

Hans Petter Graver: Concluding Remarks

I'm honoured to being entrusted with giving my concluding remarks for this day of the conference, and grateful for the chance this has given me to attend this important event. Ten minutes can in no way suffice to summarise the very rich and exciting discussions we have had during the day, so I will have to settle for some impressionistic notes inspired by the different contributions of the speakers and discussants.

Jan Helgesen started the day by asking, rhetorically I suppose, "Who should we trust, foreign judges or the people?" We have, in my opinion, learnt from this day that the question should rather be to what can we trust foreign and domestic judges and to what can we trust the people? No one can seriously claim that even our highly advanced democracy here in Norway is so mature as to render international standards and supervision of Human rights superfluous. On the other hand, many issues should be left to the political sphere.

The discussion is familiar from the national context, but the development of international Human Rights challenges our conception of law as connected to legislation, custom, legal culture and the hierarchy of courts. Many issues that are resolved and settled in national contexts regarding the role of courts and judicial review and the relationship between politics and law have to be addressed anew in our now more globalized legal order. Examples of such questions are:

- 1) What is legislation and what is interpretation?
- 2) What are appropriate canons of interpretation?
- 3) Who has the final say in interpreting the law, and what does it entail to have the "final say"?
- 4) What is the role of shared values and tacit knowledge in the interpretation and application of law?
- 5) What and how are the channels of communication between civil society and legal institutions, between legislative bodies and courts and between different courts?

As we move from more basic Human Right instruments in more general terms, to a more specific application of these norms in individual cases and to the development of more detailed and specialized treaty norms, these questions become more and more apparent because human rights increasingly merges with fundamental and other rights within the national legal orders.

This brings me to my second point: Should states ratify Human Rights conventions? All speakers today have agreed that the answer is obviously yes, although some have had some qualifications. In my view, the question we should ask is why are we asking the question of whether states should ratify Human Rights conventions? And more precisely, why are we asking this question now?

I would like to suggest that our asking of this question is a sign showing us that the very institution of ratification is under change. Ratification in international law is traditionally the act of approving an international treaty by the legislature. In many countries the ratification of international treaties follows the same rules as the passing of laws. When it comes to legislation proposed by the government, we do not in the same way ask the question "should parliaments adopt laws proposed by the government" and take for granted that the answer is "yes". All though ratification formally gives the final say to the legislature, in most cases, at least as far as many international treaties go, ratification is a rubber-stamp procedure. The nature of treaties being a negotiated compromise by many parties also does not leave much

scope for national parliaments to amend and adjust the text that the government proposes them to ratify.

The nature of international law has, however, changed in recent decades, not least in the field of human rights. The treaties are no longer confined to external matters between states, but address directly the rights and obligations of individuals within their domestic legal framework. This means that although international treaties in name, many of the treaties that the states are asked to ratify are legislation in substance. This brings the issue of a democratic deficit known from the EU-setting right into the question of development and ratification of Human Rights instruments.

As other treaties, these are negotiated by experts and concluded in conferences where representatives from the participating states' governments participate. The normal procedures to ensure participation and involvement of civil society when proposing legislation is not followed, and the legislative power in the participating states has little influence on the agenda or on the more specific content of the norms that are developed. One might say that with norms concerning human dignity and fundamental rights of individuals there should be less need for such an influence, so that the situation cannot be compared to that of for instance EU-legislation. Experience shows otherwise, and that there is scope for much political disagreement on how to best assure the rights and dignity of individuals in different situation.

It follows from this in my view, that the answer to the question "should states ratify Human Rights conventions" can be no more obvious than to the question "should parliament adopt legislation on fundamental issues of rights and human dignity proposed by the executive". The additional aspect that Human Rights conventions introduce is the desirability of international harmonization and supervision in these issues. But this is basically also a political question, at least in countries where the norms of *jus cogens* are observed.

A final observation I would like to make is addressed to the reservation many have had that unpredictability and legal uncertainty speaks against ratification in many cases. In my view it is important to remember that many, if not most human rights must be regarded as legal principles in the sense described by Ronald Dworkin or Robert Alexy. This means that their interpretation and application in individual cases by necessity is more uncertain than application of rules *strictu sensu*. If we make uncertainty an argument against ratification, we will never ratify human rights treaties, and we will therefore bring the civilising project of developing an international human rights regime to a halt. Rather than looking at uncertainty one should look at context; how important are the norms in question, how do they relate to other principles, including the right to democratic self-determination, how can communication between different legal institutions and between civil society and such institutions be enhanced and so on.

So basically, the answer to the question of the conference and this day must be "it depends"!