It, however, made clear that it was not for the EFTA Court to rule on the interpretation of provisions of national legislation, which remained the concern of the national courts.[25]

This is an interesting manifestation of dialogue between the courts which might be explained by the political background surrounding the EEA Agreement. As the EEA does not form a supranational regime that imposes itself on the national regime to the same extent as the EU, the EFTA Court takes a somewhat different approach than the ECJ when it introduces new legal concepts. The EFTA Court accepts that the dualist tradition in the Nordic States disqualifies these principles from having "direct effect", and national courts might have to arrive at the correct application of EEA law in a different manner. Therefore, the Court embraces a more heterogeneous understanding of these principles and, as a result of this collaborative attitude *vis-a-vis* the national courts, it manages to mitigate the disruption to internal procedures.

The Icelandic Supreme Court, in both *Sveinbörnsdóttir* and *Einarsson,* was faced with the methodological problem of how to give effect to these EEA principles in the national system. The above analysis of the cases shows that the Supreme Court solved this dilemma by allowing compliance with these EEA obligations by reference to its own internal criteria of validity. It, however, respected the EFTA Court's viewpoint and did not question the formal

[24] See Sveinbjörnsdóttir, para. 63. In the literature there seems to be a certain conceptual confusion regarding the EFTA Court's legal basis for this interpretive obligation. Many critics, who have commented on this paragraph, claim that: the EFTA Court exceeds its task since it is not for the Court to express itself on the interpretation of the EEA transformation act, which is national law. The author, however, agrees with Davíð Björgvinsson's stance that the Court's statement in no way dictates the application of the transformed EEA act, but simply reminds its national counterpart of the duty to interpret national law in the light of its EEA obligation. A duty that follows from national law in the EFTA States as well as the EEA obligation in Article 3 of the Agreement. See, Davíð Björgvinsson, *EES-réttur og landsréttur* (Bókaútgáfan CODEX, Reykjavík, 2006) 345-346.
[25] Sveinbjörnsdóttir, para. 18 and Einarsson, para. 48.

grounding of validity, or "legitimacy" of the doctrines. The attitude of the Supreme Court is not in the least surprising. The Court, of course, remains a national institution - even when it applies EEA law materials - and is, to a large extent, constrained by its institutional position. Just like the EFTA Court draws authority from the Agreement, Icelandic courts view their authority as based upon the Icelandic legal system. Therefore, it is entirely logical that the Court would adopt a point of view internal to its legal order to determine valid legal arguments and the weight to be given to them. The Supreme Court must find a way of justifying its action in a way that agrees with the Icelandic legal system.

2. Consistency and coherence

Secondly, the courts should seek to safeguard the integrity and coherence of the law in such a context of competing legal orders. Maduro proposes that:

> "Such claims of jurisdiction over transnational situations must be accompanied by a commitment to take into account the potential effects of the decision of a particular legal order in other legal orders. In reality, the global law arising from the regulation of transnational situations ends up being a product of the interaction between different national and international legal orders. In this context, any judicial body (national or international) must reason and justify its decisions in the context of the global legal order in which they are impacting."[26]

This means that national courts must decide "transnational legal cases" so as to make those decisions fit the decisions taken by international judicial bodies, even if they reach them with different arguments and normative starting points.[27] In both *Sveinbjörnsdóttir* and *Einarsson*, the Supreme Court accepted the binding force of the EEA law doctrines and reconciled them with national constitutional requirements. The fact that the Supreme Court emphasized the exclusively national legal basis of those doctrines in Icelandic law evidently does not imply that the EFTA Court's ruling had not been given great significance.[28] The pluralist discourse appears in both decisions as the Court announced that particularly compelling reasons were necessary not to accept the decisions of the EFTA Court.

3. Universalisability

Thirdly, the courts should reason in universal terms, thus taking into account the consequences to the "global legal order". "[A]ny judicial body (national or international) must reason and justify its decisions in the context of the global legal order in which they are

[26] Miguel Maduro, *supra* note 10, 177.
[27] *Ibid.*, and Miguel Maduro, *supra* note 12, 527-528.
[28] Davíð Björgvinsson, *supra* note 24, 224.

impacting." This, Maduro explains, means that "[s]uch decisions must be grounded in a doctrine that could be applied by any other court in a similar situation, including, in this context, the courts of a different legal order."[29]

To one familiar with EU law, this version of the *principle of universalisability* could be characterized as a sort of CILFIT-doctrine.[30] Here, the differences between the practices relating to the EU and those relating to the EEA must be considered. We would suggest that Maduro's requirement here does not fit the actual judicial experience relating to the EEA. The legal order is simply too heterogeneous in its features for the national courts of the EFTA States to accept that sort of universal character of legal reasoning. In fact, even in the EU context, this principle has been debated: *Florence Giorgi* and *Nicolas Triart* ask if making the terms of jurisprudence universal does not erase the aims of pluralism. In their opinion, the notion of pluralism is about "the recognition and the expression of particularities and differences, more than the fabrication of a universal".

Indeed, it does seem as though this theory of legal reasoning does not accommodate the pluralistic conception of the relationship between legal systems, which Maduro wishes to offer. The first two principles of contrapunctual law acknowledge national variations in the reasoning of the national courts. Thus, requiring "the courts of a different legal order" to modify their approach to what they might be expected to approve of could be said to subvert the nature of the first two principles. The limitations of such an exercise also become immediately apparent once we ask how it would work in practice: first, how should judges identify the approach other courts might adopt – assuming that such an approach is even clear to those "other" courts – and second, what courts should be identified? It should also be noted that concepts, methods of judicial reasoning, interpretive techniques and the role of the courts can vary significantly across different jurisdictions, which would make it difficult to draw conclusions from the experience of other courts. This heterogeneity was elucidated by *Catherine Richmond* in a thesis defended in 2000. For Richmond, a pluralist community can never speak in a single voice:

> [i]t may be that in an ideal political community, there would be such harmony that adjudication can and should be conducted on the assumption that the law speaks with one voice. However, we have seen that in the European Union, there is such dissonance that on certain issues, the respect for difference must outweigh the desire for unity.[31]

[29] Miguel Maduro, *supra* note 10, 177.
[30] Case 238/81, CILFIT, [1982] ECR 3415.
[31] Catherine Richmond, *Perspectives on Law: System, Authority and Legitimacy in the European Union* (PhD

This observation leads to the criticism that Maduro's calls for increased unity through the principle of universalisability might be considered impossibly idealistic for the EU, let alone the greater problems it would face due to the nature of EEA law. Hence, a more careful balancing act is required between the quest for "consistency and coherence" and the national claim to authority. However, Maduro's method makes it clear that national courts are free to find solutions according to their own methods and viewpoints.[32] This necessarily means acknowledging differences between the Member States in the application of European law. It thus seems reasonable to conclude that Maduro's statement, that decisions must be grounded in a doctrine that could be applied by any other court in a similar situation, is not intended to be taken too literally. The rationale behind the principle is that it facilitates a dialogue amongst courts and "prevents courts from deciding transnational legal cases in a purely 'domestic' manner."[33] Courts can achieve this objective by simply providing clearer reasons and rationales in support of their interpretations and taking into account the consequences of their decisions on the European level. It is on the strength of this conclusion that we may now move on to an analysis of whether the Supreme Court fully satisfied the principle.

On the basis of this conclusion, the principle was probably fully satisfied in *Einarsson*. The Supreme Court respected the supremacy of implemented EEA law by adopting, at the national level, a *lex specialis* type of rule, thus coming to a mutual accommodation of both the EEA and Icelandic legal order. Here, it is submitted that, if consistently adopted in practice, the application of *lex specialis* will contribute a degree of predictability and coherence regarding such conflict resolutions.[34] From these premises it may be concluded that the justification for privileging transformed EEA law due to its "special" character is consistent with the idea of the universalisability of reasoning (although perhaps not it the strictest sense of Maduro's version of the principle).

The legal reasoning of the Supreme Court in *Sveinbjörnsdóttir* met, without question, the universalizability test and, as a result, became an important contribution to the general development of EEA law. First, it recognised the principle of state liability as part of Icelandic law and hence provided for this legal basis to be employed in future cases. Second, its guiding value reached beyond Iceland, which became evident as it resonated in the 2005

Thesis, European University Institute, Florence 2000), 223.
[32] Miguel Maduro, *supra* note 12, 525-527.
[33] Miguel Maduro, *supra* note 10, 177.
[34] This is consistent with what is generally accepted as the universal character of legal reasoning; see e.g. Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), 99.

Norwegian Supreme Court's *Finanger II* case.[35] The Norwegian Supreme Court came to the conclusion that liability for the State followed from the internal Norwegian EEA Act, based on the same argument as in the Icelandic Supreme Court's *Sveinbjörnsdóttir*.[36]

It can be inferred from the above examples of *Sveinbjörnsdóttir* and *Einarsson* that the EFTA Court and the Supreme Court try to minimize the risk of conflicts by accommodating their respective claims. The Supreme Court accommodated the claims of both the EEA and the national legal orders by adopting an internal approach taking into account the demands arising from the EEA law doctrines. As we saw above, this internal approach was fully consistent with what Maduro perceives to be the principles of legal pluralism. Hence, it has a sound basis in pluralistic legal theory.

VI. The pitfalls – Isolationistic Interpretations

The methodology of recurring to national law in order to ensure judicial protection of EEA law rights in the EFTA States chimes well with the formal character of EEA law as public international law. However, unless this practice takes place within an institutional framework of judicial tolerance and judicial dialogue (e.g. the contrapunctual model of interpretation), such an internal approach inevitably, to quote *Giorgi* and *Triart*, "leads the judge to consider himself at the centre of the legal universe."[37] It involves the risk that the courts might prefer to deny the protection of an alleged EEA law right when the proper national rule on which to base a decision is not in place, instead of looking for solutions as to how to interpret Icelandic law in conformity with EEA obligations.

The Supreme Court's approach in *Sveinbjörnsdóttir* and *Einarsson* are two examples where the Court in an exemplary manner applied the EFTA Court's doctrines. However, it must be observed that the cases were a direct result of the interpretive advice on points of EEA law, which the Icelandic courts had requested under Article 34 Surveillance and Court Agreement (SCA). The Supreme Court has hitherto never explicitly rejected such a decision and by its own account will not do so unless justified reasons require it to do so. Thus, these two cases might not tell us the whole story about the current practical situation of EEA law in

[35] Rt. 2005: 1365 (Finanger II).

[36] In paragraph 52 of the judgment, the Judge Rapporteur stated: "I endorse the view that there is a presumption of State liability in the EEA Agreement, and that s.1 of the EEA Act, which implemented the main part of the EEA Agreement into Norwegian law, must be interpreted so as to include such liability. I note that the State has expressed the same view and that the Supreme Court of Iceland came to the same conclusion in the Sveinbjörnsdóttir case." See Common Market Law Reports (2006), issue 1611, p. 378. See also discussion in Örlygsson, Þ. (2007), p. 47.

[37] Florence Giorgi and Nicolas Triart, 'National Judges, Community Judges: Invitation to a Journey through the Looking-Glass – On the Need for Jurisdictions to Rethink the Inter-systemic Relations beyond the Hierarchical Principle', *14 European* Law *Journal* (2008) 693-717, at 693.

Icelandic courts. Case law analysis shows that the Supreme Court has a propensity to find that EEA law is not of relevance to the issues at hand - when faced with difficult decisions involving a *prima facie* tension between EEA law and national law. It is possible to identify this judicial tendency to circumvent EEA law in two distinct stages. First, the Supreme Court tends to refuse cooperation with the EFTA Court - and as a result elements of EEA law - with the argument that the dispute is not really about the interpretation of EEA law but about matters of national or constitutional law. Second, the Supreme Court endeavours only to ascertain that the domestic solution found does not violate EEA law, while relying on the black letter of national law. The distinction between the two categories is not so clear but serves as an analytical device to give structure to the study.

1. Refusing Discourse: Safeguarding the autonomy of the Icelandic legal order

Davíð Þór Björgvinsson has discussed the approach of the Icelandic Supreme Court towards referring questions to the EFTA Court. The author has made observations on a case from 2004 (Hrd. 2004.3097) which concerned a refusal to grant the claimant authorisation to place on the market a particular proprietary medicinal product. The claimant claimed to have met all the conditions provided for in the relevant Icelandic legislation,[38] which was based on certain EEA Directives.[39] He thought it necessary to make a reference to the EFTA Court in order to clarify the correct interpretation of certain provisions of the directives. The Reykjavík District Court accepted the claimant's argument and decided to refer the matter to the EFTA Court. That ruling was, however, overturned by the Supreme Court. In its refusal to refer, the Court first noted that the EFTA Court's authority is restricted to the interpretation of EEA law. It then held:

> The assessment of evidence and the factual circumstances of the case, as well as interpretation of domestic legislation and acts referred to in the annexes to the EEA Agreement that have been made part of domestic legislation, fall upon the Icelandic courts.[40]

The Supreme Court first makes clear that it is a matter for the national courts to ascertain whether EEA law, which has been transposed into national law, is applicable to the facts of the case and assess its influence on the resolution of the dispute brought before them. This

[38] Administrative Regulation No. 462/2006.
[39] Council Directive 65/65/EEC and Directive 2001/83/EC.
[40] Here cited in English from Davíð Björgvinsson, 'Application of Article 34 of the ESA/Court Agreement by Icelandic Courts', in M. Monti et al. (eds), *Economic Law and Justice in Times of Globalisation, Festschrift for Carl Baudenbacher* (Nomos- Verlag, Baden-Baden, 2007), 45.

line of demarcation in the co-operative relationship has similarly been confirmed by the EFTA Court.[41] What is remarkable in the present context, however, is that the Court in fact proceeds to say that it lies outside the EFTA Court's competence to express itself on the interpretation of EEA law which has been made part of national law. Such interpretation becomes, through the transformation of the former, a matter pertaining entirely to the internal coherence of the domestic legal order.

Although the case concerned the question of whether or not to make a reference to the EFTA Court, it gives us a certain understanding of the Icelandic judiciary's approach when having to interpret law to comply with EEA obligations. It is an example of the Court's inflexibility in relation to adjusting its traditional method of reasoning to the new reality that the EEA legal order brings. The EFTA States are obliged to ensure that those concerned by a directive can enjoy the rights granted by EEA law. However, the Supreme Court expressed the position that an interpretation of the directives themselves could not have a bearing on the case at hand as it had been incorporated into the Icelandic legal system and thus fully complied with. The case is an example of how the Supreme Court tends to adhere to a textual positivist reasoning: what is not laid down in written legal statutes should not be taken into account. This further suggests that the Court is not accustomed to having to comply with unwritten EEA law by way of judicial interpretation.

Even more astonishing, in many respects, is the the mode of reasoning by the Reykjavík District Court, in a decision which was confirmed by the Supreme Court in its *alcohol advertisement* case from 24 May 2006.[42] The defendant claimed that a total prohibition against alcohol advertising was in breach of certain provisions of the EEA Agreement, and requested an advisory opinion from the EFTA Court. In its response, the Supreme Court, however, dispensed with the interpretive request on the argument that the issue was not really about the interpretation of EEA law but about matters of national constitutional law, which are not within the EFTA Court's competence.[43] Thus, the Court saw the case through the exclusive prism of the Icelandic Constitution. This formalistic approach, however, seems to forget one detail: constitutional rights and EEA rights coexist. Shifting the emphasis towards

[41] Case E-2/95, *Eidesund*, [1995-1996] EFTA Ct. Rep. 1, para 46.
[42] Supreme Court judgment in case No. 274/2006.
[43] In response to the question of whether or not a referral to the EFTA Court had to be made the District Court stated:
"Similar cases have been argued before the [Icelandic] courts. In these cases it has been disputed that Article 20 of the Act on Alcoholic Beverages is in accordance with constitutional provisions on freedom of expression, property rights and equality and discrimination. The disputed issue in this case, as in the earlier cases, concerns the validity and interpretation of Article 20 of the Act on Alcoholic Beverages and whether it is compatible with constitutional provisions, but *legislation which has been adopted according to constitutional standards cannot be set aside on any other grounds*. The EFTA Court does not deal with such legal interpretation. It is therefore of no relevance to request an advisory opinion in this case." (Italics added)

the constitutionality of the contested provision doesn't exclude the view point of EEA affected interest.[44]

Davíð Björgvinsson has maintained that the reluctance detected in the two above cases, to take advantage of the advisory opinion procedure, can be traced partly to the Supreme Court's efforts to protect the autonomy of Icelandic system. This approach – the author notes – could, however, easily lead to a situation where a person is entitled to certain rights under EEA law, but would be denied from taking advantage of those rights before Icelandic courts.[45]

2. Arriving at a result complying with EEA law by way of "isolationistic" solutions

The Supreme Court's strategy of limiting itself to an application of domestic sources of law can be seen in the previously analysed cases. In another remarkable constitutional case of 2006 (the Tobacco Case[46]) the claimant sought a declaration that a provision in the Icelandic Tobacco Control Act, that restricted the display of tobacco products in retail stores, was inoperative as it was contrary to Articles 11 and 36 of the EEA Agreement. The Supreme Court, however, found a way to avoid ruling on the heated issue as it examined the dispute from the point of view of the Constitution, and declared unconstitutional the outright prohibition of the display of tobacco products. This case is in line with cases regarding prohibitions on the advertising and marketing of alcohol, where the Court argued that the cases primarily involve constitutional questions and EEA law is therefore not relevant.[47]

A combined reading of the two constitutional decisions from 2006 seems to imply that the only standards which the Supreme Court is willing to uphold are those of its Constitution. The Icelandic constitutional tradition may go a long way toward explaining why the Supreme Court, faced with the alternative of reviewing domestic legislative acts on the basis of standards provided by EEA-based law or the Constitution, will choose the latter option. The Supreme Court's mandate upholding the Constitution is - as *Ragnhildur Helgadóttir* has observed - beyond dispute.[48] Hence, constitutional judicial review would never cause as much

[44] In EU law, for comparison, the national courts are always welcome with questions, or obliged to refer, even though the case raises constitutional issues. See for example the *Mecanarte* case (C-348/89, ECR 1991, I-3277), para. 44-46.

[45] Davíð Björgvinsson, *supra* note 40, 45. Such situations have been defined by Neil MacCormick as examples of "radical pluralism". It takes its name from the fact that there remains a possibility of different answers from the point of view of different systems. See Neil MacCormick *supra* note 9, 259–266.

[46] Supreme Court judgment in case No. 220/2005.

[47] See Hrd. 2006:2646 (Alcohol Advertising I), Hrd. 14 June 2007 Case 599/2006 (Alcohol Advertising II) and Hrd. 25 February 2008 Case 60/2008 (Alcohol Advertising III).

[48] In a 2009 article, on the history of the Icelandic judicial review, *Ragnhildur Helgadóttir* states that "Icelandic courts unhesitatingly and openly exercise judicial review. They are not apologetic about their role as reviewers of the constitutionality of parliamentary action." Her conclusion was that, "irrespective of individual

dissent as review of domestic legislative acts on the basis of EEA-based law, which may even be contested on constitutional grounds. Against this background, it is perhaps not entirely surprising that the Supreme Court has so far been reluctant to refer to EEA-based law, at least when it would mean setting aside "purely" national law.

Another case in point would be the much discussed Hrd. 2001.3451, on the motor vehicle insurance directives. Rather than following the district court's approach and relying on the interpretation obligation to the effect that Icelandic legislation is interpreted to be consistent with the EFTA Court's understanding of the directives, a traditional cautious attitude to the exercise of EEA law was expressed. The Court restricted its scrutiny strictly to domestic law in the resolution of the case but, nevertheless, managed to arrive at a result bringing national law into conformity with the EFTA Court's understanding of the Directives. Using a quite complicated train of reasoning, based on developments in national law, the Supreme Court attempted to dress up its holding in a legal costume. The Court thereby steered clear of the risk of infringing the claimant's EEA law rights and any action against the Icelandic State for compensation.

The last example which will be cited to illustrate the point is Hrd. 2001.2505 (the *Íslandsbanki-FBA case*). This case concerned Icelandic legislation which imposed a higher fee on state guarantees in respect of foreign loans than in respect of loans considered to be domestic. In a dispute concerning the question of whether the Nordic Investment Bank was a domestic or foreign entity,[49] the Reykjavík District Court asked the EFTA Court whether the unequal treatment of loans was compatible with Article 40 EEA. The EFTA Court considered such an arrangement to be incompatible with the principle of free movement of capital laid down in Article 40 EEA. Before the Reykjavík District Court, the case concerned the issue of conflict between EEA-based rules and subsequent statutory provisions. In continuation of the advisory opinion, the District Court found that the defendant could invoke and rely on the rights granted by Article 40 EEA, in effect applying a provision of the Agreement even in presence of subsequent contrary national legislation. Upon appeal, however, the Supreme Court simply considered the bank in question to be a domestic entity. As a result, the state guarantee was not to be subject to the guarantee fees payable on loans from foreign entities.

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controversial cases, the courts play an important and largely uncontroversial role in the constitutional scheme." Thus, there is "little subterfuge and disguising of constitutional review." See R. Helgadóttir, 'Status Presens-Judicial Review in Iceland', *Nordisk Tidsskrift for Menneskerettigheter*, vol. 27(2), 185-193, at 192.

[49] The Ministry of Finance had confirmed that the Nordic Investment Bank should be considered a foreign entity and that the state guarantee should be subject to the guarantee fees payable on loans from foreign entities. The Defendant did not accept the decision by the Ministry of Finance and paid the guarantee fees on the obligations to the Nordic Investment Bank as if the obligations were in favour of a domestic entity. The claimant thus initiated proceedings before the Reykjavik City Court and claimed the payment of the guarantee fees on the assumption that the Nordic Investment Bank is a foreign entity.

Since EEA law has no competence to govern exclusively internal situations, the disputed intra-EEA law element was avoided altogether.

The above case law is interesting from a methodological perspective. A feature which appears quite clearly is that the Supreme Court increasingly substitutes wider international perspectives, to which EEA law sources of law are central, for the purely national legal perspective.[50] This approach of the Supreme Court, however, does not mean that EEA law has not been given a substantially influential role in the legal outcome of a case. By preferring an extensive interpretation of Icelandic law in a way which ensures that EEA law standards are complied with indeed raises suspicions of an unstated interpretation of Icelandic law in the light of EEA law. One could argue that this does not pose any problems as such a disguised form of giving effect to EEA law allows the court to do what it thinks is justice in the concrete case before it, i.e. rule in favour of a litigant whose EEA rights have been violated. On the other hand, such an approach of concealing a conflict between EEA law and another statute is arguably more of a judicial usurpation of power which is only likely to bring about disharmony between the EFTA Court and national courts. It neutralises the effectiveness of EEA law beyond the case at hand and will therefore not necessarily solve the problem for future litigants. It thus seems clear that, at present, the judicial motivations and loyalties of the Supreme Court do not coincide with the attitudes of interaction and adaptation that theories of legal pluralism call for.

VII. The Icelandic legal and judicial culture creating an obstacle

It is apparent from the examples provided in the previous chapter that Icelandic judges and lawyers in general do not seem to be particularly cognizant of the fact that a legal problem might have an "EEA dimension". There are a number of factors which may explain why courts seek to avoid involving EEA law in their reasoning, and these factors can of course be different in each individual case. One particular factor which will not be discussed any further here is of course the unfamiliarity with and complexity of European law. Other possible reasons may stem from the country's legal and judicial culture and the prevailing theory of legal sources. In order to gain a better overview of the relationship between EEA and Icelandic law, this chapter will venture into different aspects of the Icelandic legal culture in order to outline some of the possible explanations for the attitude displayed toward EEA law in Icelandic courts.

[50] Much the same story can be run with respect to the European Convention on Human Rights.

1. The impact of the dualist and positivist vision of law in Iceland

The Icelandic courts' reluctance to use EEA law might partly stem from the fact that they are acting in a quite dualistic legal system. Scholars have, for instance, not been unanimous on whether international law should be considered one of the sources of law in Iceland. Apart from several decisions concerning the ECHR, the courts are unfamiliar with assuming an active role when it comes to international law. Hence, the courts do not have much experience with referring to "foreign" sources or case law coming from other than Icelandic courts. The fact that referring to international law is not part of the courts' normal *modus operandi* might account for their apprehension when it comes to applying the far-reaching principle of consistent interpretation in order to make EEA rights operative at national level.

Another facet of the legal culture which could help explain why courts neglect to consider EEA law aspects or consult existing case law from the European Courts is the legal positivist tradition of applying law in Iceland, along with the legal background of Icelandic judges and lawyers. As in other legal systems tending to lean on a legal positivist vision of law, the *modus operandi* of the Icelandic courts is to view statutory rules, along with preparatory works, as sources which above all others should be used to justify a judicial decision. Study of the case law suggests that Icelandic courts appear to have certain problems exercising judicial power that the EFTA Court's judge-made principles have conferred upon them. This finding corroborates the assumption that the courts prefer to see their role as executors of the legislature's intentions, rather than take on an activist role to achieve the effectiveness of the EEA legal system, based on a reference to general principles.[51] The fact that the EEA-system is in large part governed by general principles of law might thus add to the problem of observing EEA law's importance at the national level.

It emerged from the discussion above that the EFTA Court judge-made general principles place major responsibilities on national courts. One might not have expected this characteristic of European law to be a further obstacle for Icelandic judges as general principles of law form part of the sources of law doctrine in the Icelandic system. In theory, the Icelandic doctrine of the sources of law is very broad and flexible. Even though Article 61 of the Icelandic Constitution stipulates that "judges shall be guided solely by the law" it is recognised that the courts can have recourse to other sources of law than just statutes. Icelandic scholars seem to agree that sources of law can include: statutes, regulations,

[51] This does not mean that the Icelandic courts blindly rely on the legislature. In practice, the courts have exercised judicial control of legislation and frequently set aside unconstitutional rules when a conflict of norms arises. In 1943 the Supreme Court found for the first time that it was capable of reviewing the constitutionality of a statute (see the *Hrafnkatla* judgment Hrd. 1943.237). Another expression of the activist role that courts have in the Icelandic system is their judicial control of administrative decisions.

customs, precedents, analogies, principles of law and something referred to in Icelandic legal theory as "*eðli máls*", i.e., the *nature of matters* (which refers to reasons of logic, fairness and justice). However, the sources of law are deemed to be ranked in that particular order. Other alternatives, such as analogies, precedents and preparatory works would thus be consulted in order to fill legal gaps before turning to unwritten rules, such as general principles of law. It should also be mentioned that as the Icelandic system has developed ever more written legislation, the need to refer to general principles to fill gaps has diminished. Referring to general principles of law is thus not a natural part of the Icelandic courts' judicial activity. The courts have furthermore seemed rather careful in their use of general principles of law, when no written legal sources address the situation.[52] Thus, the judiciary might not be as comfortable taking EEA legal principles into account in its legal interpretation as the theory would suggest.

This could be seen as an effort *not* to enter into the legislature's territory and upholding the existing institutional balance of between the legislature and the courts. Further to the Icelandic courts' inclination to confine its interpretation to what is expressed in the Icelandic written law follows their ensuing disinclination to consult EEA case law. The exact requirements of EEA law are often only made clear through the case law of the EFTA Court and the ECJ. EU/EEA law is heavily case law based, and the greater part of this judge-made body of law naturally derives from the latter court. Thus, the national courts have to be aware of and have recourse to the legal sources of EEA law derived from the EFTA Court/ECJ case law. It should be recalled that the status of ECJ jurisprudence as precedents and part of the EFTA States' obligations is reflected in Article 6 EEA.[53] In light of this prescribed cooperation, one could have expected the Icelandic judiciary to embrace the relevant ECJ case precedence as legal sources when dealing with issues of EEA law. However, one can clearly discern a generally hesitant attitude towards the exercise of interpreting these judgments and applying them to the national context. The fact that the Supreme Court did not make a reference to the jurisprudence of the ECJ in its legal reasoning until 26 February 2001[54] (the judgment interpreting the Motor Vehicle Insurance Directives - see above) shows that the

[52] When there is no written law to apply, judges have proved hesitant to base their decision only on general principles of law. See Sigurður Líndal, (2002), p. 231-233, who cites Hrd. 1997.1157; Hrd. 1981.182 and Hrd. 1981.1584 as examples of the courts exercising restraint when it comes to the use of principles.

[53] Article 6 EEA states that the provisions in the EEA Agreement, in principle identical with the comparable provisions in the Treaty (now TFEU), are to be interpreted in accordance with the relevant rulings of the ECJ given prior to the date of signature of the Agreement. Conversely, Article 3(2) of the Surveillance and Court Agreement (SCA) stipulates that the EFTA Court shall pay "due account" to the principles laid down by the relevant rulings of the ECJ given *after* that date.

[54] Hrd. 2001.3451

Court is less than enthusiastic about the European case law.[55] In light of the above, it does not seem too bold a statement that ECJ case law either does not receive close examination from the Supreme Court or that the Court is more inclined to interpret and apply the law independently and without regard to the ECJ's assessment of the law.

2. The impact of the implementation process on the reception of EEA law

Article 3 of Act No. 2/1993 (EEA Act) states: "[s]tatutes and regulations shall be interpreted, in so far as appropriate, in accordance with the EEA Agreement and the rules deriving from it." That the Icelandic courts have accepted this interpretive obligation does, however, not mean that the substantive rights that EEA law confers on individuals is sufficiently recognised in judicial proceedings. This requires that national law is to be read if at all possible to be consistent with directives. The courts inevitably leave EEA law rights at risk if they do not observe the contents and aim of the of relevant EEA directives, when applying the national implementing law. This has proved to be a challenge to the Icelandic courts which are not very familiar with the contextual methodology.

The method in which EEA law is implemented into national law may help provide part of the explanation for why judges and litigants find difficult to observe that a claim in front of them has its roots in EEA law. In Iceland there is a strong tradition for consolidated legislation. This means that the prevalent method for implementing directives into Icelandic law is by means of reformulation, also known as transformation. The substantial content of the directive which requires implementation is, therefore, transformed into domestic law and actually becomes domestic law. It is usually drafted directly in the text of an existing statute or administrative regulation without copying its exact wording. When the text of directives is reproduced or reformulated in consolidated legislation, the EEA roots of a provision to be applied by the courts may be curtailed. In particular when the text of the statutory law which is an implementation of a directive differs drastically from the directive, it may be difficult to ascertain the importance of relevant arguments based on EEA law and that one should perhaps have recurrence to the case law of the ECJ/EFTA Court when interpreting the contents of the statutory law. The concerns raised over the use of the transformation method are indeed justified as it can pose great problems in practical judicial life. Firstly, the technique can exclude a sufficiently precise and unconditional provision of a directive from

[55] Curiously, when it finally came to invoking an ECJ judgment, the Supreme Court did so in order to point out discrepancies between the decisions of the EFTA Court and the ECJ, and raise doubts as to the correct interpretation of the directive - which in turn strengthened its reasoning for disregarding the ruling of the EFTA Court.

being applied by the Icelandic courts in the national legal system. If the text of the provision is greatly altered in the transformation process, the national rule that is an implementation of a directive might not have the capacity to grant the individual the exact legal position which the directive intended to grant him.[56] Secondly, the technique can make it difficult to detect when EEA law rights and obligations should become operative at national level through consistent interpretation.

3. The role of the parties in raising EEA law arguments

Here, the reliance placed by the Icelandic courts on the parties themselves to plead EEA law arguments will be discussed. If a party fails to claim that a certain national provision should be interpreted in a specific manner in the light of EEA law, it is quite understandable that the court does not address the issue.[57]

The national court's willingness to raise EEA law issues and interpret national law in the light of EEA law on its own motion will largely depend on the nature of the proceedings. As a rule, the courts would be more restrictive in civil law proceedings which mostly leave the litigation in the hands of the parties. According to the principle of party autonomy (*málsforræðisreglan*) in civil law suits, it is up to the parties to make a specific claim and to allege and present the necessary facts/circumstances to be used as grounds for the case.[58] Likewise it rests with the parties to argue under what specific legal rules the facts/circumstances are to be subsumed.[59] This means that the court must remain within the scope of the dispute as set by the parties to the proceedings. The principle of party autonomy in civil law is reflected in Article 111(1) and (2) of the Icelandic Code of Civil Procedure No. 91/1991, which elucidates that the court's ruling may not be based upon facts and/or claims other than those presented by the parties.[60] The text of Article 111, however, does not include legal arguments. It has been distracted from the provision, read *e contrario*, that the court is not bound by the parties' *legal qualification* of the factual circumstances.[61] The Icelandic

[56] It should, however be recalled that if the courts cannot grant an individual his EEA law rights on the basis of the implementing national law in the on-going proceedings, the individual might have the possibility to protect his right through a subsequent claim for compensation in state liability proceedings.

[57] Hence, the expertise of a legal counsel, literate in European law, is of great importance in proceedings which possibly involve EEA law matters.

[58] See Articles 80(1)(e) and 99(2) of the Icelandic Code of Civil Procedure No. 91/1991. It is also up to the parties to provide the evidence in those cases, see Article 46(1) of the Icelandic Code of Civil Procedure No. 91/1991.

[59] See Articles 80(1)(f) and 99(2) of the Icelandic Code of Civil Procedure No. 91/1991.

[60] The Article, however, contains an exception to the rule and states that the court may go beyond the ambit of the dispute in order to examine issues which it should guard on its own motion. Such issues only concern formal aspects such as the admissibility of the action.

[61] Markús Sigurbjörnsson, *Einkamálaréttarfar* (2nd edition). (Úlfljótur, Reykjavík 2003), 23 and 172.

Code of Civil Procedure thus reflects the principle of *jura novit curia* which refers to the presumption that the court knows the law. The judge has the power to apply legal rules on its own motion and will have to determine for himself the content and true aim of the governing law. The parties cannot bind the court in matters of law.[62] The principle of *jura novit curia* does, however, not limit the parties' procedural autonomy to a large extent in practice. The court has to stick strictly to the grounds as brought forward by the parties, and is not allowed to take into account legal questions that are not mentioned.[63]

According to the principle of *jura novit curia*, the parties should not have to present evidence to prove what the law is. It is presumed that the court has that knowledge. Exceptions to the rule are, however, provided for in Article 44(2) of the Icelandic Code of Civil Procedure No. 91/1991. The two exceptions are that in matters of "foreign" law and matters of Icelandic customary law. These matters are to be regarded in the same manner as facts, and the judge must therefore rely on the claimant invoking a rule of foreign law or Icelandic customary law and to lead evidence proving its existence (the exception therefore relates to the proof of the law and not to its interpretation or application). The significant reliance placed on the parties in matters of EEA law suggests that they are treated similar to foreign law to some degree. The exception concerning foreign law should however not cover matters concerning EEA law since it is a general principle only. An exception to this exception is, for instance, to be found in Article 3 of the Icelandic EEA Act and the related jurisprudence clarifying that EEA law is to be used as an important means to interpret domestic law.

Where does this analysis leave arguments based on EEA law in the Icelandic courts? One could hold that the exercise of interpreting national law in the light of EEA law is a question of law and it is up to the court in question to find what the law is in accordance with the principle *jura novit curia*. The judge therefore not only has the discretionary power, but a mandatory requirement to evaluate implementing national legislation in the light of the substance of a directive on its own motion if EEA law elements appear in the case. Only invoking EEA law to interpret the legal rules under which invoked circumstances and facts are to be subsumed does not mean that the court goes beyond the proceedings as set by the parties. On this conclusion, a party that claims that a specific right should be available to him should not have to allege or prove that Icelandic law should be interpreted to be consistent with EEA law. The judge is obliged to know what the law is and whether the party has a right under the specific circumstances.

[62] *Ibid*, 23.
[63] *Ibid*, 22-23.

On the other hand, when it comes to EEA law, it can prove difficult to find out what the law is. In relation to inconsistencies of law between national and EEA law, the supposition that courts know the law becomes problematic because of the complexity involved when it comes to interpreting EEA law. In cases of such uncertainty, the national courts can, of course, use the advisory opinion proceedings. However, it should also be taken into account that other reasons than "knowledge deficit" can account for why a party may choose to keep EEA law out of the proceedings. A party's reliance upon EEA might result in a possible referral of a question to the EFTA Court which might lengthen and render the proceedings very costly for the party. The party might also have taken the conscious decision to withhold such arguments because he believes a more favourable result can be reached by leaving EEA material outside of the proceedings. Thus, at least in civil law proceedings, the discretion involved in certain EEA law interpretive exercises would favour treating EEA law as facts, whereby it will have to be pleaded and proved by the parties. I.e. it would argue against extending the *jura novit curia* principle to the knowledge of EEA law.

Lastly, it should be noted that even though the courts are required to interpret Icelandic law in the light of the wording and purpose of EEA law (Article 3 of the Icelandic EEA Act) and that such an interpretive exercise in theory would fall under the principle of *jura novit curia*, it is of course safer to expressly guide the national court to that basis for the right. As the courts sometimes seem reluctant to ascribe significance to EEA law even in cases where one of the parties actually sustains having such rights, it would behoove the party to not merely refer to EEA legislation in appreciation of the legal situation, but also cite case law from the ECJ/EFTA Court and general principles as well as doctrine supporting its claim. "If the mountain will not come to Mohammed, Mohammed must go to the mountain". Just like Mohammed had to resign himself to going to the Mountain, so must the legal representative take the initiative to detect and raise the EEA law facets of the case.

VIII. Adoption of a Pluralist Conception of Law in the EFTA States

The previous chapter shows that the habitual methods of judicial reasoning and application of law in the Icelandic courts can obviously have a fragmenting effect. Hence, a suitable framework within which the courts exercise their discretion is not only desirable but objectively necessary for the proper functioning of the EEA system. How then can we integrate the EEA vision into the Icelandic dualist context without deferring to, or surrendering sovereignty rights to the EEA order?

When adjusted to the circumstances of the EEA, Maduro's method is instructive in how to handle the multi-layered system of norms, and decide their interrelation, scope and circumstances for application. The idea of contrapunctual law raises the possibility of harmonising conflicting values and interests. It is the result of an interpretive effort made by courts from different jurisdictions sharing the same commitment "to engage in a coherent construction of a common legal order."[64] Maduro draws an illustrative example of how this coherence is analogous to the way different musical melodies can be harmonised:

> Counterpoint is the musical method of harmonising different melodies that are not in a hierarchical relationship among them. The discovery that different melodies could be heard at the same time in a harmonic manner was one of the greatest developments in musical history and greatly enhanced the art and pleasure of music. In law too, we have to learn how to manage the non-hierarchical relationship between different legal orders and institutions and to discover how to gain from the diversity and choices that are offered to us without generating conflicts that ultimately will destroy those legal orders and the values they sustain.[65]

If we try to capture Maduro's transposition of counterpoint to legal orders and relate it to our subject matter, an analogy could be drawn between a judge deciding matters of EEA law and a musician playing in a group. The musician must simultaneously play his part while understanding how his part fit into the overall structure of the song and how what he is playing is being perceived and interpreted by the other members of the group. Similarly, the contrapunctual principles ask the judge, when deciding a case relating to EEA law, to function as a musician playing to the tune of a broader European legal order: rather than reasoning solely from the perspective of his own legal order, he has to be sensitive to how his decision will fit into the EEA legal order as a whole and how it will be perceived and interpreted by the judges of a different legal order.

It is clear that such a project would require changes in the way that judges perceive of their institutional role and responsibility. One consequence of the opening up the legal system to competing considerations is that legal reasoning will grow more complex and multilayered. If we recall Maduro's second contrapunctual principle, "the law arising from the regulation of transnational situations ends up being a product of the interaction between different national and international legal orders." Therefore, national judges must reason and justify their

[64] Miguel Maduro, *supra* note 10, 177.
[65] Miguel Maduro, *supra* note 12, 524-525.

decisions "in the context of the global legal order in which they are impacting." Bengoetxea, MacCormick and Soriano have perfectly framed the conception of contextual interpretation:

> Constructive interpretation has to be highly sensitive to context, and the context of any particular act of legal interpretation is the need to find a way of making sense of a text in the context of a large-scale normative scheme. This cannot be a matter of trying to read the meaning of a set of words taken in isolation. For any paragraph or article of a Treaty or of a Regulation or Directive has to be read in the setting of the whole Treaty scheme.[66]

As within the Member States, the contextual or legal pluralistic approach assumes a particular importance in the EFTA States. This does not mean that the national courts should adopt the dynamic and creative legal interpretation of the EFTA Court. Although national courts of the EFTA States have a duty in common with the EFTA Court, to see that EEA law is respected, the two courts serve different normative ambitions.[67] It is important to stress that this interpretive task is exercised in normal proceedings, within the framework of the national system of remedial and procedural rules. Since EEA-based law relies upon the procedures and remedies of the EFTA States for enforcement, the contextual approach does not signify a transformation of the judiciary's legal method. It, however, requires the judges to grasp the different dynamics when the litigation concerns European-related affairs, and adjusting to the obligations of the EEA system.

In this regard, it is of utmost importance that the national courts are familiar with the principle of consistent interpretation (indirect effect) and the vast scope of application that the principle has. Some further remarks to this extent are thus warranted.

It is critical to the success of implementing legislation that the origin and context of rights emanating from EEA law is observed. In practice, the two systems operate in a symbiosis and the interpretation of this legislation at the national level must not take place in a legal vacuum. Law is intrinsically contextual and simply cannot be interpreted in such

[66] Joxerramon Bengoetxea, Neil MacCormick, and Moral Soriano, I. 'Integration and Integrity in the Legal Reasoning of the European Court of Justice', in G. De Burca and J.H.H. Weiler (eds) *The European Court of Justice.* (Oxford University Press, 2001), 43-85, at 45.

[67] The national contextual approach and the teleological method have a common approach in that they both advocate the interpretation of a rule within its wider context. However, they differ in that the teleological method does not end there. See on this Paul Craig, and De Búrca, G, *EU Law*: *Text, Cases and Materials* (3rd edition) (Oxford, New York: Oxford University Press, 2003), commenting on the teleological interpretation of the ECJ (and by extension the EFTA Court): "Often this is very far from a literal interpretation of the Treaty or of legislation in question, even to the extent of flying in the face of the expressed language." The national courts obviously do not have the same incentive to take the development of EU/EEA law into consideration. Thus, the contextual approach of the national courts and the teleological method of the European Courts represent two different approaches towards law and the one is not to be equalled with the other.

hermetically closed compartments. In order for the national court to reach a well-balanced result, it might therefore have to see both sides of the coin and undertake a "double" evaluation. It must firstly adopt the EEA perspective and grasp what the EEA directive requires in the case at hand. Such an evaluation might require the court to examine not only the directives but also the case law of the ECJ/EFTA Court as such case law can significantly influence the meaning of provisions contained in the directive. Secondly, it must appreciate whether it can be used in the case at hand, i.e. whether the national measure relating to the directive is to be used to the same effects. Certain courts might be unfamiliar with such a method of interpretation or find that such activity runs counter to their judicial function. However, it should be stressed that when there is space to interpret domestic law to be compatible with EEA law, judges are under an EEA and national legal obligation to ensure compliance. Keeping this in mind, there might not always be a need for a perfect national transformation rule describing the exact material right or legal position created by the directive. I.e. the judge might be able to give the directive effect through consistent interpretation.[68]

To what extent courts can use EEA law for the purpose of consistent interpretation would vary greatly depending on the type of action and the body of domestic law in the case at issue. National courts have leeway to adjust these matters in light of the circumstances of the case and concern for an individual's right. All in all, the effort required of national courts is adapting their methodologies in order to interpret the law within its broader context, matching the ideals of both the national and the EEA systems. The pluralist approach could thus be said to be concerned with rendering the law and the broader or common European legal system effective rather than being understood exclusively in terms of protecting rights under EEA law. National courts might also have to take other interests and aims into account, even if this might be to the detriment of the EEA right-bearer (e.g., legal certainty and party autonomy). In short, the courts must reach the best interpretation of the EEA legal system as a whole.

In order to safeguard coherence, Maduro then pushes the matter further and states that "the normative goals of rules and their connection to the overall value system" must be articulated by the judges in order to "set the stage for a substantive discussion."[69] This is, in essence, the principle of universalisability. EU/EEA law unavoidably leads to increasing homogeneization of legal problems in different jurisdictions. In order to promote

[68] This, of course, only applies when EEA law rights are litigated and the legal position falls within the scope of the Directive. If the law is applied also to other legal positions which are governed by Icelandic law, there is no obligation to apply the principle of consistent interpretation.
[69] Miguel Maduro, 'Legal Reasoning and Judicial Adjudication at the European Court of Justice', Paper presented as part of the proceedings for the Cardozo/NYU/I•CON Colloquium, March 2010, 19.

homogeneous responses to those problems, the universalisability principle suggests that judges refrain from concealing the EEA law basis of their decisions. By articulating the European law basis of their decision, the courts become characters in the unfolding of a dialogue. As such, they allow other courts to carry out a comparative analysis and look for solutions in their decision. Although judges reason from their points of principle, the framing of the narrative in a purely domestic matter gives rise to isolationistic solutions, which would impede judicial cooperation across the EEA area.

Furthermore, it is of fundamental importance for the legal development and Europeanization in the particular EFTA States that the Supreme Court takes the opportunities that present themselves to address the EEA law issues and use the case law from the European Courts in its reasoning. It must take the responsibility to develop case law and create precedents in order to clarify the effect of EEA law for the district courts, lawyers and academics. The district courts are not likely to take on the responsibility to facilitate the application of EEA law, if the Supreme Court continues to avoid arguments made on that basis. The legal mentality, on part of the academics and officials employed in the legal sector in Iceland, is also not likely to adapt to the EEA system any time soon if the Supreme Court refuses to consider the complex legal issues connected to EEA law and transpose the European case law down to the national level. Lastly, an open discussion of the European law aspects of a claimant's argument is also of utmost importance for his individual right. This is so even if it is only to dismiss them, as he will accept the ruling as final and feel that all his arguments have been taken into consideration.

IX. Conclusion

The case law analysed in this paper serves as a reminder that certain difficulties pertain for Icelandic courts to grasp the dynamics and methodology to employ when acting as protector of EEA law rights. It was concluded that Icelandic courts encounter difficulties when having to give effect to EEA law general principles of law, to identify the EEA aspects of cases and apply a more pragmatic contextual approach to determine the scope and contents of those rights. It noted that the complex legal reality of EEA law results in courts preferring to apply the familiar national rules, the contents of which they are certain. Chapter 7 then went on to discuss a number of elements of the Icelandic legal culture which could help us understand the attitudes towards EEA law in Icelandic courts. It was observed that the Icelandic system has a positivist understanding of the law. As a result, the methodology and reasoning in judicial practice is to find answers in statutory rules and their preparatory works. This

adherence to a positivist use of the law has arguably left the Icelandic courts unprepared to give EEA law - which is largely dependent on case law and general principles – its required effect. The judges do not always recognise the impact of EEA law in case a right is laid down in an EEA law directive, or observe that the EFTA Court or ECJ case law should be consulted as a source of interpretation. Hence, the judicial protection in Iceland is often confined to what is expressed in the Icelandic written law. It was noted that the courts' avoidance of the matter is not only regrettable because of the missed opportunity to create a precedent on the matter in Icelandic case law, but for the general development of EEA law in general. In other instances, however, the fault does not lie with the judges, but rather with the parties who have neglected to raise and address EEA law in the cases where it is of importance (see *supra* section 7.3).

Chapter 8 demonstrates that the lawyers and judges will need to adjust some of their habitual methodology in order to take on a different role in judicial proceedings concerning EEA law matters – one which complies with European standards. It was argued that Maduro's theory is instructive in how to handle the multi-layered system of norms, and to decide their relationship and circumstances for application. His contrapunctual model of interpretation promotes changes in the judicial style from more positivistic, text-oriented legal interpretation, to a more contextual reasoning. It would furthermore prefer that the Supreme Court openly makes clear what role EEA law might play in its decisions, especially if the parties have based their reasoning on EEA law.

However, the pluralist theory does not elaborate any concrete solution to the problem of conflicts of a legal nature between the EEA and Icelandic systems. It is inherent in the pluralist conception that it does not impose unity but allows us to maintain uncertainty as to the decision of which norm takes precedence. I.e. the approach is not about enforcing the laws emanating from the Agreement at any price, so that all national interests standing in the way must give in. The judges thus have some scope for flexibility in making those decisions in view of the circumstances or the case.

The pluralist theory can therefore be said to deepen the thought on this important matter rather than to resolve it. This is not to say that it has no normative consequences whatsoever on the decisions made by the courts. Although the theory described so far does not prescribe a solution to genuine collisions between legal orders, it is valuable in that it offers a framework for thinking of the relationship between the two orders other than in the traditional conservative form. It provides pragmatic tools designed to enhance co-operation and adaptability, thus making the national legal system more open and susceptible to the EEA

legal order. This interaction can, however, only continue up to a certain point and the Icelandic system's adaptability to the EEA system will eventually reach a stopping-point at which collisions between the two need to be addressed. Accepting a pluralist view of the relationship between the Icelandic and the EEA practice is only the first step towards entering the forum where the question of conflict awaits. As MacCormick comments:

> "[Collisions] are possible, but not inevitable. How likely they are depends on the wisdom with which interested parties approach problem-situations, and the theoretical resources available to them in approaching them."[70]

To take full advantage of the values of legal pluralism, we need to discover a passage from theory to practice. Its value becomes persuasive for national courts only within the framework of the respective national legal system. Thusly, the viewpoint that matters for such an inquiry is that of domestic law. For our purposes it is the function of legal scholarship in Iceland to propose "theoretical resources" to the national judge for approaching potential conflicts between norms originating from EEA law and Icelandic law. These resources must accommodate the needs of the EEA legal order while respecting the Icelandic constitutional framework in which the courts operate. Such a study, which attempts to formulate a normative theory of interpretation of EEA law within the Icelandic system, however, reaches beyond the scope of this paper.

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[70] Neil MacCormick, *Questioning Sovereignty*, (Oxford: Oxford University Press, 1999), 120.