

Opening conference:

Should states ratify human rights conventions? 18-20. August 2009

Comments to the Norwegian setting

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Intro remarks:

The departure point for my own comments to this session on “The Norwegian setting” was posed in the general introduction, by Njål Høstmælingen, in the following way: “The relative success of incorporation of human rights norms into national legislation has led to reluctance to ratify new conventions”. He also used the picture of a favourite puppy turned into a some kind of beast.. I think this is a rather precise observation. But we still need to ask about the who’s, what’s, and why’s. Whose reluctance are we talking about here? What is perceived to be at stake? Why is “success” a problem?

In my comments, I will approach such questions using the fate of CEDAW in Norwegian law as a kind of empirical stepping stone. CEDAW was ratified by Norway in 1981. It was not, however, one of the conventions included in the new Human rights act of 1999. Consequent battles have been over “appropriate” forms of inclusion: whether to incorporate the convention into Norwegian law, and at which level of priority. I am myself a CEDAW activist. By this I mean that I have publicly argued for the incorporation of CEDAW into the framework of the Human rights act for many years. So I am not a neutral observer in this respect.

To elaborate somewhat on Njål Høstmælingen’s presentation of speakers and his statement about; scholars who sometimes have argued against each other: In my years of activism I have on several occasions been in argumentative confrontation with the former leader of the legal section at the Ministry of Justice, Inge Lorange Backer, who today speaks from the position of professor at the department of public and international law at the university. Similarly, I have – within the general context of memberships in a governmentally appointed commission (1998-2003) to investigate “Power and Democracy” in Norway - been engaged in controversy with professor Øyvind Østerud over the democratic importance of the national implementation of international human rights. We disagree, and have done so for quite a number of years. All this is simply for the record. My

commentary will strive not to repeat too much of old disagreements. Instead, I will pose the following question, as a way to grasp the phenomenon of “reluctantism”: *Why should't CEDAW be incorporated into the Human rights act?*

Brief on background:

This spring the Norwegian parliament – the Storting – did actually decide to do the opposite, to incorporate CEDAW into the Human Rights Act. The decision was supported by all parties save one – the rightist Progress party (Frp). However, it was only made after nearly a decade's debate on the appropriate implementation form. While varying political majorities in general have been in favor of an extensive, and prioritized, incorporation strategy – as has most civil society groups – particular milieus of government lawyers have rather consistently fought to rally support for the opposite. And it now seems that one “final line” has been drawn – that is, to the incorporation of conventions through the human rights act. As stated by the present government: CEDAW would be the last international convention to enter this law.

Research question:

The debate on incorporation is an intricate one. The legal lingo of this particular form of human rights debate often cloud important issues. To me, it has been quite an effort simply to grasp what the lawyers are talking about here. But this should not exclude me; it is of course important to insist on participation; this scene is one where everyone has a part to play. Philosophers, political theorists, empiricists ; and not least, political activists.

One empirical possibility for political scientists who are interested in human rights implementation is - obviously – to study the policy-makers . To repeat professor Beth Simmons' commentary yesterday; what scholars may want to know from policy makers is – for instance – the following: What is the official policy? *Who* makes it? And *how* is it made? To this I would add – for my own part: How are the debates, and the decisions, on implementation politically *framed*?

The familiar formula of frame analysis generally asks what debates and decisions construct as “the problem” at hand , and what kind of “solutions” are seen to follow from particular, and varying, problem constructions. Which diagnoses are applied, and which prognoses are offered? What are the dominant frames, and what are the oppositional framings? Which interests clusters around the building of a frame?

In the following, I will - but very schetchy - outline some aspects of such an approach.

Resistance framing:

It is possible to outline, or suggest, a possible “master” frame for current problem construction of human rights implementation, in the Norwegian setting, as

“Internationally driven judicialisation threatens national democratic rule”.

Much is here owed to the Norwegian Power and democracy study (1998-2003). Here “judicialization” became a key word. This was, in general terms, depicted as a process whereby an increasing number of areas are regulated through law, and political decision making is handed over to courts and other legal institutions. Courts and other judicial bodies increase their decision-making powers at the expense of politics and public administration. In the human rights context, the power of the courts simultaneously moves from national to international legal institutions, thus restricting national autonomy and self-determination. This way, human rights implementation was argued to pose a threat to “democracy” in what was here framed as its “fundamental meaning”: Majority based decision-making in elected bodies. In this respect, rights based claims and politics only provide forms of “supplementary democracy”.

Promotional framing:

My own dissenting statement within the framework of this study rejected the “fundamental-supplementary” split. Likewise sweepingly, I argued that the rights based regulation of the relationship between state and individuals, and between majority and minorities, can be viewed as fundamental democratic premises. I described CEDAW as an important point of reference for a global women’s rights movement and numerous networks of local groups and organizations engaging in practical on-the-ground human rights work, and as a crucial tool for political mobilization against discrimination.

The Attorney General’s Office on resistance:

Tolle Stabell, deputy director at the General Attorney’s Office (Regjeringsadvokaten), has earlier today in detail explained the office’s position on national human rights implementation. This office houses the government’s own lawyers, and those who go to court representing the state. They regularly travel to Strasbourg. The office is a very important – but often rather publicly neglected – advisory body to the cabinet. As we heard, “judiciability” is an important pillar in the problem construction that provides the overarching “judicialisation” worry of this office. In the consultation letter written by the office in the public hearing of the power and democracy study “judiciability”

provides the demarcation that (ought to) distinguish between incorporable and un-incorporable conventions:

“Only those statutes which are “suitable for enforcement by courts” (“egnet for å håndheves av domstolene”, my translation) should be incorporated into Norwegian law. Statutes must be sufficiently “clear” to be applied by courts, and sufficiently “broad” in balancing different considerations. “

Also, some human rights might here be seen as more basic (“grunnleggende”) than others, and only the former warrant (prioritized) incorporation.

In the CEDAW controversy, the General Attorney’s office were – generally speaking - not concerned with the substantive implementation of gender equality rights. The office was concerned about vagueness and unsuitability, and ties justiciability directly to “judicialisation” in the Power and democracy study’s sense. In the CEDAW controversy the General Attorney’s Office opposed incorporation on a platform built somewhat like this:

An argument about justiciability: CEDAW contains too many unclear and vague requirements, and statements that are not law-like enough.

An argument about judicialization: Incorporation of CEDAW will thus grant power to the courts to decide what convention rights imply.

An argument about consequent and dangerous power transfers: This might change the balance between legislator and court, and increase the influence of courts at the expense of parliament.

Being non-substantive as to CEDAW rights, it is a generalize-able approach. All – or most – conventions that come up for political consideration – be that ratification or incorporation - might have to contend with the same framing: it is too vague, too open, but still likely to shift the balance of institutional power by judicializing politics in undesirable ways.

Lack of justiciability + judicialisation = problematic power shifts.

All these issues – on “clarity”, “broadness”, “suitability” - constitute legal-political battlefields. In Norway, it seems quite clear that different governments and different parliamentary majorities over time largely has disagreed that “justiciability” concerns should function simply as a mechanism of exclusion. Instead, politicians have, until recently, behaved largely as those “*sincere ratifiers*”

described by Beth Simmons yesterday. To “sincere ratifiers” “the problem at hand” would probably be constructed differently also in general terms. Maybe somewhat like this:

“How are we to secure a national legal practice that is consistent with the international human rights practice?”

Government / Parliament on incorporation:

Firstly, I have to admit that my activist experiences with CEDAW have made me more aware of “back stage” and “front stage” motivations respectively. Still – if we stick to the front stage, and the parliamentary decision in June this year to incorporate CEDAW into the Human rights act, the message is two-fold.

There is an unconditional embracement of the viewpoint that CEDAW belong among the “privileged conventions” in the human rights act. But why?

As framed in general terms by the government in the incorporation proposal:

“Incorporation of central human rights conventions strengthens the rights of individuals vis-à-vis the state, and offers effective protection against infringement. This protection is a basic principle in a law governed state and democracy. “

The general problem construction is of course vastly different from the one expressed through judicialisation concerns. While the latter sees the main challenge as “how to protect the system”, the former sees the main challenge as “how to protect the individual?”

With regard to gender equality rights:

“This prioritized incorporation will increase awareness of gender equality and women’s rights nationally, and send a strong signal to the international community.”

What is the problem represented to be? That there at present is too little awareness of women’s rights. By this the government implies that the full set of actual rights which the state already has granted individuals simply needs to be recognised by society.

The “gender equality problem” does not seem to be; in the government’s incorporation proposal; subordination of rights, violation of rights or lack of adequate protection.

After stating all the pros and cons for incorporation of CEDAW (cons being in particular tied to judicialisation) and then in much more detail than I have outlined here, the government draws the demarcation line:

While CEDAW “holds a very central place among the human rights conventions”, no new political moves will be made to incorporate others. Other conventions are of “a more special character”, the Government simply concludes.

And then?

So things are changing. Indications of a possible shift are, in addition to CEDAW as the “final line” in the Human rights act, the continued debate over ratification of the optional protocol to the convention on social, economic and cultural rights, or the majority recommendation of the commission which recently has delivered its proposal on a common anti discrimination law – the recommendation that Norway does not ratify protocol 12 to the ECHR on non-discrimination.

To all these processes, similar questions can be posed:

How is the problem framed, and which solutions follows from particular problem constructions?

Who are the main proponents of a particular frame? Who are the opponents?

And possibly: (How) can gaps be bridged?

As illustrated in this very session on “Norway”: We have heard some scholarly debate, we have listened to the state’s own lawyers, we have heard the NGOs positioning etc. But we have not heard from the potential gap bridgers. As Njål Høstmælingen said about “missed perspectives”: No Norwegian politicians have spoken here about the concrete national human rights implementation: Why it is important; what they (varyingly?) perceive as the major problems; how they (varyingly?) aim to solve them.

In short, why they think the state should continue to ratify (some?) human rights conventions. Or not.