Stefan Lorenzmeier/Vasilka Sancin (eds.)

Contemporary Issues of Human Rights Protection in International and National Settings

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Foreword

This volume is the result of a common and truly international and European effort of, in alphabetical order, the Law Faculties of the Universities of Augsburg (Germany) and Ljubljana (Slovenia). A couple of years ago, the two institutions decided to organize a series of common seminars and conferences on contemporary issues of international law, broadly understood, under the helm of the two editors of this volume.

The general outset of the series is two conferences on a common topic held at the two institutions, for which internationally renowned experts as well as younger scholars are invited to present and discuss imminent problems of international law. The first series of lectures was devoted to the protection of human rights in international and national settings and received a very positive response from the participants, which encouraged us to proceed with the preparation of an edited volume of further developed ideas, first presented at the two conferences, We do sincerely hope that the volume is useful in stirring discussions and offering new insights in understanding, interpretation, application and enforcement of human rights.

The editors would like to wholeheartedly thank everyone who made the publication possible. This means first of all the participants of the conferences for their contributions and their time spent on preparation of the chapters of this volume. Secondly, the support from *Natasha Thomson*, LL.B. (Hons., Aberdeen) and *Monika Reka Kriss*, LL.B. (Hons., Exeter) in proofreading and editing cannot be overestimated. Further thanks have to go to the publishing houses, it is a special privilege for us that leading international law publishers were interested in the publication of this volume and to the Augsburg Center for Global Economic Law and Regulation for its financial support.

We hope that the publication proves to be useful to the readers.

Augsburg/Ljubljana,
Janaury 2018

Stefan Lorenzmeier & Vasilka Sancin

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Introduction to Contemporary Issues of Human Rights in International, European and National Settings

Stefan Lorenzmeier & Vasilka Sancin

Human rights are an ever-developing area of international, European and national law. Due to their permanent challenges and relevance for everyday life of persons they are extremely prone to contemporary problems and evolutionary interpretations. This can, for instance, be clearly seen in abundance of domestic case-law as well as the jurisprudence of the European Court of Human Rights (ECtHR), and increasingly so in the jurisprudence of the Court of Justice of the European Union (EU). The volume before you addresses some legislative and institutional developments, as well as actual application and enforcement of human rights in Europe on the state as well as the international level.

In the following pages, we attempted to provide a reader with an overview of a selection of contemporary human rights issues and the reasons for their relevance. For this, we strived to group and introduce various sources of human rights applicable in the legal orders of selected European States as well as the European Union, while touching also upon some particular contemporary issues of human rights law. The authors of the volume are a blend of experienced and early stage researchers with a wide variety of backgrounds, which reflects their diversity and proves, hopefully, to be beneficial for finding new approaches and innovative solutions to existing legal problems.

I. The Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention on Human Rights and Fundamental Freedoms (ECHR)[1] represents the core human rights protection document in Europe with its 47 Member States and a very active specialized human rights

1 Of 4 November 1950, UNTS vol. 213, p. 221.

court in Strasbourg (France). The impact of the ECHR and the jurisprudence of the European Court of Human Rights on the legal systems of its Member States and, due to Art. 52 (3) Charter of Fundamental Rights of the European Union[2], the European Union can hardly be overstated.

1. The ECHR and National Law

For international treaties like the ECHR, it is the task of the national laws of the Convention's States Parties to determine its status in their respective national law. There, the ECHR enjoys either the level of constitutional law or of a lower status, mostly (federal) law. Due to the stated special status of the ECHR in its States Parties, it is possible that their national and international obligations clash, which leads to the question of which legal order prevails. This is at least problematic for the achievement of full compliance and enforceability of international human rights order. In the course of this volume, three interesting case studies will show how the ECHR is applied in a non-member state of the EU, Norway, and two new members, Poland and Slovenia, in different legal contexts.

a. Norway, Poland and Slovenia

Norway is a State Party to the ECHR since its entry into force in 1953. Although it is not a Member State of the European Union, it has a very close relationship with the EU through the EEA-Agreement[3]. Moreover, Norway has a comparatively ancient constitution which dates back to 1814 and which originally did not refer to the protection of human rights. After 200 years, the Norwegian Constitution had been amended by Art. 92 NC. The provision establishes the State's responsibility to "respect and ensure" human rights as they are formulated into this Constitution and in conventions on human rights that Norway is a party to." Yet, some topical methodological issues in the field of human rights in the aftermath of the adoption of Art. 92 NC arose and are discussed in this volume[4]. In the

2 OJ 2012 C 326/391.
3 Agreement on the European Economic Area, OJ 1994 L 1/3.
4 *Vibeke Blaker Strand* & *Kjetil Mujezinović Larsen*, The Role of the European Convention on Human Rights in the Norwegian Legal Order, p. 27.

meantime, the Norwegian Supreme Court developed several principles on how the ECHR should be applied by the Norwegian courts in practice, which are addressed as well in the contribution by *Blaker Strand* and *Larsen*.

Poland, as a new Member State of the European Union, has an extensive jurisprudence on human rights matters. Yet, in spite of Polish constitutional law adopting international human rights standards and Polish courts being obliged to follow them, Poland is frequently struggling with the obligations imposed by the ECHR, as can be seen by the case-law of the European Court of Human Rights. Therefore, it is of special importance how Poland can improve its human rights' record and can comply with its international legal obligations as discussed by *Miler*.[5].

Slovenia became a State Party to practically all major human rights instruments, mainly through succession after the former Yugoslavia and continuously endeavours to build its strong presence on international human rights issues, also through promotion of preparation and adoption of new multilateral human rights treaties. The main objective of the "founding fathers" of the Slovene constitution in 1991 was to create and guarantee an effective human rights protection for all, especially in the field of civil and political rights on the basis of the rule of law, which can be clearly seen from the case-law of the Slovenian Constitutional Court, presented by *Škrk*[6].

b. Germany

Difficult, as often, is the status of the ECHR in the German legal order. Human rights treaties concluded by Germany have the status of federal statutory law (Art. 59 (2) BL) and do not bind the Government or the *Bundestag* as constitutional law[7]. A long and rather intense argument among scholars and the German Constitutional Court is whether basic human

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5 *Dorota Miler*, The Role of the ECHR in the Polish Legal Order, p. 45. See also the contribution by *Mirjam Skrk*. p. 71.

6 *Mirjam Škrk*, International Human Rights in the case law of the Constitutional Court, (n. 5).

7 See e. g. *Stefan Lorenzmeier*, The German Constitution and International Law: Some Remarks on the Comparison with the Opennness of the South African Constitution, in: Möllers/Hugo, Transnational Impacts on Law: Perspectives from South Africa and Germany (Nomos, Baden-Baden, 2017), p. 295 ff.

rights treaties, like the ECHR, could acquire the status of constitutional law[8]. The German Constitutional Court's case law in this respect is rather narrow.

According to its case-law, fundamental human rights treaties, such as the ECHR, whose provisions are authoritatively interpreted by the European Court of Human Rights, can be used for the interpretation of the basic rights enshrined in the German Constitution[9]. As such, it is argued by scholars that the provisions of the ECHR enjoy a status similar to a constitutional guarantee[10] and go beyond the mere status of a federal law. The German Constitutional Court does not go so far, due to the restrictive wording of Art. 59 (2) BL[11]. Yet it seems to accept that some very basic human rights enshrined in international documents may be granted a special status if the German Constitution is granting them the status as well[12], such as in the case of the protection of human dignity laid down in Art. 1 BL, which is of overriding importance for the German legal order and is now also part of the EU Charter of Fundamental Rights.

Recently the German Constitutional Court had to consider the additional issue whether national statutes contravening international law are unconstitutional. According to the Court, the principle of openness to international law can derive from the systematic analysis of the BL, namely the provisions of Art. 23–26 and 59 (2) BL, which regulate the relationship between the Federal Republic of Germany and the international community[13]. Yet, as a principle it serves as a guideline for the interpretation of fundamental rights, which means that within the scope of applicable methodical principles an interpretation favourable to international law must always be chosen[14]. Therefore, the Constitutional Court held that Art. 59 (2) BL cannot be interpreted in a way that is favourable to national

8 This is, for instance, the case in Austria. For the discussion in Germany see e. g. *Ondolf Rojahn*, in: *v.Münch/Kunig*, GG-Kommentar, (Beck, München, 6th ed. 2012), Art. 59, mn. 45.

9 BVerfGE 111, 307 (323 ff.).

10 The arguments brought forward by *Martin Nettesheim*, in: *Maunz/Dürig*, GG-Kommentar, (Beck, München 2009), Art. 59 GG, mn. 184 could lead to such a conclusion.

11 BVerfG, 2 BvL 1/12, order of 15 December 2015, para. 34.

12 BVerfG, 2 BvL 1/12, order of 15 December 2015, para. 76.

13 BVerfG, 2 BvL 1/12, order of 15 December 2015, para. 65.

14 BVerfG, 2 BvL 1/12, order of 15 December 2015, para. 71.

law, which means that the legislature may only in exceptional circumstances override obligations under international law[15].

2. The European Union and the ECHR – a never-ending story?

A second issue in this regard is the relationship between the European Union and the ECHR. Originally, the European Economic Community knew no provision on the protection of human rights. The basic principle of the Treaties of Rome was to create stability in its Member States through economic integration. This has changed remarkably, as evidenced by Art. 2 and 6 TEU. Art. 2 TEU lists the core values of the Union, inter alia the "respect for human rights, including the rights of persons belonging to minorities". One of the main drivers for the change, was the German Constitutional Court's reasoning in the famous *Solange*-cases[16].

a. De lege lata status of the ECHR in the EU legal order

The European Union nowadays accepts the norms of the ECHR as part of the primary law of the Union due to Art. 6 (3) TEU and as an interpretative tool in accordance with Art. 52 (3) EU Charter of Fundamental Rights. In essence, this means that all EU Member States and the supranational organization, the European Union, have to respect the ECHR in the enacting and administration of their laws. This leads to several legal problems in the respective legal orders, some of which are briefly explored in the following pages.

b. De lege ferenda – Accession to the ECHR

The accession of the European Union to the ECHR is demanded by provisions of Art. 6 (2) TEU[17]. The already famous opinion 2/13 of the EU's Court of Justice disapproved the already negotiated accession agreement

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15 BVerfG, 2 BvL 1/12, order of 15 December 2015, mn. 72.

16 2 BvL 52/71, *Solange I*, BVerfGE 37. 271 and 2 BvR 197/83, *Solange II*, BVerfGE 73, 339.

17 OJ 2016 C 202/13.

between the EU institutions and the Council of Europe[18]. Thus, the established relationship between the two international legal regimes will remain unchanged for now until a new agreement in line with the reasoning of the ECJ is concluded, which seems to be an almost insurmountable task in light of the said reasoning. As a result, the *Bosphorus*-presumption, according to which the ECtHR can challenge acts of the EU as part of the obligations of the common member states of the ECHR and the EU, still remains valid. Of special relevance in this context is whether the presumption could be extended to other member states of the ECHR or, if this is not the case, whether the ECtHR's "margin of appreciation"-doctrine could be used. These delicate questions are analysed in the contribution by *Engel*. [19]

The proposed accession of the Union to the ECHR also tackles two further issues, the so-called co-respondent mechanism and the relationship to the inter-state application according to Art. 33 ECHR. The co-respondent mechanism was supposed to deal with the situation that the EU and its Member States were going to be parties to the ECHR at the same time. [20] Firstly, the guiding principles that had to be taken into account when incorporating the co-respondent mechanism into the existent procedure before the ECtHR are scrutinised. Secondly, by analysing the relevant articles of the rejected Draft Accession Agreement, the most important features of the mechanism adopted by the negotiating parties are shown and some of its most disputed weaknesses discussed by focusing on the ones that have been addressed by the Court of Justice itself. The question whether the parties, when bargaining about a politically acceptable deal on the EU's accession to the ECHR, have found an adequate procedural solution for individual applicants, also ought to be answered in the contribution by *Korošec*.

A related topic is the issue of the effect of the EU's accession to the ECHR on inter-state applications. Hereby, it is argued that future accession of the EU to the ECHR should not lead to an exclusion of inter-State

18 ECJ, Opinion 2/13, ECLI:EU:C:2014:2454.

19 *Daniel Engel*, The Future of the Bosphorus-Presumption after the EU's Accession to the European Convention on Human Rights, p. 133.

20 *Tina Korošec*, The Co-Respondent Mechanism Before the European Court of Human Rights: An Adequate Procedural Solution or a Flawed Mechanism?, p. 153.

applications between the, currently 28, EU Member States before the ECtHR under Article 33 ECHR as claimed in this volume by *Risini*[21].

Besides the hard law-provisions, the accession procedure of the EU to the ECHR as such is of constitutional relevance for the EU and rather peculiar. The accession procedure is remarkably different from the usual treaty-making procedure laid down in Art. 218 TFEU in terms of the required participation of EU and other bodies and the majority required in a vote. The impact of the procedural rules on the substantive treaty law are stark and the underlying reasons for the special procedure are explored and a possible adjustment proposed in *Lorenzmeier*'s contribution[22].

III. Protection of Human Rights by the EU – Internally and Externally

Independently from the ECHR the EU has also its own set of human rights norms, mostly laid down in the Charter on Fundamental Freedoms. Yet, the system of protection leads to number of problematic situations between the EU and its Member States and, on a different note, the EU is also exporting its human rights values through international agreements.

1. Human Rights Federalism

Since the signing of the Lisbon Treaty and with it the EU Charter of Fundamental Rights becoming binding part of EU primary law, there is more than one level of human rights protection in Europe.[23] First, there is the national level with several national constitutions providing fundamental rights guarantees and national constitutional or highest courts to apply and interpret those. Second, there is the EU Charter of Fundamental Rights. Last, but not least, there is the ECHR and the European Court of Human Rights (ECtHR). At this point, the question of fundamental rights federal-

21 *Isabella Risini*, The EU Legal Order and the Inter-State Complaint under Article 33 ECHR: Explaining the Incompatibility According to Opinion 2/13, p. 179.

22 *Stefan Lorenzmeier*, The Procedural and Substantial Requirements of the European Union's Accession to the European Convention on Human Rights and Fundamental Freedoms: Why So Special?, p. 193.

23 *Jennifer Hölzlwimmer*, Federalism of Fundamental Rights Protection in Germany and the EU – Two Are Better Than One?, p. 113.

ism arises and in particular, whether it is possible to develop a 'quasi-federal' system of fundamental rights protection in Europe with clear competences and courts respecting and strengthening each other. This is discussed by *Hölzlwimmer*'s contribution.

2. External Actions of the Union and Human Rights – Effects on other Countries

Moreover, the EU is also an active player on the international stage and concluded a number of international agreements, mostly concerning international trade. Since the late 1990's one can also find human rights provisions in them. Since the entry into force of the Lisbon Treaty in December 2009, Art. 21 TEU states explicitly that "the Union's action on the international scene shall be guided by […] the universality and indivisibility of human rights and fundamental freedoms". One of the closest forms of international cooperation for the EU are association agreements, which entail a very special legal status because they "involve reciprocal rights and obligations, common action and special procedure"[24].

The Eastern Partnership of the Union as part of the EU's neighbourhood policy is of very special relevance for the EU and has been at the heart of a number of political discussions in recent years, most of them along the lines of the concluded Association Agreement with Ukraine which has just recently entered into force[25]. The innovative agreement has in its first part on political objectives, some provisions concerning the respect human rights. These are so called "trigger-clauses" (e..g. "conditionality"), because the EU has the right to cancel the agreement if Ukraine fails to respect these rights. They are of special importance for the agreement, which constitutes a new type of integration without membership. The new legal framework, which has the objective to establish a unique form of political association and economic integration, is characterized by three main features: comprehensiveness, complexity and conditionality[26]. This led to the acceptance of new mechanisms of enhanced conditionality and legislative approximation, which are explored by *Petrov*.

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24 See Art. 217 TFEU.

25 The entry into force took place on September 1, 2017.

26 *Roman Petrov*, Human Rights in Association Agreements with Ukraine, Moldova and Georgia, p. 215.

IV. International Human Rights in a Broader Context

Human rights are not limited to protect the individual from interferences by the state. Other bodies, like non-governmental organizations, are expected to comply with human rights as well, as shown by the example of the International Olympic Committee (IOC) in the contribution by *Bajec Korent*.

1. International Sports Organizations and Human Rights

Special attention should be given to non-governmental organizations aiming to promote goals of fairness and sportsmanship like the international sports organizations. As the debate around the possible human rights violations concerning the upcoming football world cup tournaments in Russia and Qatar and the one on the Olympic Games in Rio de Janeiro in 2016 clearly shows the relevance of the question of the role of the international sport organizations in this context. By using the example of the Olympic Movement, it is explored which mechanism the International Olympic Committee possesses to improve the respect for human rights in a specific country. Thereby, three different mechanisms are explored, sanctioning, shaming and co-optation[27]. Another issue is whether the stated organizations are as such interested in doing so because they are politically involved in a number of scandals.

2. Social Human Rights

Additionally, another constantly evolving area are social human rights as laid down in the International Covenant on Cultural, Economic and Social Human Rights[28]. These human rights are usually termed second generation human rights,[29] and are situated at the cross-roads between individual

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27 *Daša Bajec Korent*, The Role of the Olympic Movement in the Promotion and Protection of Human Rights, p. 267.

28 ICESCR, UNTS, vol. 993, p. 3.

29 *Asbjørn Eide* & *Allan Rosas* , "Economic, Social and Cultural Rights: A Universal Challenge", in: Eide, Krause and Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, 2nd ed., (Martinus Nifhoff, Leiden, 2001), pp. 3-4; *Erika Szys-*

and collective rights. They are like the classic first generation ones[30] directed vertically at the respective public body, namely the state. Thus, it is the task of states to give these rights the proper effect within their national jurisdictions[31]. Moreover, the distinction between several generations of human rights should not lead to their division. All human rights are, in the words of the 1993 Vienna Declaration on Human Rights, "universal, indivisible, interdependent and interrelated",[32] and the drafting of two different, yet interrelated, Covenants on the subject-matter should not lead to a different conclusion. The original proposal of the Human Rights Commission was a single document entailing civil and political as well as economic, social and cultural rights,[33] which were subsequently split up in separate documents due to political pressure. Even after the split, the United Nations General Assembly, in its decision on the two Covenants, the International Convention of Civil and Political Rights[34] and the International Covenant on Economic, Social and Cultural Rights, stressed that the two

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zak, "Social Rights in the European Union", in: ibid., pp. 493-4. *Mashood Baderin* and *Robert McCorquodale* perceive this category to be very unhelpful ("International Covenant on Economic, Social and Cultural Rights: Forty Years of Development", in: Baderin and McCorquodale (eds), *Economic, Social and Economic Rights in Action*, (OUP, Oxford, 2007), pp. 3-10). In 1987, *K J Partsch* voiced "grave doubts whether the concept of generation of rights is well-founded"; see *Partsch*, "The Enforcement of Human Rights and Peoples' Rights: Observations on their Reciprocal Relations", in: Bernhardt and Jolowicz (eds), *International Enforcement of Human Rights*, (Springer, Berlin, 1987), p. 25.

30 See, for example, the individual rights enshrined in Part III of the ICCPR.

31 *Stefan Lorenzmeier*, Enforcement of Transnational Social Rights: International and National Legal Aspects, in: Fischer-Lescano/Möller, Transnationalisation of Social Rights (Intersentia, Cambridge 2016), p. 87 ff.

32 Vienna Declaration and Programme of Action, A/CONF.157/23, no. I.5. It states further that "the international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote all human rights and fundamental freedoms".

33 HR Commission, UN ESCOR, sup 9 (E/1992), 4 May 1951, pp. 20 *et seq*.

34 ICCPR, UNTS vol. 999, p. 171.

sets of rights are "interconnected and interdependent",[35] and the respective preambles of the Covenants pay regard to both sets of rules as well.[36]

The division between the two sets of rules seems to be artificial and should not be pursued further than absolutely required by law. Tribute should also be paid to the aspect that individual civil and political human rights are not limited to the sphere of the ICCPR, but have, due to their interconnectedness, a collective dimension as well. Even the ECtHR stressed that "no water-tight division" is possible between the individual rights enshrined in the ECHR and the collective ones of the European Social Charter.[37]

a. A Driver for Self-Determination?

The social, economic and cultural rights are developed further by accepting another group of collective human rights like the right to self-determination and the right to development. The question is whether these rights may be a tool for the full implementation of the social, economic and cultural human rights. The right to development as enshrined in the 1986 UN General Assembly Declaration on the Right to Development calls for recognition of a shared responsibility for respect of human rights around the globe. However, due to the lack of conceptual clarity of the right to development, its normative validity has been greatly affected and it is widely believed that it is merely a failed attempt to improve human rights and fundamental freedoms in developing states. Such assertions contradict

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35 GA res 543 (VI), 5 February 1952, preamble.

36 See, for example, the preamble of the ICESCR: "[…] in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights" and the almost identical wording in the ICCPR: "[…] in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.".

37 ECtHR, 6289/73, *Airey* v *Ireland*, judgment of 9 October 1979, para. 26. For an in-depth analysis of the jurisprudence of the ECtHR in this regard, see *Arno Frohwerk*, Soziale Not in der Rechtsprechung des EGMR, (Mohr Siebeck, Tübingen 2012).

recent developments within the Human Rights Council calling for the adoption of a legally binding document, which indicates that the right to development is still an evolving concept and has the potential to foster the extraterritorial application of economic, social and cultural rights by imposing a corresponding obligation on the developed states to ensure the enabling environment for people in developing states to exercise their economic, social and cultural rights, which is an issue discussed by *Kovič-Dine*[38].

b. Social Rights and Global Constitutionalism

Social human rights are also an essential element of a number of national constitutions and are a fundamental part of the discussion on global constitutionalism. If the core object of constitutional control, the political power, tends towards globalism, should this not also be accepted for the main power controlling the political power, the fundamental rights? In this context, one of the main issues discussed by *Guerra de Fonseca* is their place and role in the discussion on global constitutionalism, especially whether they are expendable or an essential element of legitimacy[39].

c. Enforcement of Social Human Rights

The enforcement of international human rights in the national legal orders of the European states usually differs from the enforcement of the ECHR. Hereby, the case of Germany is of special interest again because the two Covenants only at the outset enjoy the same normative value as the ECHR. The latter can have, as stated supra, a special interpretative value for the norms of the German constitution. Until now, the same status has not been granted to the Covenant-rights by the German Constitutional Court as emphasized by *Hofmann*[40]. This is be mirrored against the Slove-

38 *Maša Kovič Dine*, Right to Development, Driver for Extraterritorial Application of Economic, Social and Cultural Rights, p. 253.

39 *Rui Guerra de Fonseca*, Global Constitutionalism and Social Rights: A Few Notes on Human Rights in the Quest for a Substantive Rule of Law, p. 237.

40 *Désirée Hofmann*, International Human Rights and Their Enforcement in the German Legal Order, p. 93.

nian experience and jurisprudence of the Slovenian Constitutional Court as evident form the contribution by *Škrk*[41].

3. International Criminal Law

International criminal law is another area of quickly developing legal rules. For example, the International Criminal Court has recently sentenced the first accused for a violation of the war crime of attacking historic and religious buildings in Timbuktu[42]. Yet, it is also a comparatively new branch of law. After its humble beginnings in the International Military Tribunals in Nuremberg and Tokyo in the aftermath of the Second World War, the idea had only been resurrected in the early 1990's by establishing two ad hoc tribunals for the situations in the former Yugoslavia and Rwanda, followed by an universal statute and a universal court in 2002, the International Criminal Court (ICC).

Since its beginning, international criminal law consists of a blend of pure, traditional international and internationalized national legal rules. These rules are sometimes at odds with each other and have to be balanced. A good illustration for this phenomenon are procedural rights. It is generally accepted that accused have a right of a fair trial with a due process in line with the traditional concepts of law like the presumption of innocence. On the other hand are the rights of the victims. Victims of mass atrocity crimes are special in many ways. They have several important needs, including: receiving financial compensation; seeing that perpetrators get punishment; having a forum to speak and be heard, and obtaining the truth and sufficient evidence about the events that caused their harms. The rights of victims and defendants may conflict since they are inherently adverse parties. There are differences in the degree of protection and guarantees of the rights of victims before the ad hoc tribunals, ICC and national courts. Despite these conflicts, the named bodies established a model suitable for the realization of victim's rights in criminal proceedings without jeopardizing the defendant(s) rights, which should be protected as well. This new concept of international criminal law was unknown in the Nuremberg and Tokyo trials, and stems from various national legal orders.

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41 *Mirjam Škrk*, International Human Rights in the Case Law of the Slovenian Constitutional Court, (n. 5).

42 International Criminal Court, Al Mahdi Case, ICC-01/12-01/15.

These concepts have to be balanced in a way that the fundamental rights of the accused are not jeopardized as highlighted by *Žagar*[43].

V. Concluding Remarks

By offering an overview of some of the most imminent issues of human rights protection, this volume aims to shed some light to the often complex and important subject of human rights protection. The different contributions address the said relevant topics in an innovative manner by *inter alia* proposing new interpretative approaches, which shall lead to an improved respect and understanding of human rights in the different legal orders. Moreover, the anlyses aspire to trigger and support necessary further discussions both in academia as well as in practice at national, European and international levels in order to improve human rights records of States, international inter-governmental bodies, NGOs, and at least indirectly, non-state actors.

43 *Marina Žagar*, Defendant's Right to a Fair Trial and Improvement of the Victim's Status in the Proceedings before International Criminal Jurisdictions, p. 289.

A. Human Rights and National Legal Orders

The Role of the European Convention on Human Rights in the Norwegian Legal Order

Vibeke Blaker Strand and Kjetil Mujezinović Larsen

Abstract

Norway has been a party to the European Convention on Human Rights (ECHR) for more than 65 years. Through a presentation of the formal space accorded to the ECHR within domestic law; constitutional amendments; interpretive standards developed by the Norwegian Supreme Court; an overview of judgments from the European Court of Human Rights (ECtHR) against Norway; and a presentation of current challenges, this article offers insight into central aspects of the role played by the ECHR in the Norwegian legal order. During the last 20 years, domestic developments in relation to human rights have happened through the adoption of new regulations and through interpretation. Today, the ECHR occupies a prominent role within the human rights landscape. The Convention has also influenced, and will continue to influence, the formation of the landscape itself.

1 Introduction

The European Convention on Human Rights has acquired an important status in the Norwegian legal order. To fully understand its role, several perspectives need to be considered. Firstly, there is the formal protection offered to the ECHR in the domestic legal order (see part 2 below). The Convention is incorporated in Norwegian law, where a particular rule stipulates that in the case of norm conflicts, rights in the Convention should take precedence over conflicting norms in other national legislation. The Convention as such has not been incorporated at the constitutional level, but the Norwegian Constitution contains several provisions that are based on rights in the ECHR; and additionally, the Norwegian Constitution requires national authorities to "respect and secure" human rights. Secondly, it is necessary to consider the key interpretative strategies that have been

developed by the Norwegian Supreme Court, which have played a crucial role in concrete cases where it is argued that there is a conflict between the domestic legislation and the ECHR (see part 3). After having presented the formal protection and interpretative strategies, the article proceeds to present concrete case law material both from domestic courts and from the European Court of Human Rights (ECtHR). In addition to presenting numbers and developments regarding how often the Convention has been invoked in courts, the article comments particularly on the field of immigration as an area where there are existing tensions between the Convention and domestic laws and administrative practice (see part 4). In part 5 we discuss some current challenges relating to the constitutional status of human rights in Norway. Some concluding comments are presented in part 6.

2 The Formal Protection

2.1 The Convention as International Law and as Domestic Law

Norway signed the Convention on 4 November 1950 and ratified it on 15 January 1952, making Norway one of the original States Parties to the Convention. Norway has also ratified all the additional protocols, with the exception of Optional Protocol no. 12 on non-discrimination, which is signed but not (yet) ratified.[1]

The ECHR does not in itself set requirements for the implementation of the Convention in the domestic legal order. Article 1 requires States to "secure" the rights and freedoms in the Convention, but the Convention is silent on how this should be done. The Convention permits monistic as

1 Norway signed Optional Protocol no. 12 on 15 January 2003, and ever since there has been an ongoing debate regarding Norwegian ratification. Opponents of ratification have focused on the vague nature of the wording of the protocol and the lack of foreseeability as to how the protocol may be interpreted. Supporters of ratification focus on the fact that Norway is already bound by the similar prohibition against discrimination in Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and that OP no. 12, therefore, does not lead to new legal standards, but rather gives the European Court of Human Rights a formal legal basis to enforce a norm that already applies to Norway. The Norwegian Government has not yet indicated any intention to ratify OP no. 12 and the arguments against ratification have, so far, prevailed.

well as dualistic approaches to the relationship between international law and domestic law. Norway is in principle a dualistic state, i.e. domestic implementation is required in order for international law to become directly applicable in the national legal order. However, two important exceptions apply, which also create important monistic characteristics in the Norwegian legal order.

Firstly, some domestic legislation requires that Norwegian law in specific areas must be applied in accordance with international legal obligations, i.e. a principle of sectorial monism. The sectorial monism approach is for instance taken in section 1 no. 2 of the General Civil Penal Code: "The criminal legislation shall apply subject to such limitations as derived from any agreement, with a foreign State or from international law generally."[2] A number of other acts take the same approach.

Secondly, a generally applicable, unwritten "principle of presumption" applies, which means that Norwegian law shall be presumed to be in conformity with Norway's international legal obligations unless it is evident that there is a conflict of norms, in which case domestic law should prevail. Since the European Convention on Human Rights is incorporated within the domestic legislation, these principles now have limited relevance when applying the ECHR in the domestic legal order.

2.2 The Legal Status of the Convention before 1999

From the date of ratification, Norway had an international obligation to secure the rights and freedoms in the Convention within the domestic legal order. At that point, however, no active steps were taken in order to implement the Convention, since the domestic law was considered already to be in harmony with the Convention.[3] Therefore, the ratification by Norway of the ECHR did not lead to amendments in the domestic legislation, and the Convention was not incorporated into domestic law. This did not mean,

2 Original wording: «Straffelovgivningen gjelder med de begrensningene som følger av overenskomst med fremmed stat eller av folkeretten for øvrig.».

3 See Royal Proposition no. 83 (1951), cf. Official Norwegian Report 1993: 18 p 47. Norway made one reservation upon ratification, regarding freedom of religion and belief in Article 9. At the time of ratification, Norway had a provision in the Constitution that prohibited people belonging to the Society of Jesus to access to Norway. This reservation was revoked in 1956.

however, that the Convention did not have any impact. As will be discussed in part 4.1 below, the Convention was invoked in 292 cases before the Supreme Court until 1998.

In 1989, the domestic legislator began a process aimed at making "the central human rights conventions" part of the internal legal order, since the existing system was criticized for not giving those human rights conventions that are binding for Norway any formal status within the domestic legislation. This process led to considerable discussion about which human rights conventions should be considered "the central" ones. However, the ECHR was not particularly discussed in this regard, since there was a general agreement that the ECHR was a central human rights convention. The process culminated with the adoption of the Human Rights Act in 1999.[4]

2.3 The Human Rights Act

According to section 1 of the Human Rights Act, the purpose of the Act "is to strengthen the position of human rights in Norwegian law". To achieve this purpose, two main measures were adopted.

Firstly, the Act gives the ECHR and four other conventions the status of domestic Norwegian law, cf. section 2.[5] These Conventions have been formally incorporated into domestic law through the Human Rights Act, i.e. giving the conventions themselves in their authentic wording the status of domestic law.

Secondly, the Act gives the incorporated conventions a "semi-constitutional" status. Section 3 reads:

> The provisions of the conventions and protocols mentioned in section 2 shall take precedence over any other legislative provisions that conflict with them.

In other words, in case of a conflict between a provision in the ECHR and another norm in Norwegian legislation, the ECHR shall prevail. Conse-

4 Act 21 May 1999 no. 30 Relating to the strengthening of the position of human rights in Norwegian law (The Human Rights Act).

5 Originally, section 2 included (in addition to the ECHR) the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The UN Convention on the Rights of the Child (CRC) was added in 2003, and the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) was added in 2009.

quently, section 3 affords a particular legal status to the incorporated conventions. They do not have the status of constitutional norms, and formally they are incorporated on the same rank as other legislation, but the actual effect of section 3 is that their status lies somewhere between the Constitution and other legislation.

Section 3 gives rise to general questions of considerable importance in Norwegian law: Firstly, what approach should national courts take when they interpret the incorporated human rights conventions? And secondly, when can it be established that there exists a "conflict" between the Convention and another legislative provision? Before we return to these questions in part 3 below, let us address the constitutional protection of human rights in Norway.

2.4 The Protection of Human Rights in the Norwegian Constitution

The Norwegian Constitution was adopted 17 May 1814 and is the world's second oldest constitution that is still in force. Originally, the Constitution contained only a few provisions that protect what we today regard as "human rights", for instance a prohibition against torture during interrogations; that arrest and punishment can only take place when prescribed by law; freedom of the press; and prohibition against retroactive laws. This made the Constitution a modern document compared to its contemporaries. Over time, however, the protection of human rights in international law and in domestic constitutions has increased dramatically, while the Norwegian Constitution has undergone only sporadic amendments. The Constitution continued to protect only a few human rights, and as a result, the protection of human rights on constitutional level remained fragmented.

In 1994, the Constitution was amended to include a new provision, section 110 c, with the following wording:

> 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]

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6 Our translation. Original wording: "Det paaligger Statens Myndigheder at respektere og sikre Menneskerettighederne. Nærmere Bestemmelser om Gjennemførelsen af Traktater herom fastsættes ved Lov.".

The second paragraph was a direct reference to the Human Rights Act and, consequently, to the conventions that were selected for incorporation.

In May 2014, Norway celebrated the 200th anniversary of the Constitution. As part of the preparations for the anniversary, the Norwegian Parliament ("Stortinget") established a Human Rights Commission ("Menneskerettighetsutvalget") in 2011, which was given the mandate to propose amendments to the Constitution in the field of human rights.[7] The aim was to further strengthen the position of human rights in the Norwegian legal order. The 1814 Constitution was alleged to insufficiently reflect the actual human rights protection in the domestic legal order. The Commission considered it important that the Constitution should reflect the actual legal situation with regard to human rights, since a constitution sends important signals beyond merely the legal sphere. The Constitution is also an instrument for expressing the values that are central in the Norwegian society today. In addition, due to special procedural norms embedded in the Constitution itself, constitutional norms offer more resilience than ordinary laws if confronted with a future political climate where the removal of fundamental human rights from the domestic legal order was put on the agenda.[8] A new chapter on human rights was adopted by the Parliament in May 2014, a few days before the anniversary on 17 May. The chapter contains new provisions both regarding civil and political rights as well as economic, social and cultural rights. Many of the amendments were uncontroversial. This was the case for the civil and political rights that were adopted, many of which have a wording that is based on the corresponding provisions in the ECHR, for instance the prohibition

7 The Committee's final report was published on 19 December 2011, as Document 16 (2011–2012) Report to the Presidium of the Sorting by the Human Rights Commission concerning Human Rights in the Constitution; for the mandate, see p. 18. The Commission's recommendations are available in English: https://www.stortinget.no/globalassets/pdf/diverse/report-from-the-human-rights-commission.pdf (accessed 30 October 2016).

8 See section 121 of the Constitution. Here it is established that a proposal to amend the Constitution shall be submitted to the first, second or third Storting after a new General Election and be publicly announced in print. However, it shall be left to the first, second or third Storting after the following General Election to decide whether or not the proposed amendment shall be adopted. Amendments must never contradict the principles embodied in the Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution, and such amendment requires that two thirds of the Storting agree thereto.

against torture or inhuman or degrading treatment in section 93 of the Constitution and the freedom of assembly and association in section 101 of the Constitution. The main controversies concerned the adoption of constitutional provisions that protect economic, social and cultural rights. Some of the proposed provisions, for instance proposals to include the right to an adequate standard of living and the right to necessary medical care, were not adopted. Others gained the necessary 2/3 majority in the Parliament, for instance the proposal to include a provision on children's rights that comprise the principle of the best interest of the child. It is, however, important to observe that the Constitution does not give constitutional status to (any) human rights convention(s) as such.

As a part of the revision, section 110 c was replaced by a new section 92, which reads:

> The State shall respect and secure human rights as they are formulated in this Constitution and in conventions on human rights that are binding for Norway.[9]

This new provision gave rise to some interpretive uncertainty, which will be addressed in part 5 below.

3 Interpreting the ECHR within the Domestic Legal Order

As the highest national court, it is for the Norwegian Supreme Court to develop the general principles of interpretation when human rights conventions are applied as domestic law. The Supreme Court has had several opportunities to do so, and it has articulated a general guideline for the interpretation of human rights conventions in domestic law, with a particular reference to the ECHR:

> When they apply the ECHR, Norwegian courts need to undertake an independent interpretation of the Convention. In doing so, they shall apply the same legal method as the European Court of Human Rights. Norwegian courts shall, accordingly, consider the text of the Convention, the purpose of the Convention, and the case law of the European Court of Human Rights. It is, however, primarily for the European Court of Human Rights to further develop the Convention. If there is doubt about the balancing of different values

9 Our translation. Original wording: «Statens myndigheter skal respektere og sikre menneskerettighetene slik de er nedfelt i denne grunnlov og i for Norge bindende traktater om menneskerettigheter.».