The Status of the ECHR in Norway: Should Norwegian Courts Interpret the Convention Dynamically?

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1. Introduction

Should national courts play an active role in the development of the European Convention on Human Rights (ECHR), or should they defer the development of the ECHR to the ECtHR (European Court of Human Rights)? The question whether only the ECtHR should interpret the Convention dynamically has been at the fulcrum of Norwegian legal debate for the last ten to fifteen years.

Coming in the wake of a string of decisions that all stopped short of interpreting the ECHR dynamically, a Supreme Court judgment from 2008, read in the context of a 2002 judgment, may be seen as a harbinger of change.

2. The Status of the ECHR

Having signed the ECHR in 1950 and ratified it in 1952, Norway deferred giving human rights explicit constitutional protection until 1994. Section 110(c) of the Norwegian Constitution provides that it is ‘incumbent on the State to respect and protect human rights’, albeit specific implementation provisions are to be set out not by the Constitution, but ‘by

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4 Beyond a very limited number of rights that had remained close to their original form of the 1814 Constitution, see the further discussion in O.Wiklund, ‘The Reception Process in Sweden and Norway’, in A Europe of Rights: The Impact of the ECHR on National Systems, eds H. Keller & A. Stone Sweet (Oxford: Oxford University Press, 2008), 183.

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Norwegian law has been – and continues to be – presumed to be in accordance with international law; the fact a reference to human rights only was included in the Constitution in the 1990s was not seen as much of a problem. In 1999, this practice was reinforced by the Act on the Strengthening of the Status of Human Rights in Norwegian Law. Section 2 incorporates the ECHR along with the two UN Covenants of 1966, on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR) into Norwegian law. Later, the United Nations Convention on the Rights of the Child (UNCRC) and the attendant optional protocols as well as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) have been incorporated by being added to the instruments listed in section 2 of the Human Rights Act. The purpose of the act was to shore up the position of human rights in Norwegian law. Section 3 states that in case of conflict, provisions of the conventions and protocols included in section 2 of the act take precedence over other provisions.

As the conventions were incorporated through an ordinary statute, they do not enjoy constitutional protection, section 110(c) of the Constitution notwithstanding. The symbolic-political functions of the law aside, the Human Rights Act formally, did not shift the dynamics of Norwegian and international laws very much; the same level of protection existed before and independently of the Human Rights Act. As the incorporated rights are reinforced through a clause by which they take precedence in the event of conflict with other parts of national legislation, one could get the idea that, although incorporated only through statute, they take on semi-constitutional status. They do not.

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5 Article 110(c) provides that ‘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.’

6 E. Smith, Konstitusjonelt demokrati: Foreløpig utgave (Bergen; Fagbok forlaget, 2008), 154–157; Wiklund, 183–184.


14 Supra n. 8.

Because of the level of protection existing before the Act – and ironically – the result of this kind of law-making may in fact be the weakening of those conventions of which the act does not expressly make mention.16 One should, however, not be too glib about the symbolic function of the incorporation, as it has spurred an increasing number of human rights cases before Norwegian courts and by the same token no doubt heightened de facto human rights protection in Norway.17

3. The Impact of the ECHR

3.1. The impact of the ECHR before Norwegian courts prior to incorporation

In the 1990s, the Supreme Court made an important statement of principle in the Corrugated Cardboard case.18 Concerning illegal price-fixing and ECHR rights, this case allowed the Norwegian High Court to consider in detail the issue of Norwegian and international laws. The Court held that when considering relevant human rights provisions, ‘[f]or a Norwegian court to be justified in setting aside the effects of national rules of procedure, the differing rule which can be based on international law sources must appear sufficiently clear and unequivocal to permit such a decision’.19

Imposing a special requirement of ‘clarity’ on the international law rule to be used,20 this doctrine also underscored that in deciding whether a ruling by an international court should be given precedence in national law, it was of importance whether it was based on a situation factually and legally comparable to the situation in which the Norwegian court was to decide. The doctrine was seen as a signal to lower courts that they needed not immerse themselves in what was regarded vast and sometimes complex international sources when the ECHR was invoked by legal counsel.

At the same time, looming in the background was a question of more far-reaching scope: should the Norwegian Supreme Court defer the development of the ECHR to the ECtHR, or should it, too, play an active role in the formulation of the European ius commune of human rights? For it is precisely in the penumbral areas – where the law is not clear and unequivocal – that national Supreme Courts may have a hand in the development of ECHR law.21

Although criticized in legal doctrine and by the minority in Rt. 1999, 961, as falling short of the wording of the Human Rights Act, this doctrine survived through the 1990s.22

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17 Wiklind, 184.
19 Ibid., 616–617.
21 Smith, 1306–1307.
3.2. **Impact of Incorporation**

The intervening years having seen the adoption of the Human Rights Act 1999, *Corrugated Cardboard* was overturned by the *Bohler* case. In *Bohler*, the Supreme Court took pains to go into considerable detail on the question of the relationship between Norwegian and international laws, with the question of the evolution of the ECHR and national courts looming large.

First, the judgment in rather unambiguous terms sat aside the 'clear and unequivocal' reservation. There was no longer any need for the rule following from the ECHR to be 'clear' for it to take precedent over Norwegian law. The Supreme Court held that the question whether there is a conflict between a provision in an incorporated convention and other parts of Norwegian law is not amenable to answer by reference to general principles; it depends on interpretation of the applicable provisions in the circumstances.

Having recourse to the newly adopted Human Rights Act 1999, section 3, which seemed to influence the Court considerably, the Court said that where the solution following from the ECHR appears as reasonably clear, it is incumbent on Norwegian courts to give precedence to the ECHR provision even though this would mean the overturning of well-established Norwegian legislation or practice. The Court later underscored that one should not take what it said in *Bohler* about clarity to mean that some sort of reservation with regard to clarity still obtained; this would be a misconstruction.

At times, however, there may be well-founded doubt as to how the ECHR is to be understood. This doubt, the Norwegian Supreme Court said, could stem from the dynamic interpretation of the Convention by the ECtHR, as the latter views the former as ‘a living instrument’ to be ‘interpreted in the light of present-day conditions’.

Although Norwegian courts must use the same method of interpretation as the ECtHR, the Norwegian Supreme Court held that it is primarily for the Strasbourg Court to develop the Convention. Harking back to what it said in the *Corrugated Cardboard* case, the Court underscored that if doubt obtains as to the impact of the judgments of the ECHR, it is of importance whether the decision in question is based on a situation factually and legally comparable to the situation in which the Norwegian court is to decide. To the extent that Norwegian courts have to engage in balancing of various interests, they should – applying the method used by the ECtHR – also take account of traditional Norwegian priorities, and all the more so if the Norwegian legislature has considered the relationship to the Convention and found no conflict between Norwegian and ECHR laws.

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23 Norwegian Supreme Court Judgment, see (2000) Norsk Retstidende 996 (in Norwegian: *Bøhlerdommen*).
24 Eckhoff, 330–332.
In the view of the Supreme Court in *Bøhler*, Norwegian courts do not dispose of the same material bearing on legislation and case law in other European countries as does the ECtHR. Norwegian courts, in going about to balance different interests, may draw especially on priorities and traditions underpinning Norwegian law. In this way, they will be able to engage in reciprocal dialogue with the ECtHR, contributing to the development of the Court’s jurisprudence. A dynamic approach to the ECHR on the part of Norwegian courts would run the risk of Norwegian courts going too far. In so doing, they could grant a further human rights protection than the ECHR requires, the result of which would be interfering with the balance between the legislature and the judiciary, and engendering unnecessary limitations on legislative powers. Norwegian courts, the Supreme Court concluded, should not interpret the Convention dynamically where there may be doubt as to the interpretation of the ECHR.

The main purport of this doctrine is that the principles of ECHR construction are not the same in Norwegian courts as in other courts, insofar as the former take on a special Norwegian character. This stance has been reiterated in, among others Rt. 2003, 359 and Rt. 2005, 833. Of the different trajectories, a national Supreme Court may follow with respect to the evolution of the Convention, the approach of the Norwegian Supreme Court seems to fit well into the category former Supreme Court President Carsten Smith referred to as the ‘enforcement approach’, ‘passively receiving’ as opposed to ‘actively contributing’ to the evolution of the ECHR.

4. Conclusion: Change in the Offering?

In Rt. 2002, 557, the Norwegian Supreme Court, sitting in plenary session, held (8-5) that to prefer charges for tax evasion against someone that had already suffered additional taxes over the evasion would run counter to the *non bis in idem* principle as set out in Article 4, Protocol 7 ECHR. Although the majority quoted *Bøhler* emphasizing that it is not for national courts to develop the Convention, it may be interpreted as having done just that, by way of tacit dynamic interpretation.

The same seems to hold true for Rt. 2008, 1409. The question before the Supreme Court, sitting in plenary session, was whether one can deduce a standard of proof from Article 6(2) ECHR. This has not clearly been set out in the jurisprudence of the ECtHR. Both the majority and the minority of the Norwegian Supreme Court pointed out that

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28 This idea is especially advocated by H.P. Graver, ‘Dommer Høyesterett i siste instans’, *Jusuen Venner* (2002): 263.
29 Møse, 637.
30 Graver, 274.
33 Smith, 1307.
it is for the ECtHR to develop the Convention, the minority adding that the Bohler reticence would be particularly warranted in a case raising as many difficult questions about the standards of the ECHR as did Rt. 2002, 557. The majority, however, held by six votes that Article 6(2) ECHR does lay down a standard of proof, and by the same token seemed not to shy away from evolutive interpretation of the Convention where there may be doubt as to the correct interpretation of the ECHR.

In view of the still-prevalent Bohler doctrine, the Norwegian Supreme Court’s approach comes across as substantially different from those of English and French courts, which openly interpret the Convention dynamically.

The House of Lords, whose famous ‘no more but certainly no less’ approach to the dynamics of Strasbourg case law was set out by Lord Bingham in R (Ullah) v. Special Adjudicator,37 in 2008 developed its approach to the Convention into a fully fledged dynamic interpretation in cases where the standards of ECHR law remain uncertain. Last year’s In re P (Adoption: Unmarried Couple)38 established that nothing prevents municipal courts from interpreting the rights in municipal law as protecting interests on which the Strasbourg Court has not ruled. The House of Lords, in other words, does not fight shy of overtly interpreting ECHR rights dynamically.39

The same goes for France. For at least a decade now, French courts have construed the Convention’s provisions according to the purposive method used by the ECtHR.40 This occurred for example in Kloeckner.41 In that decision, the Cour de cassation ruled, in advance of the ECtHR, that Article 6(1) ECHR was applicable to fiscal disputes before civil courts.42

In judgments Rt. 2002, 557 and Rt. 2008, 1409, the Norwegian Supreme Court seems to have run counter to its own Bohler doctrine, tacitly leaving the door ajar to changes in its case law. Whether the Court will come out on the side of an open and fully fledged dynamic interpretation of the Convention remains to be seen. Perhaps one should not expect too much too quickly, but looking at other European national courts there seems still to be room for adventure.


38 In re P (Adoption: Unmarried Couple) [2008] 3 Weekly Law Reports 76.


41 Cass plen as 14 Jun. 1996.