

Should States Ratify Human Rights Conventions?

The Norwegian Setting

By Njål Høstmælingen

Ladies and Gentlemen,

My name is Njål Høstmælingen, and I work as a researcher at the Norwegian Centre for Human Rights. My task is – according to the program, is to set the scene.

That implies a short presentation of the history on ratification and incorporation in Norway, and a brief presentation of the different groups that will give their perspectives later on today.

Before I start, I would like to thank Andreas and Geir for inviting me to hold this introduction, and for arranging this seminar.

Hopefully, the results of the seminar and the project will help Norwegian authorities come to the right conclusions on ratifying new conventions and on implementing human rights norms into Norwegian legislation, and hopefully it also will be of relevance for Norway's work on the international level – and maybe even for other states.

The title of the conference is “Should states ratify human rights conventions”, and this part of the conference is called “The Norwegian setting”. From the conference papers I read the following:

In the Norwegian setting the focus will be on the balance between protection of human rights at the international and national level and the preservation of democratic freedom of the Parliament (‘Stortinget’) – as illustrated by recent debates

about ratification of new conventions and protocols and the incorporation of international human rights obligations in national legislation and practice. This session will include various government perspectives, the views of NGOs, and academic perspectives.

The focus of this part of the conference is thus not only on ratification, but indeed also on incorporation. I will deal with both in the following. I am a lawyer by training, and so are 6 of the 9 people on the list of speakers, so I will mostly deal with legal implications.

Much of what we will discuss today is based on Norwegian legal history, and the history is as follows:

Norway has traditionally been a dualistic country, meaning there is a wall of separation between international law and national law. International conventions and international customary law has thus traditionally not been accepted as legal arguments before Norwegian courts.

This outset on dualism can be challenged on a theoretical level, as it has been done for example by Carsten Smith.

More important today is that the dualism has been softened by two factors.

One is the so called principle of presumption, that it is presumed that Norwegian law corresponds with international law binding upon Norway. This principle is highly relevant when it comes to flexible Norwegian laws, but is of less importance when the law is more fixed.

The other is sector monism. In quite many areas national legislation imports international norms. This is the case for procedural laws in

Norway, and partly also for areas such as discrimination and children's rights.

Briefly, the import is done in two different ways. One is through transformation, where international laws are translated – in language and often also in contents – into national legislation, typically then being a section of a larger law. This form of import is giving powers to the legislator to also change the contents of the international norms being imported, in addition to leave out international provisions.

The other import system is through incorporation. This will typically be done either by adopting the full international text as part of a law – either in the text itself or as an addendum to the law – or by a short reference in the law giving the convention status as Norwegian law. This form of import is more loyal to the international text, but less flexible. It could also be more difficult to communicate the contents of the convention to the people in general and the lawyers than the method of transformation.

Sometimes the two systems are combined: full incorporation in addition to amendment of existing laws.

We also have a third factor softening the hard outset of dualism, and that is the everyday harmonization of legislation. It would maybe today be tagged globalization, but the Norwegian parliament has for quite many years passed laws highly inspired of laws in other countries, and even the human rights elements of the constitution of 1814 were inspired by written norms from especially France and the United States. This softer and not so outspoken harmonization has led to fewer conflicts between international law and Norwegian law.

When questions of incorporation arise, we also get discussions on priority or rank: if there is conflict between an international text and a national one, which one is to be given preference?

Since 1999, when the parliament passed the human rights act, the situation has been rather blurred. In the constitution, our supreme source of law, we have on the one hand a set of human rights norms, and on the other hand a general human rights provision.

The set of human rights norms in the constitution are of different clarity and detail, and just a handful of the international norms found in ICCPR and ICESCR are found. These norms are mostly related to rule of law, religion, property and speech. Some of the provisions in the constitution have clear reference to international texts (especially religion and speech), others are more homegrown, so to say. If there is a conflict between these provisions in the constitution and other formal laws, priority will be given to the constitution. The same will be the situation if there is a conflict between provisions in the constitution and other human rights provisions. This could influence the result of a conflict between discrimination and religion, or privacy and freedom of speech.

The general human rights provision in the constitution is nothing but a short reference, reading:

Article 110 c

It is the responsibility of the authorities of the State to respect and ensure human rights.

Specific provisions for the implementation of treaties thereon shall be determined by law.

The legal importance of section 110c is disputed. There are mainly two positions: One is that this is nothing but a political signal from the parliament, a signal sent at the same time as the parliament explicitly did not wish to incorporate human rights texts into the constitution. The other is that this section opens up for courts to decide cases based on human rights conventions, especially in areas that are not yet strictly regulated by formal laws.

The Parliament set up a commission just before summer holidays (and the elections), a commission with a mandate to look into human rights protection in the constitution, and propose revisions. It has explicitly been told to stay away from the field of religion, but could in theory propose full incorporation of the major human rights treaties in the constitution.

We leave the constitution, and go one level down, to formal legislation passed by the parliament. Here we will find some conventions, such as CERD (and formerly CEDAW), incorporated into laws on discrimination. If there is a conflict between provisions in these conventions and formal legislation, the conventions will not per se be given priority.

In a somewhat different level, we find the human rights act. This act incorporates ECHR, ICCPR, ICESCR, CRC – and since June 19 also CEDAW.

The CAT is not incorporated into Norwegian legislation as such, but the definition on torture is transformed into the criminal code. ILO 169 is neither incorporated nor transformed into national legislation, but there are quite many regulations relating to the Sami population.

The act is named “Act relating to the strengthening of the status of human rights in Norwegian law”. The purpose is repeated in Section 1: “The purpose of the Act is to strengthen the status of human rights in Norwegian law.”

Of interest is section 3, reading: “The provisions of the conventions and protocols mentioned in section 2 shall take precedence over any other legislative provisions that conflict with them.”

The importance of section 3 is highly disputed. On one hand, the parliament does not have powers to bind future parliaments in a simple formal law, meaning future parliaments can change section 3

at any time. In addition, the section is a result of a decision on not incorporating these conventions in the constitution.

On the other hand, it is argued that it is politically very difficult for future parliaments to change section 3, and that there is a risk that the supreme court would interpret section 3 together with section 110c limiting the parliaments flexibility on passing laws in contradiction with human rights norms. Well, we will hopefully never get an answer on this through a ruling of the Supreme Court, but maybe the abovementioned commission can give guidance through their proposals to the parliament.

I will leave the human rights act, and its section 3 here. Before I finish this brief chapter on history, I have to mention two other important factors.

One is the question on the flexibility of human rights norms: what really is it that Norway is bound by by the international conventions, and what is it that the courts should respect? One side of this is the vagueness of the norms, and the discussion on self executing provisions.

Another side is the production of texts from the international monitoring bodies. Decisions and judgments by ECtHR have been accepted as arguments in the courts, and jurisprudence from UN organs and even general comments have been used as legal sources. One thing is relevance – which seems to be accepted by the Supreme Court – another is the weight or importance of these sources. The discussion, and the practice, is rather open.

It is interesting to note that the government highly appreciated the decision made by CERD in the so called Boot Boys case, strengthening the protection against hate speech, while quite many politicians were highly negative to the decision made by ECtHR in the case on political television ads.

So far, this has been a story on incorporation. The story on ratification is easier to tell. As a “humanitarian superpower”, a country based on democracy and human rights, a small state depending on a well functioning international order, ratification of human rights conventions has been generous. (Reference to be given to Merchant?)

But it does not go as easy as it used to – the convention on disabled, the OPCAT, OP 12 to ECHR and the drafting of the OP to ICCPR have not received Norwegian ratifications, a situation that would have been different ten years back in time. Today, ILO 169 would maybe not have been ratified either, at least not without reservations.

When I comes to ratification, I think this is the story of the favorite puppy that suddenly has grown into some kind of a beast with four sets of sharp teeth: (1) The application of human rights norms in national law has challenged the powers of the courts, the administration and the parliament, (2) The international monitoring bodies have criticized Norway’s human rights protection, (3) The international monitoring bodies produce new texts and documents in a high speed with unclarity to their legal importance and (4) There is no longer a sharp dualism in this field, and thus what Norway ratifies on the international level could have direct relevance on the national level.

If this is right, the relative success of incorporation of human rights norms into national legislation has led to reluctance to ratify new conventions. If this is the lesson learned from Norway, it would be interesting to see if the same happens in other countries too.

I leave it there. But before I finish, I would also like to set focus on the speakers – or the group of speakers – to come:

First are the perspectives from the Norwegian authorities: the Ministry of Foreign Affairs, the Ministry of Justice and the Attorney General. If nothing has changed during summer vacations, these

perspectives will be rather negative both towards ratifications and towards incorporation.

Next are the perspectives from the Ngo's, here represented by the Norwegian Bar Association and Amnesty International. I would be surprised if their perspectives are in line with the authorities'. In an Ngo-world, states should draft conventions, sign conventions, ratify conventions, incorporate them in national legislation and national politics, renew and strengthen the conventions – and make sure that other states do the same.

Following the Ngo's, are the scholars. You never know with scholars, do you? Usually, they have access to the same information, but so often their conclusions vary and contradict. Not only is there an opposition between different scholars, but quite often the one and same scholar is presenting so many arguments pro et contra that it is almost impossible to conclude, or at least understand why the scholar concluded as he or she did. Our scholars today have argued against each other once in a while, both in academic articles and in newspapers. At the same time, they have all been in positions allowing them to give contents and color to the human rights politics being carried out.

My last point here today – or at least in this introduction – is that I miss three perspectives.

One is the perspective of the politicians. Are such problems discussed at all, or are they left for the bureaucrats, technocrats and the nerds interested in foreign policy? And if they are discussed, what are the arguments? And the relevance? Sometimes one might get the impression that politicians mostly are interested in getting enough support for the next election, and that this work is so hard and time consuming that there is nothing left for the more visionary thinking.

Along the same lines, what do the Norwegian people think about these questions? Do they care at all? Do they know what it is all

about? Aren't human rights violations just something that happens in Russia and poor countries in the South? Or, on the other hand, maybe human rights is about everything – even about lower prices from your telephone company, as I read in a Norwegian paper this summer.

The third perspective is the one from the courts. Quite many cases are based on – or strengthened by – human rights norms, but are the norms too vague? Are there too many conflicts between the international norms themselves, and between international based laws and national legislation? Is it too difficult to get access to the sources, and fully understand documents written in English for states quite different from Norway?

So many questions, and so little time. My time is up. I am looking forward to the presentations and discussions here today, and to the results of the Should states ratify human rights conventions-project.

Thank you for your attention.