Ideals and Implementation – Ratifying another Complaints Procedure?

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Abstract: *It is submitted that that ratification by Norway of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) may have undesirable effects for Norway, particularly since the individual complaints mechanism may in reality encroach upon the legislature's assessment of how best to achieve the aims of the Covenant and other societal goals. In the author's view, many of the arguments advanced in favour of ratification do not stand closer examination.*
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A. Introduction

For some, once Norway has joined an international instrument, it goes without saying that Norway should also accept international control mechanisms established for its supervision and enforcement. How can Norway be unwilling to accept such independent international control of obligations which we have undertaken to fulfil? Surely, this must be even clearer with respect to a human rights convention which embodies values and societal goals that we share.

In his article, Professor Evju argues extensively along these lines in favour of the ratification by Norway of the Optional Protocol to the ICESCR.[1] In my view, the issue is far from being that simple, and I believe there are sound reasons why Norway should not ratify the protocol.

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[1] In his article, Professor Evju also draws upon his extensive experience from the European Committee of Social Rights. As the Revised European Social Charter only allows for collective complaints, I consider that the experience from that complaints procedure has little relevance for the question of whether to accede to the individual complaints procedure under the Optional Protocol to the ICESCR. This is even more so because Norway has not made use of the option to allow NGOs to lodge complaints. Accordingly, I refrain from further comments on this point.

B. Are the Rights Justiciable?

The discussion often starts by asking if the rights in question are "justiciable" or "self-executing". These terms imply an assessment of whether the provisions by their content and language lend themselves to being applied as binding by courts or similar bodies in decisions in individual cases. Vagueness or a need for supplementary provisions (at national level) or administrative setup in order to become effective may hinder justiciability. There is also the possibility that a given provision carries a "core" of justiciability in the sense that beyond that core, the State may decide at its discretion how and how far it will go in order to implement the inherent values of the provision.[2]

The justiciability of a particular provision will have to be determined in the jurisdiction in which it will be applied.[3] Provisions in international conventions incorporated into Norwegian law will only be applied by the national courts if they are considered justiciable by the courts.[4] But even if a provision is not applied directly by a Norwegian court because it lacks justiciability, it may still be taken into account as a legal argument amongst others when deciding the case at national level.[5]

The Protocol seems, for its part, to rest on the assumption that all the provisions of the Covenant are justiciable, including the right to an adequate standard of living (Art. 11) and the right to the enjoyment of the highest attainable standard of physical and mental health (Art. 12). Certainly, such a general assumption differs from the view held when then Norwegian Human Rights Act 1999 was prepared.[6] Once justiciability is assumed there will be ample scope for the Committee to require States parties that have ratified the Protocol to make use of "the maximum of its available resources" to promote the rights of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[7], even if the test of reasonableness laid down in Article 8 (4) of the Protocol should secure a margin of appreciation for the State involved.

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[2] This option could also be seen as an example of a wide margin of appreciation for the nation state.

[3] Cf. Ian Brownlie: *Principles of Public International Law* (7th ed., Oxford: Oxford University Press 2008) 48-49.

[4] See Rt. 2001 p. 1006 at 1015. The view of courts may, of course, be influenced by statements by the legislature, and, especially if no indication is provided by the legislature, by statements by an international body made subsequent to the ratification.

[5] The provision will then have the status of a value or goal recognised by the law and influence the interpretation or application of other legal rules when they are open for different meanings. Likewise, an administrative authority exercising discretionary powers, will be permitted (perhaps also obliged) to take into account a non-justiciable provision.

[6] See, in particular, NOU 1993:18 *Lovgivning om menneskerettigheter* p. 125, cp. also pp. 104 *et seq*.; cf. Matthew Craven: *The International Covenant on Economic, Social and Cultural Rights* (Oxford: Oxford University Press 1995) pp. 101-02.

[7] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976, Article 2(1).

C. The Risk of Extended Obligations through Case Law

According to Professor Evju, accession to the Protocol is "primarily, a question of enforcement and enforceability of the standards already accepted". This assertion fails to take account of the open nature of most of the provisions of the Covenant which leave ample scope for different interpretations and solutions. Arguably, the Covenant establishes the values and directions but leaves it to subsequent implementation to decide how far States should go. The Committee will therefore, unavoidably, not only address matters of enforcement and enforceability, but standard-setting as well. The principle of evolutive or dynamic interpretation which appears to prevail in human rights bodies makes it difficult to predict the legal situation. The very existence of that principle of interpretation implies, in reality, a transfer of legislative powers from the national parliament based on general elections to a small international body of experts or other members.

In my view, this is more than enough to explain why Norway's incorporation of the ICESCR into domestic law, cannot be used as an argument in favour of ratifying the Protocol. On the contrary, incorporation into domestic law may serve as an argument *against* ratification, since it provides national courts with the means to enforce justiciable rights of the convention while taking due account of the national legislature and the national situation when the question of dynamic interpretation comes up.[8]

Professor Evju claims that by ratification Norway will "be in a position to take part in the shaping of prospective developments" of the Covenant. When a complaint is lodged against Norway, Norwegian authorities can certainly argue their case before the Committee. It is another question whether these arguments will influence the Committee. This is unlikely, for one thing, where the Committee bases its assessment upon previous case law. It is unrealistic to expect – and not expressly authorised under the Protocol[9] – the Norwegian Government to intervene in complaints cases against other States in order to contribute to the establishment of case law which would be desirable from the Norwegian point of view; the small number of Norwegian interventions in cases before the ECJ and the ECtHR, which will often have stronger implications for Norway, testifies to this. If a Norwegian should be elected member of the Committee, he or she must of course act independently of Norwegian interests. In short, from the point of view of influencing the development of case law under the Covenant, little is to be gained by ratification of the Protocol.

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[8] Moreover, under national law, the Norwegian Parliament may by express legislation rectify the construction adopted by the national courts if it is considered to be too evolutive to be accepted in the light of other values and considerations. After a decision by the Committee against Norway concerning a complaint this will hardly be possible.

[9] See Langford, Introduction to the Optional Protocol' in this Issue, Section D 4.

D. Effects of Abstention

Considering the effects of abstention, Professor Evju appears to argue on the one hand that abstention would give rise to the question whether Norway would then reject case law developments, which in Professor Evju's view would be an untenable position;[10] on the other hand, he seems to accept that – "technically" at least – case law from other international supervisory bodies than the ECtHR is not legally binding. His actual position remains unclear.

For my part, I find it clear that the attitude which a State may take under international law towards case law from an international supervisory body, varies according to whether the body's competence has been accepted by that State. Even if the view is taken that such case law may always be taken into account when interpreting the relevant convention, it will certainly and always be relevant and carry greater weight for States which have ratified the control mechanism under which the case law develops. This difference is likely to be more striking if the convention – or at least some of its provisions – is directly applicable in national law. It follows that it does make a difference for Norway's future attitude to case law developed under the complaints procedure whether the country has ratified the Protocol or not. This is an aspect which, of course, must be taken into account when deciding to ratify or not.

Professor Evju invokes the additional argument that non-ratification of the Protocol "would in the end amount to discarding the dynamic nature of public international law". Surely, by ratifying conventions, States parties have not subscribed to that sort of dynamism – which is more like an invention made by international lawyers and certain international bodies. Professor Evju appears to make dynamic nature an inherent quality of international law – a doubtful and unclear proposition which serves to question, not to justify, the legitimacy of case law developments.

E. The Notion of Indivisibility and Interdependence of Human Rights

Does the notion of indivisibility and interdependence of human rights naturally or necessarily lead to the ratification of the Protocol? According to this argument, Norway should ratify the Protocol because Norway has already accepted individual complaint mechanisms with respect to other human rights instruments which focus mainly on civil and political rights (the European Court of Human Rights and the UN Human Rights Committee). In my view, this is not a convincing argument.

First, the character and meaning of the notion of indivisibility and interdependence need to be assessed. It is submitted that this notion must, above all, be assessed in a political context. It serves to bridge the gap between States which place the emphasis on civil and political

[10] His reference to the Vienna Convention on the Law of the Treaties in this context is questionable, since the relevant provision – art. 31 (3) (b) – only refers to subsequent practice "which establishes the agreement of the parties regarding its interpretation".

rights and States which give priority to economic, social and cultural rights, thus paving the ground for universal support of human rights. Civil and political rights give little meaning to people that are deprived of food and housing. From a legal point of view, the notion may serve to ensure that a given human right is construed and applied so as not to interfere with other human rights. To assume that the notion itself is rejected because certain human rights provisions are deemed non-justiciable, is unwarranted.

Professor Evju also accords too much weight to the observation that there may be no sharp dividing line between rights contained in the ICESCR and other human rights. True, there may not be a clear-cut distinction. Nevertheless, the typical content of economic, social and cultural rights differs from a civil and political right, including those enshrined in the ECHR. No valid argument can, in my view, be drawn from the jurisprudence of the European Court of Human Rights which sometimes, by its evolutive or dynamic interpretation, tends to stretch the convention rights further into the field of economic, social and cultural rights. This case law development, brought about by the court itself without any express acceptance by the States, can hardly serve as an argument to the effect that States should ratify further instruments because of the obligations they have already undertaken through previous ratifications. Moreover, human rights provisions differ in formulation and preciseness. It is easy to point at economic, social and cultural rights where the provisions are drafted as goals rather than definite levels. The right then takes a vague form which is significantly different from the typical civil and political right. Admittedly, as Professor Evju points out, a number of the latter provisions allow for restrictive interpretation or exemptions by virtue of vague and imprecise clauses. But the possibility of restrictive interpretation based on a vague clause can hardly bring the provision on a par with economic, social and cultural rights, which by themselves are utterly vague.

Lastly, economic, social and cultural rights tend to have a much greater impact on resource and budgetary allocations than other human rights. It is indeed a gross misunderstanding to argue, as Professor Evju appears to do, that differing financial impact has no relevance since there is no clear dividing line between the two types of human rights as regards costs. A quick glance at the current Norwegian state budget[11] will show that the level of public expenditure linked to economic, cultural and social rights by far exceeds costs related to civil and political rights.

Professor Evju seems to argue that refusing to ratify the Protocol would suggest that economic, social and cultural rights are "less worthy of acceptance" and that the level of financial impact has hardly any relevance. Whether to accept individual complaints to an international body is not, however, a question of accepting or rejecting a human rights convention which has already been ratified and it certainly does not amount to "ranking rights not by contents but by costs". Instead, it is a question of whether to accept that an international body (and, as a possible consequence, national courts as well) should be given power to decide the

[11] Suffice it to mention that under the Norwegian state budget for 2009 more than 400 billion NOK (almost 1/3 of the total expenditures) will be spent on education, social security and health services (articles 9, 12 and 13 of the Covenant), while the justice sector accounts for less than 20 billion NOK in all, see St.prp. nr. 1 (2008-2009).

level of social security, medical services and other rights with far-reaching budgetary implications – possibly at the expense of other human rights.

F. Closing Remarks

Regardless of its impact on the domestic legal system, the argument that Norway should ratify the Protocol as a contribution towards promoting human rights standards worldwide remains to be considered. But surely, what will matter most in the field of economic and social rights is the transfer and development of resources and competence to States that fall short of the goals. Spending resources on arguing and defending a particular claim of non-compliance with the Covenant may be of little help to other individuals in need and at worst become counterproductive. Norway's reputation for promoting human rights does not rest on our adoption of all human rights instruments, but on our general commitment to human rights and choice of a variety of means as appropriate to that end.

When considering whether to ratify a new international instrument – even human rights instruments – it is perfectly legitimate and justified to take great account of possible and likely effects at national level. The last decade should have taught us the lesson that the risk of an unexpected and sometimes outright undesirable effect domestically is not to be neglected. Until international bodies and lawyers limit their allegiance to a dynamic development of conventional obligations through case law, scepticism towards new instruments may be justified. In my view, this holds true for the Optional Protocol establishing a complaints procedure under the ICESCR.