The UN Convention in Nordic Domestic Law – Lessons Learned from other Treaties

Ragnhildur Helgadóttir

1 Introduction

International treaties impact national law on a variety of levels. Firstly, and most importantly, they influence policy-making. Second, they do influence legislation – as is indeed their aim. Other papers in this collection discuss these aspects of the implementation of the U.N. Convention on the Rights of Persons with Disabilities (hereafter CRPD).¹ This article attempts to predict how that Convention will come to be viewed and applied in the domestic courts of Iceland, Norway and Denmark.²

The gist of the discussion concerns conventions or treaties which have been ratified but not incorporated into domestic law. This is a problem particular to those countries that have a dualist tradition towards international law, such as the Nordic countries.

In dualist traditions, international law and domestic law are, in principle, viewed as two distinct legal systems.³ This entails that unless rules stemming

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² Denmark, Iceland and Norway will be jointly designated as „Nordic“ here even though the correct form is to refer to them as „West-Nordic.“ The term „Nordic“ is normally used to designate those three states as well as Sweden and Finland. The usage here thus differs from the general one.
³ See M.N. Shaw, International Law (3rd edn. Grotius Publications Cambridge University Press 1991) 101–128. In British law and many jurisdictions which have been influenced by the English common law or have adopted it, a distinction is made based on whether the international law rule is a customary one or based on a treaty. See also Per Helset & Bjørn Stordrange, Norsk statsforfatningsrett (AdNotam Gyldendal 1998) 163–168; Ida Elisabeth Koch and others, Menneskerettigheder og magfordeling: domstolskontrol med politiske prioriteringer (Aarhus Universitetsforlag 2004) 11–13; Joakim Nergelius, Konstitutionellt rättighetsskydd: Svensk rätt i ett komparativt perspektiv (Fritzes 1996) 174–175 and 188.
from international law are expressly incorporated into domestic law, they are not viewed as an integral part of the domestic legal system and can, in principle, not be relied upon in domestic courts. The Nordic tradition has been to ratify international human rights conventions but not incorporate them into domestic law.

Dualist approaches stand in contrast to monist approaches, according to which rules stemming from international law become part of the (only) legal system. Holland is often taken as an example of that, although Germany and France could also be mentioned.

In theory at least, the status of an international treaty that has been duly signed and ratified poses no problem in those countries which take a monist approach: The treaty rules simply become part of the legal system. In practice, the issue may not be quite so clear, but nonetheless, it is clear why the questions raised in this paper are important primarily in those countries who tend towards a dualist view of international law.

It must be noted that irrespective of the differences between the monist and dualist traditions, it is beyond dispute that the CRPD, like other international conventions, is binding on the States Parties. However, this article will consider the Convention’s effect in the domestic courts, not states’ obligations under international law.

Dualist systems differ. While some systems have, during certain periods of time, kept international and domestic law strictly separate, others are quite faithful to international law. One can thus envision dualist approaches as existing on a continuum, running from utter disregard of international law to being quite faithful to it, even though that adherence is not based on the same principles as it is in monist approaches. Instead, it will generally be based on interpretative approaches and rules. Dualist jurisdictions will be located at different places

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4 This view was put quite clearly by Icelandic Supreme Court in 1987, when it stated in a case concerning the European Convention on Human Rights: “The provisions of art. 6 of the ECHR […] have not been given the force of law in this country. They do not change the system prescribed by law….“ Hrd. 1987.356, 357–8. See, for a similar treatment, the judgment of the Danish Supreme Court published in UfR 1986.898H. All translations of judgments are by the author, unless otherwise noted.

5 See Shaw, supra note 3 at 124–127. The distinction between dualist and monist systems can seem somewhat artificial since jurisdictions differ and some dualist jurisdictions are quite faithful to international law, as discussed infra.

6 Even while treaties have not entered into force, signatory states and states who have expressed their consent to be bound by the treaty are under the obligation not to defeat the object and purpose of the Convention prior to its entry into force. See art. 18 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

7 Chapter II.2 describes such interpretative principles in the Nordic countries.