

Opening Conference:

”Should States Ratify Human Rights Treaties?”

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Professor dr. jur. Inge Lorange Backer, Department of
Public and International Law, University of Oslo:

COMMENT TO THE NORWEGIAN SETTING FROM A SCHOLAR’S PERSPECTIVE

This conference marks the start of a research project. For
taht reason, I find it for my part inappropriate to answer the
question raised in the conference title, be it either in
affirmative or in the negative.

There should be general agreement, however, that the
concept of human rights, in the sense of *fundamental* rights
and freedoms, is a major significant contribution to the
well-being of humankind in the wake of the WW II and
dictatorial regimes. This does not, however, make a case
for ever extending the rights or adopting new rights under
the cover of human rights. Frankly speaking, is “human
right” – or “international human right” – the appropriate
label for assistance to a prisoner for artificial insemination,
for a transnational company’s application for trade mark
protection, or for the spelling of the forename Axl without
an e? The European Court of Huamn Rights has considered
all of this protected under the European Convention.

In the Norwegian setting, the question of whether states should ratify human rights conventions, may arise with respect to adopting additional rights (such as the UN Convention on the Rights of Persons with Disabilities) or control mechanisms (such as the complaints procedure established by the additional protocol to the CESCR). It is highly unlikely, even though conceivable from a purely theoretical viewpoint, that a human rights convention already ratified would be denounced. Open dissatisfaction with a convention pursuant to the jurisprudence or practice by convention bodies would be more likely to result in non-compliance on particular issues, or efforts to bring about a modification in the views of the convention bodies. Experience based on human rights conventions that have already been ratified may, however, offer empirical evidence which is relevant for the consideration of further ratifications.

The question of giving support to international human rights instruments that are not subject to ratification because they are not legally binding, may give rise to similar but far from identical considerations. There is a wide range of such instruments. I am leaving them aside for now, but it should be recognised that they can serve as an alternative to binding instruments, sometimes – for good reason or not – as a stepping-stone towards more binding instruments.

The decision on ratification depends on the exertion of power and influence, or, more rationally, on the assessment and evaluation of a variety of arguments. Basically, the decision is of a political nature.

The research task, as I see it, consists mainly in providing careful and sometimes critical analyses of possible arguments either way and in offering empirical evidence where relevant and possible. This research task may be more difficult to fulfil if the researcher is a dedicated participant in the political debate and surely there have been instances where researchers have acted in a political spirit under the academic cloak. There is sometimes a striking difference between the veneration shown by scholars towards decisions by human rights organs and the way in which rulings by the Norwegian Supreme Court is handled.

Let me indicate some themes for research.

An important consideration for states when considering whether to ratify is the actual extent of obligations – or restrictions on their legislative power – they will be accepting. It depends both on the wording of the convention, which in human rights instruments is frequently vague and wide, and the way it is or will be interpreted.

From the national point of view, legal certainty is highly desirable. Clarity is an important aspect of this. Conflicting, vague and wide human rights provisions can be clarified by the nation state through more precise implementing legislation, but is there then a risk that it will be struck down by the international control body? It has been asserted that clarity is brought about through the practice from the control body. But is this a satisfactory answer? It will take time before relevant aspects are covered by the international court or control body and the decisions will be too numerous to make the law easily accessible.

It is a fair hypothesis that the existence of an international control mechanism will enhance the effect as well as the extent of human rights obligations. It may be asked if this applies equally to control mechanisms of different kinds. To take an example: Even if the Human Rights Commission has a formal position that is markedly different from that of the ECtHR, there are indications – not least in the recent General comment no. 33 – that the HRC strives towards perceiving itself as being on a par with an international court exercising judicial functions and delivering judgments.

When control bodies are addressing and deciding individual petitions, do their decisions affect the specific individual claim only, or will the decision have wider repercussions? The ECtHR has stated in a number of its judgments that it is not for the court to express a view on the relevant

national law *in abstracto*, but to decide whether its application in the concrete case ran counter to the obligations under the ECHR. The question remains, however, whether such statements are lip service when it comes to harsh realities, for instance because redress presupposes an amendment of national law, or because there are mechanisms at work that encourage the nation state to accept the Court's view more generally in order to help avoiding an overburdening of the Court by subsequent similar applications. Moreover, recent judgments show proposals by the Court for statutory amendments to be made by the state.

Surely, the domestic effect is likely to be stronger if the convention is incorporated in national law and even more if it has been given precedence over other statutory provisions, as the case with the Norwegian Human Rights Act. But does this precedence apply to views from any control body, no matter how disputable they are?

Another reasonable hypothesis to be explored is that the extent and foreseeability of the obligations that the nation state incurs by ratification will depend on the canons of interpretation actually employed by the control body. The ECtHR appears to subscribe to a principle of dynamic or evolutive interpretation. How far does it affect the actual application of the provisions of the convention? Does a canon of this kind only work one way – towards increasing obligations for the state? By contrast, on the national level

it is well known that the law developed through judicial precedent may be adjusted after a step that is regarded too brave or rash in the light of the circumstances and observations in a subsequent case.

It has to be asked whether it is an intrinsic feature of a control body in the human rights field to try to expand its powers and influence. An example to this end could be criticisms raised by control bodies against a state for not transposing “their” convention in domestic law on the same level as other human rights conventions. The imposition of a duty to take interim measures at the instigation of the control body is another example.

What factors can lead a control body into such an expansive trend? First, it may be asked whether the bodies tend to adopt this attitude as a means to justify their own existence. Will it be more likely to occur the more independent the members of the body are from the various states parties to the convention? If the members of the body regard themselves as totally independent rather than as common representatives of the states parties, will they be more inclined to develop the interpretation of the convention according to their own minds and preferences? In this perspective, the more autonomous the nomination procedure for membership on the control body, the greater reason for concern for the nation state.

The working procedures of the control body also deserve to be studied. In a control body composed of members with different backgrounds, to what extent is the influence of each member affected by his or her background – national, cultural and professional – and language qualifications? To what extent is, in fact, the positions of the control body determined not so much by its members as by its secretariat? In this respect, it is interesting to note the difference between the ECtHR and the Norwegian Supreme Court – in the latter, the judgments are drafted by the judges themselves from the very first line and immediately after the oral hearing; in the former, the judgment is usually based on a secretariat draft produced a long time after the hearing.

Judicial dialogue – mainly on an informal basis – is a fairly recent phenomenon, in particular between international courts. What are its forms and functions? Is the main function to give reciprocal support against other powerful authorities, to promote the creation of a uniform body of law superior to national legislatures, or simply to enhance the quality of each court's decisions by learning from other courts?

There are clearly differences between the control bodies as regards the range of their competence. The values enshrined in human rights often need to be balanced against other societal values. Are specialised control bodies inclined to some sort of narrow-mindedness through giving

overall preferences to the values they are supposed to monitor? Does this differ from national (supreme) courts with a more general competence?

At the national level, courts and other control bodies are counterbalanced by the legislature and by open debate in the public sphere. This is so even where courts have a final say in matters coming before them and it helps making judges accountable to and listening to the society in which they live and adjudicate. International courts and control bodies are in a different situation. There is no counterbalancing legislature and no common public sphere, partly due to linguistic problems and the media structure. How does this affect the function of the control bodies?

A state considering whether to ratify a human rights convention may do so throwing a glance at other states. One question is whether the convention introduces a uniform standard, or do the human rights standards in question, at law or in fact, imply – in the words of the 1992 Rio Declaration on environment and development – common but differentiated obligations? If so, this may be due to the wording of the convention, or to the practice invented by the control body. Quite a different argument is whether ratification is desirable because it serves to encourage ratification from other states where human rights are less respected so far. The restrictions on national sovereignty may then be seen as a sacrifice in order to promote human rights elsewhere, but it may still be

questioned whether it is worth while and whether a similar result can be achieved by other means.

Finally, it should be asked to what extent an emphasis on further development of human rights is linked to a particular notion of the relationship between citizens and state, characterised by distrust against the state. This would be understandable in parts of the world where, in past years or in our time, the inhabitants have been offered little from the state and they have been called on to make sacrifices instead. I submit that such a notion generally appears to be unfounded in a state like the Nordic states where the welfare state is rather to be seen as a guarantor for the well-being of its people. It needs to be assessed more clearly whether the continuing development of human rights is apt to bring about a shift of balance between the individual and the community at large which may be unwanted as well as undesirable.